

# CRS Report for Congress

## Loss of Federal Pensions for Members of Congress Convicted of Certain Offenses

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# Loss of Federal Pensions for Members of Congress Convicted of Certain Offenses

## Summary

Under the so-called “Hiss Act,” Members of Congress and most other officers and employees of the federal government forfeit their federal employee retirement annuities if convicted of a federal crime that relates to espionage, treason, or several other national security offenses against the United States. In addition to the Hiss Act provisions, Congress enacted, as part of the Honest Leadership and Open Government Act of 2007, P.L. 110-81 (S. 1, 110<sup>th</sup> Congress), further provisions that will deprive Members of all of their “creditable service” as a Member of Congress for federal pension purposes if that Member is convicted of any one of a number of federal laws concerning corruption in office.

The pension forfeiture provisions of P.L. 110-81, Title IV, were enacted after the House and Senate had adopted somewhat different legislative approaches to the issue of convicted Members forfeiting their federal pensions. Under the provisions finally enacted into law, Section 401 of P.L. 110-81 (S. 1, 110<sup>th</sup> Congress) amends the provisions of the Civil Service Retirement System (CSRS) and the Federal Employee Retirement System (FERS) to provide that a Member of Congress will not receive “creditable service” toward his or her federal pension for *any* time of service as a Member if convicted for conduct (that occurred while a Member) that violated any of the following anti-corruption provisions of federal criminal law: bribery and illegal gratuities (18 U.S.C. § 201); acting as an agent of a foreign principal (18 U.S.C. § 219); wire fraud, including “honest services” fraud (18 U.S.C. §§ 1343, 1346); bribery of foreign officials (Section 104(a) of the Foreign Corrupt Practices Act); depositing proceeds from various criminal activities (18 U.S.C. § 1957); obstruction of justice or intimidation or harassment of witnesses (18 U.S.C. § 1512); an offense under “RICO” (racketeer influenced and corrupt organizations; 18 U.S.C. chapter 96); conspiracy to commit an offense or to defraud the United States (18 U.S.C. § 371) to the extent that the conspiracy constitutes an act to commit one of the offenses listed above; conspiracy (18 U.S.C. § 371) to violate the post-employment, “revolving door” laws (18 U.S.C. § 207); perjury (18 U.S.C. § 1621) in relation to the commission of any offense described above; or subornation of perjury (18 U.S.C. § 1622) in relation to the commission of any offense described above.

Any new or additional penalty for the commission of a crime, such as the penalty of forfeiture or loss of part or all of one’s federal pension, must, under the Constitution’s ex post facto prohibition, apply *prospectively* only, and can not work retroactively to take away the pensions or annuities of Members of Congress or former Members who had already engaged in the covered criminal misconduct prior to the passage of the new law. The new statutory penalties, in a similar manner to the current Hiss Act, would allow convicted former Members to retain their *own* contributions to the retirement fund, as well as their own savings and earnings in the Thrift Savings Plan under the Federal Employee Retirement System (FERS). Unlike the operation of forfeitures under the Hiss Act, however, the new provisions apparently would allow Members to also receive the government’s contribution to their Thrift Savings Plan, while such contribution appears to be forfeited under current statutory language only for loss of pensions under the Hiss Act.

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# Loss of Federal Pensions for Members of Congress Convicted of Certain Offenses

This report discusses the current law with respect to the loss of the federal pension of a Member of Congress for the conviction of certain crimes and the recent law to limit a former Member's receiving service credit toward a federal pension for any time served as a Member of Congress if that person was convicted of any one of a number of criminal offenses involving abuse of the public trust.

## Introduction

Under a provision in federal retirement law commonly referred to as the "Hiss Act," Members of Congress and other officers and employees of the federal government forfeit their federal employee retirement annuities if they are convicted of certain designated federal crimes relating to disloyalty or involving national security or national defense-related offenses against the United States. In addition, under legislation passed in 2007, the Honest Leadership and Open Government Act of 2007, P.L. 110-81, 121 Stat. 735 (September 14, 2007), Members of Congress will lose their service credit toward their federal pensions for all of the time they serve in Congress if convicted for conduct engaged in while in Congress that violates one of several criminal provisions of federal law concerning corruption in public office.

