U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

FEB 6 1984

MEMORANDUM TO FRED F. FIELDING
Counsel to the President

Re: Application of 18 U.S.C. § 603 to Federal Employee Contributions to the President's Authorized Re-election Campaign Committee

You have requested our analysis of the application of 18 U.S.C. § 603 ("section 603") to political contributions made by certain Executive Branch officers and employees to a President's authorized re-election campaign committee.1/ Section 603 of title 18 makes it a felony for any officer or employee of the United States to give a political contribution to any other officer or employee of the United States who is the "employer or employing authority" of the contributor. You have asked for our views on the scope and constitutionality of this statute, and particularly whether a contribution to a President's re-election campaign committee is prohibited under section 603 when made by certain classes of individuals: (1) "employees of the White House Office, as that term is used in 3 U.S.C. § 105"; (2) "Presidential appointees subject to Senate confirmation who are either full-time or part-time employees of the Government"; and (3) "Presidential appointees not subject to Senate confirmation who are serving, either in full-time or in a part-time capacity on Executive boards and commissions. . . ." (Attachment)

I

SUMMARY OF CONCLUSIONS

After extensive research, analysis and review, we have concluded that the Department of Justice, in its discharge on behalf of the President of his constitutional duty to "take care that the laws be faithfully executed," Art. II, § 3, must defend the constitutionality of section 603 despite our

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1/ The terms "contribution" and "authorized [re-election campaign] committee" will be understood in this memorandum as defined by sections 301(8) and 302(e)(1), respectively, of the Federal Election Campaign Act of 1971 ("FECA"), codified at 2 U.S.C. §§ 431(8), 432(e)(1).

grave doubts concerning the validity of that provision in many of its potential applications. The question of whether the statute could constitutionally be applied to impose criminal penalties upon various individuals in a variety of potential factual contexts is a very close one, complicated by difficult issues of statutory construction and legislative intent. Serious uncertainty exists concerning whom the statute covers, under what circumstances it was intended to be applicable, and why it was promulgated. For this reason the courts may well find that section 603 is unconstitutionally vague in its intended application, and/or that it is neither supported by a sufficiently important state interest nor drawn narrowly enough to avoid unnecessary abridgement of First Amendment rights.

As we develop in detail in the pages which follow, section 603 imposes criminal penalties upon activities which are clearly embraced within the protections of the First Amendment. The right to participate in the political process through financial support of a candidate implicates basic constitutional freedoms which lie at the foundation of our system of government. While these freedoms are by no means absolute, First Amendment rights may not be significantly curtailed absent a demonstrable, sufficiently important governmental interest which cannot be promoted by less drastic means. Moreover, a criminal statute -- especially one like section 603 which infringes upon First Amendment rights -- must be clearly and narrowly drawn to provide law enforcement authorities with adequate guidelines to carry out its terms in a manner free of arbitrariness or overbreadth, and afford individuals reasonable notice of what conduct is permissible and what is not.

We recognize, however, that the public does have an important interest in a government work force that administers the law in a non-partisan fashion, both in fact and in appearance. Provisions designed to ensure that federal employees will not become a political machine for any individual, group or party serve an important public objective. Moreover, the Supreme Court has upheld prophylactic measures broadly restricting Government employees' political conduct without regard to corruptness of motive in order to protect the federal bureaucracy from the appearance of vulnerability to political pressures and to provide a shield from such overt or subtle pressures.

Section 603 might be said to serve some or all of these legitimate and important government objectives. However, a broad range of other protections exist to promote these goals. The Hatch Act, for example, precludes active participation by the vast majority of the federal work force in the political

process, and other laws provide comprehensive protection to federal employees against any form of political pressure or inducements, including flat prohibitions upon solicitations of campaign contributions by federal employees from other federal employees, as well as solicitations in public buildings. Additionally, federal laws presently impose substantial restrictions on campaign contributions applicable to all citizens. It is highly uncertain how the broad additional and substantial restrictions upon First Amendment rights imposed by section 603 can be justified under any kind of strict scrutiny standard. Our constitutional doubts are magnified by the statute's facial ambiguity, and by the nearly complete absence of any meaningful legislative history as to what Congress intended to accomplish in adopting section 603 with respect to the Executive Branch.

Notwithstanding our doubts regarding the outcome of a First Amendment challenge to section 603, rational and reasonably powerful arguments may be made in support of the statute, for example, if it is interpreted not to require a flat prohibition upon all Executive Branch personnel contributions to a President's re-election campaign committee. While section 603 does not define the scope of the term "employer or employing authority," there is legislative history which supports an interpretation limiting application of the statute to cases where the candidate receiving the contribution is the "immediate employer" of the contributor. A strong basis exists for construing this limitation in the context of a presidential re-election campaign to bar contributions only from those Government officers and employees whose immediate employer is the President, i.e., those employed pursuant to White House Office personnel authorization, 3 U.S.C. § 105, and perhaps also those presidential appointees who are most directly under the immediate supervision of the President, i.e., presidential appointees who hold Cabinet rank. Under this interpretation of the statute, it is less likely (but nonetheless possible) that the courts would apply the prohibition to lesser presidential appointees such as sub-Cabinet officials or members of Executive boards and commissions, unless they report directly to the President.

The foregoing interpretation of the statute would substantially reduce section 603's vulnerability to challenge on overbreadth grounds, while largely eliminating the onerous cumulative inhibiting effect which the statute otherwise imposes upon the First Amendment rights of Government employees covered by the Hatch Act. Because this narrowing interpretation ameliorates many of the constitutional concerns regarding overbreadth which would exist with any wider interpretation of the statute, we believe, in light of the legislative history, that the courts would be inclined not to construe section 603 any

more broadly. We caution, however, that it may be argued that this construction of the statute ironically singles out for protection a class of persons who are least likely to contribute unwillingly to a President's re-election campaign. It is somewhat incongruous for Congress suddenly to impose restrictions limited precisely to that class of officials which traditionally has been exempt from prohibitions on federal employee political activity. It may be said, therefore, that this interpretation of section 603 fails rationally to promote a public interest sufficiently strong to outweigh the substantial burdens imposed upon the First Amendment rights of this group.

Another restriction on the scope of section 603 that may be adopted by the courts to avoid a finding of vagueness or overbreadth is in the area of motive. It could be argued that section 603 may only be enforced constitutionally in cases of corrupt purpose or improper expectation of gain. This was the Department of Justice's longstanding interpretation and enforcement policy of the predecessor to section 603, former 18 U.S.C. § 607. In light of the constitutional issues raised by section 603 and its relative opacity as to the individuals or circumstances which it covers, the courts may well adopt a similar construction of section 603, reasoning that such a vague yet potentially broad prohibition may constitutionally be applied to impose criminal sanctions only where a specific mens rea is established.

Regardless of the limiting interpretations which might reasonably be applied to section 603, Supreme Court and lower federal court decisions broadly upholding restrictions on the rights of public employees to participate actively in the political process may be cited in support of the statute. While these cases are arguably distinguishable from the precise context presented here, the difficulty of distinguishing some of these decisions and the relatively broad dicta in them should not be underestimated. Thus, notwithstanding our grave doubts concerning the justification for, and the apparent vagueness and overbreadth of, section 603, it certainly is possible that the courts could reach contrary conclusions on those issues. Therefore, those within the class of persons that may fall within the scope of the statute who wish an authoritative interpretation of the statute's applicability to them, as well as the authorized campaign committee of the President, may wish to consider seeking declaratory or injunctive relief from the courts. There is precedent, most notably in Buckley v. Valeo, 424 U.S. 1 (1976), for recognition by the courts of the justiciability of a suit for declaratory and injunctive relief brought by potential contributors and recipients of contributions who have a personal stake in the enforcement of a statute limiting political contributions.

While we are aware of no prosecutions under section 603 or its predecessor statute, former section 607, during the 100 years of their collective existence, we cannot definitively foreclose the possibility of prosecutions under this statute in the future. Moreover, this Department has an obligation vigorously to defend the constitutionality of section 603 in court if any reasonable argument can be made in its support, unless it could be said to infringe upon the constitutional powers or duties of the Executive. Since 18 U.S.C. § 603 may be constitutionally defensible and does not infringe upon the President's constitutional authority or responsibility, the Department would present the strongest arguments in favor of the constitutionality of the statute if its validity were challenged in court.

In light of the foregoing, we could not in good conscience suggest any course for the officials specified in your letter other than resort to the courts for a declaration as to their rights under the statute.

II

HISTORY OF SECTION 603 AND RELATED STATUTES

18 U.S.C. § 603 was enacted as part of the Federal Election Campaign Act ("FECA") Amendments of 1979, Pub. L. No. 96-187, § 201(a)(4) (1980), and provides:

> (a) It shall be unlawful for an officer or employee of the United States or any department or agency thereof, or a person receiving any salary or compensation for services from money derived from the Treasury of the United States, to make any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 to any other such officer, employee or person or to any Senator or Representative in, or Delegate or Resident Commissioner to, the Congress, <u>if the person receiving such contribution is the employer or employing authority of the person making the contribution</u>. Any person who violates this section shall be fined not more than $5,000 or imprisoned not more than three years, or both.
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> (b) For purposes of this section, a contribution to an authorized committee as defined in section 302(e)(1) of the Federal Election Campaign Act of 1971 shall be considered a contribution to the individual who has authorized such committee. [Emphasis added.]

Ia summarize the elements of the statute, a person is guilty of a felony under section 603 if (1) he is "an officer or employee of the United States or any department or agency thereof, or . . . receiv[es] any salary or compensation for services from money derived from the Treasury of the United States"; (2) he makes a "contribution" within the meaning of section 301(8) of FECA; and (3) the recipient of the contribution is a person (or an authorized committee of a person) described in criterion (1) above, and is "the employer or employing authority" of the contributor. Your question requires us to identify those persons, if any, who would be prohibited by section 603 from making political contributions to the President's authorized campaign on the theory that the President is their respective "employer or employing authority." This, in turn, requires an examination of what is meant by the statute's use of the phrase "employer or employing authority." Additionally, as discussed in Part III, below, because section 603 restricts activity protected by the First Amendment, we must examine the statute and its history to determine what objectives the statute is intended to accomplish, how it attempts to achieve those objectives, and whether it does so in a constitutionally permissible manner.

