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Soft Money, Allegations of Political Corruption, and Enron

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Summary

While the failure of Enron Corporation is widely seen as some combination of an economic business failure due to excessive risks, insider profiteering, and incomplete public disclosures, as well as a failure or lapse of efficient government regulation or oversight, there has also been persistent speculation and commentary regarding whether the Enron collapse might involve elements of government or political “corruption,” and the illegal or improper influence of monied corporate business interests over both elected and appointed officials in the Federal Government.

This Report will examine the current state of federal law with regard to the most persistent charges of government or political corruption relating to the Enron matter, including federal campaign finance regulation of hard money, the state of the federal law with respect to soft money, bribery, “illegal gratuities,” extortion, conflicts of interest and required recusals of government officials, and the “revolving door” regulations on former government officials.

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Soft Money, Allegations of Political Corruption, and Enron

Introduction

The failure of Enron Corporation has been seen primarily as an economic business failure in which excessive corporate risks and speculation, deceptive bookkeeping, insider profiteering, and conflicts of interest and possible collusion of supposedly independent outside auditors, were all part of the troubled mix. At another level, the failure of the Enron Corporation has also been seen as a failure of Government regulation, and one which exposed loopholes and gaps in such things as Government oversight and regulation of derivative trading, required public reporting and record keeping by publically traded corporations, regulations on the independence of public auditors, and rules for the protection of corporate sponsored or assisted employee pension plans.

There has also, however, been a persistent undercurrent in news and business commentary that the entire picture of the Enron collapse involves elements of Government or political “corruption,” and the illegal or improper influence of monied corporate business interests over both elected and appointed officials in the Federal Government. These contentions often involve allegations of improper influence purchased by soft money campaign contributions from Enron, the receipt of political contributions by political figures in return for favorable Government treatment, conflicts of interest of Government officials with personal financial interests in Enron, and abuses of the “revolving door” between employment in private industry and positions with the Federal Government.

This Report will examine the current state of federal law with regard to the most persistent charges of government or political corruption relating to the Enron matter, including federal campaign finance regulation of hard money, the state of the federal law with respect to soft money, bribery, “illegal gratuities,” extortion, conflicts of interest and required recusals of government officials, and the “revolving door” regulations on former government officials. Addressing a matter that is currently and continually unfolding necessarily involves a degree of uncertainty and selectivity concerning any fact situations existing or that may evolve in the ongoing investigations and revelations, and with regard to potential or hypothetical violations of federal laws, that such facts may or may not indicate. The discussion of certain federal laws, regulations, and statutory provisions regarding campaign finance law and public corruption in this Report is intended only to address some of the more significant issues and questions that have been raised relating to the Enron matter vis-a-vis political corruption, as of the date of this writing, and is not intended to exclude the possibility of the conformance with or violations of any federal law or regulation.

Current Federal Campaign Finance Law

Activity Regulated by Federal Law: Hard Money

The Federal Election Campaign Act (FECA)¹ regulates campaign contributions and expenditures relating to federal elections. The term “hard money,” which is not statutorily defined, is typically used to refer to funds raised and spent in accordance with the limitations, prohibitions, and reporting requirements of FECA.² Unlike soft money, hard money may be used “in connection with” or “for the purpose of influencing” federal elections.

Under the FECA, hard money restrictions apply to contributions and expenditures from any “person,” as defined to include, “an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons,” but not including the federal government.³ FECA defines “contribution” to include “anything of value” given to a federal candidate or committee, including money, loans, loan guarantees, and in-kind contributions, such as office space, equipment, and fundraising expenses, “for the purpose of influencing any election for Federal office.”⁴ FECA further defines “expenditure” to include any purchase, payment, distribution, loan, advance, deposit or gift of money, “for the purpose of influencing any election for Federal office.”⁵

There are three key features of FECA hard money regulation: contribution limits, disclosure requirements, and source prohibitions.

Contribution Limits.

FECA provides limits on contributions to candidates, parties, and political action committees (PACs) in federal elections. Individuals are limited to \$1,000 per election to a candidate; \$5,000 per year to a PAC; an aggregate of \$20,000 per year to a political party; and an aggregate of \$25,000 per year to all federal candidates, parties, and PACs. Multicandidate PACs and party committees are limited to \$5,000 per candidate, per election.⁶ In addition, political parties are limited in the amounts they may make in coordinated expenditures to pay for campaign services or advertisements

¹2 U.S.C. § 431 *et seq.*

²*See* 2 U.S.C. §§ 441a, 441b(a).

³2 U.S.C. § 431(11).

⁴2 U.S.C. § 431(8)(A).

⁵2 U.S.C. § 431(9)(A).

⁶2 U.S.C. § 441a(a).

in connection with a candidate, subject to formulaic limits, which are indexed for inflation.⁷

Disclosure Requirements.

Generally, FECA requires all federal candidates, PACs, and political parties, which are involved in federal elections, to register with the Federal Election Commission (FEC) and file periodic reports. Under FECA, reports are required to include aggregate amounts of cash on hand, receipts, expenditures, transfers, loans, rebates, refund dividends, and interest, itemizing amounts above \$200.⁸

Source Prohibitions.

Under FECA, labor unions and corporations are prohibited from making contributions or expenditures from their treasury funds in connection with federal elections.⁹ However, using their treasury funds, corporations and labor unions are permitted to establish, administer, and solicit contributions to separate segregated funds, *i.e.* political action committees (PACs). Hence, in order to make contributions and expenditures in federal elections, corporations and labor unions must use the funds they raise in a PAC, which are voluntarily contributed, non-corporate and non-union treasury funds.¹⁰

The Supreme Court in *Federal Election Commission (FEC) v. Massachusetts Citizens for Life (MCFL)*¹¹ evaluated the constitutional application of FECA's prescription of a separate segregated fund or PAC for corporate political expenditures. In this case, the requirement was applied to a non-profit corporation founded for purely political purposes. The founding charter of MCFL was to "foster respect for life," a purpose motivating various educational and public policy activities.¹² Drawing from its general treasury, the corporation funded a pre-election publication entitled "Everything You Need to Know to Vote Pro-life," which triggered litigation under § 441b.¹³ As the publication was tantamount to an "explicit directive [to] vote for [named] candidates," MCFL's speech constituted "express advocacy of the election of particular candidates," subjecting the expenditure to regulation¹⁴ under the express advocacy standard first articulated by the Court in

⁷2 U.S.C. § 441a(d)(3).

⁸2 U.S.C. §§ 432-437.

⁹2 U.S.C. § 441b(a).

¹⁰2 U.S.C. § 441b(b)(2)(3).

¹¹479 U.S. 238 (1986).

¹²*See id.* at 241-242.

¹³*See id.* at 242.

¹⁴*Id.* at 249. The Court found that the publication not only urged voters to vote for "pro-life" candidates, but also identified and provided photographs of specific candidates. As a result, the Court determined that the publication could not be considered a "mere discussion" of

(continued...)

Buckley.¹⁵ However, as applied to MCFL, § 441b was held unconstitutional because it infringed on protected speech without a compelling justification.¹⁶

Noting that § 441b burdened expressive activity,¹⁷ the Court examined the government’s regulatory interests in alleviating corruptive influences in elections by requiring the use of corporate PACs and the Court held that concentration of wealth, in itself, is not a valid object of regulation.¹⁸ The Court noted that a corporation’s ability to amass large treasuries confers upon it an unfair advantage in the political marketplace, as general treasury funds derive from investors’ economic evaluation of the corporation, not their support of the corporation’s politics.¹⁹ By requiring the use of a PAC, § 441b ensures that a corporation’s independent expenditure fund indexes for the “popular support” of its political ideas.²⁰ The Court held that by prohibiting general treasury fund expenditures to advance a political point of view, the regulation “ensured that competition among actors in the political arena is truly competition among ideas.”²¹

While the Court found these interests compelling as applied to most corporations, it held the restriction unconstitutional as applied to MCFL. Specifically, the *MCFL* Court found the following characteristics exempt a corporation from the regulation: (1) its organizational purpose is purely political; (2) its shareholders have no economic incentive in the organization’s political activities; and, (3) it was not founded by nor accepts contributions from business organizations or labor unions.²²

Carving out an exception for corporations with these characteristics, the Court raised equitable grounds for the regulation, stressing that “[r]egulation of corporate political activity . . . has reflected concern not about the use of the corporate form *per se*, but about the potential for the *unfair* deployment of [general treasury funds] for political purposes.”²³ The Court held that MCFL’s general treasury is not a function

¹⁴(...continued)
public issues. *Id.*

¹⁵See *Buckley v. Valeo*, 424 U.S. 1, 44 (1976), *discussed* page 9, *infra*.

¹⁶See *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. at 263.

¹⁷See *id.* at 252.

¹⁸*Id.* at 257 (“political ‘free-trade’ does not necessarily require [that participants] in the political marketplace [compete with equal resources.]”)

¹⁹See *id.* at 258.

²⁰*Id.* at 258.

²¹*Id.* at 259.

²²See *id.* at 259, 264.

²³*Id.* (emphasis added). See also, *id.* at 263 (“voluntary political organizations do not suddenly present the specter of corruption merely by assuming the corporate form.”), *but see Austin v. Michigan Chamber of Commerce*, 494 U.S. 659, 660 (1990)(suggesting that the selection of the corporate form in itself triggers the state’s regulatory interests. “[T]he unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit

of its economic success, but is an index for membership support of its political ideas.²⁴ Thus, according to the Court, purely political organizations such as MCFL cannot constitutionally be regulated by § 441b because their treasuries already embody what the regulation purports to achieve: an index of the corporation’s political support. In other words, MCFL is an example of a corporation that is not at risk for gaining an “unfair” advantage in the electoral process.²⁵

In *Austin v. Michigan State Chamber of Commerce*,²⁶ the Supreme Court affirmed and clarified its *MCFL* holding when it considered whether a non-profit corporation’s free speech rights were unconstitutionally burdened by a state prohibition on using general treasury funds to finance a corporation’s independent expenditures in state elections. While prohibiting expenditures from general treasury funds,²⁷ the statute permitted independent contributions as long as they were made from a separate segregated fund or PAC.²⁸ Plaintiff-corporation, a non-profit founded for political and non-political purposes, asserted that the regulation burdened its First Amendment interest in political speech by limiting its spending.²⁹ Further, the plaintiff contended that the regulation was not narrowly tailored to obtain the state’s interests in avoiding the appearance of corruption by limiting a corporate entity’s inherent ability to concentrate economic resources.³⁰ Although economic power, in itself, does not necessarily index the persuasive value of a corporation’s political ideas, the state argued, a corporation’s structural ability to amass wealth makes it “a formidable political presence”—a presence which triggers its regulatory interest.³¹

Unpersuaded by the corporation’s assertion of right, the Court upheld the regulation. Under *Buckley*³² and *MCFL*,³³ the Court addressed whether the plaintiff’s free speech interests were burdened by the regulation; evaluated the state’s regulatory

²³(...continued)
on independent expenditures.” *Id.*)

²⁴See *MCFL*, 479 U.S. at 259.

