



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

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Summary

Members of Congress may forfeit or lose their congressional pensions upon conviction of certain federal crimes under two different provisions of federal law:

1. Under the so-called “Hiss Act,” Members of Congress (and most other officers and employees of the federal government) will forfeit their entire 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.

2. In addition to the Hiss Act provisions, Congress enacted, as part of the Honest Leadership and Open Government Act of 2007 (HLOGA; P.L. 110-81, Section 401), and as amended by the Stop Trading on Congressional Knowledge Act (STOCK Act; P.L. 112-105, Section 15) in 2012, 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, election crimes, or misconduct in office. The forfeiture provisions of this law will apply if the criminal misconduct was engaged in while the individual was a Member of Congress (or while the individual was the President, Vice President, or an elected official of a state or local government), and if every element of the offense “directly relates to the performance of the individual’s official duties as a Member, the President, the Vice President, or an elected official of a State or local government.” 5 U.S.C. § 8411(1)(2)(B).

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 cannot 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 more recent forfeiture provisions apparently would allow Members to keep the government’s contribution to their Thrift Savings Plan, while under the Hiss Act such contribution appears to be forfeited.

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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 is 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), and amended by the STOCK Act in 2012, P.L. 112-105, 126 Stat. 301-303 (April 4, 2012), 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."¹ 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."²

In 1961, Congress amended the statute 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.³ There was concern expressed that the original law "went too far"⁴ and unduly punished former federal officials (and

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

² H.R. REP. NO. 83-2488 (1954); *United States v. Hiss*, 185 F.2d 822 (2nd Cir. 1950); note discussion of legislative history of the Hiss Act in *Hiss v. Hampton*, 388 F. Supp. 1141, 1149 - 1152 (D.D.C. 1972).

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

⁴ Note discussion in *Hiss v. Hampton*, *supra* at 1152-1153, citing testimony in *Hearings on H.R. 4601, Before the House Committee on Post Office and Civil Service*, 86th Cong., 1st 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* (continued...)

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.”⁵

Hiss Act Provisions Regarding Federal Retirement Annuity Payments

Members of Congress (and most other officers and employees of the federal government)⁶ 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.”⁷ 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. These offenses specifically include, at 5 U.S.C. § 8312:

(b) The following are the offenses to which subsection (a) of this section applies if the individual was convicted before, on, or after September 1, 1954:

(1) An offense within the purview of-

(A) section 792 (harboring or concealing persons), 793 (gathering, transmitting, or losing defense information), 794 (gathering or delivering defense information to aid foreign government), or 798 (disclosure of classified information), of chapter 37 (relating to espionage and censorship) of title 18;

(B) chapter 105 (relating to sabotage) of title 18;

(C) section 2381 (treason), 2382 (misprision of treason), 2383 (rebellion or insurrection), 2384 (seditious conspiracy), 2385 (advocating overthrow of government), 2387 (activities affecting armed forces generally), 2388 (activities affecting armed forces during war), 2389 (recruiting for service against United States), or 2390 (enlistment to serve against United States), of chapter 115 (relating to treason, sedition, and subversive activities) of title 18;

(D) section 10(b)(2), (3), or (4) of the Atomic Energy Act of 1946 (60 Stat. 766, 767), as in effect before August 30, 1954;

(...continued)

Service, Subcomm. on Retirement, 86th Cong., 1st Sess. (1959).

⁵ H.R. REP. NO. 87-541 at 1 (1961).

⁶ 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.

⁷ See now 5 U.S.C. § 8311 *et seq.*

(E) section 16(a) or (b) of the Atomic Energy Act of 1946 (60 Stat. 773), as in effect before August 30, 1954, insofar as the offense is committed with intent to injure the United States or with intent to secure an advantage to a foreign nation; or

(F) an earlier statute on which a statute named by subparagraph (A), (B), or (C) of this paragraph (1) is based.

(2) An offense within the purview of-

(A) article 104 (aiding the enemy), article 106 (spies), or article 106a (espionage) of the Uniform Code of Military Justice (chapter 47 of title 10) or an earlier article on which article 104 or article 106, as the case may be, is based; or

(B) a current article of the Uniform Code of Military Justice (or an earlier article on which the current article is based) not named by subparagraph (A) of this paragraph (2) on the basis of charges and specifications describing a violation of a statute named by paragraph (1), (3), or (4) of this subsection, if the executed sentence includes death, dishonorable discharge, or dismissal from the service, or if the defendant dies before execution of that sentence as finally approved.