The Supreme Court has often noted that "[i]n determining the scope of a statute, we look first to its language." United States v. Turkette, 452 U.S. 576, 580 (1981). See also American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982); Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); Lewis v. United States, 445 U.S. 55, 60 (1980). In this instance, the key term of limitation, "employer or employing authority," is vague on its face. As this Office previously observed with respect to this phrase, "[t]he concept of 'employing authority' is so broad and the President's constitutional authority both as Chief Executive and Commander-in-Chief is so extensive that the President might well be regarded as the 'employing authority' of a very significant number of officers and employees in the civil and military service."2/ On the other hand, the term could be interpreted to apply only to those persons who are employed in the President's

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2/ Memorandum for the Attorney General, re: H.R. 5010 -- Amendment of the Federal Election Campaign Act, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel at 3 (Jan. 2, 1980) ("Simms Memorandum").

In a memorandum circulated within this Department from Allen K. Campbell, Director, Office of Personnel Management, re the Hatch Act (March 14, 1980), it was noted that "[o]ne possible reading of a recent amendment to 18 U.S.C. 603 is

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immediate working environment, the White House Office. We must therefore review the legislative history of section 603 as well as other related statutes in order to help clarify the meaning and scope of its application. See generally Watt v. Alaska, 451 U.S. 259 (1981); United States v. Zacks, 375 U.S. 59 (1963); Pompano v. Michael Schiavone & Sons, Inc., 680 F.2d 911 (2d Cir.), cert. denied, 103 S. Ct. 454 (1982).

The predecessor to section 603 appeared as former 18 U.S.C. § 607 (1976), which purported on its face to prohibit any direct or indirect political contributions by any Government employee to any other Government employee or to any Senator or Member of Congress:

> Whoever, being an officer, clerk, or other person in the service of the United States or any department or agency thereof, directly or indirectly gives or hands over to any other [such person], or to any Senator or Member of or Delegate to Congress . . ., any money or other valuable thing on account of . . . any political object, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Thus, former section 607 appeared facially to impose an even broader prohibition than does section 603.

Former section 607 found its roots in section 14 of the Pendleton Civil Service Act of 1883, 22 Stat. 403, as amended, which was enacted to eliminate certain forms of

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that employees of the federal government may not make contributions to President Carter or to the Carter-Mondale Presidential Committee. An amendment to this statute is currently pending in Congress and at this time it is our understanding that neither President Carter nor the Carter-Mondale Presidential Committee is accepting contributions from federal employees."

The discussion of section 603 in the manual entitled Federal Prosecution of Election Offenses (Oct. 1982), prepared by the Election Crimes Branch of the Public Integrity Section of the Criminal Division, does not define the Government employees with respect to whom the President is the "employer or employing authority." It says simply that the statute in general "applies to all congressional staff, to Presidential and White House employees, as well as to ministerial civil service personnel." Id. at 31.

blatant political abuse then prevailing within the Executive Branch.3/ The principal reforms effected by the Pendleton Act were the establishment of a merit civil service to protect a small fraction (roughly 10%) of "clerks" then employed in the Executive Branch, and the creation of a Civil Service Commission to supervise the employment and termination of these merit employees. Additionally, the Act contained four criminal provisions which, prior to 1980, were codified at 18 U.S.C. §§ 602, 603, 606 and 607 (1976), and were intended to prohibit some particularly serious abuses of the "spoils system," such as overt political activities in federal facilities, politically motivated threats and reprisals against Government employees, and the widespread practice of demanding political contributions, or "assessments," from subordinates.4/

Prior to the Pendleton Act, Congress had undertaken to prohibit intra-Governmental political solicitations and "shake-downs" of Government workers by attaching a rider to an 1876 appropriations measure which made it a crime for any officer or employee in the Executive Branch not appointed by the President with the advice and consent of the Senate to request of, receive from, or give to any other such officer or employee a political contribution. Act of August 16, 1876, ch. 287, § 6, 19 Stat. 169, now codified in part at 5 U.S.C. § 7323. See generally 4 Cong. Rec. 2808, 3597, 5529 (1876) (pertinent legislative history). In 1882 the Supreme Court upheld the constitutionality of this provision, finding that it was an appropriate exercise of congressional power, inter alia, to "protect the classes of officials and employees provided for from being compelled to make contributions for [political] purposes through fear of dismissal if they refused." Ex Parte Curtis, 106 U.S. 371, 374 (1882). Justice Bradley dissented on First Amendment grounds, declaring that the statute, in effect, made it a "condition of accepting any employment under the government that a man shall not, even voluntarily and of his own free will, contribute in any way through or by the hands of any other employee of the government to the political cause which he desires to aid and promote. I do not believe," Justice Bradley declared, "that Congress has any right to impose such a condition upon any citizen of the United States." Id. at 376. The majority, however, while not explicitly mentioning the First Amendment, appears to have read the statute more narrowly to encompass only solicited contributions made directly to an officeholder: "The managers of political campaigns, not in the employ of the United States, are just as free now to call on those in office for money to be used for political purposes as ever they

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3/ See generally 14 Cong. Rec. 600-630 (1882).

4/ Id.

were, and those in office can contribute as liberally as they please, provided their payments are not made to any of the prohibited officers or employees." Id. at 373. On the other hand, the Court continued:

> If contributions from those in public employment may be solicited by others in official authority, it is easy to see that what begins as a request may end as a demand, and that a failure to meet the demand may be treated by those having the power of removal as a breach of some supposed duty, growing out of the political relations of the parties. Contributions secured under such circumstances will quite as likely be made to avoid the consequences of the personal displeasure of a superior, as to promote the political views of the contributor, -- to avoid a discharge from service, not to exercise a political privilege. The law contemplates no restrictions upon either giving or receiving, except so far as may be necessary to protect, in some degree, those in the public service against exactions through fear of personal loss.
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> Political parties must almost necesarily exist under a republican form of government; and when public employement depends to any considerable extent on party success, those in office will naturally be desirous of keeping the party to which they belong in power. The statute we are now considering does not interfere with this. The apparent end of Congress will be accomplished if it prevents those in power from requiring help for such purposes as a condition to continued employment. [Emphasis added.]

Id. at 374-75.5/ Thus, while the prohibition considered in Curtis was facially quite broad, the Court seems to have construed it narrowly in upholding its constitutionality.

5/ The Court referred to two earlier related statutes which it found were also intended to "promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service." 106 U.S. at 373. One, an 1867 statute, prohibited Government employees from requiring or requesting a workingman in a navy yard to make a political contribution. The other, passed in 1870, prohibited solicitations among employees for a gift to a superior, and prohibited the giving and receiving of such a gift. Id. The latter prohibition currently is codified at 5 U.S.C. § 7351; see p. 13 infra.

Neither the 1876 appropriations rider nor the Pendleton Act specifically addressed the conduct of employees of the Legislative Branch. Thus, notwithstanding the possibility that former section 607 could have been read to prohibit Legislative as well as Executive Branch employees from making political contributions to any other Government employee or Member of Congress, the Department of Justice interpreted that section not to cover contributions made by persons employed in the Legislative Branch.6/

Additionally, notwithstanding the language of former section 607 which prohibited contributions made "directly or indirectly," this Department construed that section as not prohibiting any federal employee from making a political contribution to the campaign committee of an incumbent candidate for federal office, provided that the contribution was "received by a political committee in the normal course of its operation and where the facts and circumstances surrounding its making suggest that it was not its donor's intent to accomplish any corrupt purpose thereby."7/ The Department of Justice restated its position regarding enforcement of former section 607 in a letter to the Chairman of the Senate committee chiefly responsible for drafting the present language of section 603: "[a] prosecutable case under [former] section [607] would generally require some evidence that the donor/defendant was prompted by an expectation of some improper gain in making the contribution in question, such as an intent to curry favor with his superior."8/ This Department explained, inter alia, that section 607 had to be interpreted in pari materia with the Hatch Act, 5 U.S.C. § 7324, and its implementing regulations, 5 C.F.R. Part 733, discussed below, which permitted -- and continue now to permit -- an Executive Branch employee to make a voluntary contribution to

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6/ See, e.g., Letter to Senator Mark O. Hatfield, from Patricia M. Wald, Assistant Attorney General, Office of Legislative Affairs, at 8 (Feb. 24, 1978).

7/ S. Rep. No. 95-500, 95th Cong., 1st Sess. 43 (1977) (quoting from a letter from Henry E. Peterson, Assistant Attorney General, Criminal Division (Aug. 12, 1974)). See 3 OLC 324 (1979) (voluntary contributions to committees supporting incumbent federal officers for re-election are not prosecutable under section 607).

8/ Letter to Senator Howard W. Cannon, Chairman, Senate Committee on Rules and Administration, from Patricia M. Wald, Assistant Attorney General, Office of Legislative Affairs, at 5 (Oct. 21, 1977) (emphasis added).

the political committee supporting an incumbent candidate for federal office.9/ In sum, on the eve of legislative action to amend section 607, Congress was aware that, notwithstanding the broad language of the statute apparently prohibiting all political contributions directly or indirectly from one federal employee to another, that provision had been interpreted and enforced by this Department narrowly to encompass only a contribution directly to a candidate (not to a candidate's campaign committee) from an Executive Branch employee which was tainted by "an expectation of some improper gain" or "an intent to curry favor with [a] superior."10/

In amending former section 607 in 1980, we may also assume that Congress was aware 11/ of the numerous other provisions of federal law -- both penal and non-penal -- which relate to political activities of federal workers, in addition to the provisions of FECA which regulate campaign contributions generally. Former sections 602, 603 and 606 of title 18,12/ which constituted the other criminal provisions of the original Pendleton Act, prohibited the following activities, respectively: (1) knowingly soliciting a political contribution from a fellow officer or employee of the United States; (2) knowingly soliciting or receiving a political contribution in any room or building where Government employees conduct official duties; and (3) discharging, promoting, or in any way changing the rank or compensation of a fellow officer or employee of the United States for making or failing to make a political contribution.

9/ See Hatfield and Cannon Letters, supra notes 6 & 8; see also 3 OLC 324 (1979).

10/ Cannon Letter, supra note 8, at 5. Commenting upon this Department's interpretation of former section 607, a 1977 report of the Senate Committee on Rules and Administration stated, "[t]he Department of Justice's enforcement policy needs clarification and a determination should be made with regard to the proper interpretation and enforcement of section 607." S. Rep. No. 95-500, 95th Cong., 1st Sess. 6 (1977).