²⁵See *id.* at 260.

²⁶494 U.S. 652 (1990).

²⁷The statute defined “expenditure” as “a payment, donation, loan, pledge, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate.” *Id.* at 655 quoting Mich. Comp. Laws § 169.206(1) (1979).

²⁸The Michigan Statute was modeled on the provision of FECA requiring corporations and labor unions to use a separate segregated fund or PAC when making independent expenditures in connection with federal elections, 2 U.S.C. §441b(b)(2)(C). See *Austin*, 494 U.S. at 656 n. 1.

²⁹See *id.* at 658.

³⁰See *id.* at 659.

³¹*Id.*, quoting *Federal Election Comm’n v. Massachusetts Citizens for Life*, 479 U.S. 238, 258 (1986)(MCFL).

³²424 U.S. 1 (1976)(per curiam).

³³479 U.S. 238 (1986).

interests; and asked whether the regulation was narrowly tailored to achieve those interests.³⁴ The Court found that the plaintiff’s freedom of expression was burdened by the regulation, but held that the state achieved its compelling interests by narrowly tailored means.

By limiting the source of a corporation’s independent expenditures to a special segregated fund or PAC, the *Austin* Court held that the regulation burdened the plaintiff’s freedom of expression.³⁵ The regulation placed various organizational and financial burdens on a corporation’s management of its PAC,³⁶ limited PAC solicitations to “corporate members” only;³⁷ and prohibited independent expenditures from corporate treasury funds.³⁸ Similar to its finding in *MCFL*, the Court found that the statute’s requirements burdened, but did not stifle, the corporation’s exercise of free expression to a point sufficient to raise a genuine First Amendment claim.³⁹ Thus, to overcome the claim, the regulation had to be motivated by compelling governmental interests and be narrowly tailored to serve those interests.

First, the *Austin* Court evaluated the state’s regulatory interests. The state argued that a corporation’s “unique legal and economic characteristics”⁴⁰ renders it a “formidable political presence” in the market place of ideas, which necessitates regulation of its political expenditures to “avoid corruption or the appearance of corruption.”⁴¹ The Court stressed that the regulation’s purpose was not to equalize the political influence of corporate and non-corporate speakers, but to ensure that expenditures “reflect actual public support for political ideas espoused by corporations.”⁴² Moreover, the Court was careful to emphasize that the mere fact that corporations can amass large treasuries was not its justification for upholding the

³⁴See *Austin*, 494 U.S. at 657. Antecedent to these inquiries, the Court affirmed that the plaintiff’s interest in using general funds for independent expenditures is “political expression at the core of our electoral process and of the First Amendment freedoms.” *Id.* at 657, quoting *Buckley*, 424 U.S. at 39. Moreover, the Court noted that the plaintiff’s status as a corporation did not completely erode its free speech interest under the First Amendment. See *Austin*, 494 U.S. at 657, citing *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)..

³⁵See *Austin*, 494 U.S. at 657.

³⁶For example, the Court noted that the regulation required a corporation to appoint a treasurer to administer the fund, keep records of the funds’ transactional history, and create and periodically update an informational statement about the fund for the state. *Id.* at 658.

³⁷*Id.*

³⁸*Id.*

³⁹*Id.*, citing *MCFL*, 479 U.S. at 252 (plurality opinion).

⁴⁰As examples, the Court cited attributes that enhanced a corporation’s ability to manage and attract capital assets favorable to its shareholder’s proprietary interests, such as perpetual life, limited liability, and favorable treatment with respect to the accumulation and distribution of capital. *Austin*, 494 U.S. at 658-659.

⁴¹*Id.* at 658, 659, citing *Federal Election Comm’n v. National Conservative Political Action Committee*, 470 U.S. 480, 496-497 (1985), and *MCFL*, 479 U.S. at 258.

⁴²*Id.* at 660.

statute. Rather, the Court identified the compelling state interest as “the unique state-conferred corporate structure,” which facilitates the amassing of large amounts of wealth.⁴³ On these grounds, the Court appeared to recognize a valid regulatory interest in assuring that the conversion of economic capital to political capital is done in an equitable way. In other words, the Court held that corruption of the electoral process itself, rather than just the corruption of candidates, is a compelling regulatory interest.

After finding a compelling state interest, the *Austin* Court determined that the regulation was neither over-inclusive nor under-inclusive with respect to its burden on expressive activity. Responding to the plaintiff’s argument that the regulation was over-inclusive insofar as it included closely held corporations, which do not enjoy the same capital resources as larger or publicly-held corporations, the Court ruled that the special benefits conferred to corporations and their *potential* for amassing large treasuries justified the restriction.⁴⁴ Plaintiff’s under-inclusiveness argument, alleging that the regulatory scheme failed to include unincorporated labor unions with large capital assets, fared no better. The Court distinguished labor unions from corporations on the ground that unions “amass large treasuries . . . without the significant state-conferred advantages of the corporate structure.”⁴⁵ Here again, the Court remarked that the corporate structure, not corporate wealth, triggers the state’s interest in regulating a corporation’s independent expenditures.⁴⁶ Hence, despite the burden on political speech, the Court upheld the regulation because it was narrowly tailored to reach the state’s compelling interests.

In sum, the *Austin* Court clarified *MCFL* and upheld the three-part test for when a corporation is exempt from the state’s general interest in requiring a corporation to use a separate segregated fund or PAC for its “independent expenditures.”⁴⁷ Under *Austin*, a corporation is exempt from the PAC requirement when (1) the “organization was formed for the express purpose of promoting political ideas;”⁴⁸ (2) no entity or person has a claim on the organization’s assets or earnings, such that “persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity;”⁴⁹ and (3) the organization is independent from “the influence of business corporations.”⁵⁰

⁴³*Id.*

⁴⁴*See id.* at 663.

⁴⁵*Id.* at 665.

⁴⁶“The desire to counter-balance those advantages unique to the corporate form is the State’s compelling interest in this case.” *Id.* *But see MCFL*, 479 U.S. at 259 (“[r]egulation of the corporate political activity thus has reflected concern not about the corporate form per se, but about the potential for unfair deployment of wealth for political purposes.”)

⁴⁷*See Austin*, 494 U.S. 662-664.

⁴⁸*Id.* at 662, *quoting MCFL*, 479 U.S. at 264.

⁴⁹*Id.* at 663, *quoting MCFL*, 479 U.S. at 264.

⁵⁰*Id.* at 664, *citing MCFL*, 479 U.S. at 264.

Activity Unregulated by Federal Law: Soft Money⁵¹

“Soft money” is also an undefined term in federal election law and regulation. Strictly speaking, “soft money” is considered to be those funds that are not regulated by FECA, *i.e.* hard money. Sometimes referred to as nonfederal funds, the term “soft money” often refers to non-FECA funds raised by the national committees of the two major political parties. “Soft money” may also refer to corporate and/or labor treasury funds and individual contributions, in excess of federal limits, which cannot legally be used in connection with federal elections, but can be used for other purposes. In addition, “soft money” is also used to describe funds spent for issue advocacy communications by corporations and labor unions.

Political Party Soft Money.

Political party soft money funds are raised by the national parties from sources and in amounts prohibited in federal elections by the FECA and are then largely transferred, in accordance with applicable state law, to state and local political parties for grassroots and party-building activities, overhead expenses, and issue ads. Since the 1979 FECA Amendments, certain grassroots, voter-registration, get-out-the-vote, and generic party-building activities are exempt from FECA coverage.⁵² Therefore, money raised and spent for these activities is not regulated and hence, is considered political party soft money.

Corporate and Labor Union Soft Money.

Generally, contributions and expenditures by corporations, labor unions, membership organizations, cooperatives, and corporations without capital stock have been prohibited in federal elections.⁵³ FECA, however, provides for three exemptions from this broad prohibition, that is, contributions and expenditures for: (1) communications by a corporation to its stockholders, executive or administrative personnel and their families or by a labor organization to its members or families on any subject; (2) nonpartisan voter registration and get-out-the-vote activities by a corporation aimed at its stockholders and executive and administrative personnel and their families or by a labor organization aimed at its members and their families; and (3) the establishment, administration and solicitation of contributions to a separate segregated fund (commonly known as a political action committee or PAC or SSF) to be utilized for federal election purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.⁵⁴

⁵¹For further discussion of soft money, see, *Campaign Finance: Constitutional and Legal Issues of Soft Money*, by L. Paige Whitaker (IB98025); *Soft and Hard Money in Contemporary Elections: What Federal Law Does and Does Not Regulate (97-91)*, by Joseph E. Cantor.

⁵²U.S.C. § 431(9)(B)(viii),(ix).

⁵³U.S.C. § 441b.

⁵⁴U.S.C. § 441b(b)(2)(A)-(C); *see also* 11 C.F.R. § 114.1(a)(2)(i)-(iii).

Soft Money Spent On Issue Advocacy.⁵⁵

Spending on issue advocacy communications is another use of soft money that has gained popularity in recent federal election cycles. Issue advocacy communications are paid for by a group, such as a for-profit or non-profit corporation or labor organization, for advertisements that could be interpreted to favor or disfavor certain candidates, while also serving to inform the public about a policy issue. The prevailing view in the lower courts is that Supreme Court precedent requires that only those communications that expressly advocate the election or defeat of a clearly identified candidate can be constitutionally regulated; any such communication that does not meet this “express advocacy” standard is constitutionally protected First Amendment speech, which cannot be regulated. Hence, issue ads may be paid for with unregulated soft money.

Origin of Issue Advocacy.

In *Buckley v. Valeo*,⁵⁶ the Supreme Court provided the genesis for the concept of issue and express advocacy communications. In order to pass constitutional muster and not be struck down as unconstitutionally vague, the Court ruled, FECA can only apply to non-candidate “expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office,” *i.e.*, expenditures for express advocacy communications.⁵⁷ A footnote to the opinion provides examples of such “express advocacy”: terms “such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’”⁵⁸ Communications without these ‘magic words’ are often classified as issue advocacy, thus falling outside the scope of the FECA. In its rationale for establishing such a bright line distinction between issue and express advocacy, the Court noted that the discussion of issues and candidates as well as the advocacy of election or defeat of candidates “may often dissolve in practical application.” That is, according to the Court, candidates (especially incumbents) are intimately tied to public issues involving legislative proposals and governmental actions.⁵⁹

In the 1986 decision of *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, (*MCFL*),⁶⁰ the Supreme Court continued to distinguish between issue and express advocacy, holding that an expenditure must constitute express advocacy in order to be subject to the FECA prohibition against corporate use of treasury funds to make an expenditure “in connection with” any federal election.⁶¹ In *MCFL*, the Court ruled that a publication urging voters to vote for “pro-life” candidates, while

⁵⁵For further discussion of issue advocacy, see, *Campaign Finance Reform: A Legal Analysis of Issue and Express Advocacy*, by L. Paige Whitaker (CRS Report #98-282).

⁵⁶424 U.S. 1 (1976).

⁵⁷*Id.* at 44.

⁵⁸*Id.* n.52; see 11 C.F.R. 101.22(a).