## "Hiss Act": National Security Offenses

### Background

Congress enacted legislation in 1954 to prohibit the distribution of any federal retirement annuities to federal officers and employees, including Members of Congress, who were convicted of various offenses under federal law relating to disloyalty, the national defense and national security, conflicts of interest, bribery and graft, or for federal offenses relating generally to the exercise of one's "authority, influence, power, or privileges as an officer or employee of the Government."<sup>1</sup> The passage of this legislation was prompted to a great extent by the celebrated case of Alger Hiss, a federal worker in the Department of State who had been charged and convicted of perjury in relation to the passing of national security secrets to a communist agent, and the law is now commonly referred to as the "Hiss Act."<sup>2</sup>

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<sup>1</sup> P. L. 83-769, 68 Stat. 1142 (Sept. 1, 1954), see now 5 U.S.C. §§ 8311 *et seq.*

<sup>2</sup> See H.R. REP. NO. 83-2488 (1954); *United States v. Hiss*, 185 F.2d 822 (2<sup>nd</sup> Cir. 1950); (continued...)

In 1961, Congress amended the statute relating to the loss of pensions of federal officers and employees to narrow the coverage of the law to what were considered more serious offenses dealing only with disloyalty and national security and defense, and withdrawing from coverage violations of crimes which were either relatively minor in nature, or not considered sufficiently related to protection of the United States.<sup>3</sup> There was concern expressed that the original law “went too far”<sup>4</sup> and unduly punished former federal officials (and their innocent families) when the former employee or official, in addition to facing fine and imprisonment for an offense, may be left destitute without any retirement income at all for the violation of “comparatively minor offenses.”<sup>5</sup>

## **Hiss Act Provisions Regarding Federal Retirement Annuity Payments**

Members of Congress and most other officers and employees of the federal government<sup>6</sup> now forfeit the federal retirement annuities for which they had qualified if they are convicted of a federal crime that relates to espionage, treason or other national security offense against the United States, as expressly designated in the so-called “Hiss Act.”<sup>7</sup> The provisions of this law concerning forfeiture of pensions apply, at 5 U.S.C. § 8312, to convictions for such offenses as disclosure of classified information, espionage, sabotage, treason, misprision of treason, rebellion or insurrection, seditious conspiracy, harboring or concealing persons, gathering or transmitting defense information, perjury in relation to those offenses, and other designated offenses relating to secrets and national security.

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<sup>2</sup> (...continued)

note discussion of legislative history of the Hiss Act in *Hiss v. Hampton*, 388 F. Supp. 1141, 1149 - 1152 (D.D.C. 1972).

<sup>3</sup> P.L. 87-299, 75 Stat. 640 (Sept. 26, 1961), see now 5 U.S.C. § 8312.

<sup>4</sup> Note discussion in *Hiss v. Hampton*, *supra* at 1152-1153, citing testimony in Hearings on H.R. 4601, House Committee on Post Office and Civil Service, 86<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1959), see also 107 CONG. REC. 19,106 (1961); 105 CONG. REC. 5831, 5833-5835 (1959); Hearings on S. 91, Senate Committee on Post Office and Civil Service, Subcomm. on Retirement, 86<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1959).

<sup>5</sup> H.R. REP. NO. 87-541 at 1 (1961).

<sup>6</sup> Federal judges are not under the general federal retirement system since such Article III judges are appointed for life to serve during periods of good behavior, and receive compensation for such service “which shall not be diminished during their Continuance in Office.” U.S. CONST. art. III, § 1. Judges qualified to retire from regular active service receive a lifetime salary, the amount of which is dependent upon whether they meet thresholds for remaining active in senior status (in which case the salary is increased to keep pace with the current salary of judges), or inactive (in which case their salary stays the same as it was when they went inactive). 28 U.S.C. § 371 (see 28 U.S.C. § 372, as to disability retirement). If a judge is convicted of a felony, and is subsequently impeached and removed from office, he or she is no longer entitled to any compensation from that former office.

<sup>7</sup> See now 5 U.S.C. § 8311 *et seq.*

Conviction of one of the specified offenses controls whether an executive official, Member or employee loses his or her federal pension under the Hiss Act. The Member or employee can not “save” his or her pension by resigning from office, either prior to or after indictment or conviction of such offense. Whether a Member of Congress is expelled from Congress, or a federal executive officer (other than the President)<sup>8</sup> is impeached and removed, is not relevant to the loss or retention of a pension, as the criminal conviction for a crime specified under the law controls whether the pension is lost under the Hiss Act.