11/ See generally Northcross v. Bd. of Education of Memphis, 412 U.S. 427 (1973); Allen v. Grand Century Aircraft Co., 347 U.S. 535 (1954).

12/ These sections now appear as sections 602, 607 and 606, respectively.

Congress supplemented these Pendleton Act prohibitions over time with the following additional criminal and non-criminal statutes:13/

(1) 18 U.S.C. § 595 -- prohibits a local, state or federal officer or employee, in connection with an activity financed wholly or partially by the United States, from using his official authority to affect the nomination or election of a candidate for federal office;

(2) 18 U.S.C. § 599 -- prohibits a candidate for federal office from promising appointments to any public or private position in return for political support;

(3) 18 U.S.C. § 600 -- prohibits any person from promising any employment or benefit made possible by an Act of Congress as consideration for past or future political activity;

(4) 18 U.S.C. § 601 -- prohibits any person from knowingly causing or attempting to cause any other person to make a political contribution by depriving or threatening to deny any employment or benefit made possible by an Act of Congress;

(5) 5 U.S.C. § 7321 -- authorizes the President to prescribe rules to assure that Executive Branch employees are free of any obligation to make political contributions or render political service by reason of their employment;

(6) 5 U.S.C. § 7322 -- authorizes the President to prescribe rules to assure that no Executive Branch employee shall use his official authority to influence or coerce the political action of any person;

13/ The following textual references are to current United States Code sections. A number of these statutes, along with former section 607, have historically been interpreted and enforced by this Department in pari materia with the Hatch Act and its implementing regulations. See generally pp. 10-11 supra and accompanying notes; Election Crimes Branch, Criminal Division, U.S. Dept. of Justice, Federal Prosecution of Election Offenses (Oct. 1982); Criminal Division, U.S. Dept. of Justice, Election Law Manual 13-14 (Sept. 1976).

(7) 5 U.S.C. § 7323 -- prohibits an Executive Branch employee not appointed by the President with the advice and consent of the Senate from requesting, receiving from, or giving to another employee or Member of Congress a political contribution.14/

(8) 5 U.S.C. § 7351 -- prohibits a Government employee from (a) soliciting a contribution from another employee for a gift to a superior, (b) making a donation as a gift to a superior, or (c) accepting a gift from an employee receiving less pay than himself.

Perhaps the most significant of all statutes in this area existing at the time of the adoption of section 603 was the Hatch Act, 5 U.S.C. § 7324, which prohibits almost all Executive Branch employees from using their official authority or influence to affect the results of an election, and from "tak[ing] an active part in political management or in political campaigns." The Act, passed in 1939, 53 Stat. 1148, was intended to codify those regulations and administrative determinations of the Civil Service Commission governing political activities which were in effect at the time the Act was passed. Under the Act, as implemented currently by the Merit Systems Protection Board, the vast majority of Executive Branch employees are prohibited from taking any active role in partisan political campaigns. For the purpose of understanding the context within which section 603 was adopted, two features in particular of the Hatch Act are notable. First, employees paid from the White House Office appropriations, 3 U.S.C. § 105, as well as heads of Executive departments and policymaking officials appointed with the advice and consent of the Senate, are exempt from any coverage under the Act. Second, the Act and its implementing regulations permit all employees to make voluntary contributions to political organizations, including committees that support incumbent federal officers for re-election.15/

On September 10, 1979 the House of Representatives unanimously passed H.R. 5010 which, as amended, eventually became the FECA Amendments of 1979.16/ The bill, described as "technical and noncontroversial" in nature by one of its

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14/ We are informally advised by the Office of the Special Counsel to the Merit Systems Protection Board that, in its view, section 7323 does not prohibit political contributions to a "campaign committee."

15/ See 5 C.F.R. Part 733.

16/ See 125 Cong. Rec. 23815 (1979).

sponsors,17/ primarily was intended to make certain changes in the reporting and disclosure requirements contained in FECA.18/ It also contained amendments to sections 602, 603 and 607 of title 18.19/ For unspecified reasons, the existing provisions of title 18 entitled "place of solicitation" and "making political contributions," 18 U.S.C. §§ 603 and 607 respectively, were switched in H.R. 5010, thereby making the bill's section 603 the descendent of former section 607. Section 603 of the House bill provided:

> It shall be unlawful for any officer, clerk, or other person in the employ of the United States or any department or agency thereof to make a contribution within the meaning of section 301(8) [of FECA] to any other such officer, clerk, or person or to any Senator or Representative in . . . Congress, unless such contribution is voluntary: Provided, however, That no contribution, voluntary or otherwise, may be made by any such officer, clerk, or person to any Senator or Representative in . . . Congress, or their authorized committee within the meaning of section 302(e)(1) of [FECA], if that person authorizing such committee is the employer or employing authority of the person making such contribution.20/

Thus, Executive Branch employee contributions were to be prohibited only if they were involuntary, but, as explained in

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17/ Id. at 23813 (remarks of Rep. Thompson).

18/ These changes included eliminating filing requirements for certain candidates, reducing the scope and number of required reports to be filed with the Federal Election Commission, encouraging volunteer and grass-roots political activity by reducing or eliminating certain reporting requirements related thereto, and modifying the Commission's enforcement process. See 125 Cong. Rec. 36753-55 (1979).

19/ Former section 602 was amended, inter alia, to clarify that an improper solicitation of a political contribution covered by its terms could occur only where the solicitor "knowingly" solicited an individual protected by the statute. Section 602 was also amended to make the term "contribution" subject to the definition found in FECA, 2 U.S.C. § 431(8).

Former section 603 was amended, inter alia, to provide an exemption to the prohibition against receiving unsolicited contributions in congressional offices if they are transferred to an appropriate political committee within seven days of receipt. See 125 Cong. Rec. 36753-55 (1979).

20/ 125 Cong. Rec. 23813 (1979).

the committee report accompanying the House version, congressional employees would be flatly prohibited from "contribut[ing] to [their] employer although voluntary contributions to other Members of Congress would be allowed. An individual employed by a congressional committee," the report stated, "cannot contribute to the chairman of that particular committee. If the individual is employed by the minority that individual cannot contribute to the ranking minority member of the committee or the chairman of the committee."21/ Another section of the report stated that under the bill "Congressional employees may make a voluntary political contribution to a Member of Congress other than their immediate employer . . . ."22/

Section 603 of the House bill marked the first appearance of the term "employer or employing authority," but at this stage in the legislative history the term was restricted in its application to members of Congress only. While it was clearly the intention of the House bill to apply a prophylactic, per se prohibition upon contributions -- "voluntary or otherwise" -- made by Legislative Branch employees, that prohibition would apply only where the contribution was made to one's "immediate employer." With respect to Executive Branch employee contributions, section 603 was intended to "allow voluntary contributions from federal employees to other federal employees"; only those which were not "voluntary" were prohibited.23/

21/ H. Rep. No. 96-422, 96th Cong., 1st Sess. 26 (1979).

22/ Id. at 3 (emphasis added). See also 125 Cong. Rec. 23815 (1979).

23/ H.R. Rep. No. 96-422, at 26. In the section of the House committee report entitled "Brief Bill Summary," it was noted that the bill "amends section 602, 603, and 607 of title 18 to comport with existing Justice Department enforcement of these sections." H.R. Rep. No. 96-422, at 3; see also 125 Cong. Rec. 23814 (1979). At least with respect to former section 607, however, the House bill did not precisely embody "existing Justice Department enforcement" policy. For example, (1) whereas this Department interpreted former section 607 not to apply to Legislative Branch employees, the House bill expressly prohibited such employees from making certain contributions; and (2) whereas this Department understood former section 607 to prohibit Executive Branch employee contributions made with a corrupt purpose or improper expectation, the House bill merely prohibited such contributions if they were made involuntarily. See pp. 10-11 supra; but cf. Hatfield letter, supra note 6, at 9 (stating Justice Department position that "voluntary political contributions by Federal employees to political committees supporting candidates for Federal office do not present prosecutable violations of 18 U.S.C. 607")(emphasis added).

During Senate consideration of H.R. 5010, section 603 was amended to include its present language. This amendment was part of substitute language for a number of sections of H.R. 5010 proposed on the floor in unprinted form, without any explanatory committee report, by Senators Byrd, Pell and Hatfield.24/ The only explanation concerning these Senators' substitute language for section 603 was provided by Senator Hatfield, who stated:

> Certain revisions are also proposed to the Criminal Code as it applies to political contributions by or to Federal employees. Current provisions of the Criminal Code reflect a longstanding concern that no Federal employee be subject to any form of "political assessment." Consistent with this underlying concern, the revised language permits a Federal employee to make a voluntary contribution to another Federal employee who is not his or her employer or employing authority.25/

As amended and unanimously passed by the Senate,26/ H.R. 5010 was returned to the House, which passed it unanimously two days later without any reference to the Senate's revised language in section 603.27/

The language of section 603 as adopted by Congress differs from the earlier House version in two important respects.28/ First, unlike the House version, section 603 on its face clearly prohibits Executive Branch employees as well as congressional employees from making contributions to

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24/ 125 Cong. Rec. 36744 (1979).

25/ Id. at 36754 (emphasis added) (remark apparently not spoken by Sen. Hatfield on the Senate floor).

26/ See id. at 36755.

27/ Id. at 37187-37198.

28/ We note additionally that those persons to whom contributions may not be given (if they are an "employer or employing authority" of the contributor) are described more broadly in the enacted version to include any "officer or employee of the United States or any department or agency thereof, or a person receiving any salary or compensation for services from money derived from the Treasury of the United States." This language was undoubtedly taken from identical language in
(footnote cont'd)

other federal employees only if the recipient is their "employer or employing authority." Second, section 603 as enacted makes no reference whatever to the voluntariness of any contribution covered by its terms. While there is no explicit statement in the legislative history explaining these changes, the most probable interpretation appears to be that the Senate wished to narrow the prohibition relating to Executive Branch personnel to apply only with respect to contributions made to one's employer or employing authority, thereby, for example, making it clear that Executive Branch employees could contribute to incumbent congressional candidates' campaign committees.29/ On the other hand, the Senate broadened the prohibition relating to those same individuals by rejecting the House version's dual standard of voluntariness for Executive Branch employee contributions and a per se prohibition against congressional employees' contributions to their "immediate employer." Instead, the Senate adopted a unitary, per se prohibition against contributions to an immediate employer, and applied the prohibition to all Government employees.