⁵⁹*Id.* at 42.

⁶⁰479 U.S. 238 (1986).

⁶¹*Id.* at 249-250.

also identifying and providing photographs of certain candidates who fit that description, could not be regarded as a “mere discussion of public issues that by their nature raise the names of certain politicians.” Instead, the Court found, the publication “in effect” provided a directive to the reader to vote for the identified candidates and ergo, constituted express advocacy.⁶²

In *FEC v. Furgatch*,⁶³ the Ninth Circuit presented the following three-part test to determine whether a communication may be considered issue advocacy:

First, even if it is not presented in the clearest, most explicit language, speech is ‘express’ for the present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed ‘advocacy’ if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be ‘express advocacy of election or defeat of a candidate’ when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.⁶⁴

However, the trend in the circuit courts appears to be away from the *Furgatch* and FEC definitions toward a more limited interpretation of what type of speech will constitute “express advocacy.” Hence, regulation of fewer types of communications are being upheld as constitutionally permissible and therefore, more “issue ads” are permissibly funded with soft money. In *Maine Right to Life Committee v. FEC*,⁶⁵ the First Circuit affirmed the district court’s opinion that the FEC surpassed its authority when it included a “reasonable person” standard in its definition of “express advocacy.” The court reasoned that such a standard threatened to infringe upon issue advocacy, an area protected by the First Amendment. (*Id.* at 12.) The Fourth Circuit reached a similar conclusion in *FEC v. Christian Action Network*.⁶⁶ Likewise, in *Vermont Right to Life Committee v. Sorrell*,⁶⁷ the Second Circuit found that state campaign regulations triggering disclosure and reporting requirements of speech that “expressly or *implicitly* advocate[] the success or defeat of a candidate” were facially invalid under the First Amendment because they would result in a regulation of constitutionally protected issue advocacy, (*emphasis added*). In *Vermont*, the court held that the Supreme Court in *Buckley* had established an “express advocacy standard” in order to insure that regulations were neither too vague nor intrusive on First Amendment protected issue advocacy. Accordingly, the court held that by

⁶²*Id.* at 249-250.

⁶³807 F.2d 857 (9th Cir. 1987), *cert. denied*, 484 U.S. 850 (*Id.* at 44 n.52; *see* 11 C.F.R. 101.22(a) (1987)).

⁶⁴*Id.* at 864.

⁶⁵914 F.Supp. 8 (D. Maine 1996), *aff’d per curiam* 98 F.3d 1 (1st. Cir. 1996), *cert. denied*, 118 S.Ct. 52 (Oct. 6, 1997).

⁶⁶92 F.3d 1178 (4th Cir. 1997).

⁶⁷216 F.3d 264 (2d Cir. 2000).

including the term “implicitly,” the regulations extend to advocacy with respect to public issues, in violation of the rule enunciated in *Buckley* and its progeny.⁶⁸

Issue Advocacy Distinguished from Independent Expenditures.

Soft money spent for issue advocacy communications is sometimes confused with independent expenditures. Although both types of expenditures are purportedly independent, (indeed, Justice Kennedy argues that, by nature, practically all expenditures are coordinated with a candidate and, thus, cannot be considered independent),⁶⁹ only independent expenditures are subject to the FECA. The *Colorado I* Court held that the First Amendment would prohibit the application of a FECA provision, 2 U.S.C. § 441a(d)(3), limiting political party expenditures made independently and without any coordination with a candidate or his or her campaign. Essentially, the *Colorado* decision banned any limitations on political party expenditures when they are made independently of a candidate’s campaign.⁷⁰ Since a political committee making independent expenditures, however, is still subject to FECA restrictions regarding sources and contribution amounts it may receive from a person, (*see, e.g.*, 11 C.F.R. § 110.0(d)), an independent expenditure is not considered soft money.

In *FEC v. Colorado Republican Federal Campaign Committee (Colorado II)*,⁷¹ the Supreme Court held that a political party’s coordinated expenditures, unlike genuine independent expenditures, may be limited in order to minimize circumvention of the Federal Election Campaign Act’s (FECA) contribution limits. While the Court’s opinion in *Colorado I* was limited to the constitutionality of the application of FECA’s “Party Expenditure Provision” (2 U.S.C. § 441a(d)(3)) to an *independent* expenditure by the Colorado Republican Party, in *Colorado II* the Court considered a facial challenge to the constitutionality of the limit on *coordinated* party spending. Persuaded by evidence supporting the FEC’s argument, the Court found that coordinated party expenditures are indeed the “functional equivalent” of contributions.⁷² Therefore, in its evaluation, the Court applied the same scrutiny to the coordinated “Party Expenditure Provision” that it has applied to other contribution limits: inquiring whether the restriction is “closely drawn” to the “sufficiently important” governmental interest of stemming political corruption. The

⁶⁸On July 6, 1995, the FEC promulgated regulations defining “express advocacy” in a manner consistent with the test espoused in *Furgatch*. (60 Fed. Reg. 35292, 35304 (codified at 11 C.F.R. 100.22)(effective Oct. 5, 1995) 60 Fed. Reg. 52069 (Oct. 5, 1995).) Despite the emerging trend in the federal courts against the *Furgatch* express advocacy doctrine, the FEC has declined to revise its regulations defining “express advocacy.” (*See* 63 Fed. Reg. 8363 (Feb. 19, 1998).) The FEC has stated that its primary reason for this decision is “its belief that the definition of ‘express advocacy’ found at 11 CFR 100.22(b) is constitutional.” (*Id.* at 8264.)

⁶⁹*Colorado Republican Committee v. FEC (Colorado I)*, 518 U.S. 604 (1996)(Kennedy, J., concurring in the judgment, dissenting in part).

⁷⁰*Id.* at 614-17.

⁷¹121 S.Ct. 2351 (2001).

⁷²*Id.* at 2362.

Court further determined that circumvention of the law through “prearranged or coordinated expenditures amounting to disguised contributions” is a “valid theory of corruption.”⁷³ In upholding the limit, the Court noted that “substantial evidence demonstrates how candidates, donors, and parties test the limits of the current law,” which, the Court concluded, “shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties’ coordinated spending wide open.”⁷⁴

Campaign Contributions and Official Government Acts

There have been numerous charges and suggestions of “corruption” of, or in, the Federal Government because of the totality of campaign contributions made by those associated with the Enron Corporation to national political parties, to candidates and to public officials’ PACs, and the subsequent adoption of governmental policies that were particularly favorable to the Corporation.⁷⁵ The term public or political “corruption” has enough imprecision and gradations of meaning to include merely a “perversion”⁷⁶ of a political system which, ideally, is intended to operate to the benefit of the general public rather than for the enrichment of a few, or where the “motivations” of public officials are not based on the general, public interest.⁷⁷ However, if the term “corruption” is used in the more narrow, technical sense generally employed when analyzing the operation of governments, there would then need to be developed some indication of wrongful conduct which violated particular statutory or regulatory standards, that is, generally, criminality or other unlawful conduct on the part of Government officials, or on the part of the Corporation in

⁷³*Id.* at 2361, 2362.

⁷⁴*Id.* at 2367.

⁷⁵Washington Post, January 23, 2002, at A16, “Campaign Finance After Enron”: “The existing system of soft-money donations allowed Enron to buy access to the administration and Congress. Although it is not clear yet whether this access corrupted the policy of the Bush administration, it appears likely that it did corrupt Congress in the late 1990s”; Washington Post, January 25, 2002, at A18, “NSC Aided Enron’s Efforts”; Washington Post, January 25, 2002, at A18, “For Gramms, Enron Is Hard to Escape”; Stone and Zeller, “Enron’s Collapse Renews Old Battles,” *National Journal*, January 19, 2002, at 182 -183; Washington Post, January 27, 2002, at A 8, “Pentagon Official From Enron in Hot Seat”; BNA Money and Politics Report, January 17, 2002, “Lieberman Rejects Recusal From Probe Despite Enron Donations to Leadership PAC.”

⁷⁶See common definition of “corruption” in *Webster’s New Collegiate Dictionary* (1977); *Black’s Law Dictionary* (7th ed. 1999), definition 1: “Depravity, perversion, or taint; an impairment of integrity, virtue or moral principle; esp. the impairment of a public official’s duties by bribery.”

⁷⁷*Note*, generally, discussion by James Madison of republican principles and governmental power to pursue “the public good,” that the object of all political constitutions is to have for officials those who “discern” and “pursue” the “common good of society,” and of the problems of the “perversion of the power to advance the public happiness ... to the public detriment.” *The Federalist Papers*, Nos. XLI and LVII.

relation to its contributions or relationships to those Government officials, which served private or personal ends.⁷⁸ Unless more particularized facts are forthcoming either through the press or from governmental investigations, the discernment of actual criminality or illegality in the allegations concerning the improper or undue “influence” in the Government caused by Enron political contributions or lobbying, that is, prosecutable public or “political corruption,” may be difficult to identify under current federal law.

As discussed in the sections above, unlimited soft money campaign contributions were not prohibited or regulated at the time of the Enron contributions, and were not illegal under federal law. Similarly, political contributions of so-called “hard money,” while regulated in amount and source, were also permitted from individuals, such as corporate officers, and from political action committees (but not directly from corporation or labor union treasuries), and were not illegal. As a general matter, campaign contributions, as opposed to other transfers of wealth from private entities to public officials, are not only *permitted* under law and practice, but are seen as *necessary* in our system of privately financed campaigns for elective office. Without campaign contributions from private parties (or a system of Government financed campaigns), it is postulated that only the wealthiest individuals using their own personal funds could afford to run a viable campaign for federal office.⁷⁹ Campaign contributions from private entities thus have a facial legitimacy that gifts or other transfers of wealth from private parties to public officials do not have, and have been recognized as having a First Amendment, freedom of expression and association component.⁸⁰

If it is assumed that the campaign contributions from persons and entities affiliated with Enron to federal candidates, political action committees, and political parties were lawful under current federal law as to the amount, the source, and the required disclosures and reporting of such contributions, the question remains as to whether the donation of otherwise lawful campaign contributions, and the subsequent votes or policies favorable to the political donor, necessarily indicate corruption in Government. The correlation between campaign contributions and, for example, votes in Congress for or against particular legislation has always been a difficult subject for analysis, both in proof and in theory. In the first instance, there is what has been described as the “chicken or egg” conundrum: that is, in these circumstances, did campaign contributions flow to those elected public officials because their independent positions, ideology and votes are favorable to the business enterprise in

⁷⁸Huberts, *Expert Views on Public Corruption Around the Globe*, at 2-3 (Vrije Universiteit Amsterdam 1996); *Black’s Law Dictionary*, *supra*, definition 2; *note* generally, U.S. Department of Justice, *Prosecution of Public Corruption Cases* (1998).

⁷⁹*Buckley v. Valeo*, 424 U.S. 1, 26 (1976): “Under a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign.” John T. Noonan, Jr. *Bribes*, p. 621 (Macmillan 1984): “Democracy does not work without campaigns for office. Campaigns require money. Unless only the rich are to run, the money must be raised. If the government supplied it, the danger of manipulation by incumbents would be great.”