## **Hiss Act Forfeiture and Employee Contributions and Thrift Savings**

Current law regarding the denial of pension benefits to those convicted of certain disloyalty and national security offenses applies generally to the loss of one’s “annuity or retired pay” under the federal pension system.<sup>9</sup> The existing law on pension forfeiture provides that while persons convicted of covered offenses may be denied the *annuity* payments from their government pensions, those persons, upon proper application, may receive back their own contributions that they have made into the retirement system. The provisions of 5 U.S.C. § 8316 currently provide that “the amount, except employment taxes, contributed by the individual toward the annuity ... shall be refunded upon appropriate application.”<sup>10</sup> Furthermore, interest on the employee’s contributions at the prevailing rate is repayable, generally up until the time that the employee was convicted of the covered offense.<sup>11</sup>

The original Hiss Act provisions on forfeiture of annuities were enacted before the adoption of the Federal Employee Retirement System (FERS), and the Hiss Act provisions were not specifically amended to expressly address the new retirement provisions of FERS.<sup>12</sup> Although the Hiss Act was not itself amended, the FERS legislation expressly provides that upon a forfeiture of annuities under the Hiss Act, an employee also forfeits the government contributions, and all the earnings

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<sup>8</sup> The President is not covered by the retirement provisions applicable to other officers and employees of the federal government, but rather is granted by statute a monetary allowance for life. A President who is removed from office by impeachment and conviction, however, may not receive the lifetime stipend. See P.L. 85-745, as amended, 3 U.S.C. § 102, note.

<sup>9</sup> 5 U.S.C. § 8312(a).

<sup>10</sup> 5 U.S.C. § 8316(a).

<sup>11</sup> 5 U.S.C. § 8316(b).

<sup>12</sup> FERS provides what has been described as a three-part retirement system whereby (1) an officer or employee is required to participate in the Social Security system; (2) the officer or employee will receive a basic annuity from the government based on service (significantly reduced from the Civil Service Retirement System [CSRS] amount); and (3) the employing government agency will place a certain amount in a Thrift Savings Plan for that employee. In addition, the employee may choose to place up to a certain percentage of his or her income in the Thrift Savings Plan for retirement investment, and if the employee does this, the agency will match a percentage of that voluntary employee contribution.

attributable to such contributions, in the employee's Thrift Savings Plan.<sup>13</sup> This would indicate that under the current operation of law, employees and Members convicted of offenses under the Hiss Act who lose their annuity and lose the government contributions and earnings from those contributions in the Thrift Savings Plan, are allowed to receive back their own contributions and all the earnings attributable to those voluntary contributions in the Thrift Savings Plan.

## **Spouse and Dependent Beneficiaries**

Under provisions of current law, when a Member of Congress or other federal officer or employee forfeits his or her federal annuity/pension because of a conviction for one of the offenses covered under the Hiss Act provisions of federal retirement law, that pension is not paid even to an "innocent" spouse or dependant of the Member, officer, or employee, except under special circumstances for a "cooperating spouse." Federal law now provides that the spouse of a Member, officer or employee who forfeits his or her pension under the Hiss Act shall be eligible for "spousal pension benefits" if the Attorney General "determines that the spouse fully cooperated with Federal authorities in the conduct of a criminal investigation and subsequent prosecution of the individual which resulted in such forfeiture."<sup>14</sup>

## **Federal Pension Annuities and Anti-Corruption Law Violations**

### **Background**

The impetus for adopting additional provisions concerning the loss or forfeiture by Members of Congress of their federal pensions appears to be the convictions and guilty pleas of Members and former Members of Congress who were found to have abused their position of trust while in Congress and who, according to press reports, will continue to receive substantial annuity payments under the federal retirement system.<sup>15</sup> Legislation and amendments introduced and considered over a number of years in Congress have proposed to expand the circumstances under which a Member of Congress (and, in some legislative proposals, congressional or other government employees) would lose their rights to annuity payments from the federal government

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<sup>13</sup> 5 U.S.C. § 8432(g)(5): "Notwithstanding any other provision of law, contributions made by the Government for the benefit of an employee or Member under subsection (c), and all earnings attributable to such contributions, shall be forfeited if the annuity of the employee or Member, or that of a survivor or beneficiary, is forfeited under subchapter II of chapter 83."

<sup>14</sup> 5 U.S.C. § 8318(e).

<sup>15</sup> *CQ Today*, "House Will Vote This Week on Denying Pensions to Convicted Lawmakers," January 16, 2007, at 20; Michael Crowley, "Pension Plans for Cons," *Reader's Digest*, June 2007; Anderson Cooper, "Convicted congressmen collect public pensions," [<http://www.cnn.com/CNN/Programs/anderson.cooper.360/blog/2007/01/convicted-congressmen-collect-public.html>], Wednesday, Jan. 03, 2007; Keller, "Bills Would Deny Convicts' Pensions," *Roll Call*, May 2, 1996, at p. 3.

if they were convicted of a wider range of criminal offenses than contained in the current Hiss Act.<sup>16</sup> Some of the legislative proposals would have greatly expanded the list of crimes for which a violation would trigger the loss of federal pensions, to include numerous provisions of law dealing with what might generally be considered forms of “public corruption,” including false statements, false claims, fraud, conspiracy, and crimes relating to elections and campaigns, while others were more narrowly focused on crimes such as bribery and illegal gratuities, conspiracy to violate the bribery law, and perjury and subornation of perjury related to bribery allegations.