28/ (Cont'd)
former section 602 of title 18, which prohibited, inter alia, the described persons from engaging in political solicitations with others of the same class. Prior to the 1980 amendments this Office reviewed the scope of this language in former section 602, and concluded that, while "arguments based on the language of § 602 and certain statements contained in the legislative history of the Pendleton Act might be cited in support of the view that the President does not come within the class of persons mentioned . . . , the better view, in our judgment, is that the President does, indeed, fall within the terms of that provision." Memorandum for Philip Heymann, Assistant Attorney General, Criminal Division, from Larry A. Hammond, Acting Assistant Attorney General, Office of Legal Counsel, at 13 (Jan. 17, 1979). For the reasons outlined in that previous opinion, we believe the phrase used in section 603, "officer or employee of the United States or any department or agency thereof, or a person receiving any salary or compensation for services from money derived from the Treasury of the United States," must be interpreted to include the President.

29/ See House Committee on Standards of Official Conduct, 97th Cong. 1st Sess., Ethics Manual for Members and Employees of the U. S. House of Representatives 119 ("under [the 1979 amendments] Members of Congress . . . may apparently receive unsolicited political contributions from employees of the Federal Government.").

There is very little guidance in the legislative history concerning how the phrase "employer or employing authority" should be understood in the context of Government employees not employed in the Legislative Branch. As noted earlier, the House committee report declared that congressional committee staff would be barred from contributing only to the campaign of their "immediate employer," i.e., the chairman, not to other Members such as the Speaker, the Majority Leader, or other committee members whose employment relationship with the contributor is more attenuated. Unfortunately, there is no evidence that Congress ever considered whether contributions to a President's re-election campaign would be covered by the statute, or to what extent the President was intended to be an "employer or employing authority" of Government workers. But cf. note 28 supra.

We have found only one indication of legislative intent with respect to the scope of the term "employer or employing authority" in the specific context of the Executive Branch. On January 8, 1980 two letters were sent to President Carter from the Chairmen and ranking members of the Senate and House committees which considered H.R. 5010, urging him to sign the bill. The text of the two letters is identical, and sought to allay the President's concern that section 603 might unconstitutionally abridge the right of federal employees to make political contributions:

> We understand that you are concerned about First Amendment questions raised by [section 603] which, among other things, prohibits certain types of voluntary political contributions by certain classes of Federal employees. It was our intention that this provision be read narrowly so that, for example, only the employees of the White House Office, as that term is used in 3 U.S.C. 105, would be barred from contributing to the reelection campaign of an incumbent President.
>
> We are agreeable to seeking legislation which would either simply repeal [section 603], or amend that section to insure that coverage conforms precisely to our original intention as set forth above, or take other appropriate action to correct this problem.30/

30/ Letter from Reps. Frank Thompson, Jr. and Bill Frenzel, to President Carter (Jan. 8, 1979 [sic]); Letter from Senators Clayborn Pell and Mark O. Hatfield, to President Carter (Jan. 8, 1980) (emphasis added).

While letters to the President from Members of Congress urging him to sign an enrolled bill normally would not be considered controlling, or even very persuasive, evidence of congressional intent, we believe that given the absence of any other dispositive -- or even highly probative -- legislative history, these letters must be carefully considered.31/ The four co-signers of the letters were virtually the only Members of Congress to take an active role in the debate over H.R. 5010, and their committees had direct responsibility for drafting the bill and bringing it before their respective Houses. Further, these letters are the only pre-enactment sources that speak unambiguously and directly to the particular issue whether, and to what extent, the statute prohibits contributions to an incumbent President's re-election campaign: "[i]t was our intention that this provision be read narrowly, so that, for example, only the employees of the White House Office, as that term is used in 3 U.S.C. 105, would be barred from contributing to the reelection campaign of an incumbent President."32/ This declaration, of course, does not conclude

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31/ See generally CPSC v. GTE Sylvania, Inc., 447 U.S. 102, 118 n.13 (1980) (citations omitted):

> less formal types of subsequent legislative history provide an extremely hazardous basis for inferring the meaning of a congressional enactment. While such history is sometimes considered relevant, this is because, as Mr. Chief Justice Marshall states . . . "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." Such history does not bear strong indicia of reliability, however, because as time passes memories fade and a person's perception of his earlier intention may change. Thus, even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislatiave history prior to its enactment.

32/ We recognize, of course, that it is possible to argue that the failure of Congress to repeal or amend section 603 as suggested in the letters may be taken as a sign that the narrow interpretation suggested therein was rejected by Congress. We do not believe in this case that it is appropriate to draw any inference one way or another from (footnote cont'd)

our inquiry; but we do consider it a significant indication that section 603 was not intended to be applied broadly in the context of contributions to an incumbent President's authorized campaign committee.

While H.R. 5010 was awaiting action by President Carter in January, 1980 this Office advised the Attorney General that proposed section 603 raised a "significant First Amendment question."33/ We pointed out that the bill applied on its face to "any and every person in federal service . . . ." We concluded:

> The bill would reverse a long-standing legislative judgment. It would upset the delicate constitutional balance struck in the Hatch Act between permissible and prohibited political conduct, a balance that was approved in Letter Carriers [discussed infra]. Compounding the difficulty, the scope of the new prohibition is made vague and uncertain by the vagueness of the concept upon which the coverage depends, the concept of an "employing authority." The President is certainly the "employing authority" of, for example, the National Security Adviser;

32/ (Cont'd)
post-enactment congressional silence with respect to section 603. There is some indication, in fact, that Congress may have chosen not to amend section 603 because it believed that whatever constitutional difficulties existed could be resolved through narrow interpretation and limited enforcement of the provision by this Department. See Memorandum to Files from Jan E. Dutton, Attorney, Public Integrity Section, Criminal Division, re H.R. 1510 -- Amendments to Anti-Patronage Statutes (Jan. 25, 1980) (during a meeting concerning enforcement of section 603 between Department of Justice lawyers and Robert Moss, General Counsel, Committee on House Administration, Moss, who played a key role in drafting H.R. 5010, suggested that by limiting the legal definition of an employer to one who "directs and controls," section 603 could be read to avoid any chilling effect upon constitutional rights. Moss also suggested that the only persons whom the President "directs and controls" are "the 350-odd Schedule C members of his staff and the Cabinet members").

33/ Simms Memorandum, supra note 2, at 1.

but is he the "employing authority" of a United States Attorney or of a member of the Senior Executive Service in the Department of Defense? Whatever the intended scope of the prohibition, the "chilling effect" of this vague new statute will be substantial if it becomes law. 34/

Notwithstanding these very grave concerns over the constitutionality of the proposed amendment to section 603, President Carter signed H.R. 5010 into law on January 8, 1980. He did so, he stated, because the "measure significantly improves the Federal Election Campaign Act by eliminating burdensome regulation of candidates and political committees and by increasing the opportunity for grass-roots political participation." However, he expressed serious doubts as to the constitutionality of the prohibition on voluntary campaign contributions:

> [A] severe infringement of Federal employees' first amendment rights . . . is caused by [section 603]. Under present law a person in Government service is permited to make voluntary campaign contributions to the authorized campaign committee of any candidate for elective office in the Federal system. This is a protected freedom that all citizens enjoy, and it is of vital importance.

34/ Id. at 2, 5. The Simms Memorandum went on to state:

> It is conceivable that the "chilling" effect resulting from the breadth and vagueness of the prohibition could be cured by some restrictive and precise administrative or prosecutorial interpretation of the prohibition, were the bill to become law. It was administrative construction that saved the Hatch Act itself from constitutional attack both from the standpoint of overbreadth and from the standpoint of vagueness. See Letter Carriers, supra. But it is not at all clear what sort of "restrictive and precise" interpretation can be given to this new prohibition. There is little in the legislative history or in the language of the bill itself that would make it possible to draw a bright line around the class of officers and employees who are subject to the prohibition and to separate them from those who are not.

> [Section 603] would restrict that right significantly by undermining the ability of persons in Federal service to make even totally voluntary contributions to the campaigns of their employing authority. This is an unacceptable and unwise intrusion upon their rights under the first amendment, and the Attorney General has advised me that it raises grave constitutional concerns. [Original emphasis.]

We may summarize the foregoing review of the legislative history of section 603 as follows:

(1) It seems reasonably clear that section 603 was intended primarily as a prophylactic device to curb the imposition, or the appearance of imposition, upon Government workers of "political assessments" in the form of inducements or coercion by their "employer or employing authority." This objective appears in Senator Hatfield's brief explanation of the Senate version of section 603, in the history of its immediate predecessor (former 18 U.S.C. § 607) and the Pendleton Act as a whole, as well as the 1876 precursor of former section 607, which is a linear ancestor of section 603.

(2) The phrase "employer or employing authority" first appeared in the House version of section 603, where it was intended to apply only to the "immediate employer" of a Legislative Branch employee. The committee report accompanying the House version stated, for example, that while an individual employed by a congressional committee would be prohibited from contributing to the chairman of that committee, he could contribute to other Members of that committee as well as to other Members of Congress, presumably including a Member of the congressional leadership of his own party. Indeed, we are informally advised that this narrow construction has been adopted by the ethics committees of both Houses of Congress concerning their present application of section 603 to congressional employees.35/ This prophylactic prohibition against contributions to one's "immediate employer" appears to have been adopted by the Senate as the preferred method of treating political contributions by Government employees not only in the Legislative Branch, but in the Executive Branch as well.

(3) There is no indication that Congress intended radically to alter or increase the limitations imposed by the Hatch Act and the multiplicity of other penal and non-penal

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35/ See generally House Ethics Manual, supra note 29, at 127-28.

statutes insofar as voluntary contributions to a President's campaign are concerned. Specifically, there is no evidence that Congress intended to impose an unprecedented criminal sanction upon voluntary contributions by each and every Executive Branch employee to an incumbent President's authorized committee. Such contributions have always been permitted under the Hatch Act and its implementing regulations.36/ We believe that congressional silence on this issue, if nothing else, indicates that such a sweeping revision in existing law was not Congress's intention when it passed H.R. 5010, a bill described by one of its sponsors as "technical and noncontroversial" 37/ in nature. See generally Muniz v. Hoffman, 422 U.S. 454 (1975); Bush v. Oceans Int'l, 621 F.2d 207 (5th Cir. 1980); Minpeco v. ContiCommodity Services, Inc., 558 F. Supp. 1348 (1983) (statutory changes in status quo should not be inferred absent clear congressional indication).