⁸⁰*Buckley v. Valeo*, *supra* at 14-23.

question, or were those positions or votes actually influenced by or taken *because* of the campaign contributions? A similar issue could be raised with respect to Administration positions on legislative issues, regulatory policy and other executive policy initiatives, and campaign contributions to presidential candidates and to the national committees of those candidates' parties.⁸¹ It is understood that as a general matter individuals and organizations will make campaign contributions to those officials and political entities with whom they agree on most matters of public policy.⁸² It would, therefore, be as little of a surprise to find that those affiliated with an energy corporation such as Enron would make 73% of their campaign contributions to members of or entities affiliated with the Republican Party⁸³ which, as a general matter, is perceived as being more ideologically consonant with the interests of ownership and management of such businesses, than to discover that those affiliated with labor organizations made the largest percentage of their contributions to members of the Democratic Party,⁸⁴ which is perceived as being more aligned with the interests of the workers in those businesses.

It is, of course, always difficult to discern the "real motivation" behind a position, policy or ideology adopted by a public official, unless some empirical evidence like candid writings or statements is produced clearly tying a position, vote, or action to a contribution or other private promise or thing of value. Motivations, besides generally being hidden, are often complex or mixed, and even those actions by a public official which seemingly benefit only a few favored donors at the ultimate expense of the general public might arguably have been based on an official's notions of the public interest and the public policy belief that what is good for the profitability of a large business entity is generally good for the entire country. Even in the broadest definition of corruption, as a perversion of a public official's motive to act in the interest of the "public good," there is no universal consensus as to which public policies best serve the "public good." The fact, therefore, that political contributions were made to candidates and political parties, and that those candidates or members of that party, when elected or appointed, eventually voted on or pursued policies favorable to those campaign contribution donors, does not, in our system of privately financed political campaigns, necessarily implicate *per se* Government "corruption" or illegal actions, absent specific connecting or "linking" factors.

⁸¹Washington Post, January 29, 2002, at A1, "Access vs. Success? Enron's Policy Clout Tough To Measure," noting that it is a "difficult task separating actions taken to please a major campaign contributor from the bona fide policy views of a market-oriented administration."

⁸²"A contribution serves as a general expression of support for the candidate and his views...." *Buckley v. Valeo*, *supra* at 21; *United States v. Brewster*, 506 F.2d 62, 73, note 26 (D.C.Cir. 1974). "If the [campaign] money comes from citizens, they give it to candidates they expect to vote, on at least some issues, in accordance with the donor's desires. Normally, at any rate, money is given to an officeseeker whose views on important issues coincide with the giver's." Noonan, *Bribes*, *supra* at 621.

⁸³Center for Responsive Politics, Money in Politics Alert, "The Fall of a Giant: Enron's Campaign Contributions and Lobbying," November 9, 2001, Vol. 6, No. 31.

⁸⁴Center for Responsive Politics, opensecrets.org, Industry Totals, Long-Term Contribution Trends: Labor, 1990 - 2002 election cycles.

This is not to say, however, that the “independent” judgment of a public official could not be subtly influenced by the reliance and dependence on large contributors, such that the public official could rationalize that what’s good for his or her private benefactors is always good for the country; nor is it to suggest that the overall influence on Government policy from large contributors could not be “undue” or severely “imbalanced” in favor of those interests represented by accumulated and aggregated wealth at the expense of other competing (but less well-financed, well-organized or politically astute) public interests. There is fairly widespread agreement on at least the *potential* for public “corruption,” if not the “appearance” of corruption in the distortion of the independent judgment of Government officials, endemic in a system which breeds dependence on large campaign contributors. The United States Supreme Court has noted the “danger” to the country, in the severe eroding of “confidence in the system of representative Government,” of “the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.”⁸⁵ The noted and respected ethicist, the late Senator Paul Douglas, explained in his treatise *Ethics in Government*, that often “the corruption of public officials by private interests takes a more subtle form” than outright bribes, through indirect financial support which may “put the public official under such a feeling of personal obligation that the latter gradually loses his sense of mission to the public”⁸⁶ Douglas noted that sometimes subtle “shifting loyalties” from the community to narrow private interests may lead such an official to make decisions favorable to “his private benefactors and patrons” while all the time “the official will claim – and may indeed believe – that there is no causal relationship between the favors he received and the decisions which he makes.”⁸⁷

One other allegation of “corruption” that is consistently heard is that the large campaign contributions and wealth of Enron allowed it more “access” to Government officials than a typical member of the public or constituent would have. Evidence of the desire for “access” (or, at the least, to create “good will”) may be observed in the increasing tendency for large contributors to give campaign contributions to both political parties, or to both candidates of the parties running in the same election.⁸⁸ It is theorized that in such cases, the organization or entity making such contributions to both sides is looking to ensure “access” to the elected official, rather than basing contributions on ideological factors or more immediate attempts at influencing public policy. Receiving access or “face-time” because of one’s campaign contributions to the political party or to that official, however it may offend notions of equality and republican egalitarianism, is a current fact of life in our political system of privately financed campaigns where personal “receptions” with party leadership, special personal “briefings,” brunches or breakfasts with Representatives or other Government officials, are provided specifically as incentives and rewards exclusively

⁸⁵*Buckley v. Valeo*, *supra* at 27.

⁸⁶Paul H. Douglas, *Ethics in Government*, at 44 (Harvard University Press 1952).

⁸⁷*Id.*

⁸⁸*See*, for example, Common Cause, “Life of the Party: Soft Money in the 1st Half of 2001-2002 Cycle,” at 3: “... many special interests are still playing it safe by making significant contributions to both parties.”

for large contributors to the party or the candidate. As developed in more detail below, mere “access” to a Government official in return for or as a reward or incentive for political contributions has thus far been found not to necessarily implicate either the bribery or extortion laws.

If there is deemed, as a matter of public policy, to be a need to address or rectify the real or perceived imbalance of influence or access, or the actual or appearance of political corruption resulting from large, unlimited campaign contributions of soft money to political parties and leadership PACs, for example, it would appear that such remedial action would need to be addressed not through prosecution of “corruption” under current federal criminal laws, but rather through new regulatory and remedial legislation which addressed the matter in a more systemic fashion. As explained by the Supreme Court in upholding contribution limitations of so-called “hard money” to candidates, current federal laws on “corruption” such as bribery and extortion “deal only with the most blatant and specific attempts of those with money to influence governmental action.”⁸⁹ As discussed in more detail below, federal criminal corruption statutes such as the federal bribery or extortion laws would require evidence of a more particularized connection or linkage between the contribution of money and a particular official act (that is generally, a *quid pro quo* arrangement) than has been reported in the Enron matter thus far in the press or in revelations from congressional hearings.

Bribery

The most persistent allegations of “political corruption” in the Enron matter is that the company “bought,” through large campaign contributions widely distributed, particular official favors, official acts or official forbearance from officers or employees of the Federal Government. Such allegations would, as an initial matter, raise questions of violations of federal criminal law under the federal bribery statute.

The federal bribery statute at 18 U.S.C. § 201 provides criminal penalties for any federal “public official”⁹⁰ who “corruptly” seeks, receives, accepts or agrees to receive “anything of value personally or for any other person or entity, in return for being influenced in the performance of any official act.”⁹¹ This provision of federal law specifically requires that the thing of value be “corruptly” received, sought or agreed to be received by the public official “in return for being influenced” in the performance of an official act. The “corrupt” nature of the transaction is part of the required intent which is characteristic of a bribe.⁹² The required transaction involved, that is,

⁸⁹*Buckley v. Valeo, supra* at 27-28.

⁹⁰A “public official” includes any Delegate to or Member of Congress, or any officer or employee of the United States, or any person acting for or on behalf of the United States or any of its departments, agencies or branches. 18 U.S.C. § 201(a)(1).

⁹¹18 U.S.C. § 201(b)(2)(A). The statute also prohibits, in a complimentary fashion, the corrupt *giving* or *offering* of something of value by anyone *to* the official in return for the official’s being influenced in the performance of an official act. § 201(b)(1)(A).

⁹²“Corruptly” engaging in the conduct “bespeaks a higher degree of criminal knowledge and
(continued...)

corruptly receiving something of value “in return for” being influenced is interpreted as an element of the offense that requires some corrupt or wrongful “agreement” or “bargain,” often described as a *quid pro quo* — something given in exchange for something received.⁹³ The bribe under these circumstances must be shown to be the thing that is the “prime mover or producer of the official act” performed or agreed to be performed.⁹⁴

Certainly, campaign contributions, whether of soft money or regulated hard money, could be the “thing of value” in a “bribe,” and can be implicated in a bribery scheme *if* the other elements of the crime of bribery are present.⁹⁵ However, for a “bribe” to be present in the case of campaign contributions, there must be shown a specific *quid pro quo*, that is, a corrupt agreement or understanding between the parties that the public official will do some specific official act in return for the receipt of certain valuable consideration. When such a corrupt agreement exists (*e.g.*, “I will support this legislation or policy in return for you providing a campaign contribution to my political committee”), there exists the requisite element of being “influenced” to do the act “in return for” the campaign contribution.⁹⁶ When there is only a campaign contribution and a subsequent official act favorable to the donor, but no evidence of such an agreement directly linking the motivation for the official act to the contribution, then there is no bribe. This is why the Supreme Court has noted that bribery is among the least subtle, and most blatant forms of public corruption.⁹⁷

As to campaign contributions generally, the courts have noted that: “Every campaign contribution is given to an elected public official probably because the giver supports the acts done or to be done by the elected official.”⁹⁸ The court noted, furthermore, that: “No politician who knows the identity and business interests of his

⁹²(...continued)

purpose” than simple criminal intent (an intent to do the act). *United States v. Brewster*, 506 F.2d 62, 71 (D.C.Cir. 1974); *United States v. Hsieh Hui Mei Chen*, 754 F.2d 817, 822 (9th Cir. 1985), *cert. denied*, 471 U.S. 1139 (1985). The House Report on the bribery provision recodified in 1962 described the word “corruptly” to mean “with wrongful or dishonest intent.” H.R. Rpt. No. 748, 87th Cong., 1st Sess. 18 (1961). The “corrupt” intent of the bribery provision requires a “specific intent” to be shown, as opposed to a simple *mens rea*. *United States v. Strand*, 574 F.2d 993, 995-996 (9th Cir. 1978).

⁹³ *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404 (1999); *United States v. Brewster*, *supra* at 72; *United States v. Arthur*, 544 F.2d 730, 734, 735 (4th Cir. 1976), *United States v. Strand*, *supra*; *United States v. Tomblin*, 46 F.3d 1369, 1379 (5th Cir. 1995).

⁹⁴*United States v. Brewster*, *supra* at 72, 82.

⁹⁵*United States v. Anderson*, 509 F.2d 312 (D.C.Cir. 1974), *cert. denied*, 420 U.S. 991 (1975). Under the bribery clause, a bribe need not be only for the official “personally,” but may be sought “for any other person or entity” (18 U.S.C. § 201(b)(2)), such as, presumably, a campaign committee or political party. *See, e.g., United States v. Kelly*, 748 F.2d 691, 699, n.19 (D.C. Cir. 1984).

