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The American Law Institute
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Principles of the Law, Government Ethics

Tentative Draft No. 1

(April 24, 2015)

SUBJECTS COVERED

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The typical ALI Section is divided into three parts: black letter, Comment, and Reporter's Notes. In some instances there may also be a separate Statutory Note. Although each of these components is subject to review by the project's Advisers and Members Consultative Group and by the Council and Annual Meeting of the Institute, only the black letter and Comment are regarded as the work of the Institute. The Reporter's and Statutory Notes remain the work of the Reporter.

The Council approved the initiation of this project in October 2009.

Earlier versions of the material contained in this Draft can be found in Preliminary Draft No. 1 (2013) and Council Draft No. 1 (2014).

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Foreword

The ALI's project on Principles of Government Ethics is designed to provide guidance to government agencies and individuals on the proper standards of conduct that should apply to current and former public employees and officials. This topic is of critical importance to the confidence that citizens have in their government. The ALI Council undertook this project following an era of widely publicized scandals that raised issues of public integrity. As a result, all levels of government have struggled to develop, revise, and refine the rules and procedures intended to ensure that public officials act in the public interest and use public resources for public, not private, purposes. The ALI, with its tradition of painstaking research and broad engagement by diverse groups of leaders of the legal profession, can play an important role as this area begins to move toward maturity.

Our project will address a wide variety of specific issues: Under what circumstances, if ever, can elected officials receive gifts, free meals, entertainment, or travel from private citizens whose interests are affected by government? What restrictions should be imposed on the private economic activities of elected officials and government employees? What restrictions, if any, should apply to former government officials who seek or accept private employment? What should lobbyists be required to disclose about their activities? What procedures should be used to investigate and resolve claims of ethical misconduct or conflict of interest?

This Meeting is the first one at which Principles of Government Ethics will be reviewed. Presented for discussion and approval are four important Sections of Chapter 4, dealing with the election-related activities of public employees. I am very grateful to the Reporter, Richard Briffault of Columbia University School of Law, and to the Associate Reporters, Kathleen Clark of Washington University School of Law and Richard Painter of University of Minnesota Law School, for their very significant work on this project. Their Advisers and Members Consultative Group, as well as the Council, contributed sustained attention and important insights, and deserve our deep thanks.

RICHARD L. REVESZ
Director
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April 23, 2015

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PRINCIPLES OF THE LAW, GOVERNMENT ETHICS

§§ 401–404

REPORTER'S MEMORANDUM

The ethical standards that ought to govern the behavior of government officials have long been a matter of great public interest. The development of the standards and procedures needed to assure that public officials act in the public interest and use public resources for public, not private purposes, has been the focus of criminal codes, ethics laws, executive orders, and legislative rules at all levels of government, federal, state, and local. The goal of the Principles of Government Ethics project is to distill a basic set of principles that articulate the values that ought to shape the field and, where possible, to present operational rules that will vindicate those goals in order to provide some guidance to the many governments, particularly at the state and local level, that may be developing ethical standards for the first time or revising, refining, and strengthening rules previously adopted.

The Principles of Government Ethics will consist of the following chapters:

Chapter 1 Scope, General Principles, and Definitions

Chapter 2 Gifts and Other Private Benefits Provided to Public Servants

Chapter 3 Conflicts of Interest and the Outside Activities of Public Servants

Chapter 4 The Election-Related Activities of Public Servants

Chapter 5 Post-Government Employment Restrictions on Former Public Servants

Chapter 6 Administration and Enforcement of Government Ethics

A potential seventh chapter (which would become Chapter 6, and the administration and enforcement chapter would become Chapter 7) would address Lobbying.

Briefly put, after an initial chapter laying out the scope and general principles of the project and defining key terms that will be used throughout the project, the next four chapters will address the substantive principles of government ethics. Chapter 2 will consider the principles governing the provision of benefits by outsiders to public officers and employees. Chapters 3 and 4 look at the actions of government officials that provide them with private

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benefits, with Chapter 3 focusing on economic and personal benefits and Chapter 4 focusing on the use of public resources in election campaigns. Chapter 5 examines the rules that ought to govern the behavior of former public servants when they thereafter seek and obtain private employment. Chapter 6 turns from substantive principles to the equally important topic of the administration and enforcement of those principles. The chapter on lobbying would, if we add it, consider the rules that ought to govern the actions of people outside government who seek to influence government actions.

Four sections of Chapter 4 are attached. Chapter 4 addresses a critical subject for the Principles of Government Ethics—the need to place limits on the ability of government officers and employees to use public resources for their personal or partisan benefit in elections. The key move it makes is to take the longstanding concept of regulating the *political* use of public resources and focusing instead more narrowly on *election-related* activities. This reflects the idea that in a democratic system elected officials and their appointees may appropriately use public resources to pursue public policy goals and particular political, legislative, or regulatory agendas. Our officials are elected in part because they campaign for the political purposes they intend to pursue when in office; their senior appointees may be selected because of their political affiliation or support for those goals; and the voters can judge at the next election whether they approve of an elected official's or administration's political actions and vote it out of office if they disapprove. But the use of public resources to support a candidate's or party's *election campaign* is an entirely different matter. The legitimacy of an elected official's pursuit of political goals depends on the fairness of the election in which she or he was elected. The use of public resources to aid one candidate or party undermines the fairness of the election and distorts the electoral process. Taxpayers can have no interest in having their funds used to support one side in an election, much as citizens have no interest in the powers they have delegated to elected officials being used to aid one side in an election. In many ways, the election-related used of public resources is more pernicious than the use of public power for private personal benefit, as it not only diverts public resources to private ends, it also undermines the role of elections as the linchpin in the system of democratic self-government.

Of course, it is simple enough to declare that public resources should not be used to aid candidates or parties in an election; it is far more difficult to determine what actions of

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government officials should be deemed election-related—as opposed to more broadly and permissibly political—for purposes of articulating the restrictive principle. Public policy and electoral politics often go together. Public officers may act for reasons that are simultaneously intended to advance both their policy aims and electoral goals, and actions that advance an elected official's or administration's political program may also advance their electoral success or the success of their party. A central focus of this Chapter is to work through the permissible governmental/impermissible electoral distinction in a variety of contexts where the question has most commonly arisen and raises particularly important concerns.

In the four sections that follow, § 401 lays out the general principle that government officers should not use public resources in connection with elections. It provides a theoretical justification for the principle; it defines the basic concepts of public resources and election-related activities; and it provides appropriate exceptions. Sections 402, 403, and 404 apply the restriction and draw the government/elections distinction in three areas that have been the subject of considerable, albeit not always consistent, regulation at the federal, state, and local level — communications, travel, and public-employee participation in campaigns. These have been addressed variously in statutes, administrative regulations, legislative ethics, and occasionally in case law. Not all jurisdictions have adopted laws or ethical regulations on these issues, or have done so for all officials. Indeed, many have not. One goal of this project is to provide a model for jurisdictions that have not acted or have not fully considered these issues. But the rules articulated in these provisions draw on and distill concepts found in a wide range of existing legal materials

For each of these sections, readers ought to consider

- the scope of the proposed definitions of election-related activities
- the public resources covered
- the proposed exceptions for unavoidable or de minimis electoral activity; and,
- in § 403, the treatment of mixed governmental and election-related travel.

An issue that cuts across these first four sections relates to the different types of public officers and employees subject to the proposed principles. In some places, such as §§ 401(a), (b), 402(a), (b), 403(a), (c), and 404(a), the proposed principles do not distinguish among different categories of public officers and employees. In other places, particularly §§ 401(c), 403(b), and

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404(b),(c),(d), the Chapter proposes different principles for different categories of public servants: elected officials (with further differences between a chief executive and legislators), their staffs, senior appointed officials, and other employees. An important question is whether and to what extent the same principles should apply across the board to all public servants, and when and, again, to what extent distinctions should be made. Are the distinctions drawn, particularly in § 404, the appropriate ones? If not, does the rule need more distinctions or fewer distinctions, or should it otherwise draw the distinctions differently?

In addition to these four sections, the Reporter has researched and drafted two additional sections, which remain under review, that would (i) address the activities of elected officials who seek to advance the interests of their campaign contributors, and (ii) articulate a more general principle concerning the use of government resources, such as legislation, outside the context of a specific election, to aid candidates or political parties to win elections. Although the practice of rewarding contributors with favorable government action does not involve the commitment of public resources directly to electioneering, it raises similar concerns about the ability of government officials to draw on government resources for personal political benefit. The question of restrictions on actions on behalf of campaign contributors has also been addressed, albeit less precisely, by some government ethics codes and commentators. There is relatively little basis in American law for treating purely partisan action concerning election laws as an ethical issue. Such an approach would be consistent with, if not necessarily mandated by, the concerns underlying the other sections of this Chapter, although it would also be controversial.

— Richard Briffault
Reporter

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CHAPTER 4

THE ELECTION-RELATED ACTIVITIES OF PUBLIC SERVANTS

§ 401. Prohibition on the Use of Public Resources in Election Campaigns

(a) Except as provided in subsections (b) and (c), public servants may not use public resources to promote, attack, support, or oppose the campaign of any candidate for elected office, to assist or oppose any political party, or to assist or oppose any other organization in its support for or opposition to candidates for elected office.

(i) "Elected office" includes any federal, state, or local office.

(ii) "Public resources" include but are not limited to

(A) public funds;

(B) space in buildings, offices, or rooms owned, rented, or leased by a public entity;

(C) office equipment and supplies, such as stationery, postage, mailing lists, and office files; furniture; computer hardware, software, and e-mail systems; printers, copiers, fax machinery, telephones, and personal digital assistants; and

(D) publicly maintained websites.

(iii) Campaign-related activities subject to this prohibition include but are not limited to the solicitation, receipt, or acceptance of campaign contributions; planning campaign strategy; solicitation of endorsements or other statements of support; solicitation to work on an election campaign; and solicitation of votes.

(b) The use of public resources for campaign-related activity is permitted when such resources are generally available to competing candidates or political organizations, or to the public.