## Legislative History

The Senate passed ethics and lobbying reform legislation, S. 1, 110<sup>th</sup> Congress, on January 18, 2007, which included an amendment dealing with the loss of a Member’s pension for the violation of several criminal provisions of federal law.<sup>17</sup> This earlier version of S. 1 would have amended the current provisions of the Hiss Act to add additional crimes to the current list of offenses for which a federal official might lose all of his or her pension annuities when such added crimes are “committed by a Member of Congress.” The House of Representatives, on January 23, 2007, passed a stand-alone bill on pension reform, H.R. 476, 110<sup>th</sup> Congress.<sup>18</sup> The House bill operated somewhat differently than the Senate bill. Instead of a former Member forfeiting all of his or her pension annuities, the bill disallowed credit for service time as a Member of Congress if that person, while a Member, had committed acts that led to a felony conviction under several anti-corruption statutes.<sup>19</sup> No conference on the differing House and Senate bills on pension reform, or on the measures concerning lobbying and ethics reform, was ever convened. Rather, identical measures, as amendments in the nature of a substitute for S. 1, were brought before the House and Senate. Under a suspension of the Rules, the amended S. 1 passed the House on July 31, 2007,<sup>20</sup> and was agreed to in the Senate on August 2, 2007.<sup>21</sup> The measure was presented to the President on September 4, 2007, and signed by the President into law, as P.L. 110-81, on September 14, 2007.

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<sup>16</sup> See, for example, in the 110<sup>th</sup> Congress, H.R. 14, H.R. 97, H.R. 348, and S. 1, as amended by Senate Amendment 1; in the 109<sup>th</sup> Congress, H.R. 4975, as passed by the House on May 3, 2006, and other measures introduced, including H.R. 4535, H.R. 4524, H.R. 4518, H.R. 4548, H.R. 4546; in the 104<sup>th</sup> Congress, H.R. 350, H.R. 2244, H.R. 3310, H.R. 3447, S. 1794.

<sup>17</sup> Amendment No. 1, as modified by Amendment No. 3, Senator Kerry, see 151 CONG. REC. S486-S487, S489 (daily ed. Jan. 12, 2007). S. 1, Sections 301-304, as passed by the Senate on Jan. 18, 2007, 151 CONG. REC. S991-S1000.

<sup>18</sup> H.R. 476, 110<sup>th</sup> Congress (Rep. Boyda), 151 CONG. REC. H860 (daily ed. January 23, 2007).

<sup>19</sup> H.R. 476, Section 1(a), note current 5 U.S.C. § 8332, “Creditable service.”

<sup>20</sup> 151 CONG. REC. H9192-H9210 (daily ed. July 31, 2007).

<sup>21</sup> 151 CONG. REC. S10687-S10719, S10723-S10724 (daily ed. August 2, 2007).



## Operation of the Pension-Loss Provisions

Under current federal pension laws, whether CSRS or FERS, one of the principal determinants of the annuity portion of one's federal pension is the number of years of federal service credited to the retiring official. The provisions adopted by Congress as title IV of the substitute S. 1, and enacted into law as P.L.110-81, provide that any former Member of Congress who, while a Member, had engaged in conduct that results in the conviction for one of several criminal offenses will lose *all* of the "creditable service" toward his or her federal pension annuity earned for being a Member of Congress.<sup>22</sup> This means that a person who is a Member or former Member of Congress who has been convicted of one of those offenses listed (for conduct engaged in while a Member of Congress and relating to one's official congressional duties) would not receive federal pension annuities based on any congressional service; however, if he or she had other creditable federal service time, such as if one had been an executive branch employee, or had a military pension, that person could receive the annuity payments resulting from that non-congressional federal service. Thus, the 2007 changes to the pension laws work in a somewhat different way than the Hiss Act, where a conviction of one of the national security offenses listed in that act would result in the loss of one's *entire* federal annuity payment.