(3) Perjury committed under the statutes of the United States or the District of Columbia-

(A) in falsely denying the commission of an act which constitutes an offense within the purview of-

(i) a statute named by paragraph (1) of this subsection; or

(ii) an article or statute named by paragraph (2) of this subsection insofar as the offense is within the purview of an article or statute named by paragraph (1) or (2) (A) of this subsection;

(B) in falsely testifying before a Federal grand jury, court of the United States, or court-martial with respect to his service as an employee in connection with a matter involving or relating to an interference with or endangerment of, or involving or relating to a plan or attempt to interfere with or endanger, the national security or defense of the United States; or

(C) in falsely testifying before a congressional committee in connection with a matter under inquiry before the congressional committee involving or relating to an interference with or endangerment of, or involving or relating to a plan or attempt to interfere with or endanger, the national security or defense of the United States.

(4) Subornation of perjury committed in connection with the false denial or false testimony of another individual as specified by paragraph (3) of this subsection.

(c) The following are the offenses to which subsection (a) of this section applies if the individual was convicted before, on, or after September 26, 1961:

(1) An offense within the purview of-

(A) section 2272 (violation of specific sections) or 2273 (violation of sections generally of chapter 23 of title 42) of title 42 insofar as the offense is committed with intent to injure the United States or with intent to secure an advantage to a foreign nation;

(B) section 2274 (communication of restricted data), 2275 (receipt of restricted data), or 2276 (tampering with restricted data) of title 42; or

(C) section 783 (conspiracy and communication or receipt of classified information) of title 50 or section 601 of the National Security Act of 1947 (50 U.S.C. 421) (relating to intelligence identities).

(2) An offense within the purview of a current article of the Uniform Code of Military Justice (chapter 47 of title 10) or an earlier article on which the current article is based, as the case may be, on the basis of charges and specifications describing a violation of a statute named by paragraph (1), (3), or (4) of this subsection, if the executed sentence includes death, dishonorable discharge, or dismissal from the service, or if the defendant dies before execution of that sentence as finally approved.

(3) Perjury committed under the statutes of the United States or the District of Columbia in falsely denying the commission of an act which constitutes an offense within the purview of a statute named by paragraph (1) of this subsection.

(4) Subornation of perjury committed in connection with the false denial of another individual as specified by paragraph (3) of this subsection.

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 cannot “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)⁸ 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.⁹ 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.”¹⁰ 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.¹¹

⁸ 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.

⁹ 5 U.S.C. § 8312(a).

¹⁰ 5 U.S.C. § 8316(a).

¹¹ 5 U.S.C. § 8316(b).

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.¹² 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 attributable to such contributions, in the employee's Thrift Savings Plan.¹³ 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 dependent 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."¹⁴

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

¹² 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.

¹³ 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."

¹⁴ 5 U.S.C. § 8318(e).

payments under the federal retirement system.¹⁵ 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 if they were convicted of a wider range of criminal offenses than contained in the current Hiss Act.¹⁶ 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—HLOGA

The pension forfeiture provisions were originally included in the Senate-passed version of the Honest Leadership and Open Government Act of 2007 (HLOGA), dealing with ethics and lobbying reform, as an amendment to the legislation.¹⁷ This earlier version of the pension forfeiture provisions 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, which operated somewhat differently from the Senate bill.¹⁸ Instead of a former Member forfeiting all of his or her pension annuities as under the Hiss Act, the House 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.¹⁹ The approach used in the House version was eventually adopted in the final measure that was passed by Congress and signed into law.²⁰

¹⁵ *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.

¹⁶ See, for example, in the 110th Congress, H.R. 14, H.R. 97, H.R. 348, and S. 1, as amended by Senate Amendment 1; in the 109th 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 104th Congress, H.R. 350, H.R. 2244, H.R. 3310, H.R. 3447, S. 1794.

¹⁷ S. 1, 110th Congress, January 18, 2007, 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.

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

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

²⁰ No conference on the differing House and Senate bills on pension reform (or on the underlying measures concerning lobbying and ethics reform) was ever convened. Rather, identical measures, as amendments in the nature of a substitute for S. 1, 110th Congress, were brought before the House and Senate. Under a suspension of the Rules, the amended S. 1 passed the House on July 31, 2007 (151 CONG. REC. H9192-H9210 (daily ed. July 31, 2007)), and was agreed to in the Senate on August 2, 2007 (151 CONG. REC. S10687-S10719, S10723-S10724 (daily ed. August 2, 2007)). 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.