(c) An elected official, or staff to an elected official, may use public resources for campaign-related activity if such use

(i) is incidental and subordinate to the public use or is, as a practical matter, unavoidable, and

(ii) involves minimal public expense, or, if the cost is more than de minimis, the public is reimbursed for the cost of the campaign-related use.

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Comment:

a. General principle barring use of public resources for electoral purposes. As a general rule, public servant should not use public resources to support or oppose candidates for elected office, political parties, or other political organizations that support or oppose candidates for elected office. This general rule is based on two fundamental principles: First, public resources should be used to advance public, not private, purposes. There is no public interest in aiding a particular candidate or party that is in competition with others to win an election. Using public resources to aid a candidate or party to win an election is simply a specific instance of the generally prohibited misuse of public resources for private gain.

Second, in our democratic system, elections are the central mechanism that enables the public to determine who shall wield public power and to hold government officials accountable for their actions. The ability of government officials to use government resources to favor one candidate or party over others would undermine this essential purpose of elections. Instead of the voters choosing their government, people in government would be using taxpayer dollars to keep themselves in power. As the California Supreme Court has explained, "[a] fundamental precept of this nation's democratic electoral process is that government may not 'take sides' in election contests or bestow an unfair advantage on one of several competing factions. A principal danger feared by our country's founders lay in the possibility that the holders of government authority would use official power improperly to perpetuate themselves, or their allies, in office. . . . [T]he selective use of public funds in election campaigns . . . raises the specter of just such an improper distortion of the democratic electoral process." Stanson v. Mott, 17 Cal. 3d 206, 217, 551 P.2d 1, 9 (1976). The prohibition on the use of public resources to aid or oppose candidates, parties, or other political organizations in the context of elections is, thus, appropriate both to prevent the diversion of public funds to private benefit and to assure the government impartiality necessary for democratic elections to function as intended in determining the control of government.

Many jurisdictions have rules forbidding the "political" use of public resources. But much of government action is "political" in the sense of advancing the policy views and legislative or regulatory programs of particular groups and constituencies, typically in the belief that, or based on arguments that, such views or goals would benefit the public, as well as the interests of the proponents of those programs. There is nothing improper about a government official advancing a particular program or policy or taking actions that are popular with the

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electorate and, thus, may benefit the official in the next election. The use of government resources solely to aid officials in their election campaigns, however, is different. The benefit is intended to go to specific candidates or the party in power, not the public more broadly; the impact on the election is more direct; and the appearance of government intervention in the election—with the consequent effect on the public's perception of the fairness of the election—is more obvious.

The examples in subsection (a)(2) focus on the use of money and the material resources of government; government services, that is, the time and effort of public employees, are more specifically addressed in § 404, infra. In addition, two types of material resources that have been particular subjects of public concern and legal regulation—government-funded communications, such as franked mail and public-service announcements that feature elected officials, and campaign-related uses of government-owned transportation equipment—are addressed more specifically in § 402 and § 403, infra.

Illustrations:

1. Senator A, who is in the middle of his campaign for reelection, holds a daytime press conference in a room he has reserved in the State Capitol in which he announces his position on a contested campaign issue not related to any pending legislation, and he challenges his opponent to respond. His Senate office staff have used their office equipment to prepare the Senator's speech, to invite reporters to the event, and to prepare and make copies of a handout to be distributed at the event. Staff also attend the event to keep track of the questions and enable the Senator to prepare additional responses after the press conference. By using a public space to make a campaign statement, by using public office equipment in connection with a campaign event, and by having public employees work on the event and participate in it during regular work hours, the Senator has violated the prohibition on the use of public resources in election campaigns.

2. Senator B, who is also running for reelection, holds a daytime press conference in a room in the State Capitol to discuss the latest development in the legislative fight over a change in state tax policy that she has proposed. As in Illustration 1, her legislative staff organized the event and prepared materials for it, and some attend it. The questions and answers at the press conference focus entirely on the legislative issue. When a

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reporter raises a question about her reelection campaign, she declines to answer it, saying "the focus of today's event is policy, not politics." Even though her position is a politically popular one and the publicity about the press conference is likely to help her then-current reelection campaign, Senator B has not violated the prohibition on the use of public resources in an election campaign. Her actions constitute a legitimate use of public resources to advance a public-policy position.

3. A third member of the state legislature seeking reelection, Senator C, also holds a daytime press conference in the State Capitol, uses his official staff and office equipment to organize it, and has his staff attend. The purpose of the press conference is to enable the Senator to rebut charges of official misconduct that have been leveled against him in the media. He explains that his actions were all consistent with Senate Rules. In the question-and-answer period that follows, several reporters ask the Senator to address additional charges raised by his campaign opponent and to discuss the implications of the dispute for his reelection campaign. He takes a handful of these questions, criticizes his opponent for "misleading" the public, and then terminates the press conference. This example falls within a gray area. The use of official resources to discuss and respond to charges concerning the official's compliance with the rules that govern his office does not violate the prohibition against the use of public resources for electoral purposes. However, responding to election-related statements and making expressly election-related comments begin to turn the press conference into a campaign event. That only a limited portion of the press conference was devoted to the express discussion of the campaign—and the Senator's termination of the press conference when it became more election-related—might place the press conference within the exception of subsection (c). Better still, knowing that holding a press conference devoted to rebutting charges of misconduct leveled during a reelection campaign is likely to result in a discussion of electoral politics, Senator C should have structured the press conference as a campaign event from the outset and not used official resources for it, or, alternatively, as in Illustration 2, the Senator could have refused to respond to any campaign questions and more carefully limited the question-and-answer period to the press conference's stated purpose.

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b. Exception for electorally neutral uses. Not all uses of government resources for electoral purposes are improper. A public building or meeting space may be used for party conventions, political rallies, or candidate events if it is available to other candidates, parties, or the public under politically neutral rules that provide equal opportunities for access. Similarly, a jurisdiction may publish a voter pamphlet that includes statements from candidates promoting their campaigns, provided space in the pamphlet is available to all candidates who qualify under politically neutral rules. So, too, a jurisdiction may adopt a system that provides public funds to qualifying candidates or political parties to be used in election campaigns if funding is available to multiple candidates or parties under politically neutral rules.

c. De minimis exception. De minimis or practically unavoidable campaign-related uses of public resources are not improper. For example, if a supporter sends an elected official who is running for reelection a campaign contribution, and that contribution is sent to the official's government office rather than the official's campaign headquarters, the contribution can be stored in a filing cabinet in the government office until such time as it may be forwarded to the campaign headquarters. Similarly, some jurisdictions provide their senior executive official—the mayor or governor—with a residence as well as an office. It would not be improper for such an official to hold occasional political strategy sessions, comparable to those that might be held in a private home, in the official residence.

Illustrations:

4. Representative D's campaign staff has contacted the Representative's official legislative office for a copy of a speech that the Representative recently gave as well as for a list of the Representative's legislative accomplishments. If Representative D's legislative office would ordinarily provide the speech and legislative accomplishments to other organizations or to members of the public who ask for these materials, it can provide them to the campaign.

5. Councilor E's office receives telephone calls and e-mails from people who want to reach his campaign office. The Councilor's official staff may forward the e-mails to the campaign office and provide callers with the address, website, and telephone number of the campaign. However, the official staff may not provide substantive campaign-related information in response to inquiries about the campaign.

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Restrictions on the use of public resources for campaign-related activities are widespread, including at the municipal level, see, e.g., Los Angeles Municipal Code, § 49.5.5 (2011); Philadelphia Board of Ethics, Regulation No. 8; City of Chicago, Governmental Ethics Ordinance, ch. 2-156-135; at the state level, see, e.g., Alaska Stat. Ann. § 24.60.030; Cal. Gov't Code § 8314; Kans. Stat. Ann. § 25-4169; Tenn. Code Ann. § 2-10-206; Rev. Code Wash. Ann. § 42.52.180; and in federal law, see, e.g., 5 U.S.C. § 7324(a)(2), 18 U.S.C. § 607, U.S. Senate Ethics Manual, Rules 38.2, 40, 41 (2003). The various laws, regulations, and ethical codes vary in scope, stringency, specificity, and coverage. Some jurisdictions provide different rules or different treatments for executive- as opposed to legislative-branch officers, or to elected officials and senior appointees, as opposed to other public servants. Some rules are in criminal codes, others in ethics statutes or in the rules and regulations of ethics commissions or of legislative bodies. Some are very specific, while some are written at a very high level of generality. Some jurisdictions do not specifically target the election-related use of public resources but generally bar "the use of official position to secure unwarranted privileges . . . that are not properly available to similarly-situated individuals outside state government," see, e.g., Ind. Code Ann., § 4-2-6-5.5(a)(3)(B). Accord, Ark. Code Ann. § 21-8-304(a); 29 Del. Stat. Ann. § 5806. The proposed prohibition reflects the overlapping consensus of the many jurisdictions that have addressed this issue, although it does not precisely mirror any one of them.

Many jurisdictions also recognize that "in the practical operation" of an elected official's office, some *de minimis* use of public resources for election-related purposes may occur, see, e.g., United States Senate Ethics Manual (2003) at 141; accord, New Jersey Joint Rules of the Senate and General Assembly (2012), § 31(b); Pennsylvania, Ethical Conduct Rules of the Senate (2011) at II.2 (a), (b); Rev. Code Wash. Ann. § 42.52.180 (2) (e). A few jurisdictions specifically permit elected officials to engage in a limited amount of political activity in publicly-provided facilities, see, e.g., Alaska Stat. Ann. § 39.52.120(b)(6) (permitting use of "governor's residence for meetings to discuss political strategy" provided there is no cost to the state); but see Hawai'i Code Ann, § 84-13.5 (specifically barring the use of the governor's official residence "for any events intended to solicit funds, support, or votes for any candidate for elective public office.").