The crimes for which a Member or former Member would lose the time credited for congressional service are felony convictions for

- bribery and illegal gratuities (18 U.S.C. § 201);
- acting as an agent of a foreign principal (18 U.S.C. § 219);
- wire fraud, including a scheme to defraud the public of the "honest services" of a public official (18 U.S.C. §§ 1343, 1346);
- bribery of foreign officials (Section 104(a) of the Foreign Corrupt Practices Act);
- depositing proceeds from various criminal activities (18 U.S.C. § 1957);
- obstruction of justice, intimidation or harassment of witnesses, etc. (18 U.S.C. § 1512);
- an offense under "RICO" (racketeer influenced and corrupt organizations; 18 U.S.C. chapter 96);
- conspiracy to commit an offense or to defraud the United States (18 U.S.C. § 371) to the extent that the conspiracy constitutes an act to commit one of the offenses listed above;
- conspiracy (18 U.S.C. § 371) to violate the post-employment, "revolving door" laws (18 U.S.C. § 207);
- perjury (18 U.S.C. § 1621) in relation to the commission of any offense described above; or
- subornation of perjury (18 U.S.C. § 1622) in relation to the commission of any offense described above.

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<sup>22</sup> P.L. 110-81, Section 401(a), amending 5 U.S.C. § 8332 (CSRS), and Section 401(b), amending 5 U.S.C. § 8411 (FERS).

**Member Contributions and Thrift Savings Plan.** Under the provisions of P.L. 110-81 (S. 1, 110<sup>th</sup> Congress), those convicted of offenses covered by the loss of annuity provisions may receive back their *own* contributions to the retirement system, as well as their *own* contributions and earnings in their Thrift Savings Plan (TSP) account (in a similar manner as in the operation of the Hiss Act provisions).<sup>23</sup> It appears that Members of Congress also retain the *government's* contributions to their TSP accounts because, under existing law, the government's contribution is forfeited only upon a forfeiture "under subchapter II of chapter 83" (of title 5 of the United States Code), which is the citation for the so-called "Hiss Act."<sup>24</sup> Since Members would be losing only "creditable service" for congressional pension annuities under the provisions of P.L. 110-81, and not under the Hiss Act (which is not amended by the new legislation), and no provision in the new legislation requires such forfeiture, it would appear that Members would be entitled to all of the contributions and proceeds in their personal Thrift Savings Plans.<sup>25</sup>

**Spouse and Dependent Children.** When a former Member loses his or her pension annuity, normally the former Member's spouse and dependent children are also deprived of that retirement income. To alleviate the potential for hardship in certain cases, the new provisions of law allow an exception to be made by the Office of Personnel Management when, "taking into account the totality of the circumstances," it is considered "necessary and appropriate" to make annuity payments to the spouse or children of an individual.<sup>26</sup>

## **Retroactivity, Ex Post Facto Laws, and other Constitutional Considerations**

Although, as discussed earlier in this report, the target of and motivation for the legislative changes in the pension provisions for Members of Congress may be certain infamous cases of official misconduct by former Members of Congress who continue to receive substantial government pensions even after corruption convictions, any new legislation adopted by Congress could apply *prospectively* only. It would not be able to apply, as a constitutional matter, *retroactively* to cut off or lessen the annuities of those former Members as a penalty for having engaged in any criminal misconduct *prior* to the enactment of the new legislation (even if the conviction for that misconduct occurred after the passage of the law).

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<sup>23</sup> 5 U.S.C. § 8316(a), (b); 5 U.S.C. § 8432(g)(5); note P.L. 110-81, Section 401(a) and (b), and existing definition of "lump-sum credit," 5 U.S.C. § 8331(8).

<sup>24</sup> 5 U.S.C. § 8432(g)(5): "Notwithstanding any other provision of law, contributions made by the Government for the benefit of an employee or Member under subsection (c), and all earnings attributable to such contributions, shall be forfeited if the annuity of the employee or Member, or that of a survivor or beneficiary, is forfeited under subchapter II of chapter 83."

<sup>25</sup> 5 U.S.C. § 8432(g)(1).

<sup>26</sup> P.L. 110-81, Section 401(a), adding 5 U.S.C. § 8332(o)(5), and Section 401(b), adding 5 U.S.C. § 8441(l)(5). The Hiss Act, as noted earlier, allows the Attorney General to make provisions for an innocent and cooperating spouse. 5 U.S.C. § 8318(e).

**Ex Post Facto Laws.** The effect of the new legislation is to increase the “penalty” for the commission of certain crimes to include not only the statutorily designated fine and/or imprisonment, but also to include the loss of one’s federal pension annuities for the commission of those particular crimes. Legislation which attempts to increase the penalty for acts which were committed *before* the enactment of that legislation, would raise serious constitutional issues concerning ex post facto laws.