Amendments in STOCK Act

The pension forfeiture provisions originally placed in the law by the Honest Leadership and Open Government Act of 2007 (HLOGA) were amended in 2012 by the provisions of the so-called “Stop Trading on Congressional Knowledge Act,” (STOCK Act). The STOCK Act amended the pension forfeiture provisions in two ways. Initially, the law added numerous other federal criminal laws relating generally to public corruption, election law violations, and misconduct in office, for which a final felony conviction would result in losing creditable service as a Member of Congress for federal pension purposes.²¹

Secondly, the STOCK Act expanded the potentially relevant time period in which conviction of one of the listed offenses would result in loss of creditable service. Under the pension forfeiture provisions in HLOGA, a Member of Congress would lose all of the creditable service as a Member for pension purposes if that person engaged in the prohibited conduct while in Congress. The STOCK Act expanded that provision so that a Member of Congress would lose the credit for service as a Member for pension purposes if convicted of one of the numerous corruption offenses for conduct engaged in not only during the time such person served as a Member of Congress, but also during the time such person served in office as the President, the Vice President, or as an elected official of a state or local government.²²

Operation of the Pension-Loss Provisions

Under current federal pension laws, whether the Civil Service Retirement System (CSRS) or the Federal Employee Retirement System (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 in HLOGA and amended in the STOCK Act provide that any former Member of Congress who, while a Member of Congress, or while the President, Vice President, or while an elected official of a state or local government, 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.²³ This forfeiture will apply to such misconduct if “[e]very act or omission of the individual that is needed to satisfy the elements of the offense directly relates to the performance of the individual’s official duties as a Member, the President, the Vice President, or an elected official of a State or local government.”²⁴

The operation of these pension forfeiture provisions 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

²¹ P.L. 112-105, Section 15(b), 126 Stat. 302-303 (2012). Such other criminal offenses include conflicts of interest (18 U.S.C. § 203); conspiracy to make false claims (18 U.S.C. § 286); making false claims to the government (18 U.S.C. § 287); vote buying (18 U.S.C. § 597); illegal solicitation of political contributions from federal employees (18 U.S.C. § 602); soliciting political contributions in a federal building or office (18 U.S.C. § 607); theft, conversion, or embezzlement of government funds or property (18 U.S.C. § 641); false statements to the government (18 U.S.C. § 1001); obstruction of proceedings before government agencies (18 U.S.C. § 1505); attempt to evade or defeat paying taxes (26 U.S.C. § 7201), among other offenses.

²² P.L. 112-105, Section 15(a), 126 Stat. 301 (2012).

²³ 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).

²⁴ 5 U.S.C. § 8411(l)(2)(B) [FERS]; 5 U.S.C. § 8332(o) [CSRS].

engaged in while a Member of Congress or in other public office and directly relating to one's official 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.²⁵ Thus, the changes made in 2007 and 2012 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:

- i. An offense under section 201 of title 18 (relating to bribery of public officials and witnesses).
- ii. An offense under section 203 of title 18 (relating to compensation to Member of Congress, officers, and others in matters affecting the Government).
- iii. An offense under section 204 of title 18 (relating to practice in the United States Court of Federal Claims or the United States Court of Appeals for the Federal Circuit by Member of Congress).
- iv. An offense under section 219 of title 18 (relating to officers and employees acting as agents of foreign principals).
- v. An offense under section 286 of title 18 (relating to conspiracy to defraud the Government with respect to claims).
- vi. An offense under section 287 of title 18 (relating to false, fictitious or fraudulent claims).
- vii. An offense under section 597 of title 18 (relating to expenditures to influence voting).
- viii. An offense under section 599 of title 18 (relating to promise of appointment by candidate).
- ix. An offense under section 602 of title 18 (relating to solicitation of political contributions).
- x. An offense under section 606 of title 18 (relating to intimidation to secure political contributions).
- xi. An offense under section 607 of title 18 (relating to place of solicitation).
- xii. An offense under section 641 of title 18 (relating to public money, property or records).

²⁵ Under FERS, any payment of disability claims under that particular retirement system may also be affected by conviction of a corruption offense covered by the provisions of HLOGA and the STOCK Act, since disability retirement under FERS is based on completion of "at least 18 months of civilian service *creditable under section 8411* ..." 5 U.S.C. § 8451(a)(1)(A) (emphasis added). Since conviction of one of such offenses results in losing one's "creditable service" under § 8411, qualifying for FERS disability payments may also be affected. For a thorough discussion of Member retirement plans and requirements of federal employee disability programs, see CRS Report RL30631, *Retirement Benefits for Members of Congress*, by (name redacted), and CRS Report RS22838, *Disability Retirement for Federal Employees*, by (name redacted).