§ 402. Prohibition on the Use of Public Resources for Communications in Election Campaigns

(a) Communications financed by public resources may not be used to promote, attack, support, or oppose the campaign of any candidate for elected office, or to assist or oppose any political party or other organization that supports or opposes candidates for elected office.

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(b) Public resources may not be used to finance advertisements or the preparation or dissemination of mass communications that use the name, voice, or likeness of a public official who is running for office during the period preceding the election—including primaries, general elections, runoffs, and special elections—in which the official is a candidate.

(i) For purposes of this subsection, "mass communications" shall mean radio, television, mass mailings of printed communications (such as letters, newsletters, pamphlets, or brochures), use of telephone banks or robocalls, bulk e-mails, text messages, websites, social media accounts and other forms of telecommunication.

(ii) The news or editorial programs of a public radio or television station may use the name, voice or likeness of a public official running for office in the pre-election period, provided that such action is taken independently of the official.

(c) Public resources, as defined in § 401(a)(ii), may not be used to finance mass communications by an elected official to the general public outside the official's constituency.

Comment:

a. Communications covered. The general principle that public resources should not be used to aid or oppose candidates for election or political parties applies more specifically to publicly funded communications. The types of communications this rule applies to include but are not limited to government-funded broadcasts on radio or television, booklets, pamphlets, newsletters, flyers, billboards, mail, telephone banks, robocalls, and uses of the Internet such as electronic mail, websites, social-network accounts, and Twitter accounts. This prohibition covers government-funded communications that expressly support or oppose a candidate or party, solicit votes or support for or opposition to a candidate or party, solicit campaign volunteers, or solicit funds to be used for electioneering or partisan activity. Such communications disseminated in the pre-election period should refrain from using the name, likeness, or voice of an official who is running for office in the coming election. The rule would apply whether the official is running for reelection to his or her current office or is seeking election to another office. Like the rule in § 401, this would prevent the non-neutral use of government funds in an election, as well as avoid the public perception that government funds are being used to aid one

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candidate—typically, an incumbent—over others. The prohibition would not apply to any private or personal e-mail or social-network account maintained by a public servant.

b. Pre-election period. The rule does not define the length of the pre-election period. Jurisdictions that have a rule like this generally use 60 or 90 days before the election. Some jurisdictions define the pre-election period as the entire calendar year in which an election will be held, although it is not clear that so long a period is appropriate. The point here is to balance the interest of members of the public in being able to receive information and requests for information from public officials against the danger that officials will use those communications in election campaigns. The rule reflects the view that, generally, the informational value of the communications dominates the unfair-electoral-competition concern, but as an election nears, the balance shifts and the danger of electoral unfairness outweighs the public-information benefit.

c. Mass communications. The restriction applies only to mass communications, such as broadcasts (including by cable and satellite), mass mailings, mass telephone calls, and mass e-mails and comparable uses of the Internet. These are the communications most likely to have an impact on an election. Moreover, even when such communications involve little or no marginal cost to the government, as is typically the case with Internet communications, they are still likely to be perceived by the public as unfair taxpayer-supported assistance to a candidate. The restriction does not define how many messages constitute a "mass" mailing or e-mailing, as that might vary according to the size of the constituency or the level of government. However, it would seem that anything more than a few hundred, or perhaps a few dozen, nonindividualized letters or messages, would be a mass mailing. On the other hand, this rule would not affect the ability of a government official who is running for office to use government resources to send individual letters or e-mail messages, subject to the general rule in subsection (a) prohibiting government-funded electioneering.

d. Exceptions. Public officials, including elected officers, may generally use public resources to fund communications that refrain from express electioneering. Such communications can play an important role in informing the public about government policies, programs, and actions, or about issues of public health, safety, and welfare more generally. Publicly funded communications such as questionnaires and opinion polls can also be used by public officials to obtain information concerning the public's beliefs, concerns, and knowledge that may be appropriately used in shaping subsequent official actions. However, publicly funded

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communications, including communications seeking public opinion, can also be used as a subtle form of electioneering. Mail or e-mail from an elected official that prominently displays the official's name or likeness or broadcast advertisements that promote a public program or some other public activity but also feature the face or voice of an elected official reinforce the voters' awareness of the official, present the official in a positive light, and, thus, may tend to aid the official's campaign and give the official an unwarranted electoral advantage.

The rule is intended to apply to new communications disseminated in the pre-election period, not to the continuation of ongoing communications—such as the maintenance of an official website—or to the distribution of pre-existing publications. Thus, the proposal would not require states or cities to take down the "Governor F. Welcomes You to State of Fredonia" billboards that customarily greet motorists when an interstate highway enters a new state, or the "this project funded by Gotham City, Jane S. Mayor" billboards that are often seen at municipal construction sites. Of course, such communications would still be subject to the general rule in subsection (a) prohibiting government-funded electioneering.

Subsection (b)(ii) specifically exempts programming by public radio or television stations that refers to officials who may be seeking election. Such programming, if undertaken independently of the elected official referred to, is likely to have an informational value to the public that far outweighs any danger that it will unfairly aid the elected official whose name, voice, or likeness is mentioned.

Illustrations:

1. The State of Fredonia pays for a number of radio public-service announcements (PSAs) in which Governor G is prominently featured. These call for the public to, inter alia, fasten their seat belts, refrain from smoking, and take vacations at Fredonia's many beaches and parks. These state-financed PSAs do not ordinarily violate the rule in § 402; however, if the Governor is seeking reelection, they would violate the prohibition on the use of public resources for communications in election campaigns if they are aired in the months immediately preceding the election. If the Governor is facing a challenger in a contested primary, the prohibition would also apply in the months preceding the primary election.

2. The Council of Emerald City has just voted to approve a bond issue that would finance major improvements to the City's schools. Under the laws of the state of Oz, that

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bond issue requires voter approval. The City is paying for a "vote yes" television and mailing campaign that will prominently feature the Mayor and leaders of the Council urging the voters to approve the bond issue. The Mayor and Council members, however, are also up for reelection and will appear on the same ballot as the bond issue. As a result, public funds may not be used to pay for "vote yes" ads that feature the names, likenesses, or voices of the Mayor and Council members. Although the bond-issue ads will not electioneer on behalf of the Mayor or featured Council members, the ads will inevitably promote their candidacies. Nothing in the rule would bar the Mayor and members of the Council from campaigning for the bond issue, and, if state law allows it, public funds may be used to pay for ads that promote the bond issue, provided they do not so feature the Mayor or other candidates.

3. The legislature of the state of Ruritania pays for its members to send up to six mass mailings to their constituents each year. Members may use these mailings to tout their legislative accomplishments, advocate their policy priorities, and feature their photographs in meetings with community groups. The use of state funds for these mailings is permissible. However, state-funded mass mailings may not be sent to constituents during the pre-election period.

4. Representative H uses state funds to pay for mail that responds to individual inquiries her office receives. She may continue to do so during the immediate pre-election period. However, in response to a constituent's question concerning a tax-reform issue, she may not use public funds to send an answer that says that she supports the reform "and, if reelected in November, I will fight for it in the next legislative session." That would involve the use of public funds for an election-related communication.

5. The public television station in Gotham City, which receives funds from the city government, airs a nightly "Newsmakers" program in which public officials and individuals involved in public issues are interviewed. "Newsmakers" may continue to interview elected officials even during the pre-election period, provided that the decision to invite any such officials and the questions asked them are the product of the independent journalistic judgment of the program's producers and/or reporters. If the program does interview an elected official seeking reelection, it would be prudent,

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although not required, for the program to also invite the official's opponents, although not necessarily at the same time as the official.

6. The Gotham City public television station discussed in Illustration 5 also airs a weekly program called "The Mayor's Hour," in which the Mayor discusses current issues and interviews guests she has invited. If the Mayor is running for reelection, this program should not be aired in the pre-election period.

e. Communications sent outside constituency. Subsection (c) specifically prohibits elected officials from using public funds to send mass communications, such as broadcast and television advertising, to the general public outside the official's constituency. This reflects the view that there is less of a public interest in members of the public being able to hear from an elected official who is not their representative, and, conversely, the concern that the reason the official is sending mass mailings or broadcast advertising out of her own jurisdiction is to use the mailings to assist her in a run for higher office—such as a mayor who would like to run for governor, or a representative planning to run for the Senate—or, perhaps, to run in a different constituency after a redistricting. This rule would not prohibit an elected official from using public funds to send an individualized letter, e-mail, or other message outside the district, or from posting messages accessible from outside the district on an official website or social-network account, subject again to the general rule that such a message refrain from electioneering. Nor would the rule prohibit the airing of publicly funded broadcast ads featuring an elected official that are aimed primarily at the elected official's constituency and are otherwise permitted if they incidentally and unavoidably are received by viewers or listeners outside the constituency.

Illustration:

7. Because the principal media market of the state of Fredonia overlaps with that of the neighboring state of Ruritania, the PSAs aired in Illustration 1 reach many listeners in that state. As the out-of-state reach of the PSAs is incidental to the targeting of Fredonia listeners and unavoidable, it does not violate the prohibition.

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Federal law specifically provides that it "is the intent of the Congress that a Member of or Member-elect to Congress may not mail as franked mail" mail which "solicits political support for the sender or any other person or any political party, or a vote or financial assistance for any candidate for any public office." 39 U.S.C. § 3210(a)(5)(C). Federal franking law also prohibits a Member of the House of Representatives from using the frank on any mass mailing sent within 90 days before an election in which the Member is running, and prohibits a Senator from using the frank on any mass mailing sent within 60 days before an election in which the Member is running. 39 U.S.C. § 3210(a)(6). "Mass mailing" is defined as a mailing of more than 500 newsletters or other pieces of mail with substantially identical content during one session of Congress. 39 U.S.C. § 3210(a)(6)(E).