⁹⁶*United States v. Brewster*, *supra*; *United States v. Anderson*, *supra* at 330.

⁹⁷*Buckley v. Valeo*, *supra* at 27-28.

⁹⁸*United States v. Brewster*, *supra* at 73, note 26.

campaign contributors is ever completely devoid of knowledge as to the inspiration behind the donation.”⁹⁹ Therefore, while campaign contributions can be bribes where there exists a corrupt bargain (a *quid pro quo* arrangement), campaign contributions given to a candidate or official merely as support, or in appreciation or thank you for certain official positions or votes taken, as is the case for many or most campaign contributions, are not considered to be bribes. The United States Court of Appeals for the District of Columbia Circuit, in *United States v. Anderson, supra*, for example, where a conviction of a lobbyist was upheld for bribing a Senator with “campaign contributions” to influence the Senator on particular postal rate legislation, approved the jury instructions given by the trial judge which “exonerated campaign contributions inspired by the recipient's general position of support on particular legislation.”¹⁰⁰

Campaign contributions may also be in the nature of general contributions, donations or payments to causes, entities or to other persons, sometimes called “goodwill” payments, which are given merely to create a favorable atmosphere or feeling of gratitude in the recipient, or with “some generalized hope or expectation of ultimate benefit on the part of the donor,” but which are not given nor received in the context of any express or implied agreement, and are therefore not considered “bribes” under the statute.¹⁰¹ Political contributions to entities such as a candidate’s political campaign committee do not in themselves constitute bribes “even though many contributors hope that the official will act favorably because of their contributions.”¹⁰² A Court of Appeals in *United States v. Allen*, interpreting a bribery statute being used as a predicate offense for a RICO charge, explained as follows:

[A]ccepting a campaign contribution does not equal taking a bribe unless the payment is made in exchange for an explicit promise to perform or not perform an official act. Vague expectations of some future benefit should not be sufficient to make a payment a bribe.¹⁰³

The concept of the lack of a corrupt agreement generally in campaign contributions, as distinguished from bribes, was discussed in terms of reciprocity and “obligation” by author John T. Noonan, Jr., in his work entitled *Bribes*. Discussing what he calls “donations of democracy,” Noonan raises the issue of the differences between such contributions and bribes, and later in his work attempts to answer the question raised:

Normally, at any rate, money is given to an officeseeker whose views on important issues coincide with the giver's. The money is given with the hope, expectation, purpose that particular views will be translated into particular votes. A tacit reciprocity exists. How is money given a candidate different from a bribe?

⁹⁹*United States v. Brewster, supra* at 81.

¹⁰⁰509 F.2d *supra* at 330.

¹⁰¹*United States v. Johnson*, 621 F.2d 1073, 1076 (10th Cir. 1980); *United States v. Arthur, supra* at 734, 735; *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993).

¹⁰²*United States v. Tomblin*, 46 F.3d 1369, 1379 (5th Cir. 1995).

¹⁰³10 F.3d 405, 411 (7th Cir. 1993).

* * *

Campaign contributions are imperfect gifts because they are usually not set in a context of personal relations; they are intended to express ... an identification with a cause. They are not wholly the recipient's – their purpose is restricted. They are given in response to work done or expected to be done. ... They do not express or create overriding obligations, that is, there is no absolute obligation on the part of the contributor to recognize past work by the candidate, and there is no absolute obligation on the part of the candidate to do the work the contributor expects. Absence of absolute obligation creates one difference between contributions and bribes.¹⁰⁴

The issue of providing “access” to elected public officials for private individuals in return for campaign contributions has been examined in several court decisions in the context of bribes, or under a similar standard for extortion. Even where a campaign contribution might be accepted “in return for,” or as the *quid pro quo*, for a particular opportunity for access or a personal meeting with a public official, there remains the question as to whether special access to and the meeting with a contributor by a public official, particularly an elected official, constitutes an “official act” of that public official as contemplated by the bribery law. An “official act” is defined in the bribery statute to mean:

... [A]ny decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.¹⁰⁵

While the term “official act” is often interpreted broadly to include any decisions and actions on governmental matters taken by an official within his official capacity, even if such duties are not prescribed by statute or regulation (such as those activities established by settled practice),¹⁰⁶ there needs generally to be involved some decision, recommendation or forbearance on a governmental matter pending or to be brought before the official. Voting on legislation, recommending the adoption or rejection of a particular official policy, or intervening on behalf of a private party before another public official or agency on an official governmental matter, would all most likely involve “official acts,” while merely meeting with a constituent or other private individual, on the other hand, has not been found to involve any specific decision, duty or official act. The Department of Justice has explained in congressional testimony that: “The courts that have addressed the issue have held that such access in exchange for political contributions is not an ‘official act’ that can provide the basis for a bribery or extortion prosecution.”¹⁰⁷ In *United States v. Carpenter*, the court expressly found that “granting or denying a lobbyist access to present her views” to a legislator did not

¹⁰⁴Noonan, *Bribes*, *supra* at 621, 696-697.

¹⁰⁵18 U.S.C. §201(a)(3)

¹⁰⁶Note legislative history, at H.R. Rpt. No. 748, *supra* at 18, and S. Rpt. 2213, 87th Cong., 2d Session, 8 (1962); *United States v. Birdsall*, 233 U.S. 223, 231 (1914); *United States v. Biaggi*, 853 F.2d 89, 97 - 98 (2d Cir. 1988), *cert. denied*, 109 S.Ct. 1312 (1989).

¹⁰⁷Testimony of Attorney General Janet Reno, to the House Committee on the Judiciary, Hearings, 105th Cong., 1st Sess., October 15, 1997, at 32.

constitute an “official act” of the legislator,¹⁰⁸ and in *United States v. Sawyer*, the court found that “the desire to gain access, by itself,” does not amount “to an intent to influence improperly the legislator’s exercise of official duties.”¹⁰⁹

Being available for and showing deference towards contributors, particularly generous contributors, by offering special, more regular, or greater access for such contributors, has thus been found to involve conduct which constitutes what might be considered an unavoidable, reality in the world of political fund raising, that is, a kind of “access” payment which is permitted in practice in our form of private funding of campaigns for elective office.¹¹⁰ “Granting or denying access to an elected official’s time based on levels of contributions,” noted the court in *Carpenter*, appears to be conduct that should not be criminalized since it is, as expressed by the Supreme Court, “unavoidable so long as election campaigns are financed by private contributions,” and has “long been thought to be well within the law.”¹¹¹ The court in *Carpenter* noted specifically: “Elected officials must ration their time among those that seek access to them and they commonly consider campaign contributions when deciding how to ration their time.”¹¹² While such explicit connections between contributions and personal access may offend Americans’ sense of equal representation, fairness and egalitarianism, it appears that it has not been considered as yet to rise to a “corrupt” bargain for an “official act” violative of the bribery or extortion statute.¹¹³

¹⁰⁸961 F.2d 824, 827 (9th Cir. 1992).

¹⁰⁹85 F.3d 713,731 (4th Cir. 1996). See also other cases cited in the Attorney General’s testimony, *United States v. Rabbitt*, 583 F.2d 1014, 1028 (4th Cir. 1978); *United States v. Loftus*, 992 F.2d 793, 796 (8th Cir. 1993).

¹¹⁰“Campaign contributions may be considered a subspecies of a larger class - access payments. ‘I’m not paying for my congressman’s vote,’ the large contributor will say. ‘I simply want to be sure he will listen to my side of the case.’[T]he access buyer is paying not only for attention but for favorable attention. The payment is close to what would be called a bribe if made to a judge; but access to and favorable attention by, a legislator has not generally been regarded in the same way as an approach to a judge. ...The hypotheticals show that a legislator is not in the position of a judge. The judge’s office is modeled on the paradigm of the transcendent Judge of the Bible and a sharp line distinguishes him from the litigants before him. The legislator, on the contrary, is his constituent’s *representative* A certain identity of interest is expected to exist between constituent and legislator...” Noonan, *Bribes*, *supra* at 689, 623-624.

¹¹¹*United States v. Carpenter*, *supra* at 827, quoting *McCormick v. United States*, 500 U.S. 257, 272 (1991).

¹¹²*United States v. Carpenter*, *supra*

¹¹³The Senate Select Committee on Ethics has ruled that although offering campaign contributors “special” access to policy discussions with the Senator “may violate no law or Senate rule, they nonetheless affect public confidence in the Senate” and that campaign contributions should not be solicited in a manner in which “special treatment” or “special access” is offered as incentives for such contributions. Senate Select Committee on Ethics, Interpretative Ruling No. 427, September 25, 1987.

Illegal Gratuities

Within the bribery statute is the so-called “illegal gratuities” clause which penalizes a public official who, other than as provided by law for the discharge of official duties, agrees to accept something of value “personally for or because of any official act performed or to be performed by such official.”¹¹⁴ This provision has been found to be a “lesser included offense” of a bribe,¹¹⁵ and does not require a “corrupt” intent for a violation. The different intent elements for an illegal gratuity, that is, the absence of a required “corrupt” intent, and the absence of a need to show an intent to influence or be influenced, are among the principal distinctions between a bribe and an illegal gratuity.

What is required for a violation of the illegal gratuities clause is that a public official receive or seek something of value, other than as provided by law, “personally” (or “for himself”),¹¹⁶ “for or because of” an “official act” done or to be done by him. There does not have to be an express or implied *quid pro quo* or a corrupt bargain for an illegal gratuity,¹¹⁷ but the thing of value must be received “personally” (or for the official himself), and must be “for or because of” an official act, that is, connected in some way to an official act, function or duty performed or to be performed. A thing of value received even after an official act is performed, as a “thank you” or in appreciation for doing an act that would have been done in any event, uninfluenced by the donation, might, therefore, still constitute an illegal gratuity, while a bribe, on the other hand, must be shown to be the “prime mover” influencing the act.

The intent factor in the bribery provision, as distinguished from the intent required in the “illegal gratuities” clause was expanded on by the Supreme Court:

The distinguishing feature of each crime is its intent element. Bribery requires intent “to influence” an official act or “to be influenced” in an official act, while illegal gratuity requires only that the gratuity be given or accepted “for or because of” an official act. In other words, for bribery there must be a *quid pro quo* – a specific intent to give or receive something of value *in exchange* for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may have already determined to take), or for a past act that he has already taken.¹¹⁸

¹¹⁴18 U.S.C. §201(c)(1)(B). The giving or offering of an illegal gratuity to a public official is prohibited at § 201(c)(1)(A).

¹¹⁵*United States v. Brewster*, *supra* at 68-76.

¹¹⁶The statute was amended in 1986, P.L. 99-646, §46(f),(g), 100 Stat. 3601-3604, November 10, 1986, to provide technical amendments to the criminal code, including changing the terms “for himself” to “personally.” There is no indication of an intent to change the substance of the elements of the offense, and therefore in this report the terms “personally” and “for himself” are used interchangeably.