- xiii. An offense under section 666 of title 18 (relating to theft or bribery concerning programs receiving Federal funds).
- xiv. An offense under section 1001 of title 18 (relating to statements or entries generally).
- xv. An offense under section 1341 of title 18 (relating to frauds and swindles, including as part of a scheme to deprive citizens of honest services thereby).
- xvi. An offense under section 1343 of title 18 (relating to fraud by wire, radio, or television, including as part of a scheme to deprive citizens of honest services thereby).
- xvii. An offense under section 1503 of title 18 (relating to influencing or injuring officer or juror).
- xviii. An offense under section 1505 of title 18 (relating to obstruction of proceedings before departments, agencies, and committees).
- xix. An offense under section 1512 of title 18 (relating to tampering with a witness, victim, or an informant).
- xx. An offense under section 1951 of title 18 (relating to interference with commerce by threats of violence).
- xxi. An offense under section 1952 of title 18 (relating to interstate and foreign travel or transportation in aid of racketeering enterprises).
- xxii. An offense under section 1956 of title 18 (relating to laundering of monetary instruments).
- xxiii. An offense under section 1957 of title 18 (relating to engaging in monetary transactions in property derived from specified unlawful activity).
- xxiv. An offense under chapter 96 of title 18 (relating to racketeer influenced and corrupt organizations).
- xxv. An offense under section 7201 of the Internal Revenue Code of 1986 (relating to attempt to evade or defeat tax).
- xxvi. An offense under section 104(a) of the Foreign Corrupt Practices Act of 1977 (relating to prohibited foreign trade practices by domestic concerns).
- xxvii. An offense under section 10(b) of the Securities Exchange Act of 1934 (relating to fraud, manipulation, or insider trading of securities).
- xxviii. An offense under section 4c(a) of the Commodity Exchange Act (7 U.S.C. 6c(a)) (relating to fraud, manipulation, or insider trading of commodities).
- xxix. An offense under section 371 of title 18 (relating to conspiracy to commit offense or to defraud United States), to the extent of any conspiracy to commit an act which constitutes—
 - (I) an offense under clause (i), (ii), (iii), (iv), (v), (vi), (vii), (viii), (ix), (x), (xi), (xii), (xiii), (xiv), (xv), (xvi), (xvii), (xviii), (xix), (xx), (xxi), (xxii), (xxiii), (xxiv), (xxv), (xxvi), (xxvii), or (xxviii); or

(II) an offense under section 207 of title 18 (relating to restrictions on former officers, employees, and elected officials of the executive and legislative branches).

xxx. Perjury committed under section 1621 of title 18 in falsely denying the commission of an act which constitutes—

(I) an offense under clause (i), (ii), (iii), (iv), (v), (vi), (vii), (viii), (ix), (x), (xi), (xii), (xiii), (xiv), (xv), (xvi), (xvii), (xviii), (xix), (xx), (xxi), (xxii), (xxiii), (xxiv), (xxv), (xxvi), (xxvii), or (xxviii); or

(II) an offense under clause (xxix), to the extent provided in such clause.

xxxi. Subornation of perjury committed under section 1622 of title 18 in connection with the false denial or false testimony of another individual as specified in clause (xxx).

Member Contributions and Thrift Savings Plan

Under the provisions of HLOGA, as amended, 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).²⁶ 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."²⁷ Since Members convicted of covered corruption offenses would be losing "creditable service" for congressional pension annuities under the provisions of HLOGA, as amended, and would not be forfeiting their pensions under the Hiss Act (which was not amended), and no provision in HLOGA or the STOCK Act requires the loss of contributions to one's TSP, it would appear that Members would be entitled to all of the contributions and proceeds in their personal Thrift Savings Plans.²⁸

Spouse and Dependent Children

When a former Member loses his or her 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.²⁹

²⁶ 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).

²⁷ 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."

²⁸ 5 U.S.C. § 8432(g)(1).

²⁹ 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).

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 punitive legislation can apply *prospectively* only. As a constitutional matter, Congress cannot *retroactively* cut off or lessen the annuities of former Members as a penalty for having engaged in any criminal misconduct *prior* to the enactment of the legislation (even if the conviction for that misconduct occurred after the passage of the law).