The federal district court in Common Cause v. Bolger, 574 F. Supp. 672 (D.D.C. 1982) rejected the claim that the frank was an unconstitutional subsidy to incumbents because the franking law limits use of the frank to official business and specifically bars its use to solicit political support and to send mass mailings in the pre-election period, which under the statute in effect at the time of the *Bolger* decision was 28 days. The court recognized the danger that the frank could be used to promote incumbents' reelection efforts, but, noting that "Congress has recognized the basic principle that government funds should not be spent to help incumbents gain reelection," 574 F. Supp. at 683, declined to further police the potential election-related uses of the frank. See also Albanese v. FEC, 884 F. Supp. 685 (E.D.N.Y. 1985), aff'd, 78 F.3d 66 (2d Cir. 1996) (rejecting the claim that the frank provides incumbents with an unfair advantage); cf. Hamilton v. Hennessey, 783 A.2d 852 (Comm. Ct. Pa. 2001) (state legislator's newsletters, designed and prepared with public funds, that are intended to influence an election should be treated as campaign expenditures). See also Bellomo, *Hamilton v. Hennessey:* A Check on Misuse of Representative Franking Privileges During Campaigns, 12 Widener L.J. 307 (2003).

Federal law also forbids members of the House of Representatives from sending franked mail "outside the area constituting the congressional district from which the Member or Member-elect was elected." 39 U.S.C. § 3210(a)(6)(ii)(I). This is an issue that has been the subject of litigation. In Rising v. Brown, 313 F. Supp. 824 (C.D. Cal. 1970), which arose many years before the restriction on out-of-district franked mail was enacted, the court enjoined a member of the House who was a candidate for the Senate in a primary election from using the franking privilege to send outside his district 300,000 copies of a brochure that featured the Member prominently. Shortly thereafter, a Seventh Circuit panel in Hoellen v. Annunzio, 468 F.2d 522 (7th Cir. 1972), divided over the question whether a member of Congress could use the frank to send mass mailings to residents who lived outside his current district but within the post-redistricting district in which he was planning to seek election. The majority, in an opinion by then-judge John Paul Stevens, sustained the lower court's injunction against the franked mailings. Although the content of the mailings—questionnaires asking for opinions on various public issues—was not a problem as "it is appropriate for a Congressman to solicit the view of his constituents on views of public importance," Judge Stevens concluded "logic dictates that we

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should not close our eyes in the face of extrinsic evidence which reveals that an appearance of official business is nothing more than a mask for a private purpose"—the incumbent's effort "to advance his candidacy." 468 F.2d at 526-527. Judge Swygert dissented, finding that the official content of the mailings was sufficient to qualify them to be franked. In a near-contemporaneous decision, Schiaffo v. Helstoski, 492 F.2d 413 (3d Cir. 1974), the Third Circuit held that, as nothing in the franking law at the time barred a Member of Congress from sending mass mailings to residents of the area that would become part of his district after the next election, the Member could not be enjoined from using the frank for such mailings. In Coalition to End the Permanent Congress v. Runyon, 971 F.2d 765 (D.D.C. 1992), the United States Court of Appeals for the District of Columbia Circuit summarily held unconstitutional the provision of the franking law, then on the books, that expressly permitted Members of Congress to send mass mailings to residents who had been added by redistricting to their districts as of the coming election, finding that the measure advanced only the interest of a Member "as a candidate, not as a representative." Before the time to file a petition for certiorari elapsed, Congress repealed the law authorizing mass mailings to district residents-to-be. As a result, the court ultimately decided not to publish a full opinion; Judge Silberman dissented from that decision and filed a full opinion, emphasizing that as "the very nature of American constitutional democracy" is based on free and fair elections, a government action that favors one candidate over another or that "provides a subsidy to incumbents directly in contemplation of an election" must receive heightened judicial scrutiny. 979 F.2d 219, 225. For commentary on the franking litigations, see Note, Congressional Perquisites and Fair Elections: The Case of the Franking Privilege, 83 Yale L.J. 1055 (1974); Sellers, We Should Abolish the Franking Privilege, Mass Constituent Communications, and Other Campaign-Related Government Speech But Frankly, It Won't Be Easy, 42 U. Tol. L. Rev. 121 (2010).

A number of states also prohibit the use of public funds to pay for mass mailings that feature elected officials or candidates for elective office in the pre-election period. See, e.g., Alaska Stat. Ann. § 24.60.030(c) (60-day pre-election period); N.J. Joint Rules of the Senate and General Assembly (2012), § 33A (calendar year in which a member of the legislature will be a candidate in the general election); Pennsylvania, Ethical Rules of Conduct of the Senate (2011), II. 5 ("No Senate-funded newsletter may be printed or distributed within sixty days of the primary or general election for any Senate member running for the office of Senate or any other elective office"); Rev. Code Wash. Ann. § 42.52.185 (restrictions on mailings by legislators in the 12-month period beginning December 1 before a general election for the state legislature).

A few states specifically regulate the use of the name, likeness, or voice of elected officials in state-funded public-service advertisements. Illinois's rule is particularly restrictive. 5 ILCS 430/5-20 specifically provides that no public-service announcement or advertisement on behalf of any state-administered program containing the "proper name, image or voice of any executive branch constitutional officer or member of the General Assembly shall be (i) broadcast or aired on radio or television; (ii) printed in a commercial newspaper or a commercial magazine; or (iii) displayed on a billboard or electronic message board at any time."

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Indiana provides that "a state officer may not use the state officer's name or likeness in a communication"—defined to include only audio or video communications or newspapers—paid for entirely or in part with appropriations made by the general assembly. However, the Indiana law provides exemptions for a communication made by the governor concerning public health or safety, and a communication justified by a compelling public-policy reason that has been approved by the state budget agency upon the recommendation of the legislative budget committee. See Ind. Rev. Stat. § 4-2-6-15. New York State's Joint Commission on Public Ethics has proposed a rule that would prohibit airing any public-service announcement that features a candidate within 60 days prior to a general, primary, or special election in which the candidate is on the ballot, except if the announcement relates to a state or national emergency. See Draft Proposed Rule, 19 NYCRR 940 Public Service Announcements: Permissible and Proper Usage.

§ 403. Regulation of Publicly Funded Travel Related to Election Campaigns

(a) Subject to subsection (b):

(i) Public funds may not be used to pay for travel in connection with election-related or partisan activities.

(ii) Vehicles or other transportation equipment, such as motor vehicles or aircraft, that are owned, rented, or leased by a public entity may not be used for travel in connection with activities that promote, attack, support, or oppose the campaign of any candidate for elected office, or to assist or oppose any political party, or to assist or oppose any other organization in its support for or opposition to candidates for elected office.

(b) When for reasons of security, protocol, ceremonial functions, or overall demands of time, a government official as a practical matter must use a publicly owned vehicle or transportation equipment for travel, the official may use such vehicle or transportation equipment in connection with election-related or partisan activity, provided that the official reimburses the public entity that owns, rents, or leases the vehicle or equipment for the share of the cost of the travel that is attributable to the election-related or partisan activity. Similarly, an official may use public funds to pay for travel that is partly election-related or partisan, provided that the primary purpose and predominant activity of the travel is not election-related or partisan, and the official reimburses the public entity for the share of the cost of the travel that is attributable to the election-related or partisan activity.

(c) For purposes of this Section, an activity will be considered election-related or partisan if it involves:

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(i) soliciting votes, contributions, or support for or opposition to any candidate for elected office, or making public statements promoting, supporting, attacking, or opposing a candidate for elective office;

(ii) soliciting votes, contributions, or support for or opposition to a political party or to a political organization that supports or opposes candidates for elective office;

(iii) attending a national, state, or local political-party convention, the meeting of any political-party committee, or attending an event sponsored by a political party or other political organization;

(iv) attending a campaign or partisan rally or a campaign or partisan fundraising event; or

(v) speaking, during a defined pre-election period, at a public event in a jurisdiction at which candidates for office in that jurisdiction are featured as speakers or attendees; however, speaking at an event that clearly involves an official response to a national, state, or local emergency will not be considered election-related.

Comment:

a. Scope. The general principle that public resources should not be used to aid or oppose candidates for election or political parties applies more specifically to publicly funded travel. This principle applies both to the use of public funds to purchase commercial travel services, such as airline or train tickets or motor-vehicle rentals, as well as to the use of transportation equipment owned or rented by or leased to a public agency.

b. Exceptions. Political travel by elected officials presents complications not raised by other political uses of public resources. Public officials will typically be able to secure entirely private resources for most campaign activities, such as campaign offices, computers, mailing lists, office equipment, etc., but it may not always be possible or reasonable for elected officials, who may appropriately engage in electoral or partisan travel, to separate their electoral or partisan travel from their official travel. Security concerns may require that an official travel in a government-owned car or plane, and even apart from security concerns it may not make sense for a state official who wants to travel from the state capitol to another part of the state for both

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electoral and nonelectoral purposes to make two separate trips—one publicly funded and one privately funded. Instead, the official should be able to combine both activities in a single trip, provided the principal purpose of the trip is governmental and the official—or other entity such as the official's campaign committee or political party—reimburses the government for the portion of the trip attributable to partisan or election-related activities.

c. Travel for mixed electoral and nonelectoral purposes. The election-related or partisan activities identified in the first four clauses of subsection (c) are self-explanatory: they all involve electoral or partisan advocacy or fundraising, or participating in an election-related or partisan event. The fifth clause addresses a more subtle problem—travel by elected officials or senior appointees that is nominally nonpartisan or nonelectoral, but that, due to the timing of the event, may have electoral implications. This may occur when an elected official or senior appointee, such as a cabinet member, travels to a politically contested jurisdiction in a pre-election period to announce at a publicized event some new government program, local infrastructure project, or contract with or grant to a local business or not-for-profit service provider and is joined by members of the official's or appointee's party who are candidates in the upcoming election. The event may be nominally nonpolitical, but it is likely, and may have been intended, to benefit those candidates. To that extent, pre-election-period travel that eschews electoral advocacy and is limited to the announcement of new programs or new spending resembles pre-election mass mailings of newsletters that also avoid advocacy but, by prominently featuring elected officials, can have electoral benefits. As the United States Office of Special Counsel "OSC") recently found, "[w]hile awarding grants can be official activity" sending cabinet officials to hotly contested Congressional districts to announce the award can constitute "manipulation of agency business to help targeted candidates. . . . [C]are must be taken to ensure that the official nature of an event is bona fide, substantial, and not merely a guise for political endorsement." United States Office of Special Counsel, Investigation of Political Activities by White House and Federal Agency Officials During the 2006 Midterm Elections 95 (Jan. 2011).