(4) While the pre-passage legislative history of section 603 fails to provide any guidance on how the term "employer or employing authority" is to be applied in the particular context of a President's re-election campaign, we do have such guidance in the form of letters to the President from four key legislators from both Houses of Congress who unambiguously declared their view that the provision "be read narrowly." Given the paucity of other, more authoritative evidence, we are inclined to give substantial weight to these Members' views of the statute in this particular context, at least as to the outer limits of section 603's intended scope.

(5) Notwithstanding the foregoing conclusions, it remains unclear how section 603 would be interpreted by a court with respect to voluntary contributions by Government employees to a President's re-election campaign committee. The unfortunate fact is that no authoritative indication exists in the legislative history of this section specifying those who would be prohibited from making such a contribution. Nor is there any legislative source describing the sort of problem or public interest which would be addressed by section 603 in this particular context. Moreover, while numerous related statutory provisions in one form or another restrict the rights of Government employees to engage in political activity, none has been interpreted to prohibit such persons from voluntarily contributing to a President's re-election campaign committee. For this reason

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36/ See p. 10 supra.

37/ See note 17 supra.

it is difficult to isolate a particular legislative need addressed in the general corpus of election laws which would either justify, or delimit the scope of, section 603's prohibition in the context of a President's re-election campaign.

In light of the vagueness which exists in applying section 603 in this context, and the statute's apparent imposition of criminal penalties upon the exercise of First Amendment rights by a potentially large group of citizens, we turn to the constitutional standards which must guide the interpretation and application of this law.

III

CONSTITUTIONAL CONSIDERATIONS

However the term "employer or employing authority" is understood, section 603 appears to prohibit each and every federal worker from making a political contribution to any other person in Government service who may be considered the contributor's "employer or employing authority." This prohibition applies notwithstanding the fact that the contribution is given voluntarily, and absent any solicitation, coercion, inducement or attempt to gain favor. In the particular context of a President's re-election campaign, this reading of section 603 would limit the rights of approximately five million federal civilian employees and military personnel.

The limitation imposed by section 603 operates "in an area of the most fundamental First Amendment activities." Buckley v. Valeo, 424 U.S. 1, 14 (1976). It is clear that "all citizens [have] a constitutionally protected right to actively support, work for and campaign for a partisan candidate for political office . . . . " McCormick v. Edwards, 646 F.2d 173, 175 (5th Cir.), cert. denied, 454 U.S. 1017 (1981). Indeed, "it can hardly be doubted that the constitutional guarantee [of the First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office." Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971). In Buckley, the Supreme Court's 1976 comprehensive analysis of the constitutionality of Federal election law limitations on campaign financing, the Court specifically recognized that while some restriction upon the right to contribute to candidates for political office may be constitutionally imposed for certain purposes, such restrictions "implicate fundamental First Amendment interests . . . of political expression and association . . . ." 424 U.S. at 23. Moreover, "the making of a political contribution by an individual is a means of self-expression which is directly linked to that individual's right to vote. Thus the Supreme Court has held that Congress may not . . . totally prohibit individual contributions." FEC v. Weinstein, 462 F.Supp. 243, 249 (S.D.N.Y. 1978) (citing Buckley v. Valeo).

Because political contributions constitute, in and of themselves, a form of activity protected by the First Amendment, and are also directly linked to the right to vote which "is preservative of other basic civil and political rights," Reynolds v. Sims, 377 U.S. 533, 562 (1964), restrictions upon such contributions must be carefully and meticulously scrutinized. "It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny." Elrod v. Burns, 427 U.S. 347, 362 (1976)(op. of Brennan, J.); see also Reynolds v. Sims, 377 U.S. at 562; NAACP v. Alabama, 357 U.S. 449, 460-61 (1958). With respect to section 603 this "exacting scrutiny" must be directed at two constitutionally salient characteristics: its potential vagueness in scope of application, and its potential overbreadth with respect to any demonstrable and compelling state interest.38/

Section 603 is also subject to careful constitutional scrutiny for vagueness because it is a penal statute. A criminal statute is unconstitutionally vague under the Due Process Clauses of the Fifth and Fourteenth Amendments if it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, ____ U.S.____, 51 U.S.L.W. 4532, 4533 (1983); see also Village of

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38/ It has been observed that the doctrines of vagueness and overbreadth are very closely related in the First Amendment area:

> to the extent that each is designed to insulate First Amendment activity from the exercise of arbitrary discretion at the hands of local officials, they are virtually indistinguishable. Thus, a vague statute which lends itself to an expansive construction suffers from the vice of overbreadth since it is capable of arbitrary or discriminatory use against protected activity.
>
> Moreover, to the extent persons refrain from protected activity because they fear an expansive construction of a vague statute, the impact cannot be distinguished from that caused by a precise but overbroad statute which explicitly forbids the protected activity.

1 N. Dorsen, P. Bender, B. Neuborne, Political and Civil Rights in the United States 1486 (4th ed. 1976) (citation omitted).

Hoffman Estates v. Flipside, 455 U.S. 489 (1982). Where substantial limitations upon protected First Amendment activity are imposed through criminal statutes, constitutional scrutiny for vagueness is particularly exacting. See Smith v. Goguen, 415 U.S. 566, 573 (1974); Parker v. Levy, 417 U.S. 733, 756 (1974); Winters v. New York, 333 U.S. 507, 515 (1948); United States v. Dozier, 672 F.2d 531, 539 (5th Cir.), cert. denied, 103 S. Ct. 256 (1982); Joyce v. United States, 454 F.2d 971, 982-83 n. 25 (D.C. Cir. 1971), cert. denied, 405 U.S. 969 (1972).

The Supreme Court, however, has upheld both state and federal restrictions upon the political rights of public employees against void-for-vagueness challenges. Broadrick v. Oklahoma, 413 U.S. 601 (1973); CSC v. Letter Carriers, 413 U.S. 548 (1973). See generally United Public Workers v. Mitchell, 330 U.S. 75 (1947)(upholding Hatch Act); United States v. Wurzbach, 280 U.S. 396 (1930)(upholding prohibition upon solicitation or receipt of political contributions); Ex Parte Curtis, supra. In Letter Carriers, the Court held that the Hatch Act was sufficiently particularized in specifying both what was forbidden as well as what was permitted political conduct. The Court relied heavily upon Civil Service Commission regulations which construed in explicit detail the expansive language of the statute which generally prohibited any Executive agency employee from taking "an active part in political management or in political campaigns." 5 U.S.C. § 7324(a). Moreover, the Court emphasized, the Commission had established a procedure by which any employee in doubt about the legality of some particular conduct could seek and obtain authoritative advice from the Commission. 413 U.S. at 580.

In the Letter Carriers companion case, Broadrick v. Oklahoma, supra, the Court also treated allegations of impermissible vagueness in the context of a constitutional challenge to a law limiting the political rights of state civil servants in much the same manner as the Hatch Act does for federal workers. The Court relied upon what it described as the "plainest language" of the statute which, inter alia, forbade all state employees in the classified service from soliciting contributions for any political purpose without regard to the employment status of the contributor. Id. at 607-8. The statute also prohibited all state officers from soliciting or receiving any political contribution from an employee in the classified service. See id. at 604 n.1. As in Letter Carriers, the Court found it to be "significant" that the state Personnel Board was available to rule in advance on the permissibility of particular conduct under the statute. Id. at 608 n.7. Following both Letter Carriers and Broadrick, one lower federal court has upheld a broadly worded state-imposed limitation upon political contributions by public employees against a vagueness challenge. See Bruno v. Garsaud, 594 F.2d 1062, 1064 (5th Cir. 1979), discussed at pp. 28-29 infra.

As we have noted, the void-for-vagueness doctrine in First Amendment cases is closely related to the requirement that statutes which infringe on fundamental liberties must be "narrowly drawn to accomplish a compelling governmental interest." United States v. Grace, ____ U.S. ____, 51 U.S.L.W. 4444, 4446 (1983); see also Plummer v. City of Columbus, 414 U.S. 2 (1973); United States v. Robel, 389 U.S. 258 (1967); Aptheker v. Secretary of State, 378 U.S. 500 (1964); NAACP v. Button, 371 U.S. 415, 438 (1963). In the particular context of limitations upon the right of political association, the Supreme Court has declared that:

> a significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest. For even when pursuing a legitimate interest, a State may not choose means that unnecesarily restrict constitutionally protected liberty. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedom." If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.

Kusper v. Pontikes, 414 U.S. 51, 58-9 (1973) (holding unconstitutional an Illinois election statute limiting the right to vote in a party's primary election to those who have not voted in any other party's primary election during the preceding 23 months) (citations omitted). Similarly, in Broadrick v. Oklahoma, 413 U.S. at 611-12, it was recognized that:

> the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. Herndon v. Lowry, 301 U.S. 242, 258 (1937); Shelton v. Tucker, 364 U.S. 479, 488 (1960); Grayned v. City of Rockford, 408 U.S. [104,] at 116-117 [1972]. [Emphasis added.]

Again, however, we observe that the Supreme Court has repeatedly declined to hold that the broad restrictions upon the political rights of public employees (generally in the "classified" or "protected" civil service) found in the Hatch Act and similar state legislation are either unsupported by sufficiently important state interests or not drawn narrowly with respect to them. In Letter Carriers the Court upheld

the Hatch Act's restrictions upon the First Amendment rights of Government employees, declaring that "plainly identifiable acts of political management and political campaigning on the part of federal employees may constitutionally be prohibited." 413 U.S. at 567. The Court isolated three "major," "important" governmental interests which justified the Hatch Act's restrictions: (1) the need for "impartial execution of the laws," id. at 565; (2) the need to assure that "the rapidly expanding Government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine," id.; and (3) the need to assure that "Government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs." Id. at 566 (emphasis added). See also Broadrick v. Oklahoma, 413 U.S. at 610 (active partisan political activity by state employees may be constitutionally prohibited); United Public Workers v. Mitchell, 330 U.S. at 99 (active political participation by federal workers may be prohibited); United States v. Wurzbach, 280 U.S. at 398-99 (political pressure among federal workers to make contributions may be prohibited); Ex Parte Curtis, 106 U.S. at 373 (solicitation of political contributions by federal workers may be prohibited).