¹¹⁷*Brewster*, *supra* at 72; *Sun-Diamond*, *supra* at 404 - 405.

¹¹⁸*United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404 - 405 (1999).

Although no specific illegal bargain, or “corrupt” intent, in receiving an illegal gratuity need be shown, there is a criminal intent required of an illegal gratuity which would distinguish this wrongful receipt of a payment from a mere gift unrelated to any official act, or from a lawful campaign contribution given to an elected public official “because of” his stand, vote, or position on an issue. The intent has been described by one court as the knowledge that one is being compensated or rewarded for a particular official act or acts:

...[U]nder the gratuity section, “otherwise than as provided by law ... for or because of any official act” carries the concept of the official act being done anyway, but the payment only being made because of a specifically identified act, and with a certain guilty knowledge best defined by the Supreme Court itself, *i.e.*, “with knowledge that the donor was paying him compensation for an official act ... evidence of the Member's knowledge of the alleged briber's illicit reasons for paying the money is sufficient.”¹¹⁹

As far as otherwise lawful campaign contributions that are given “for or because of” an official position, official vote, or other official act of a Government officer, the donation or the receipt of such a campaign contribution is generally not considered to be an “illegal gratuity,” substantially because such payments are not considered to have been received or sought with the requisite intent to “compensate” the public official “personally” for his acts, as they are not received by the official “for himself” or “personally” but rather by another entity or person for campaign or other similar political uses.¹²⁰ Under federal campaign laws all federal candidates are required to have a principal campaign committee to which all campaign contributions are given or transferred, and from which they are expended under authority of the committees’ treasurers, only for campaign or other designated purposes.¹²¹ Furthermore, federal law provides that candidates may not convert campaign contributions to their own personal use.¹²² It may therefore be difficult in the case of campaign contributions to candidate committees, or even in the case of soft money contributions to political party committees or so-called leadership PAC’s, to show that the money donated was received by the official with the requisite criminal intent to be “personally” compensated or rewarded for or because of an official act. As stated by the United States Court of Appeals for the District of Columbia in the *Brewster* case:

[A] public official's acceptance of a thing of value unrelated to the performance of any official act and *all bona fide contributions directed to a lawfully conducted campaign committee or other person or entity are not prohibited* by 201(g) [now 201(c)].¹²³

¹¹⁹*United States v. Brewster*, 506 F.2d 62, 81-82 (D.C.Cir. 1974), quoting from earlier Supreme Court decision in *United States v. Brewster*, 408 U.S. 501, 527 (1972).

¹²⁰*United States v. Brewster*, *supra* at 77.

¹²¹2 U.S.C. §432(e); 2 U.S.C. §432(a); 2 U.S.C. §439a.

¹²²2 U.S.C. §439a.

¹²³506 F.2d at 77. Emphasis added.

If facts are developed, however, that contributions or payments made to a third party or entity “for or because of” official acts done or to be done by a public official, were used or expended in a manner to financially enrich or financially benefit the official personally, then it might be argued that such funds were received “personally” or “for himself” even if originally directed to a third-party entity. Contributions to a committee or any third party, therefore, which are used, for example, to pay for personal living expenses of a public official, a personal car or other personal expenses such as transportation, clothing, food, or the college tuition for one’s child, might arguably be considered payments for the official “himself.”¹²⁴ In the *Brewster* case the court found that the monies given ostensibly as “campaign contributions” were given by a lobbyist to a sham committee which was merely the “alter ego” of the Senator, which did not report or keep records such as other political committees under the federal law at that time, and from which the Senator freely drew funds for his own personal use, and thus could be considered “illegal gratuities” received by the Senator.¹²⁵

It has been suggested in some commentary that payments other than the reported campaign contributions may have been made by Enron Corporation to various public officials, but that such payments may be “hard to track” because “Enron’s reporting and record-keeping are not very good”¹²⁶ If it were found that other monies, gifts or things of value, other than campaign contributions to committees, were given by the Enron Corporation to federal officials, then questions of whether such donations or gifts were “illegal gratuities” under the federal law would most likely involve whether such gifts or other things of value had the requisite connection to any “official acts” of those federal officers. While some cases in the circuits had gone so far as to find that a specific official act need not have been contemplated or identified for a payment or compensation to constitute an “illegal gratuity” as long as payments were given to a recipient who was in a “position to use his authority in a manner which could affect the gift giver,”¹²⁷ the Supreme Court in 1999 in the *Sun-Diamond* case found that such so-called “status gifts,” unconnected to any identified official act, were not violative of the illegal gratuities provision.¹²⁸

¹²⁴*Brewster*, *supra* at 69-70, 75-76; see also *United States v. Gomez*, 807 F.2d 1523, 1527 (10th Cir. 1986), payment made to third party on direction of official so that “money could not be linked to him.”

¹²⁵506 F.2d at 69-70, 75-76.

¹²⁶John W. Dean, FindLaw’s Legal Commentary, “Some Questions About Enron’s Campaign Contributions: Did Enron Successfully Buy Influence With the Money It Spent?” January 18, 2002.

¹²⁷*United States v. Niederberger*, 580 F.2d 63, 69 (3rd Cir. 1978), *cert. denied*, 439 U.S. 980 (1978); *United States v. Allesio*, 528 F.2d 1079, 1082 (9th Cir. 1976), *cert. denied*, 426 U.S. 94 (1976).

¹²⁸*Sun-Diamond*, *supra* at 406 - 410. Money given merely because of a person’s official position is not an illegal gratuity without a link to a specific official act for which the money was given. *United States v. Ahn*, 231 F.3d 26, 31 (D.C.Cir. 2000), *cert denied*, 121 S.Ct. 1364; *United States v. Schaffer*, 183 F.3d 833, 844 (D.C.Cir. 1999). Gifts to federal officials, even gifts unconnected to any official act may, however, violate ethics rules and

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Extortion

Somewhat related to the bribery offense is the “extortion” provision of federal law, commonly known as the “Hobbs Act,” which prohibits the interference with commerce by way of “extortion,” defined as the “obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, *or under color of official right*.”¹²⁹ Demands by elected public officials on private citizens for payments, such as for campaign contributions, even when the payments are to be made to third parties such as campaign committees, may fall within the extortion provisions when there is some wrongful use of one's official position to induce or coerce the contribution. As stated by one court, the Hobbs Act would “penalize those who, under the guise of requesting `donations,’ demand money in return for some act of official grace.”¹³⁰ Federal courts have noted that the crime of “extortion” and the crime of bribery under federal law, “are really different sides of the same coin,” and that the intent requirements of the two federal offenses are parallel.¹³¹

The Supreme Court has found that elected officials who ask for *bona fide* campaign contributions, only violate this law when there is evidence of a specific *quid pro quo*, similar to the bribery statute. The Court noted in *McCormick v. United States*,¹³² that the mere nearness in time of official acts by a recipient public official and campaign contributions from the beneficiaries of those acts, that is, “shortly before or after campaign contributions are solicited and received from those beneficiaries,” does not evidence “extortion” under the law, and is an “unrealistic assessment” of the requirements of the crime, particularly in light of how “election campaigns are financed by private contributions and expenditures.”¹³³ Rather, the Court found that the statute would be violated by a request from an elected official to a member of the public for a voluntary campaign contribution “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,” where the “official asserts that his official conduct will be controlled by the terms of the promise or undertaking.”¹³⁴ The Supreme Court in *McCormick* explained:

Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is

¹²⁸(...continued)

regulations such as those promulgated for the House of Representatives (House Rule XXV(5)), the Senate (Senate Rule XXXV), or for the executive branch of Government (Office of Government Ethics regulations, 5 C.F.R. §§ 2635.201 *et seq.*).

¹²⁹18 U.S.C. § 1951(b)(2). Emphasis added.

¹³⁰*United States v. Dozier*, 672 F.2d 531, 537 (5th Cir.), *cert. denied*, 459 U.S. 943 (1982).

¹³¹*United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993), citing *Evans v. United States*, 504 U.S. 255, 265-268 (1992).

¹³²500 U.S. 257 (1991).

¹³³*Id.* at 272.

¹³⁴*Id.* at 273.

also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they 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, is an unreal assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, “under color of official right.” To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.¹³⁵

In a similar vein as the bribery provision, the making of campaign contributions, either on one’s own initiative or in response to a request from an official or the official’s campaign, with the mere hope or expectation that one might be treated favorably in the future because of one’s generosity and support in making such campaign contributions, does not provide the necessary *quid pro quo* or corrupt character for an extortion charge:

[T]he explicitness requirement serves to distinguish between contributions that are given or received with the “anticipation” of official action and contributions that are given or received in exchange for a “promise” of official action. ... When a contributor and an official clearly understand the terms of a bargain to exchange official action for money, they have moved beyond “anticipation” and into an arrangement that the Hobbs Act forbids.¹³⁶

Conflicts of Interest

Entering Government Service and Financial Interests

Allegations have been raised concerning prohibited conflicts of interest of persons who have entered the executive branch of the Federal Government and who have held substantial amounts of stock in Enron Corporation, or who were either officers or employees of Enron, or of the accounting firm Arthur Anderson, and who then worked on official governmental matters that had an impact on the Enron Corporation.

It should be noted that under the current state of the federal law there is no statute which expressly requires a general divestiture of all private financial interests before entering Federal Government service, nor could such a provision be practically or reasonably enacted if the Federal Government were to have any success in recruiting qualified persons to Government service. When nominees are required to receive Senate confirmation, however, it is often the case that agreements are reached between the nominee and the Senate committee reviewing the nomination as to the

¹³⁵500 U.S. at 272.

¹³⁶*United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir. 1992).

disposition of particular assets that may prove troublesome, in a conflict of interest context. Such agreements may require the nominee to divest certain assets or place others in a “blind trust.”

The issues of “conflicts of interest” with regard to private financial holdings and interests of a Federal Government official are handled primarily under federal law by requiring the “recusal” or disqualification of the federal officer from participating in any official governmental matter affecting the officer’s personal financial interests, or the financial interests of the officer’s spouse and minor children, or the financial interests of certain businesses or organizations with which the officer is currently affiliated.¹³⁷ Underlying the statutory and regulatory scheme for avoiding conflicts of interest with respect to certain assets and ownerships is the financial disclosure requirement under federal law, which assists in identifying potential sources of conflicts of interest.¹³⁸ Persons who are entering Government service and who have assets and ownerships which may create the potential for regular conflicts of interest, such that these persons would, under the law, have to continually “recuse” themselves from official matters central to their Government positions, may be directed by ethics officials to divest the financial interest in question.¹³⁹ Although such divestiture of assets and interests by federal officials in the executive branch of Government is sometimes in order, conflict of interest regulation in the executive branch of the Federal Government most often involves disclosure and disqualification.

Disqualification and Current Financial Interests.

An officer or employee in the executive branch of the Federal Government is required to disqualify (or “recuse”) himself or herself from taking official actions on governmental matters which would have a “direct and predictable effect” upon a personal financial interest of the employee, or which would have such an effect upon the financial interests of the employee's immediate family, or upon the financial

¹³⁷18 U.S.C. § 208.