Subsection (c)(v) is intended to assure that de facto election-related travel is treated as election-related. The difficulty is coming up with a rule that does so. The Office of Special Counsel's report on political activities by White House and federal-agency officials in 2006 determined that "agencies must take into account all relevant facts to determine the predominant

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purpose of the event in question." The report then presented a nonexclusive list of 13 "[e]xamples of circumstances to consider":

> "(1) the type of event and the reason for holding it; (2) whether candidates (including incumbents seeking reelection) will be present at the event and what their role will be; (3) the relationship, if any, between the event and official agency business; (4) whether a candidate's request is one reason for the agency political appointee to attend the event; (5) whether the event was scheduled prior to a candidate's involvement or after; (6) the agency political appointee's motivation for attending the event; (7) the frequency of similar types of events during non-election years and whether agency political appointees participated in such events in those years; (8) the proximity of the event to the date of the election; (9) who invited the agency political appointee to attend (e.g., congressional office, campaign staff, OPA [the White House Office of Political Affairs], other agency officials, political party); (10) the parties responsible for planning and organizing the event; (11) whether the event is open or closed to media; (12) remarks made during the event by any person; and (13) other event invitees and the audience, i.e., whether party operatives or donors will be present."

Id. at 95-96. This is not a very helpful test. It relies on far too many criteria, many of which are subjective and difficult to assess, and it is far from clear how the different criteria add up. The OSC's approach would be difficult to apply in individual cases and unpredictable in results. It would give little guidance to public officials. The rule proposed in subsection (c)(v) relies essentially on two criteria: the presence of candidates (OSC circumstance # 2) and proximity of the event to an election (OSC circumstance # 8). As the OSC report emphasized, "proximity of the event to the date of the election is a critical factor." Id. at 96. By focusing on the two most important factors, the proposed rule—which also resembles the rule barring publicly funded pre-election mass mailings—is relatively crisp and objective, and should be easy to apply. The limited exemption for travel to pre-election public appearances that involve candidates during an emergency—such as occurred in the period between Superstorm Sandy and the November 2012 general election—recognizes that, in rare circumstances, even some pre-election public activities, by or with candidates, are better treated as appropriate uses of public resources and not as a diversion of public funds for electoral purposes.

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Illustrations:

1. Gotham City provides the Deputy Mayor with a car to be used for official business. After regular business hours, the Deputy Mayor drives his city car to a political event at which his boss, the Mayor, will give a speech in support of her reelection. He then drives the car home. Unless there is a pressing security for using the City's car, the Deputy Mayor has improperly used his publicly provided vehicle for political activity.

2. The State Senate Majority Leader takes the state plane to fly from the state capitol to Gotham City, where he has a number of appointments to meet with business leaders to discuss the economic implications of pending tax legislation and where he will also speak at a fundraiser for the Gotham City committee of his political party. He then uses the state plane to fly back to the capitol. The Senator must reimburse the state for the portion of the cost of his trip attributable to attending the fundraiser.

3. In the week before Election Day, the State's Secretary of Health flies from the capitol to Pleasantville to dedicate the opening of a new state-funded health-care facility. On the platform with her and also invited to speak are the Mayor and several members of the Pleasantville City Council, all of whom are running for reelection. Although the Secretary avoids any political statements in her prepared remarks, an event that so prominently features candidates running for office in the immediate pre-election period is unavoidably political. The state may not cover the costs of her travel from the capitol to Pleasantville and back. However, if the officials who are on the platform and are invited to speak include candidates of parties other than the party of the Governor who heads the administration of which the Secretary is a part, and the Secretary avoids electioneering statements, this would be permissible governmental travel.

4. A terrible fire has devastated a neighborhood in Gotham City. The Mayor takes his City-provided car to the area, oversees the emergency response, meets with neighbors, and makes multiple appearances on television, including some with other locally elected representatives, until the fire is entirely put out and the needs of the victims for shelter and other assistance have been addressed. Although Gotham City's Election Day is next week and the Mayor and the other officials are on the ballot, this is a permissible use of a City-provided resource.

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REPORTER'S NOTE

Although many states do not specifically regulate the electoral or partisan travels of public officers, several do expressly refer to state-owned motor vehicles or aircraft when they bar the electoral or partisan uses of public resources. See, e.g., Cal. Gov't Code § 8314(a), (b)(3); Fla. Stat. Ann. § 106.15(2); Kans. Stat. Ann. § 25-4619a(a)(1); S.D.C.L. § 5-25-1.1; Rev. Code Wash. Ann. § 42.52.180. See also Los Angeles City Ethics Comm'n (2011) (defining prohibited political activity to include the use of City vehicles for campaign activity). Accord, Vernon's Texas Code Ann., Gov't Code § 2205.036(b) (state aircraft may not be used to provide transportation to a passenger who "will attend or has attended an event sponsored by a political party" or who "will attend or has attended an event at which money is raised for private or political purposes"). Florida's law prohibits a candidate from using any state-owned aircraft or motor vehicle "solely for the purpose of furthering his or her candidacy" and also provides that if a candidate uses any state-owned aircraft or motor vehicle for official business but then "while on such trip performs any function in furtherance of his or her candidacy for nomination or election to public office" the candidate "shall prorate the expenses incurred and reimburse the appropriate agency for any trip not exclusively for state business." Kentucky's law permitting use of state aircraft by the governor or lieutenant governor for personal business—albeit without a specific reference to electoral or partisan activity—when required "for reasons of security, protocol, ceremonial functions, or overall demands of time" provides a basis for the language in the proposed rule. See Ky. Rev. Stat. Ann. § 174.506 (2009). Due to a scandal sparked in part by allegations of improper political use of state aircraft, New York's Attorney General proposed that the state adopt more rigorous rules limiting political travel on state aircraft, see State of New York, Office of the Attorney General, Report of Investigation into the Alleged Misuse of State Aircraft and the Resources of the New York State Police (July 23, 2007), but it does not appear that such rules were adopted.

At the federal level, the Hatch Act generally prohibits federal executive-branch employees from engaging in political activity in a vehicle owned or leased by the federal government, 5 U.S.C. § 7324(a)(4). However, the Act exempts from this prohibition (and from other prohibitions restricting political activity) the President and Vice President, and those employees who are deemed on duty at all times and who are appointed by the President with Senate confirmation. Although the President and Vice President are entirely excluded from Hatch Act restrictions, see 5 U.S.C. § 7322(1) (excluding the President and Vice President from the definition of federal employee), the Office of Legal Counsel of the Department of Justice ("OLC") has taken the position that the "basic norm" requiring that appropriated funds be used only for the purposes for which they have been appropriated forbids the use of federal funds to pay for the President's or Vice President's political travel, but OLC determined that the President and Vice President may use federal facilities or funds for trips that combine official and unofficial activities provided they reimburse the government for the political component of the trip. See Office of Legal Counsel, U.S. Dep't of Justice, Payment of Expenses Associated with Travel by the President and Vice President, 6 U.S. Op. Off. Legal Counsel 214, 1982 WL

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170689 (O.L.C., March 24, 1982). Addressing the question of how to determine when a travel expense should be considered "political," OLC declined to provide a specific rule but emphasized instead the need for flexibility and the use of a "common sense understanding of the nature of political and official activities," with "[a]ppearing at party functions, fundraising and campaigning for specific candidates" given as "the principal examples of travel which should be considered political." Id. at 217 (citing and quoting from an earlier OLC opinion, "Political Trips," March 15, 1977). As a study by the Congressional Research Service observed, the terms "political" and "official" are "rather general, and the White House determines whether a trip is for official or political purposes, or a combination of the two." L. Elaine Halchin, Presidential Travel Policy and Costs (Congressional Research Service Report for Congress, May 17, 2012) at 1.

The Hatch Act does apply to senior political appointees and provides that the costs of their political activity, including political travel, may not be paid for with government funds. 5 U.S.C. § 7324(b)(1). Government funds may not be used at all for a purely political trip; for a trip that combines official and political events, "agencies must apportion the travel costs between the federal government and the relevant political organization or candidate, and ensure that the Treasury is appropriately reimbursed." U.S. Office of Special Counsel, OSC Advisory Regarding Mixed Travel by Presidentially-Appointed/Senate Confirmed (PAS) Employees, Oct. 6, 2011, at 1. Like the Report on White House Political Activities in the 2006 Midterm Elections, this 2011 OSC Advisory does not articulate a specific rule for determining what constitutes a "political" event but instead lists 12 factors that are very similar to the 13 in the Report on the 2006 elections, and further cautions that "[t]his list is illustrative and is by no means exhaustive. In some cases, one or more of these considerations may not apply, and depending on all circumstances, some may be more useful than others in classifying an event. Other facts peculiar to a particular event may tend to indicate the nature of the event, and they should be considered as well." See id. at n.3. In one incident that attracted media attention, the Office of Special Counsel concluded that then-Secretary of Health and Human Services ("HHS") Kathleen Sebelius engaged in political activity when she travelled to North Carolina in early 2012 to speak in her official capacity at a gala dinner sponsored by a not-for-profit organization and, in the course of her remarks, called for the re-election of the President, and recognized and endorsed the Democratic candidate for governor who was at the event. As a result, HHS reclassified the event as political and the Secretary reimbursed the government for the costs of her travel. See U.S. Office of Special Counsel, Report id Prohibited Political Activity Under the Hatch Act, OSC File No. HA-12-1989 (Kathleen G. Sebelius) (August 23, 2012).