Lower courts, again following Letter Carriers and Broadrick, have similarly rejected a variety of overbreadth arguments and upheld significant limitations upon government employees' participation in the political process. See, e.g., Morial v. Judiciary Comm'n of Louisiana, 565 F.2d 295 (5th Cir. 1977), cert. denied, 435 U.S. 1013 (1978)(upholding state law requiring judges to resign before running for another office); Otten v. Schicker, 655 F.2d 142 (8th Cir. 1981)(upholding police regulation prohibiting employees from running for elective office); Paulos v. Breier, 371 F.Supp. 523 (E.D. Wisc. 1974), aff'd, 507 F.2d 1383 (7th Cir. 1974)(upholding suspension of police officer for sending letter to other officers urging support of a political candidate); Hartsell v. City of Knoxville, 375 F. Supp. 340 (E.D. Tenn. 1973)(upholding broad ban upon city employees participation in political campaigns).

The two most significant lower court cases for our purposes are Bruno v. Garsaud, supra, and Wachsman v. City of Dallas, 704 F.2d 160 (5th Cir.), cert. denied, No. 83-617, 52 U.S.L.W. 3440 (Dec. 5, 1983). In Bruno, a New Orleans police officer sought to enjoin a civil service investigation concerning his alleged signing and presenting of checks to a city councilman at a banquet in the councilman's honor. A Louisiana statute prohibited public employees from "directly or indirectly, pay[ing] or promis[ing] to pay any . . . contribution for any political organization or purpose. . . ."

594 F. 2d at 1063. In a very brief opinion, the Court of Appeals for the Fifth Circuit held that Bruno's conduct was clearly covered by the statute, and could constitutionally be proscribed. "In light of both the importance of the state interests underlying the statute and the numerous situations to which it might be validly applied, this is not an appropriate case for invalidating a state statute in its entirety at the behest of one whose conduct the statute constitutionally proscribes. . . ." Id. at 1064. The court did not elaborate upon which state interests it found sufficient to support the statute, but warned that it had "strong doubts that [the statute] could constitutionally be enforced to prohibit Louisiana classified employees, at least when acting as private citizens without any fanfare or publicity, from making contributions to a political candidate or party." Id. (citing Buckley v. Valeo).

In Wachsman, the same court upheld an analogous prohibition against contributions by Dallas city employees to the political campaigns of Dallas City Council candidates. The court found that although the Dallas city charter prohibition "affects a substantial first amendment right, we find it is reasonably necessary to achieve a compelling public objective." 704 F.2d at 173. That objective, the court explained, was to "prevent employees from being discriminated against or from attempting to achieve favor with council candidates." Id. at 174; see id. at 162 (charter provision containing contribution ban expressly stated that its purpose was to "avoid undue influence of city employees on the outcome of city council elections and to avoid undue influence of city councilmen or candidates for city council on city employees"). Moreover, the court determined that the contribution limitation was appropriately tailored to achieve these goals: "city employees are limited only to an extent that furthers their ability to perform optimally." Id. at 175.

One very forceful lesson from these cases is that the courts recognize that the need to immunize the classified public service from partisan political involvement is substantial and will justify relatively broad restrictions on the rights of these employees to engage in the political process. The case law regarding top-level policy officials, often described as "political" appointees, on the other hand, is virtually non-existent, because Congress and the state legislatures generally have not seen fit to prohibit political activity by those persons.

Finally, with respect to the issues of compelling interest and overbreadth, we note that in Buckley v. Valeo the Supreme Court held that FECA's limitation upon the amount an individual

could contribute to particular candidates was constitutional.39/ While acknowledging that restrications upon political contributions to candidates for public office "implicate fundamental First Amendment interests" of political expression and association, 424 U.S. at 23, the Court declared that "'[n]either the right to associate nor the right to participate in political activities is absolute.'" Id. at 25 (quoting Letter Carriers, 413 U.S. at 567). "Even a 'significant interference with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." Id. (quoting Cousins v. Wigoda, 419 U.S. 477, 488 (1975)) (emphasis added). See also Morial v. Judiciary Comm'n, 565 F.2d at 300 (court determines that under Buckley decision restrictions upon political activity of public employees are permissible "if justified by a reasonable necessity . . . to achieve a compelling public objective."). Applying that standard, the Buckley Court upheld FECA's $1,000 limitation on the amount an individual could contribute to a single candidate. The Court emphasized the manifest, demonstrable and significant problem of actual and potential public corruption which inheres in a regime of unlimited political contributions, and further noted a broad range of political activities in which those who were affected by the contribution limitation could continue to engage, specifically including contributions to candidates and their committees:

> The Act's $1,000 contribution limitation focuses precisely on the problem of large campaign contributions -- the narrow aspect of political association where the actuality and potential for corruption have been identified -- while leaving persons free to engage in

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39/ The Court did invalidate FECA's limitation upon independent expenditures, its limitation upon a candidate's expenditure of personal funds, and its ceilings upon overall campaign expenditures, holding that these limitations were not justified by sufficiently strong governmental interests to outweigh the "exacting scrutiny applicable to limitations on core First Amendment rights of political expression." 424 U.S. at 44-5; see id. at 39-59. The Court distinguished these impermissible expenditure limitations from the permissible contribution limitations by observing that while the former substantially restrained both the "quantity and diversity of political speech," the latter constituted "only a marginal restriction upon the contributor's ability to engage in free communication." Id. at 19-21.

independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources. [Emphasis added.]

Id. at 28. The Court made repeated references throughout its opinion to legislative and other reports which helped to clarify the legislative interest and establish the specific and substantial factual basis for the legislation. See, e.g., id. at nn. 20, 21, 23, 27, 28, 34-37, 40.

To summarize, section 603 is subject to "exacting scrutiny" with respect to two basic constitutional norms: (1) it must provide "sufficient definiteness" so that an ordinary person can understand what behavior is proscribed, specifically in this case, whether one's contribution to a presidential re-election campaign committee constitutes a crime, and (2) it must be "narrowly drawn" so as to represent a "considered legislative judgment" that the "compelling needs of society" justify this limitation upon First Amendment activity. We now apply these constitutional standards to the various possible interpretations which the courts may give to the scope of section 603.

IV

CONSTRUCTION OF SECTION 603 IN LIGHT OF ITS LANGUAGE, HISTORY, AND CONSTITUTIONAL CONSIDERATIONS

We have described the constitutional considerations generally implicated by section 603's criminal sanction against activity protected by the First Amendment. We now discuss how those considerations may apply in regard to the most likely judicial interpretations of the scope of that provision. We note at the outset that a court's choice among statutory interpretations does not occur in a constitutional vacuum. The Supreme Court has cautioned that "our task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations." CSC v. Letter Carriers, 413 U.S. at 571. This same judicial policy is manifest in other cases concerning First Amendment rights. See United States v. Grace, ____ U.S. ____, 51 U.S.L.W. 4444, 4445 (1983) ("Our normal course is first to 'ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.'"); New York v. Ferber, 102 S.Ct. 3348, 3361 n.24 (1982)("[w]hen a federal court is dealing with a federal statute challenged as overbroad, it should, of

course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction.").40/

Particularly in the area of election law statutes, this judicial policy has been employed to restrict the scope of provisions which are ambiguous and pose potentially grave constitutional difficulties if broadly construed. FEC v. Machinists Nonpartisan Political League, 655 F.2d 380, 394 (D.C. Cir.) ("[i]n this delicate first amendment area, there is no imperative to stretch the statutory language, or read into it oblique inferences of Congressional intent . . . . Achieving a reasonable, constitutionally sound conclusion . . . requires just the opposite"), cert. denied, 454 U.S. 897 (1981). Thus, because section 603 imposes potentially substantial and unprecedented limitations upon Government employees' exercise of First Amendment rights, its terms must be interpreted to avoid constitutional infirmity, if possible.

With this general principle in mind, we consider four possible interpretations of section 603 with respect to Government employee contributions to a President's re-election campaign committee.

A. Section 603's Scope of Application to a President's Re-election Campaign Committee May be Unconstitutionally Vague

We believe that a court may find section 603's scope of application with respect to contributing to a President's re-election campaign committee to be so uncertain that it will hold the statute to be unconstitutionally vague.

As noted in Part II, above, no authoritative indication exists in the language or history of section 603 specifying those who are prosecutable criminally for contributing to a President's re-election campaign. Indeed, the absolute lack of any legislative hearings, reports, or floor debates which might afford a means of reducing the statute's obvious vagueness while at the same time clarifying the requisite compelling state interest constitutes a serious, if not fatal, flaw in this legislation. While it is true that broad restrictions upon the political activities of Government workers were upheld against allegations of vagueness by the Supreme Court in Letter Carriers, that case is easily distinguishable from any case involving section 603, since (1) unlike the Hatch

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40/ See also United States v. Rumely, 345 U.S. 41, 45, 47 (1953); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937); Ashwander v. TVA, 297 U.S. 288, 341, 346-47 (1936) (Brandeis J., concurring); Crowell v. Benson, 285 U.S. 22, 62 (1932).

Act, whose terms were definitively supplemented by decades of administrative adjudications and rulemaking, section 603 has no regulatory or administrative gloss which provides any guidance concerning which person's contribution to the President's campaign is proscribed; and (2) unlike the Hatch Act, an administrative statute with respect to which any employee could obtain definitive advice from the agency exclusively authorized to administer it, section 603 is a criminal provision which, because of its vagueness, may permit "a standardless sweep [that] allows . . . prosecutors and juries to pursue their personal predilictions." Smith v. Goguen, 415 U.S. at 575. Clearly a statute imposing penal sanctions must be more carefully drafted than other remedial or regulatory statutes in order not to "encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, ____ U.S. ____, 51 U.S.L.W. at 4533.

While it is, of course, impossible to predict with confidence the outcome of a vagueness challenge to section 603, we believe that a court would have difficulty finding legislatively established "minimal guidelines" necessary to avoid essentially "standardless" application of the statute to a President's re-election campaign. Id. at 4534. See pp. 25-26 supra.