¹³⁸Detailed public financial disclosure is required from nominees and certain high level officials upon entering the Federal Government, and yearly from all federal officers and employees compensated above a certain salary level, including all Members of Congress, under the provisions of the Ethics in Government Act of 1978, as amended, *see* now 5 U.S.C. app. §§ 101 *et seq.* In addition, employees not compensated above the threshold rate triggering public disclosure may be required to provide the agency with a confidential financial report. 5 U.S.C., app. § 107(a); Executive Order 12674, as modified by Executive Order 12731, Section 201(d); *see* now 5 C.F.R. §§ 2634.901 - 2634.909.

¹³⁹5 C.F.R. § 2635.403(b). An agency may also prohibit or restrict the ownership of certain financial assets or class of assets by its employees where, because of the mission of the agency, such interests would “cause a reasonable person to question the impartiality and objectivity with which agency programs are administered.” 5 C.F.R. § 2635.403(a). There may be certain positions in regulatory entities concerning which Congress has enacted specific requirements in the organic act of the agency, commission or board barring certain directors or other top officials from the ownership of any interests in any private business regulated by that federal agency, commission, board or bureau.

interests of the employee's outside private employer or business associates.¹⁴⁰ The statutory language is directed not only at conduct which is improper, but rather is preventative in nature, and is directed at situations which merely have the potential to tempt or subtly influence an official in the performance of official public duties. The ownership of certain private economic or financial interests alone, without any improper conduct, thus raises the disqualification requirement as to governmental matters which affect those interests.¹⁴¹

While the disqualification statute applies broadly to officers and employees of the executive branch of the Federal Government and the independent agencies, it does not apply to any *elected* officials of the Federal Government, that is, required disqualification does not apply to the President, Vice President, and Members of Congress, substantially because of the potential interference with the constitutional duties required of their offices.¹⁴² Specifically as to Members of Congress (who act as *representatives*, and not as regulators or administrators), the principles of representative self-government anticipate that Members of Congress will have a community of interests with constituents and that particular Members may represent in Congress those various interests that they have in common with those whom they represent.¹⁴³ A mandatory disqualification of a Member of Congress would, furthermore, act as a disenfranchisement of his or her constituents, as there is no “deputy” Member to vote in the Member’s place, and could therefore affect the constituency’s right to representation in Congress.¹⁴⁴

Disqualification from “Participation”. The kind of “participation” which is barred for a federal official in governmental matters affecting his or her financial interests, is participation in a matter “personally and substantially ... through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise....” It would appear that the qualifier “personally” within § 208 means that

¹⁴⁰18 U.S.C. § 208; *note* regulations of the Office of Government Ethics, at 5 C.F.R. §§ 2635.402; *see* also 5 C.F.R. § 2635.502 for regulatory recusals beyond the statutory disqualification provision.

¹⁴¹*United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 549 (1960): “The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government.”

¹⁴²18 U.S.C. § 202(c); *note* Office of Government Ethics Advisory Opinion, 83 x 16, October 20, 1983; Department of Justice, Acting Attorney General Silberman, letter opinion to Senator Howard Cannon, Chairman, Committee on Rules and Administration, September 20, 1974.

¹⁴³“At some point a purist attitude towards the evils of conflicts of interest in the Congress runs afoul of the basic premises of American representative government.” The Association of the Bar of the City of New York, Special Committee on the Federal Conflict of Interest Laws, *Conflict of Interest and Federal Service*, at 14-15 (1960).

¹⁴⁴“Constituents of the disqualified Member of Congress are denied their Constitutional right to representation in the particular legislation at hand.” The Association of the Bar of the City of New York, Special Committee on Congressional Ethics, *Congress and the Public Trust*, at 40 (1970).

one took the governmental action (or inaction) in question oneself, as opposed to having it merely under one's overall, general responsibility (as a head of a Department would have over all department matters). However, regulations adopted by the Office of Government Ethics note that personal participation “includes the direct and active supervision of the participation of a subordinate in the matter.”¹⁴⁵ The qualifier “substantially” would appear to rule out merely “ministerial” or procedural acts or acts on a peripheral matter, and relates to the significance and nature of the involvement, and not merely the time devoted to the matter.¹⁴⁶

Governmental “Matters” Covered. The personal participation by an official in a governmental matter, such as giving advice or making recommendations, will come within the statute when such involvement is in regard to a “particular matter,” rather than just merely in relation to a general area of public policy, such as “in relation to economics.”¹⁴⁷ The term “particular matter” and the enumeration of those particular matters in the statute have been recognized to be “comprehensive of all matters that come before a federal department or agency.”¹⁴⁸ Since, for the statutory disqualification requirement, the “particular matter” need not involve specific or identified parties,¹⁴⁹ such term has been broadly interpreted to mean any “discrete and identifiable matter” such as “general rulemaking” or proposed regulations.¹⁵⁰ As stated by the Department of Justice's Office of Legal Counsel, the restrictions of § 208 will apply when a federal official reviews proposed rules that will impact an entire industry of which a firm connected to the federal official is part, and need not affect or deal with *only* that particular firm to come within the restrictions of § 208(a):

[W]e have consistently interpreted § 208(a) to apply to rule-making proceedings or advisory committee deliberations of general applicability where the outcome may have a “direct and predictable effect” on a firm in which the Government employee is affiliated, even though all other firms similarly situated will be affected in a like manner. An example might be the drafting or review of environmental regulations which would require the considerable expenditures by all firms in the particular industry of which the company is a part.¹⁵¹

¹⁴⁵5 C.F.R. § 2635.402(b)(4).

¹⁴⁶Note discussion in Perkins, “The New Federal Conflict of Interest Laws,” 76 *Harvard Law Review*, 1113, 1128 (1963): “The qualifying adverbs personally and substantially are intended to rule out participation by purely ministerial or procedural acts, but not to create a loophole for the lazy executive in the chain of command who may not have bothered to dig into the substance of the case.” See also 5 C.F.R. § 2635.402(b)(4).

¹⁴⁷Note discussion of “particular” matter as used in 18 U.S.C. § 203 and 208, in Manning, *Federal Conflict of Interest Law*, Harvard University Press (Cambridge 1963), at 134-135, 54-55, citing H.R. Rpt. No. 748, 87th Congress, 1st Session, at 20 (1961).

¹⁴⁸H.R. Rpt. No. 748, *supra* at 20.

¹⁴⁹Compare to 18 U.S.C. § 207(a),(b), and 5 C.F.R. § 2635.502(a); see 2 O.L.C. 151, 153-154 (1978).

¹⁵⁰2 Op.O.L.C. 151, 153-154 (1978).

¹⁵¹2 Op.O.L.C. *supra* at 155. A different interpretation and application of the restriction may
(continued...)

The Office of Government Ethics, in regulations issued under the statutory disqualification provision, has explained that the recusal requirement will extend to “governmental action such as legislation or policy-making that is narrowly focused on the interests of ... a discrete and identifiable class of persons.”¹⁵² The regulations note, however, that the disqualification provision will not apply to “the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons.”¹⁵³

Financial Interest Required. The statutory language of § 208 requires a disqualification of a government employee in a matter in which the employee, the employee's family or connected organization “has a financial interest.” This has been interpreted to mean that the particular governmental matter in which the employee would be involved has a “substantial probability” of affecting those financial interests.¹⁵⁴ The regulations of the Office of Government Ethics state that an employee must recuse himself or herself if the governmental matter “will have a direct and predictable effect” on those covered financial interests,¹⁵⁵ and explains that a matter will have a direct effect on a financial interest “if there is a close causal link between any decision or action to be taken in the matter and any expected effect,” that is, if the “chain of causation” is not “attenuated” nor “contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter.”¹⁵⁶

Exemptions. Although the statutory language provides no express *de minimis* amount or interest to which the statute would not apply, exemptions to the disqualification provision may be provided generally by regulation of the Office of Government Ethics for interests which are “too remote or too inconsequential to affect the integrity of the services” of the Government employees covered by the

¹⁵¹(...continued)

apply to those who are “special Government employees” employed on a part-time or intermittent basis to advise the government.

¹⁵²5 C.F.R. § 2635.402(b)(3).

¹⁵³*Id.*

¹⁵⁴The required impact on a financial holding of an employee, or on an entity with which the employee is connected, for the disqualification provision to apply, was described in terms of the real, as opposed to a speculative, possibility of financial gain or detriment to an entity, by the United States Court of Appeals in *United States v. Gorman*, 807 F.2d 1299, 1303 (6th Cir. 1988): “A financial interest exists on the part of a party to a Section 208 action where there is a real possibility of gain or loss as a result of developments in or resolution of a matter. Gain or loss need not be probable for the prohibition against official action to apply. All that is required is that there be a real, as opposed to a speculative, possibility of benefit or detriment.” See also *United States v. Mississippi Valley Generating Co.*, *supra* at 549, 555 (1960). Note 5 C.F.R. § 2635.402(b)(1)(ii).

¹⁵⁵5 C.F.R. § 2635.402(a).

¹⁵⁶5 C.F.R. § 2635.402(b)(1)(i).

provision.¹⁵⁷ Under this authority, OGE has issued regulations generally exempting certain holdings, such as, for example, individual holdings in a “diversified mutual fund” or “diversified unit investment trust”; the holding of publicly traded securities, not exceeding \$5,000 in value, of an entity affected as a specific party to a governmental matter; and holdings of publicly traded securities, not exceeding \$25,000 in any one entity or \$50,000 in all affected entities, of an entity which may be affected by a particular governmental matter “of general applicability.”¹⁵⁸

Waivers may also be obtained by an individual employee for insubstantial financial interests under § 208(b)(1). These individual waivers may be obtained by an employee or officer concerning a particular financial interest if the employee advises the Government official responsible for his or her appointment about the nature and circumstances of the interest, discloses the interest, and receives a written determination from the appointing official that the financial interest “is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee.”¹⁵⁹

Regulatory Recusals. In addition to and beyond the *statutory* disqualification in 18 U.S.C. § 208, the Office of Government Ethics [OGE] has promulgated regulations requiring recusals of federal officials in other situations to help ensure the avoidance of “an appearance of loss of impartiality in the performance of” official duties by a federal employee.¹⁶⁰ This regulation, in comparison to the statutory recusal requirement, expands the persons and entities who are deemed to be so connected to the employee that their financial interests may be “imputed” to that employee (and, as such, would constitute cause for recusal or disqualification of the employee from a governmental matter affecting those interests); but, as compared to the statutory disqualification, narrows those matters that are included in the disqualification requirement.

As to current associations and relationships, the regulation requires a Government employee in the executive branch to recuse himself or herself from a “particular matter involving specific parties” when the employee knows that the matter will have a direct and predictable effect on the financial interests of, for example, a member of his or her household who is a relative, on the financial interests of an entity in which the employee’s spouse, children or parents are serving or seek to serve as an officer, employee or director, or on an organization (other than a political party) in which the employee is an active participant, and where the employee believes that his or her impartiality may be questioned, unless the employee first advises his or her agency about the matter and receives authorization to participate in the matter.¹⁶¹

¹⁵⁷18 U.S.C. § 208(b)(2); *see* 5 C.F.R. § 2635.402(d)(1).