The United States Senate takes a similar approach to government-funded travel by Senators and Senate staff. The primary purpose of a trip must be official in nature to justify the use of official funds. If the purpose of a trip is to campaign for reelection, all expenses must be paid from campaign or personal funds. Expenses for mixed-purpose trips, "those involving stops for campaign as well as official activities" must be pro-rated "to appropriately reflect the expenses associated with each segment of the trip." United States Senate, Select Committee on

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Ethics, 108th Cong., 1st Sess., Senate Ethics Manual (2003 ed.) at 119. In addition, during the 60 days before an election in which a Senator is a candidate, neither the Senator nor his or her personal staff may accept an official per diem for travel, even if the travel is for official purposes only, unless the Senator's reelection candidacy is uncontested. However, official funds may still be used for airfare (the moratorium appears to apply only to food and lodging expenses in connection with travel), and it does not apply to a Senator's candidacy in a state or local election. See id. at 120. The House of Representatives provides that Members and staff may use official funds for travel "only if the primary purpose of the trip is the conduct of official business." A Member or staff member may, while on official travel, "engage in incidental campaign or political activity, provided that no additional travel expenses are incurred as a result." But "when the primary purpose of a trip is in fact the conduct of campaign or political activity, then the travel expenses must be paid with campaign funds and cannot be paid with official funds." United States House of Representatives, Committee on Standards of Official Conduct, 110th Cong., 2d Sess., House Ethics Manual (2008 ed.) at 131.

§ 404. Restrictions on Public-Employee Participation in Election Campaigns and Partisan Activities

(a) Except as provided in subsections (b), (c), and (d), a public employee may not

(i) use the authority of his or her office to influence the outcome of an election;

(ii) engage in election-related or partisan activities while

(A) on duty or during normal working hours and receiving government compensation; or

(B) in any room, building, or other location occupied in the discharge of the official duties of a public employee; or

(C) wearing a uniform or official insignia identifying the person as a public employee; or

(iii) require or improperly influence any other public employee to engage in election-related or partisan political activity, whether while on duty or on the other public employee's own time.

(b) An elected official may engage in election-related or partisan activities during normal working hours, provided that

(i) the official does not use the authority of his or her office to influence the outcome of an election or to assist the electioneering activities of a political party;

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(ii) the official does not require or improperly influence any other public employee to engage in election-related or partisan activity, whether while on duty or on the other public employee's own time;

(iii) the official does not wear any uniform or official insignia of office while engaged in public election-related or partisan activities, such as speaking at a campaign rally or fundraising event;

(iv) the official does not engage in public election-related or partisan activities in any room, building, or other location occupied in the discharge of the official's official duties;

(v) any such election-related or partisan activity does not impose any additional cost on the government, or, if such activity does so, the official reimburses the government for the additional cost in a timely fashion; and

(vi) any such election-related or partisan activities do not interfere with the ability of the official to discharge his or her official duties and do not compromise the efficiency and integrity of the official's office or agency.

(c) A senior appointed official such as a cabinet officer, agency head, or other significant policymaking official whose appointment or nomination to office and removal from office is normally determined by an elected official or whose official duties and responsibilities continue outside normal working hours and away from the official's normal workplace may engage in election-related or partisan activities during normal working hours, provided that the conditions stated in clauses (i) through (vi) of subsection (b) of this Section are satisfied.

(d) An employee who works on the immediate staff of an elected official may, while on duty and as part of his or her official responsibilities, engage in minor or incidental election-related or partisan work concerning the election of that employee's employer.

Comment:

a. Scope. The general principle that public resources should not be used to aid or oppose candidates for election or political parties applies more specifically to publicly funded employee services. As a result, public employees should not engage in activities related to election campaigns or partisan politics while at work or paid to work, and should not use their official

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position—such as the authority to issue a license or approve a contract—or the symbols of office, such as a badge or uniform, for election-related or partisan activities.

Election-related and partisan activities include, but are not limited to: managing a campaign; working on campaign advertising strategy; speaking at or attending a campaign rally; attending a party convention or committee meeting; soliciting voters to vote for or against a candidate; preparing or distributing campaign literature or signs, or working on any other form of campaign communications, including broadcast advertising; posting campaign-related information on a website or social-media site; working for a candidate or encouraging others to work for a candidate; soliciting or accepting contributions for a candidate or political party; doing research or developing written materials for a candidate or party; preparing or conducting a campaign poll; preparing, circulating, or filing nomination papers; doing campaign administrative work, such as preparing campaign finance reports, responding to a candidate questionnaire, or managing a campaign data base.

Not only must government employees not engage in election-related or partisan activities while on duty or during time for which they receive compensation from a government, but they must not require or improperly influence other public employees to engage in election-related or partisan activities, whether during their work time or while off duty. Improper influence includes indicating to an employee that a term or condition of public employment—including initial hiring, retention, promotion, salary increase, compensatory time off, or any other benefit—may be affected by the employee's participation or nonparticipation in election-related or partisan activities, whether as part of the employee's job or as nominally "voluntary" activity while "off duty." Consistent with the policy of protecting government employees from coercion to participate in politics, a government employee may not knowingly be solicited by another government employee to make a campaign contribution. However, the rule would not be violated if the employee receives a contribution request as part of a general fundraising solicitation not targeted specifically at government employees.

The restriction on political activity by public servants does not apply when an employee is off duty, or while the employee is not engaged in work for which he or she receives compensation from a government. For employees who work during normal working hours, the on-duty restriction does not apply after work, or while the employee is on leave. However, a person may not be hired or employed for a so-called "no-show" government job, that is, a

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position for which he or she is paid a government salary without being expected to work on government responsibilities, so that the employee may do political work for an election campaign. If an employee is receiving government compensation, the employee must be engaged in work that contributes to the governmental function of the office or agency in which he or she is employed and that is commensurate with the salary received. An employee, however, may reduce his or her hours, or go on leave with a concomitant reduction in salary and benefits, to work on an election campaign.

Illustrations:

1. M is a clerk at the state department of motor vehicles. She is a strong supporter of the governor, who is seeking reelection. She volunteers for the governor's campaign in the evenings and on weekends, when she is off duty. She has also used her office's e-mail to forward to her co-workers an invitation to a fund-raising event for the governor, with the cover note: "I thought you all might be interested in this event. It's up to you whether you want to attend, but I think the governor has been doing a good job for us." M's off-duty volunteer works for the governor complies with the rule against the use of public resources for electoral purposes, but her use of the office e-mail to distribute a fund-raising appeal to her co-workers violates the rule.

2. N and O are Gotham City police officers. The police officers' union is holding a rally to announce its support for the Mayor's reelection. Both N and O attend the rally while they are off duty. N is wearing his uniform; O is in civilian clothes. Attendance at the election rally while off duty is permissible, but N has violated the rule against the electoral uses of public resources by wearing his uniform.

3. P is a caseworker in one of Gotham City's human resources agencies. He wears a large "Re-elect the Mayor!" campaign button on his coat on his way to work. When he gets to the office he transfers the button to his shirt and continues to wear it throughout the day, including in meetings with clients and co-workers. P can certainly wear the button when he is not on duty, but he should not wear it while at work, as it promotes the election of a candidate, even if it does so silently.

4. Q is the manager of a State Representative's district office. At the close of the work day. Q calls the office staff together and tells them: "The Representative is engaged

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in a tough reelection battle this year. Our jobs are tied to her winning. I hope I will see as many of you as possible volunteering at her campaign office tonight or over the weekend." This constitutes an improper effort to influence public employees to engage in election-related activity, even though the election work would be on the employee's own time.

b. Elected officials. Drawing a line between electoral/partisan and official activities is more difficult for elected officials. Elected officials may appropriately seek reelection or election to another office. As many elected officials do not have defined work hours or have responsibilities not limited to the ordinary working day, if they engage in electioneering it may very well be while they are "on duty." Although electioneering during working hours should be kept to a minimum, some on-duty election-related and partisan activity is consistent with holding elective office. Nevertheless, the general principles that government be neutral in election contests, and that government resources be dedicated to public, not private, purposes continue to apply. An elected official may not use the authority of his or her office in aid of an election campaign. Such an official, for example, could not require an applicant for a government contract to support the official's election, contribute to his or her campaign, or indicate that the applicant's support or lack thereof for the official's campaign or for the official's election opponent would be taken into account in determining the contract award or some other government benefit. So, too, an elected official may not require or improperly influence other public employees to engage in, or not engage in, election-related or partisan activity.

Elected officials whose duties are not limited to the normal working day may engage in election-related or partisan activities while on duty and during normal working hours, including giving speeches, seeking votes, raising campaign funds, and preparing campaign communications. Elected officials should refrain from engaging in public electioneering activities such as attending rallies, giving speeches, or speaking at fundraising events while wearing a government uniform or in their government offices. Such public electioneering with the attributes of office undermines the appearance of government neutrality essential to the legitimacy of elections. But they may engage in less public activities, such as meeting with campaign aides, planning campaign strategy, or writing speeches, while in uniform or in their government offices. Such election-related activity ought not to impose any additional cost on the official's government employer. Should it do so, the official must reimburse the government in a

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timely fashion. Moreover, although an elected official may engage in election-related or partisan activity during normal working hours, the official's first obligation continues to be to the public and to the effective discharge of the official's government obligations and responsibilities. Specific duties, such as a legislator's attending sessions of the legislature or carrying out committee tasks, or an executive's responsibility to oversee the operations of government offices or agencies within the official's jurisdiction and to comply with the governmental obligations of the position must take priority over campaigning.

Illustrations:

5. Governor R is engaged in a tough campaign for reelection. He is spending most of the four weeks before the election on the campaign trail, and his day is filled with campaign events. This is permissible, but when giving a campaign speech he may not use his official state lectern, which has the state seal prominently displayed on it, nor may he require his government staff—other than those he may need for security reasons or to maintain contact with his office—to accompany him to campaign events.