Ex Post Facto Laws

The effect of the provisions in HLOGA and the STOCK Act is to increase the “penalty” for the commission of certain crimes to include the loss of one’s federal annuity for the commission of those particular crimes. Legislation which increases 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.³⁰ 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.”³¹

Although Congress may not increase the penalty or “punishment” for an 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.³² However, a lower federal court in the celebrated Alger Hiss case found that the Hiss Act, if applied retroactively to deny Alger Hiss his pension, was punitive in nature and not regulatory,³³ 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

³⁰ *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.

³¹ *Fletcher v. Peck*, 6 Cranch (10 U.S.) 87, 138 (1810).

³² See *De Veau v. Braisted*, 363 U.S. 144, 160 (1960); *Flemming v. Nestor*, 363 U.S. 603, 613-621 (1960).

³³ “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).

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.³⁴

It would therefore appear from the judicial precedents that the application of any provision to deny a pension to a Member of Congress for the commission of a crime deemed to be a felony under federal law could be prospective only. The law could apply to criminal conduct engaged in after the enactment of that provision, but could not apply, under the *ex post facto* clause of the Constitution, to deprive former Members of Congress 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.³⁵ 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,”³⁶ and thus a “pension granted by the Government confers no right which cannot be revised, modified or recalled by subsequent legislation.”³⁷ 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.³⁸ 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 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

³⁴ *Hiss v. Hampton*, *supra* at 1153.

³⁵ *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 (1st 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).

³⁶ *Rafferty v. United States*, 210 F.2d 934, 936 (3rd Cir. 1954).

³⁷ *Stouper v. Jones*, *supra* at 242.

³⁸ *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.”

service” for a violation of one of the anti-corruption provisions in the Honest Leadership and Open Government Act of 2007.³⁹

Loss of Pension Annuities and the 27th Amendment

The pension forfeiture provisions of HLOGA took effect upon enactment, September 14, 2007, and apply to any crime committed after that date. The question has arisen as to whether, because of the 27th 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 110th Congress.⁴⁰ 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 27th Amendment, for several reasons.

Initially, it should be noted that the 27th 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.⁴¹ Even if new pension forfeiture provisions 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.⁴² A retired Member of Congress who had committed an offense newly covered under the law while a Member (after the passage of the new law),⁴³ who had committed such offense during the Congress adopting such legislation (110th Congress), and who sought to have his or her pension annuities *not* diminished by forfeiting “creditable service,” could thus raise the 27th Amendment defense and, in the event that a court agrees with the interpretation that the law had varied the “compensation for the services of

³⁹ 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, 99th Cong., 2nd 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.

⁴⁰ The 27th 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.

⁴¹ Compare the language of the 27th Amendment expressly delaying the effective date of legislation, with the prohibitory language of Article I, Section 9 of the Constitution.

⁴² “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*; 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.

⁴³ Note discussion of *ex post facto* laws, above (and *Hiss v. Hampton*, 338 F. Supp. 1141, 1148-1149, 1153 (D.D.C. 1972)).

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 27th Amendment would apply, in any event, to a change in the pension laws applicable to former Members of Congress. The 27th 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.⁴⁴ 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.⁴⁵ In a case dealing with a procedural “standing” issue, dismissing a challenge under the 27th 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:

The Twenty-seventh Amendment does not deal with congressional pensions. Plaintiffs cite no authority that indicates congressional pensions fall under the Twenty-seventh Amendment....⁴⁶

While there is a substantial question as to whether a future pension to be paid 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 27th Amendment, the issue has been mooted and is no longer relevant since the end of the 110th Congress with respect to HLOGA, and will be after the end of the 112th Congress for the STOCK Act amendments.

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⁴⁴ *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....”

⁴⁵ In a case dismissing a 27th 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.*, *Shaffer v. Clinton*, 240 F.3rd 878 (10th Cir.), *cert. denied sub nom.*, *Shaffer v. O’Neill*, 534 U.S. 992 (2001), the District Court dismissed the 27th 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) cannot present a ripe case involving a pension-based injury to himself.” 54 F.Supp.2d at 1025.

⁴⁶ *Shaffer v. Clinton*, 54 F.Supp.2d 1014, 1019-1020 (D.Colo. 1999), *aff’d on other grounds sub nom.*, *Shaffer v. Clinton*, 240 F.3rd 878 (10th Cir.), *cert. denied sub nom.*, *Shaffer 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.

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