¹⁵⁸5 C.F.R. § 2640.201, 202. *See* other miscellaneous exceptions at § 2640.203.

¹⁵⁹18 U.S.C. § 208(b)(1); 5 C.F.R. § 2635.402(d)(2).

¹⁶⁰5 C.F.R. § 2635.501(a).

¹⁶¹5 C.F.R. § 2635.502(a).

Disqualification and Past Associations.

While the statutory recusal provision applies only to current financial interests and associations of the executive branch official, the *regulatory* disqualification provision in the regulations of the Office of Government Ethics, discussed above, may reach some past interests and affiliations of the Government official. The regulatory recusal requirement includes recusals from certain governmental matters which affect the financial interests of any person or entity for whom the Government official served within the last year as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee.¹⁶²

If one of those persons or entities to which the employee had been connected within the past year has a financial interest which may be directly and predictably affected by a particular governmental matter “involving specific parties,” then the employee should consider recusal, or seek to receive a specific authorization to participate in the matter. It should be noted that a particular governmental matter “involving specific parties” is narrower than merely a “particular matter,” and would not include such things as general rulemaking affecting an industry, but rather would apply only to matters such as a determination, contract, claim, controversy, investigation, charge, accusation, arrest or other such matter involving a particular party where the United States is also a party or has a direct or substantial interest. A particular matter “involving specific parties” is generally or typically a matter involving “a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties,” as opposed to rulemaking, legislation, or the formulation of general policy or standards.¹⁶³

Leaving Government and the “Revolving Door” Law

Certain questions have arisen concerning federal officials in regulatory positions who reportedly promoted policies favorable to Enron, and then shortly after leaving their official Government employment took a position with the Corporation.

Negotiating Private Employment.

The conflict of interest considerations for one leaving the Government for the private sector begin before the official actually leaves, and begin in earnest as soon as negotiations and discussion for private employment commence with a prospective private employer. The principal federal conflict of interest law for executive branch employees, at 18 U.S.C. § 208 provides, among other restrictions, that once any federal employee or officer in the executive branch begins “negotiating” subsequent employment with a private employer, that employee or officer must disqualify himself or herself from directly participating in any particular governmental matter which has a direct and predictable effect on the financial interests of that potential private employer.

¹⁶²5 C.F.R. § 2635.502(b)(1).

¹⁶³See definition of “particular Government matter involving a specific party” at 5 C.F.R. § 2637.102(a)(7) (in context of 18 U.S.C. § 207); and at 5 C.F.R. § 2637.201(c)(same).

Quoting with approval from a Bar Association study which was the model for the legislative language in question, a federal court described the purpose of the statute as a measure to deal with the “nagging and persistent conflicting interests of the government official who has his eye cocked toward subsequent private employment.”¹⁶⁴ As noted in a law review by Roswell Perkins, the chairman of the special Bar Association study which was the model for the 1962 conflict of interest legislation: “The lure of a lucrative job following government employment is often great, and it is essential that a quarantine on official dealings with prospective employers be established as soon as future employment becomes a *matter of discussion* or understanding.”¹⁶⁵

Judicial interpretations of the disqualification requirement concerning the “negotiating” provision have focused on the types of conduct and discussions which would constitute “negotiating” under the statute. It appears that the judicial interpretations of the criminal provision may require, at the least, some beginning of a *mutual discussion* rather than merely *unilateral* overtures concerning the possibility of future employment. In *Conlon v. United States, supra*, the Court of Appeals, District of Columbia Circuit, reversed a lower court decision that had dismissed charges under the statute and had given the term “negotiating” a very narrow reading. The Court of Appeals explained that to comport with the legislative intent of the measure, “we must conclude that Congress meant the words ‘negotiating’ and ‘arrangement’ in § 208(a) to be given a broad reading, rather than the narrow reading accorded them by the district court.”¹⁶⁶ The Court of Appeals found that in the context of the statute, the term “negotiating” is “not exotic or abstruse” but is a “common word[] of universal usage.”¹⁶⁷ The common legal and general usage of the term “negotiate,” it may be noted, denotes communications which “pass between parties” or the process of arriving “through discussion” at some kind of agreement,¹⁶⁸ or “to confer with another” to arrive at a settlement of an issue.¹⁶⁹ Thus, in *United States v. Gorman*, the 6th Circuit Court of Appeals, noting that “negotiation” is to be given its “common, everyday meaning,” found that negotiations may be evidenced by the defendant federal employee’s “initial conversation” with a prospective employer and the federal employee’s “list of conditions for taking employment.”¹⁷⁰

¹⁶⁴ *United States v. Conlon*, 628 F.2d 150, 155, n.26 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1149 (1982), citing to the comprehensive report of the Bar of the City of New York, Special Committee on Federal Conflict of Interest Law, *Conflict of Interest and Federal Service*, at 234 (1960).

¹⁶⁵ Perkins, “The New Conflict of Interest Law,” 76 *Harvard Law Review* 1113, 1133 (April 1963). Emphasis added.

¹⁶⁶ *United States v. Conlon, supra* at 155.

¹⁶⁷ *Id.* at 154. See also *United States v. Gorman*, 807 F.2d 1299, 1303 (6th Cir. 1986).

¹⁶⁸ *Black's Law Dictionary*, at 1036 (6th ed. 1990).

¹⁶⁹ *Webster's New Collegiate Dictionary*, at 769 (1977).

¹⁷⁰ 807 F.2d at 1303. See *CACI, Inc.-Federal v. United States*, 719 F.2d 1567 (Fed. Cir. 1983), as to when “negotiations” with an outside business are ended for federal employees.

In addition to the criminal statute, it should be noted that the Office of Government Ethics in the executive branch of the Federal Government has issued regulations concerning this potential conflict of interest. The regulations interpret 18 U.S.C. § 208(a), as well provide ethical standards of conduct beyond the narrower restrictions of the criminal statute.¹⁷¹ Under the regulations, and as the regulations interpret 18 U.S.C. § 208(a), a federal employee is “negotiating” private employment, such that a disqualification is required, when the employee is engaged in a “mutually conducted” discussion or communication with an employer with a view toward reaching agreement about prospective employment, even if specifics about terms, conditions of employment, or particular positions are not discussed:

For these purposes, as for 18 U.S.C. 208(a), the term negotiations means discussion or communication with another person, or such person's agent or intermediary, mutually conducted with a view toward reaching an agreement regarding possible employment with that person. The term is not limited to discussion of specific terms and conditions of employment in a specific position
....¹⁷²

Furthermore, in addition to the criminal statutory restrictions on “negotiating,” the regulations of the Office of Government Ethics (OGE) may require recusal and disqualification even “when an employee's actions in seeking employment fall short of actual employment negotiations.”¹⁷³ The regulations also require recusal and disqualification from an official matter affecting a private employer if the federal employee has begun “seeking employment” with that private employer, even if no “negotiations” or mutual discussions were involved, simply by making an “unsolicited communication ... regarding employment” to a private firm (other than merely asking for an application or sending a resume to someone who is affected by the employee's duties “only as part of an industry or other discrete class”),¹⁷⁴ or if the employee has made a response other than a rejection to an unsolicited communication from a private source concerning employment.¹⁷⁵

As noted in the OGE regulations: “Disqualification is accomplished by not participating in the particular matter.”¹⁷⁶ There is no general requirement for a written, or filed disqualification. However, the regulations provide that during the time one is within this status of negotiating employment, an employee “should notify the person responsible for his assignment,” or if the individual is responsible for his or her own assignments, then the official must take “whatever steps are necessary” to ensure compliance.¹⁷⁷ Appropriate oral or written communication to one's coworkers and supervisors concerning a required disqualification are suggested in the regulations

¹⁷¹ 5 C.F.R. § 2635.601, 5 C.F.R. § 2635.603(b)(1)(i).

¹⁷² 5 U.S.C. § 2635.603(b)(1)(i).

¹⁷³ 5 C.F.R. § 2635.601.

¹⁷⁴ 5 C.F.R. §§ 2635.603(b)(1)(ii) and 2635.604(a).

¹⁷⁵ 5 C.F.R. § 2635.603(b)(1)(iii).

¹⁷⁶ 5 C.F.R. § 2635.604(a).

¹⁷⁷ 5 C.F.R. § 2635.604(b).

as steps to ensure compliance,¹⁷⁸ although, as noted above, written documentation of a recusal is not required in the regulations except to conform to a previous ethics agreement with the Office of Government Ethics.¹⁷⁹ In addition to disqualification, violations of the provision may be avoided if a waiver from the disqualification requirement is obtained in writing from the official responsible for the employee's appointment.¹⁸⁰

Post-Government Employment Restrictions.

As a general matter, once an individual leaves federal employment he or she is *not* restricted from being hired, employed or retained by any particular firm or industry.¹⁸¹ However, after leaving federal employment, persons who were federal officers and employees may be restricted or regulated in some *types* of employment activities in which they may engage for their new private employers under the provisions of a current criminal statute, codified at 18 U.S.C. § 207. The types of employment duties that are restricted activities under the law involve private “representational,” lobbying, or advocacy-type of activities before the Federal Government. Some of the provisions of this law would apply to all employees in the executive branch after they leave government service, while other provisions of the statute apply only to more “senior” level officers or employees, or to Members of Congress.

Section 207 of title 18 provides a series of post-employment restrictions on “representational” or advocacy activities before the Federal Government, including: (1) a lifetime ban, covering all executive branch employees, on switching sides, that is, leaving Government service and representing a private party on the same “particular matter” involving the same “specific parties” on which the officer had worked “personally and substantially” while with the Government (§ 207(a)(1)); (2) a two-year ban on “switching sides” on a somewhat broader range of matters which were under the executive branch officer’s “official responsibility” during the last two years of Government service (§ 207(a)(2)); (3) a one-year restriction applying to all officers and employees of the executive branch and Members and employees of Congress, on assisting others on certain trade or treaty negotiations in which one had participated (§ 207(b)); (4) a one-year ban on certain high-level officials in the executive branch and Congress performing some representational or advisory activities for foreign governments or foreign political parties (§ 207(f)); and (5) a one-year “cooling off” period for certain high-level officials barring representational communications on behalf of private parties on any matter before the Government offices, agencies or departments in which they had worked, or, in the case of higher level officials, including Members of Congress, barring for one year representational communications on behalf of private parties on any matter before a wider range of

¹⁷⁸ 5 C.F.R. § 2635.604(b).

¹⁷⁹ 5 C.F.R. § 2635.604(c).

¹⁸⁰ 5 C.F.R. § 2635.605; 18 U.S.C. § 208(b)(1) and (3).

¹⁸¹ Certain more restrictive post-employment rules as to employment opportunities are in force for “procurement officials” who were involved while with the Government in certain large procurements from private entities. *See* 41 U.S.C. § 423(d).

Government officers or employees in their former branch of Government (18 U.S.C. §§ 207(c), (d), and (e)).