6. At Mayor R's weekly cabinet meeting, the chief of staff who runs the session devotes the discussion to the ways that cabinet members can help the Mayor's reelection campaign. The cabinet members are directed to accelerate any decisions or announcements that would be helpful so that they are made public before the election, and they are told to coordinate all news releases for the duration of the campaign with the governor's campaign manager. Although some attention to the electoral consequences of government decisions is inevitable, the chief of staff has gone too far in directing the subordination of the performance of official duties to the needs of the election.

7. Representative S is the head of her party's legislative campaign committee. Her party is currently in the minority and needs to win several more seats at the November election if it has any hope of enacting its policy program next year. To that end, the Representative works with the party's state committee in recruiting candidates for state representative, and provides them with advice on campaign strategy, tactics, messaging, and fund-raising. To help with this work, she has hired two new legislative aides. When the legislative session is busy, these aides work on legislative issues, but after the session ends in June they devote all of their time to party political work while still collecting a

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state pay check. Hiring staff as public employees, but then having them undertake election-related political work, is an improper use of public resources. The employees, however, could take a leave of absence and go off the state payroll to work on the campaign and then resume their state jobs and work on state issues after the election.

c. Senior government appointees. Similar considerations support permitting some election-related or partisan activity during normal working hours by senior government appointees, who are often appropriately referred to as "political appointees." Traditionally, these positions are outside of civil-service rules, and those who hold these offices are appointed because they share the political philosophy or partisan goals of the elected administration. As a result, senior appointees, such as cabinet officers, may appropriately engage in some election-related or partisan activity without compromising the neutrality generally expected of government officials. Given that the official duties and responsibilities of many senior appointees extend well beyond normal working hours, some election-related or partisan activity during normal working hours is permissible. Like elected officials, senior appointees must not use the authority of public office to influence an election; require or unduly influence subordinates to engage in (or refrain from) election-related activities; engage in public electioneering activities, like speaking at fundraising or rallies, in government buildings or while wearing or displaying the insignia of office; allow their electoral activities to impose additional, unreimbursed costs on government; or permit their electoral activities to interfere with the discharge of their official responsibilities. However, they may give election-related speeches, raise campaign money, and attend election rallies.

Illustrations:

8. Commissioner T is a member of the Governor's cabinet and a strong supporter of his reelection. She has been contacted by his campaign committee and asked to give a series of speeches around the state touting his accomplishments. Some of these speeches will occur at noontime rallies and other events during the standard workday. She may undertake the campaign activity, provided that she does not ask for official staff to assist with or prepare any of the campaign speeches, that she does not charge the state for the costs of her travel, and that her campaign work does not interfere with her completion of her official duties.

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9. After returning from her campaign tour, Commissioner T calls her senior staff, including her deputy commissioners and assistant commissioners, into her office. She tells them how concerned she is about the election. "All that we have tried to do to improve the lives of the people of this state is at risk if the governor does not win another term. I strongly hope you will join me in supporting his campaign." Even though she is addressing only political appointees, her effort, undertaken during the workday and in her office, to influence the staff to participate in election-related activity is a misuse of her office.

d. De minimis exception. Public employees who are the immediate staff of an elected official, such as a state legislator or city councilmember, may engage in minimal election-related work incidental to their official responsibilities. Election-related phone calls, e-mails, or contributions may mistakenly be sent to the elected official's government office rather than the official's campaign committee. If that occurs, the public staff may accept the call and provide the caller with the proper phone number for the campaign committee, forward the e-mail to the campaign committee, or take the contribution and send it on to the campaign. The official's government assistant may work with the candidate's campaign staff in order to schedule the official's government appointments. Tasks that involve coordinating the official's electoral and governmental activities, but not direct involvement in electioneering itself, may be unavoidable for the staff members who work for an elected official.

Illustrations:

10. Councilor U is running for reelection. X, her legislative assistant (LA), regularly contacts the Councilor's campaign manager to confirm the details of the Councilor's campaign commitments and to let the campaign manager know when the Councilor has to be back at City Hall for committee meetings and Council votes. When the Councilor is in her office at City Hall, the LA periodically reminds her of when she has to leave for campaign events and when she needs to reschedule a campaign event because of a government obligation. These de minimis involvements of the LA in the Councilor's reelection activities are permissible.

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11. Z is also on Councilor U's legislative staff. Eager to aid the Councilor's reelection, he volunteers at her campaign headquarters in the evenings. While at the Councilor's office on workdays, he continues to help the campaign by photocopying literature and stuffing envelopes, which he then brings back to the campaign for mailing. He also uses the Council office computer to post messages supporting the Councilor's reelection on Facebook and Twitter. This activity, conducted during work time, at a government office, and using government equipment, is not de minimis and violates the rule against the use of public resources to aid a candidate.

REPORTER'S NOTE

The federal government, most states, and many localities restrict the election-related activities of public employees. In so doing, many jurisdictions adopt different rules for executive-branch employees, legislative-branch employees, and elected officials, and some also distinguish within the executive branch between civil-service and political appointees. Some jurisdictions also apply at least some rules across the board to nearly all public employees. The principles proposed reflect a common core of rules and prohibitions in multiple jurisdictions even though they do not correspond precisely to the rules of any one jurisdiction.

The federal criminal code contains numerous prohibitions on the use of federal office to affect elections. Some of these are comparable to those in § 404(a) and some are more restrictive. These provisions apply to both the executive branch and Congress. 18 U.S.C. § 600 prohibits the promise of "employment, position, compensation, contract, appointment, or other benefit, provided for or made possible in whole or in part by any Act of Congress, or any special consideration in obtaining any such benefit, to any person as consideration, favor, or reward for any political activity or for the support of or opposition to any candidate or any political party in connection with any general or special election to any political office." 18 U.S.C. § 601 makes it a crime to seek a campaign contribution for a candidate or party by denying or threatening to deny someone a government job or benefit. 18 U.S.C. § 602 makes it a crime for a member of or candidate for Congress or any other federal officer or employee to "knowingly solicit" a campaign contribution from any other federal officer, employee, or person. 18 U.S.C. § 603 makes it a crime for a federal officer or employee to make a campaign contribution to a member of Congress or any other federal officer or employee "if the person receiving such contribution is the employer or employing authority of the person making the contribution." 18 U.S.C. § 606 prohibits a federal officer or employee from intimidating any other federal officer or employee—through discharging, promoting, demoting, or in any manner changing the official rank or compensation of the other officer or employee, or promising or threatening to do so—to give or refrain from giving a campaign contribution. 18 U.S.C. § 607 prohibits the solicitation or receipt of campaign contributions for federal, state, or local elections "from a person who is located in a room or building occupied in the discharge of official duties by an officer or employee of the

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United States." This provision specifically makes it "unlawful for an individual who is an officer or employee of the Federal Government, including the President, Vice President, and Members of Congress," to solicit or receive a campaign contribution "while in any room or building occupied in the discharge of official duties by an officer or employee of the United States, from any person." However, the provision also specifically allows "persons on the staff" of a member of Congress or the Executive Office of the President to receive campaign contributions "provided, that such contributions have not been solicited in any manner which directs the contributor to mail or deliver a contribution to any [federal] room, building, or other facility" and "provided that such contributions are transferred within seven days of receipt" to an authorized campaign committee. 18 U.S.C. § 610 more generally prohibits any person from intimidating, threatening, commanding, or coercing, or attempting to intimidate, threaten, command, or coerce, any employee of the executive branch of the federal government or in a civil-service position in a nonexecutive-branch agency to engage in, or not to engage in, any political activity, including, but not limited to, voting or refusing to vote for any candidate, making or refusing to make any political contribution, or working or refusing to work on behalf of any candidate.

The Hatch Act, 5 U.S.C. §§ 7321-7326, and its implementing regulations, 5 C.F.R. § 734, generally regulate the political activities of all civilian employees of the executive branch of the federal government, other than the President and Vice President. The Hatch Act divides the federal executive workforce into three groups. Most federal employees fall into a "less restricted" category. They may not: (i) use their official authority to influence an election; (ii) solicit, accept or receive a donation or contribution for a political party or candidate for partisan office; (iii) be candidates for public office in partisan elections; (iv) knowingly solicit or discourage participation in any political activity of anyone who has business pending before their employing office, or (v) engage in partisan political activity while on duty, in any federal room or building, while wearing a uniform or official insignia, or using any federally owned or leased vehicle. See, e.g., Burrus v. Vegliante, 336 F.3d 82, 87-90 (2d. Cir. 2003) (postal workers violated the Hatch Act by posting electioneering materials on union bulletin boards in nonpublic areas of post offices; this was prohibited "on-the-job" political activity on government property even if it did not interfere with the employees' performance of their official duties). Employees in certain agencies—such as the FBI, Secret Service, and agencies involved in national security, criminal justice, or enforcement of the election laws, as well as administrative law judges—are subject to further restrictions, including prohibitions on taking an active part in partisan political campaigns or partisan political management, such as distributing campaign materials or participating in partisan voter-registration drives. Finally, federal employees appointed by the President by and with the advice and consent of the Senate or who are paid from the appropriation for the Executive Office of the President are permitted to engage in political activities while on duty, wearing an official uniform or badge, in a government office or while using a government-owned or -leased vehicle, provided such activities do not impose costs on the U.S. Treasury. However, additional restrictions on such advice and consent employees are authorized by 5 C.F.R. 735.103, and have been imposed in certain cases with the consent of the

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Office of Legal Counsel to the Department of Justice. (See Letter of Assistant Attorney General Walter Dellinger to Lorraine P. Lewis, General Counsel, Office of Personnel Management, Sept. 20, 1994). In some cases, this authority has been specifically delegated to employing agencies. (See Memorandum of President Clinton to the Secretary of State, Oct. 24, 1994).