The Constitution, at Article I, Section 9, clause 3, states an express limitation upon Congress that “No Bill of Attainder or ex post facto Law shall be passed.” A prohibited ex post facto law is one that makes criminal an action which when engaged in was innocent under the law; or, as explained by the Supreme Court in 1798: “Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed” is a prohibited ex post facto law.<sup>27</sup> Chief Justice Marshall explained simply and clearly that an ex post facto law “is one which renders an act punishable in a manner in which it was not punishable when it was committed.”<sup>28</sup>

Although Congress may not increase the penalty or “punishment” for an act after-the-fact, that is, for conduct that has already occurred, the Court has allowed certain legislation that it deemed to be “regulatory” rather than punitive in nature and intent, which did in fact affect the rights or property of individuals based on pre-enactment conduct.<sup>29</sup> However, regarding specifically the pensions of federal officers and employees, a lower federal court in the celebrated Alger Hiss case found that the Hiss Act was, if applied retroactively to deny Alger Hiss his pension, punitive in nature and not regulatory,<sup>30</sup> and was therefore a prohibited ex post facto law adopted by Congress after Hiss had engaged in the subject conduct:

The question before us is not whether Hiss or Strasburger are good or bad men, nor is it whether we would grant them annuities if we had unfettered discretion in the matter. The question is simply whether the Constitution permits Congress to deprive them of their annuities by retroactive penal legislation. We conclude that it does not. We hold that as applied retroactively to the plaintiffs the challenged statute is penal, cannot be sustained as regulation, and is invalid as an *ex post facto* law prohibited by the Constitution.<sup>31</sup>

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<sup>27</sup> *Calder v. Bull*, 3 Dall. (3 U.S.) 386, 390 (1798). Italics in original. See also *Ex parte Garland*, 4 Wall. (71 U.S.) 333, 377-380 (1866), noting that Congress may not increase the punishment for acts already committed by prescribing certain penalties as “disqualifications” or eligibility requirements when they operate in fact as additional punishments for a crime.

<sup>28</sup> *Fletcher v. Peck*, 6 Cranch (10 U.S.) 87, 138 (1810).

<sup>29</sup> See *De Veau v. Braisted*, 363 U.S. 144, 160 (1960); *Flemming v. Nestor*, 363 U.S. 603, 613-621 (1960).

<sup>30</sup> “The proper function of a regulation is to guide and control present and future conduct, not to penalize former employees for acts done long ago.” *Hiss v. Hampton*, 338 F. Supp. 1141, 1148-1149 (D.D.C. 1972).

<sup>31</sup> *Hiss v. Hampton*, *supra* at 1153.

It would therefore appear from the judicial precedents that the application of any provision to deny a pension to one who was a Member of Congress or a congressional employee for the commission of a crime deemed to be a felony under federal or state law, could be prospective only. The law could apply to criminal conduct engaged in from the time of the enactment of that provision forward, but could not apply, under the *ex post facto* clause of the Constitution, to deprive former Members of Congress or congressional staff of their pensions for the conviction of crimes that occurred *prior* to the enactment of the proposed legislation.

**Contracts.** There have been questions raised as to whether the change in the annuity provisions of federal retirement law for Members of Congress who are convicted of certain crimes would incur problems concerning the sanctity of contracts. As to any future *annuity* payments affected, even those “earned” or expected prior to the commission of the particular crime in question, judicial precedents have provided a clear indication that future annuity payments to be provided by the government for its officers, employees, veterans or others do not create a current property right or interest in such *future* payments, but rather create a mere “expectancy” or “government fostered expectation” that may be modified, revoked, or suspended by the authority granting it through subsequent legislation.<sup>32</sup> That is, as specifically found by federal courts, “even where ... there has been compulsory contribution to a retirement or pension fund the employee has no vested right in it until the particular event happens upon which the money or part of it is to be paid,”<sup>33</sup> and thus a “pension granted by the Government confers no right which cannot be revised, modified or recalled by subsequent legislation.”<sup>34</sup> There would thus appear to be no violation or abrogation of any specific “contract” by increasing the penalties for the violations of certain specific crimes to include forfeiture or partial forfeiture of anticipated federal annuity payments, even those future benefits that had accrued (or for which credit had been “earned”) prior to the commission of the crime.<sup>35</sup> It should be noted that the current provisions of the so-called “Hiss Act,” originally adopted in 1954, operate in the manner questioned. A federal officer’s or employee’s annuity payments, even those that were “credited” to him or her or “earned” over the course of many years, may be forfeited upon the subsequent