B. Section 603 May be Construed to Prohibit All Executive Branch Employees and Military Personnel From Making a Contribution to the President's Re-election Campaign Committee

As already noted, the term "employer or employing authority" is so broad and the President's authority both as Chief Executive and Commander-in-Chief is so extensive that section 603 could be read to prohibit most, if not all, five million Executive Branch employees and military personnel from making a contribution to the President's re-election campaign committee. This interpretation is a genuine possibility given the absence of any determinative legislative history concerning the application of section 603 in this context. However, as already noted, the paucity of legislative materials makes it very difficult to determine the requisite compelling state interest which might justify this expansive interpretation. It must be remembered that in construing a statute under the strict scrutiny standard, a court normally will refuse to hypothesize conceivable governmental purposes which may support challenged legislation. Johnson v. Robison, 415 U.S. 361, 376-77 (1974). See also Schlesinger v. Ballard, 419 U.S. 498, 511 (1975) (Brennan, J., dissenting); Buckley v. Valeo, 424 U.S. at 25 ("'significant interference with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest")(emphasis added).

The Letter Carriers decision is of little help in finding sufficiently important public interests to support application of section 603 to all Executive Branch employees and servicemen. We doubt that the interests which supported the Hatch Act's prohibition on "active" participation in political management and campaigns, see pp. 27-28 supra, would also suffice to justify imposing an additional criminal penalty for wholly voluntary contributions by career civil servants or members of the armed forces to a President's re-election campaign committee. A voluntary political contribution is a relatively passive and unobtrusive means of political affiliation, and cannot fairly be described as a "plainly identifiable act[] of political management and political campaigning." Letter Carriers, 413 U.S. at 567. See Bruno v. Garsaud, 594 F.2d at 1064 (expressing doubt whether state statute could constitutionally prohibit public employees "when acting as private citizens without any fanfare or publicity, from making contributions to a political candidate or party"). Moreover, while most contributions are reported, the act of making a contribution is usually a private act, and we are not persuaded that the public interests justifying a prohibition upon "active" political involvement would also support a flat prohibition upon a private, uncoerced political contribution.41/ Clearly there are constitutional limits beyond which the Letter Carriers rationale may not be pushed. See Buckley v. Valeo, 424 U.S. at 48 n.54 (noting that Letter Carriers "carefully declined to endorse provisions threatening political expression").

Nor, in our view, can sufficiently important governmental interests be found to justify a blanket application of section 603 by analogizing the statute to the contribution limitations upheld in Buckley v. Valeo. Persons in Government service are already subject to the contribution limitations upheld in Buckley, the stringent restrictions on political activity imposed by the Hatch Act, and the protection of a variety of prophylactic criminal and administrative statutes discussed at pp. 11-13, above. The constitutional issue raised by section 603 is whether a "sufficiently important interest" exists to support this section's additional restriction on federal employees' right "to assist . . . in supporting candidates and committees with financial resources," and whether it is "closely drawn" to avoid unnecessary abridgement of that right. 424 U.S. at 25, 28. The Buckley decision upholding contribution limitations is by no means dispositive

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41/ But cf. Bruno v. Garsaud, supra (contribution limitation statute could be applied constitutionally to police officer who sponsored political banquet and presented checks to politicians); Wachsman v. City of Dallas, supra (upholding prohibition against any contribution by Dallas city employees to candidates for Dallas City Council).

as to this issue because (1) the prohibition contained in section 603 in no way addresses the problem "identified" in Buckley of corruption incident to large-scale political contributions; (2) neither the language nor the legislative history of section 603 indicates in any way that it was intended to serve the "important interests" underlying the FECA contribution limitations; and (3) unlike those limitations, section 603 cannot be said to "leav[e] persons free to engage in independent political expression"; on the contrary, a broad interpretation of section 603 entirely shuts off one of the only remaining significant avenues open to a federal worker under the Hatch Act who may wish unobtrusively to associate with a particular candidate who falls within its terms.

For these reasons, we are convinced that a court which understood section 603 flatly to prohibit most or all of the five million civilian and military workers in the Executive Branch from making voluntary, private political contributions to the President's re-election campaign committee could well hold the statute to be unconstitutional on the ground that it is not carefully tailored to promote a demonstrable and sufficiently important public interest.

C. Section 603 May be Construed to Prohibit Only Persons Employed by the President Pursuant to White House Office Personnel Authorization, 3 U.S.C. § 105, and Those Presidential Appointees Who Hold Cabinet Rank, From Making Contributions to the President's Re-election Campaign Committee

We have noted that there is no evidence in the legislative history of section 603 that Congress intended to impose a sweeping criminal sanction upon voluntary contributions by each and every Executive Branch employee to an incumbent President's authorized committee. In addition, while the pre-passage legislative history of section 603 fails to provide any guidance on how the term "employer or employing authority" is to be applied in the context of a President's re-election campaign, the legislative history that does exist supports an interpretation that limits application of the statute to cases where the candidate receiving the contribution is the "immediate employer" of the contributor. Moreover, prior to the President's approval of the bill, four key members of Congress expressed their view that, consistent with such a reading, "only the employees of the White House Office" should be prohibited from making contributions to a President's authorized committee.

We believe that a clearly defined, narrow interpretation of the term "employer or employing authority" might be employed by the courts in an attempt to save the statute from constitutional infirmity. The Court in Letter Carriers upheld the

Hatch Act largely due to the limiting and clarifying regulations and adjudications of the former Civil Service Commission. See Letter Carriers, 413 U.S. at 571-80. In this instance, unfortunately, we have no similar contemporaneous or post-passage administrative construction which helps to limit or clarify section 603's application to a President's re-election campaign. Since there exists a wide range of statutes 42/ which already prohibit the President and those who work for him from soliciting, inducing, depriving or threatening any Government employee with respect to political contributions, the type of political pressure most likely to satisfy a court as constituting a compelling governmental interest of sufficient magnitude to justify section 603's additional penal sanction would probably have to be based on an assumption about the coercive effect inherent in a relationship with an "immediate employer." Cf. Wachsman v. City of Dallas, 704 F.2d at 173-74 (upholding prohibition upon contributions by city workers to city council candidates, but expressing "doubt" whether the ban could be applied "across-the-board").

The Supreme Court in Letter Carriers observed that "'in an employer/employee relationship, the extent of voluntaryism tends to be rather substantially circumscribed.'" Id. at 566 n. 12. As the relationship between employer and employee -- candidate and contributor -- becomes more attenuated, however, the compelling legislative interest required to justify the additional limitation imposed by section 603 becomes more difficult to demonstrate. This factor is particularly compelling in the case of the President, who might be considered the "employer or employing authority" of more people than any other elected official in the United States, yet he has a personal employer/employee relationship with only a minute fraction of them. For this reason we believe the constitutional considerations which bear upon the phrase "employer or employing authority" as applied to the President require that the phrase be construed narrowly to apply only to those persons in Government service who may reasonably be expected to be subject to some form of subtle pressure to contribute to the President's re-election committee because of the President's status as their immediate "employer or employing authority."

A reasonable expectation of such political pressure could be argued to exist as a result of three elements in an employment relationship involving the President: (1) the President personnally appoints the contributor, or employs him pursuant to his discretionary authority under 3 U.S.C. § 105; (2) the President personally supervises the performance of the contributor; and (3) the contributor works in an office involved with the

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42/ See pp. 11-13 supra.

political activities of the President.43/ Assuming that the purpose of section 603 is to protect against the possibility of coercion by an "employer or employing authority," and consistent with the constitutional imperative of employing legislative means "closely drawn to avoid unnecessary abridgement of associational freedoms,"44/ an interpretation which employs these three elements of appointment, close supervision, and working environment comes closest to fulfilling the legislative intent and complying with constitutional standards. Moreover, this construction would substantially ameliorate the severe infringement upon First Amendment rights which otherwise would result from applying the statute to those whose ability to participate actively in the election is already seriously limited by the Hatch Act.

43/ We note that the first two elements -- appointment and close supervision -- also appear in other legal contexts as essential features of the employer/employee relationship. Although neither the term "employee" nor "employer" is defined in title 18, the term "employee" is defined for title 5 purposes to include any individual who is "(1) appointed in the civil service by . . . the President; . . . (2) engaged in the performance of a Federal function . . . and (3) subject to the supervision of an individual named by paragraph (1). . . ." 5 U.S.C. § 2105(a). (The title 5 definition of "employee" is the one normally used as a starting point for any analysis of whether the conflict of interest provisions of title 18 apply to a particular individual. Other statutory definitions of the terms "employee" and "employer" have been found inapposite to this problem.)

The elements of appointment and direct supervision are also present in the definition of "employee" found in the common law of agency, where a distinction is drawn between a "servant" (or, more recently, "employee") and an "independent contractor." The Restatement (Second) of Agency § 220(2) states, "in determining whether one acting for another is [an employee] or an independent contractor, the following matters of fact, among others, are considered: (a) the extent of control which . . . the master may exercise over the details of the work . . . ." See also Lodge 1858, AFGE v. Webb, 580 F.2d 496, 504 (D.C. Cir.) ("degree of control or supervision is the principal element that differentiates employees and independent contractors at common law, in the state statutory context, and in the context of other federal statutes as well")(original emphasis), cert. denied, 439 U.S. 927 (1978).

44/ Buckley v. Valeo, 424 U.S. at 25.

As discussed earlier, the legislative history of section 603 does support the conclusion that the statute should be read no more expansively than to bar contributions only from those Government employees whose immediate employer is the President. However, while this limiting interpretation of the scope of section 603 constitutes a reasonable definition in general of the outside perimeter of the statute's coverage, and may be the construction most faithful to the legislative history, applying it to the particular class of persons who work directly for the President appears anomolous in several respects. A reasonably persuasive case can be made for the proposition that this interpretation provides protection for those Government officers and employees who least need it because they are least likely to be unwilling to make contributions voluntarily to the President's re-election campaign committee. Government employees in the White House Office, and policymaking officials of the United States who hold Cabinet rank, as a class, are without doubt the most politically active individuals in the Executive Branch. Indeed, the Hatch Act, 5 U.S.C. § 7324(d), expressly exempts such individuals, among others, from any limitations imposed by the Act upon political activity.45/ Such individuals must be assumed to be well aware of the political role they assume when entering office, and are therefore least likely to be intimidated by, or resistent to, political activity. In fact, this group of individuals, who are by custom politically involved as part of the President's "team," are exempted from most restrictions on political activity for the reason that such restrictions would be illogical and might serve to weaken the political process.