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<sup>32</sup> *Zucker v. United States*, 758 F.2d 637 (Fed. Cir. 1985), *cert. denied*, 474 U.S. 842 (1985); *Walton v. Cotton*, 19 How. (60 U.S.) 355, 358 (1857); *United States ex rel. Burnett v. Teller*, 107 U.S. 64, 68 (1883); *Pennie v. Reis*, 132 U.S. 464 (1889); *McLeod v. Fernandez*, 101 F.2d 20 (1<sup>st</sup> Cir. 1938), *cert. denied*, *Toste v. McLeod*, 308 U.S. 561 (1939); *Steinberg v. United States*, 163 F. Supp. 590, 591 (Ct. Claims 1958); *Flemming v. Nestor*, 363 U.S. 603, 609-610 (1960); *Stouper v. Jones*, 284 F.2d 240 (D.C. Cir. 1960); *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980).

<sup>33</sup> *Rafferty v. United States*, 210 F.2d 934, 936 (3rd Cir. 1954).

<sup>34</sup> *Stouper v. Jones*, *supra* at 242.

<sup>35</sup> *Adams v. United States*, 391 F.2d 1212, 1221 (Fed. Cir. 2004): “Like all federal employees, Appellants served by appointment. The terms of their employment and compensation, consequently, were governed exclusively by statute, not contract”; *Kizas v. Webster*, 707 F.2d 524, 535 (D.C. Cir. 1983): “[Federal workers’] rights are therefore a matter of legal status even where compacts are made. In other words, their entitlement to pay and benefits must be determined by reference to the statutes and regulations governing [compensation], rather than to ordinary contract principles.”

conviction of one of the particular national security-related crimes designated in the Hiss Act, in a somewhat similar manner as the loss of “creditable service” for a violation of one of the anti-corruption provisions in the Honest Leadership and Open Government Act of 2007.<sup>36</sup>

**Loss of Pension Annuities and the 27<sup>th</sup> Amendment.** The pension forfeiture provisions of P.L. 110-81 (S. 1, 110<sup>th</sup> Congress) took effect upon enactment, September 14, 2007, and apply to any crime committed after then. The question has arisen as to whether, because of the 27<sup>th</sup> Amendment to the United States Constitution, the law would require a delayed effective date so the new pension forfeiture provisions could not apply to Members until after the end of the 110<sup>th</sup> Congress.<sup>37</sup> From the history of the amendment, and the relatively little case law, it does not appear that the new pension forfeiture law would be required to specifically include a “delayed” effective date to comport with the 27<sup>th</sup> Amendment, for several reasons.

Initially, it should be noted that the 27<sup>th</sup> Amendment is self-executing and does not require a specifically stated delayed effective date. This constitutional provision does not *prohibit* the enactment of a law that would change the compensation for services of a Member during the current Congress, but rather states that no law so enacted “shall take effect” until an election of Representatives has intervened.<sup>38</sup> Even if the new pension law were found to vary the “compensation for the services” of a Member, the constitutional provision merely provides that the law would not “take effect” until after the next election.<sup>39</sup> A retired Member of Congress who had

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<sup>36</sup> As to the employee contributions to and earnings in the Thrift Savings Plan, the legislative history of the provisions establishing the Federal Employee Retirement System (FERS) indicates that Congress intended for such an account and its earnings to be a current vested property interest of the employee, which is not merely a promised future benefit, but rather “is an employee savings plan” where the “employee owns the money” which is merely being held “in trust for the employee and managed and invested on the employee’s behalf ....” Conf. Report No. 606, 99<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 137 (1986). As to the Thrift Savings Plan moneys, the conferees stated, “The employee owns it, and it cannot be tampered with by any entity including Congress.” See also Federal Retirement Thrift Investment Board Memorandum, to Thomas J. Trabucco, from General Counsel John J. O’Meara, “Section 304 of the Intelligence Authorization Act for Fiscal Year 1996,” at 5-6, July 10, 1995. The Thrift Board memo appears to indicate that even the government’s contributions to the Thrift Savings Plan should be treated as a vested property interest of the employee.

<sup>37</sup> The 27<sup>th</sup> Amendment, known as the “Madison Amendment,” provides that “No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.” Originally “proposed to the Congress in 1789 by James Madison — along with eleven other amendments, of which ten became the Bill of Rights ....” (*Boehner v. Anderson*, 809 F.Supp. 138 (D.D.C. 1992), *aff’d*, 30 F.3d 156, 159 (D.C. Cir. 1994)), it was not finally ratified until 1992.

<sup>38</sup> Compare the language of the 27<sup>th</sup> Amendment expressly delaying the effective date of legislation, with the prohibitory language of Article I, Section 9 of the Constitution.

<sup>39</sup> “Our understanding of the Madison amendment is ... in essence [that] it conditions the operation of a law varying congressional compensation upon an election of Representatives and the expiration of the Congress that voted for it. *The law may be enacted at any time;* (continued...) ”

committed an offense newly covered under the law while a Member (after the passage of the new law<sup>40</sup>), who had committed such offense during the Congress adopting such legislation (110<sup>th</sup> Congress), and who sought to have his or her pension annuities *not* diminished by forfeiting “creditable service,” could thus raise the 27<sup>th</sup> Amendment defense and, in the event that a court agrees with the interpretation that the law had varied the “compensation for the services of the Senators and Representatives” during this current Congress, the court could then find that the loss of creditable service would not take effect until after the next election.

There is, however, an underlying question as to whether the 27<sup>th</sup> Amendment would apply, in any event, to a change in the pension laws applicable to former Members of Congress. The 27<sup>th</sup> Amendment expressly applies only to “compensation for the services” of Senators or Representatives. As noted by the sponsor of the provision, James Madison, and in the states ratifying the provision, the intent of the constitutional restriction was to prevent current Members from obtaining the “particular benefit” of increasing their own salaries.<sup>41</sup> It thus might be argued that the provision appears to apply to salaries (or fees) as compensation for services, as opposed to a future annuity or pension, or other such potential retirement benefits provided only upon certain contingencies to those who are former Members of Congress.<sup>42</sup> In a case dealing with a procedural “standing” issue, dismissing a challenge under the 27<sup>th</sup> Amendment to the automatic cost-of-living adjustments for Congress which, it was argued, would affect the future pension of a Member of Congress, the United States District Court in Colorado expressly noted:

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<sup>39</sup> (...continued)

when the election has been held the first condition is fulfilled; when the new Congress is seated the second condition is fulfilled. Therefore, the law, although duly enacted pursuant to Article I, does not “take effect” at the earliest until the new Congress has been seated.” *Boehner v. Anderson*, 30 F.3d at 161-162, emphasis added.

<sup>40</sup> Note discussion of *ex post facto* laws, above (and *Hiss v. Hampton*, 338 F. Supp. 1141, 1148-1149, 1153 (D.D.C. 1972)).

<sup>41</sup> *Boehner v. Anderson*, 30 F.3d at 159: “According to Madison, and to all the ratifying states that stated their understanding, the purpose of the amendment is to ensure that a congressional pay increase ‘cannot be for the particular benefit of those who are concerned with determining the value of the service.’ James Madison, Speech in the House of Representatives (June 8, 1789) in *The Congressional Register*, June 8, 1789....”

<sup>42</sup> In a case dismissing a 27<sup>th</sup> Amendment challenge to an automatic COLA raise for Congress, which would affect future pension amounts, the court found no injury to a *current* Member based on future potential pension benefits available to a *former* Member. In *Shaffer v. Clinton*, 54 F.Supp.2d 1014, 1025 (D.Colo. 1999), *aff’d on other grounds sub nom.*, *Schaffer v. Clinton*, 240 F.3d 878 (10<sup>th</sup> Cir.), *cert. denied sub nom.*, *Schaffer v. O’Neill*, 534 U.S. 992 (2001), the District Court dismissed the 27<sup>th</sup> Amendment case against the automatic COLA raise for Members in part based on the fact that “a claim regarding pensions must fail because (1) the Amendment does not cover pensions, and (2) Congressman Shaffer (sic) can not present a ripe case involving a pension-based injury to himself.” 54 F.Supp.2d at 1025.

The Twenty-seventh Amendment does not deal with congressional pensions. Plaintiffs cite no authority that indicates congressional pensions fall under the Twenty-seventh Amendment....”<sup>43</sup>

There is thus a substantial question as to whether a future pension to be granted to a former Member of Congress only upon certain qualifying contingencies (e.g., age and years of service) is “compensation” to a current Member as contemplated by the 27<sup>th</sup> Amendment. In any event, this issue will be mooted, and will no longer be relevant after the end of the 110<sup>th</sup> Congress.

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<sup>43</sup> *Shaffer v. Clinton*, 54 F.Supp.2d 1014, 1019-1020 (D.Colo. 1999), *aff’d on other grounds sub nom.*, *Schaffer v. Clinton*, 240 F.3d 878 (10<sup>th</sup> Cir.), *cert. denied sub nom.*, *Schaffer v. O’Neill*, 534 U.S. 992 (2001). The decisions of the District Court and Court of Appeals dealt with lack of standing and injury to plaintiffs.