45/ One member of Congress justified this exemption as follows:

> A President of the United States should have the right to defend his record in the arena of politics, and the same thing is true of a Cabinet member or policy-making officials, who naturally must defend the policies for which they are responsible in the field of political activity.

84 Cong. Rec. 9630 (1939) (Rep. White).

"Political activity" ultimately is closely bound up with "policy" and with the structure of our government and the process of governing. The Constitution does not contemplate that the Executive Branch or the Legislative Branch would somehow be insulated from "politics." The Supreme Court often refers to these two branches as the "political branches", in order to connote that those branches, headed by elected officials, are the places where policy should be made.

With respect to campaign contributions in particular, such individuals are undoubtedly much more likely, as a group, to wish to contribute to the President's re-election campaign committee then a comparably-sized, random group of other Government employees. Congress generally has recognized that the public understands and accepts the political role performed by this group of officers and employees, and no appearance of impropriety is likely to result from allowing such individuals to contribute their financial resources -- in addition to their time and energy -- to the President's re-election.46/ Finally, virtually all of the cases which uphold restrictions on political activity by public employees do so in the context of the protected civil service, not top-level, appointed, "political" policymakers.

For these reasons it is by no means certain that a court would adopt a construction of section 603 which prohibited contributions only when made by the President's "inner-circle" of political appointees. Moreover, were a court to do so, it might conclude that the restriction upon the First Amendment rights of this class of persons was not justified by a demonstrable or sufficiently important legislative interest.

D. Section 603 May be Construed to Prohibit Political Contributions Only Where Some Corrupt Purpose or Expectation of Improper Gain is Demonstrated

We have considered one other construction of section 603 which might be employed to narrow its scope and thereby avoid serious questions concerning overbreadth. The legislative history of section 603 reveals an intention to curb the possibility of political assessments by federal employers upon other federal employees. The term "assessment" connotes the imposition of some charge, levy or fee; it implies some absence of voluntariness. The Department of Justice maintained a long-standing position that former 18 U.S.C. § 607, the

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46/ It could be argued, on the other hand, that while Congress exempted employees of the White House Office, among others, from those limitations upon political activity imposed by the Hatch Act, Congress could also determine with complete consistency that such persons should be absolutely insulated from any pressure to contribute their personal financial resources to the President's re-election campaign. This is particularly true, one might argue, given the political environment within which they work, and the fact that these Government employees, unlike most others, are legally authorized to contribute their time and talents to the campaign.

predecessor statute to section 603, would be enforced only in cases of corrupt motive. This policy was evidently perceived by Congress as a policy of enforcing a prohibition only against involuntary contributions. Congress also evidently concluded that this Department's application of former section 607 only to Executive Branch employees did not fully promote the policy of protecting Government employees from political assessments; concern existed over the protection of congressional employees as well. Former section 607 therefore was amended to broaden the class of protected Government employees to include congressional employees. Contributions to a candidate's authorized committee were also expressly brought within the ambit of the statute.

It could be argued that this legislative process does not reflect any clear intent to disturb or overturn the long-standing Department of Justice policy of enforcing former section 607 only in cases of corrupt motive. Limiting the prohibition to cases of corrupt purpose (or expectation of improper gain) is consistent with the purposes underlying former section 607 and, perhaps, its revision in 1980. While wholly voluntary contributions to the President's authorized committee, free of any corrupt purpose or improper expectation and made pursuant to applicable Hatch Act limitations, would not be limited under this interpretation of section 603, contributions to the President's campaign by Executive Branch employees and military personnel of whatever rank or station that are not made in a wholly voluntary fashion, free of corrupt purpose or improper expectation, would be prosecutable under that section. 47/

Especially given the vagueness in the scope of section 603's application, construing the statute in this fashion to include a mens rea requirement would undoubtedly help reduce the likelihood of a successful challenge to the constitutionality of the law. The Supreme Court has "recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea." Colautti v. Franklin, 439 U.S. 379, 395 (1979). "The requirement that the [criminal] act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." Screws v. United States, 325 U.S. 91, 102 (1945) (plurality opinion). Moreover, the courts have held that a statute that otherwise may

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47/ As we noted earlier, any knowing solicitation of a political contribution from these federal employees by another federal employee is a crime under 18 U.S.C. § 602.

be unconstitutionally vague may be saved by the inclusion of a specific mens rea requirement even absent clear statutory language indicating the existence of such requirement. See Gasser v. Morgan, 498 F.Supp. 1154, 1160 (N.D. Ala. 1980) ("specific intent requirement can be implied into an offense even when no mental element is expressly required by the statute") (original emphasis).

Construing section 603 in this manner also alleviates substantial constitutional difficulties by focusing its application more precisely on those interests found by the Court in Letter Carriers to justify some infringement of Government employees' First Amendment rights, viz., guarding against the possibility that the public work force might be converted into a "corrupt political machine," and assuring that Government employees are not pressured to make contributions "in order to curry favor with their superiors." Letter Carriers, 413 U.S. at 565-66.

V.

CONCLUSIONS AND RECOMMENDATION

While the issue is a very close one, complicated by difficult questions of statutory construction and legislative intent, we have serious reasons to doubt the constitutionality of section 603. The courts may well find that section 603 is impermissibly vague in its intended application, and/or that it is neither supported by sufficiently important state interests nor drawn narrowly enough to avoid unnecessary abridgement of First Amendment rights. We have articulated in parts IV, C and IV, D, however, two limiting constructions of the statute, both of which are arguably compatible with the purposes of the statute and its legislative history and which, if adopted by the courts, would materially reduce the vulnerability of section 603 to constitutional attack for overbreadth.

Clearly, Congress may constitutionally legislate to restrict active political participation and intimidation among Government workers. Congress may even be able, with a clear purpose and a precise statute, to prohibit some or all of the federal work force from making political contributions to some, or perhaps even all, federal employee-candidates. Unfortunately, while Congress may have intended to accomplish something of this nature with section 603, we are presented with a virtually empty legislative record and must therefore speculate as to legislative motive and goal, who Congress intended to affect, under what circumstances, and why.

We deal in an area in which comprehensive protections and prohibitions already exist. While this factor by no means precludes further remedial or prophylactic legislation,

First Amendment standards require us to search for and weigh the legislative goal which motivates the imposition of this specific incremental limitation, and consider that goal against the First Amendment rights which are limited in order to achieve it. If no sufficiently important public benefit is achieved as a result of the limitations imposed upon these rights, the courts will not enforce the statute. Here, we cannot ascertain what Congress intended to accomplish in passing section 603, why it felt it was necessary, which class of persons were intended to be protected, and under what conditions.

However, as we have stressed throughout this opinion, courts have been particularly sensitive to the legitimate governmental objectives implicit in attempts to insulate public employees, at least those in the classified service, from political pressures, temptations and influences, both actual and apparent. Traditional First Amendment values have apparently been subordinated to these interests in many of the relevant cases. The irony of this statute is that its most logical narrowing construction to avoid an overbreadth defect restricts the statute's application to those individuals not in the protected service and rarely considered in need of this type of restriction. Therefore, we are unable to predict with confidence precisely how the statute would be construed by the courts, and any opinion we could offer would be of only limited utility to those who would rely upon it.

We emphasize that the Department of Justice maintains a long-standing, constitutionally-based policy of defending in litigation the constitutionality of an act of Congress whenever a reasonable argument can be made in support thereof, even if the Attorney General and the lawyers examining the case conclude that the argument may ultimately be unsuccessful. Only in those rare instances where an act infringes upon the constitutional powers and duties of the Executive, or when prior precedent overwhelmingly indicates that the statute is invalid, will the Department refuse to defend a statute's constitutionality.48/ Because this statute does not trench upon

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48/ See generally Letter from Attorney General William French Smith to Honorable Strom Thurmond and Honorable Joseph R. Biden, Jr. (April 6, 1981); Representation of Congress and Congressional Interests In Court: Hearings Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 94th Cong. 2d Sess. (1975-76) (testimony of Assistant Attorney General Rex Lee); 40 Op. A.G. 158 (1942); 39 Op. A.G. 11 (1937); 38 Op. A.G. 252 (1935); 31 Op. A.G. 475 (1919).

the powers or duties of the President, and because we find that reasonable arguments may be constructed in support of the constitutionality of section 603, the Department of Justice would vigorously defend the constitutionality of the statute if it were challenged in court.

We therefore suggest that the legal interests of the individuals mentioned in your request would best be served by commencement of a civil action seeking declaratory and/or injunctive relief against enforcement of section 603. Those individuals mentioned in your request, as well as the President's authorized re-election campaign committee, could assert standing to seek appropriate relief from enforcement of this statute during the upcoming Presidential campaign as was done in Buckley v. Valeo, 424 U.S. at 7-8 (holding that "a potential contributor" and various political organizations had standing to challenge FECA's contribution limitations). A judicial determination of the scope of section 603 would provide substantially greater protection and legal certainty for the persons mentioned in your request than would be afforded by any legal opinion.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

Attachment

ATTACHMENT

THE WHITE HOUSE

WASHINGTON

November 14, 1983

MEMORANDUM FOR THEODORE B. OLSON
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Scope of 18 U.S.C. § 603

As you know, 18 U.S.C. § 603 prohibits an officer or employee of the United States receiving any salary or compensation from the United States from making a political contribution to the authorized campaign committee of his "employer or employing authority". I would appreciate receiving your views on the scope and constitutionality of 18 U.S.C. § 603 as soon as possible.

In providing such views, please address the following questions:

(1) Does 18 U.S.C. § 603 prohibit employees of the White House Office, as that term is used in 3 U.S.C. § 105, from contributing to the authorized campaign committee of the President?

(2) Does 18 U.S.C. § 603 prohibit Presidential appointees subject to Senate confirmation who are either full-time or part-time employees of the Government from contributing to the authorized campaign committee of the President?

(3) Does 18 U.S.C. § 603 prohibit Presidential appointees not subject to Senate confirmation who are serving, either in full-time or in a part-time capacity on Executive boards and commissions from contributing to the authorized campaign committee of the President?

Thank you for your immediate attention to this matter.