Congress is not subject to the Hatch Act, however, the Senate and House of Representatives have adopted rules governing political activity by their members and staff. Senate Rule XLI allows each Senator to designate three assistants to handle federal campaign contributions, but otherwise prohibits Senate officers or employees from being involved with federal campaign funds. Although no other Senate Rule addresses the election-related or partisan work of Senators or Senate staff, the Senate Ethics Manual provides that as Senate employees "are compensated from funds from the Treasury for regular performance of official duties," they should not engage in campaign activities "on Senate time, using Senate equipment or facilities." U.S. Senate, Select Comm. on Ethics, Senate Ethics Manual (108th Cong., 1st Sess., 2003) at 139. In addition, "[s]taff may not be required to do political work as a condition of Senate employment." Id. at 140. The Senate Ethics Manual does recognize that "in the practical operation of a Member's office some minimal campaign-related activities might unavoidably be performed by a Member's staff in the course of their official congressional duties for a Member." Id. at 141. Other than noting the applicability of the restrictions of 18 U.S.C. § 607 on campaign activity in federal buildings and 18 U.S.C. § 602 on solicitation of campaign funds by members of Congress from federal employees (including congressional staff) and the general principle of federal law that "official resources may only be used for official purposes," id. at 151, the Senate Ethics Manual does not purport to regulate the campaign-related or partisan activities of Senators.

The Code of Official Conduct of the U.S. House of Representatives—Rule XXIII of the Rules of the House—gives only limited attention to political activity. Clause 8(a) provides that a Member or officer of the House may not retain an employee who does not perform duties "commensurate with the compensation such employee receives," and then goes on to state that "when it is anticipated that an employee will be assuming significant campaign duties, it may be necessary for the employing Member to make an appropriate reduction in the employee's House pay. Certainly an appropriate reduction in salary is necessary when a full-time employee goes to part-time status in the congressional office in order to do campaign work." This bars the use of public funds to hire no-show employees to engage in campaign work. The House Ethics Manual requires that campaign work by House employees "must be done on their own time and outside the congressional office, and without the use of any House resources." Committee on Standards of Official Conduct, U.S. House of Representatives, House Ethics Manual (110th Cong., 1st Sess., 2008) at 121. "Among the specific activities that clearly may **not** be undertaken in a congressional office or using House resources (including official staff time) are the solicitation of contributions; the drafting of campaign speeches, statements, press releases or literature; the completion of FEC reports; the creation or issuance of a campaign mailing; and the holding of a meeting on campaign business." Id. at 124 (emphasis in original). Although the Manual notes

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that "certain **limited** activities in a congressional office . . . related to a Member's campaign are permissible," such as coordination of the Member's schedule, handling press inquiries, and referring campaign matters to the campaign office, id. at 132-135 (emphasis in original), the Manual also emphasizes that "in no event may a Member or office compel a House employee to do campaign work.

> To do so would result in an impermissible official subsidy of the Member's campaign. The prohibition against coercing staff members to do campaign work is quite broad. It forbids Members and senior staff from not only threatening or attempting to intimidate employees regarding doing campaign work, but also from threatening or otherwise pressuring them to do such work."

Id. at 135-136. On August 2, 2012, the House voted to reprimand Representative Laura Richardson (D-Cal.) for multiple ethical infractions, most prominently coercing members of her official staff to work on her 2010 reelection campaign, along with using official resources for campaign purposes. The House Ethics Committee report determined that these actions violated 31 U.S.C. § 1301, which requires that appropriations "shall be applied only to the objects for which the appropriations were made"; House Rule XXIII, cl. 8(a) requiring that staff working on campaigns take a reduction in pay; and—due to the misuse of staff—clause 1 of the Code of Official Conduct, which provides that a Member "shall behave at all times in a manner that shall reflect creditably on the House." See U.S. House of Representatives, Report of the Committee on Ethics, In the Matter of Allegations Relating to Representative Laura Richardson (112th Cong., 2d Sess., Aug. 1, 2012).

There is relatively little case law dealing with the campaign-related activities of public employees. Between 1975 and 1981, the United States Court of Appeals for the District of Columbia Circuit heard and rejected on standing or justiciability grounds three cases brought by plaintiffs who claimed that certain high-level executive-branch or congressional employees were improperly working on election campaigns. In Public Citizen, Inc. v. Simon, 539 F.2d 211 (D.C. Cir. 1976), taxpayers brought an action for declaratory and injunctive relief to require the Secretary of the Treasury to take action to recover salaries paid to members of the White House staff who were "devoting substantially all of their working time to the 1972 Presidential election campaign, rather than to the official business for which their positions are authorized." The court found that the taxpayers lacked standing and dismissed the suit. In Winpisinger v. Watson, 628 F.2d 133 (D.C. Cir. 1980), supporters of Senator Edward Kennedy brought suit against members of the Carter administration—including seven cabinet officers and seven presidential assistants—claiming the defendants had illegally employed their public authority to help President Carter in his nomination battle against Kennedy. The court again ruled that the plaintiffs lacked standing, but went further and emphasized the prudential barriers to judicial action:

> "A fair characterization of the accusations would necessarily include the observation that they relate, quite literally, to virtually every discretionary decision made by the Administration acting through these high government officials. Consequently, any relief,

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> to be effective, would have to be as broad as the authority of the high offices held by the federal defendants. Whether shaped as declaratory relief, injunctive relief, or both, the court's judgment would have to interject itself into practically every facet of the Executive Branch of the federal government, on a continuing basis . . . . The judiciary is not to act as a management overseer of the Executive Branch."

Id. at 139-140. The third case, U.S. ex rel Joseph v. Cannon, 642 F.2d 1373 (D.C. Cir. 1981) was a *qui tam* action brought under the False Claims Act, contending that Senator Howard Cannon (D-Nev.) authorized the payment of his administrative assistant's salary over a 20-month period in 1975-1976 when the assistant allegedly worked "exclusively and extensively" for the Senator's reelection and, thus, was not performing "official legislative and representational duties." The court concluded that the claim was essentially nonjusticiable. The Senate had not barred Senate staff from participating in a Senator's reelection campaign, and the court found there were no "judicially discernible rules or standards" for resolving "the question whether Senators may use paid staff members in their campaign activities." Id. at 1379. "In the absence of any discernible legal standard or even of a congressional policy determination that would aid consideration and decision of the question . . . we are loathe to give the False Claims Act an interpretation that would require the judiciary to develop rules of behavior for the Legislative Branch." Id. at 1385. See also Note, Use of Congressional Staff in Election Campaigning, 82 Colum. L. Rev. 998 (1982); Chemerinsky, Protecting the Democratic Process: Voter Standing to Challenge Abuses of Incumbency, 49 Ohio St. L.J. 773 (1988).

At the state level, New York's highest court affirmed the dismissal of a criminal indictment charging the minority leader of the state senate, his chief of staff, and three other senators with multiple counts of grand larceny, theft of services, and defrauding the government for putting senate staff to work on election campaigns while drawing their state salaries. People v. Ohrenstein, 77 N.Y.2d 38 (1990). The court noted that "the line between political and governmental activities is not so easily drawn in cases dealing with legislators and their assistants," id. at 47, and that "at the time the defendants acted, their conduct was not prohibited in any manner; nor could they have known that they were subject to criminal prosecution for their acts; there was no statute, nor was there any rule or regulation defining the duties of legislative assistants or limiting the nature or extent of their permissible political activities." Id. at 52. Given the lack of any state laws or senate rules barring senate employees from engaging in election-related work during working hours, a criminal prosecution could not be sustained. The court did, however, sustain the counts in the indictment charging the defendants with filing false instruments when they certified on the payroll records that "no-show" employees—employees who performed no legislative services of any kind to justify their salaries and who were hired solely to be campaign workers—performed "proper duties" and with committing larceny when they induced the state to rely on the false statements to pay the employees. Id. at 54. For a critical assessment of the *Ohrenstein* decision, see Gardner, The Uses and Abuses of Incumbency: *People v. Ohrenstein* and the Limits of Inherent Legislative Power, 60 Fordham L. Rev. 217 (1991).

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In *Ohrenstein*, the lack of legislative rules regulating the work of legislators and staff was fatal to much of the indictment, but in a pair of Wisconsin cases—State v. Jensen, 681 N.W.2d 230 (Wis. Ct. App. 2004) and State v. Chvala, 678 N.W.2d 880 (Wis. Ct. App. 2004), aff'd, 693 N.W.2d 747 (Wis. 2005)—the existence of specific rules supported indictments of legislative leaders who put legislative employees to work on campaigns for legislative seats during compensated time. In *Jensen*, the court sustained criminal complaints against the speaker and the majority leader of the state assembly for felony misconduct in public office and the misdemeanor of intentional misuse of public position for private benefit for engaging in election-related activity by directing legislative employees to raise and distribute campaign funds and assist candidates on their campaigns during times for which the employees were receiving compensation as state employees. The court found such actions violated the "code of ethics for public officials and employees" provision of Wisconsin law barring a state public official from using his or her office or position "in a way that produces or assists in the production of a substantial benefit, direct or indirect, for the official . . . or an organization with which the official is associated"—in this case their party's legislative campaign committee—as well as other statutes more specifically barring officeholders from using "perquisites of office" to gain an advantage in elections and barring public officials from soliciting or receiving contributions or services while engaged in their official duties. The court also looked to Assembly rules, a provision of the Assembly Employee Handbook barring political activity during working hours, and other legislative materials and ethics rulings, in determining that the use of legislative employees on campaign work constituted felony misconduct. See 681 N.W.2d at 238-240. The court specifically rejected the defendants' argument that engaging in political activity on state time was consistent with their positions as legislative leaders seeking to use elections "to advance their political legislative agenda." Id. at 241. In the Wisconsin court's view, electioneering activity was simply not legitimate use of legislative staff:

> "The line between 'legislative activity' and 'political activity' is sufficiently clear so as to prevent any confusion as to what conduct is prohibited under this statute. . . . Legislators and reasonable persons should and would know the difference. In addition, the allegations before us speak of conduct which, on its face, cannot reasonably be construed as legitimate legislative activity. Such activity includes campaign fundraising, preparations and maintenance of campaign finance reports, candidate recruitment and campaign strategy development."

Id. at 242. As the court tartly concluded after giving detailed accounts of the allegations that Assembly employees were, while receiving public salaries, preparing and disseminating campaign literature, fundraising, managing campaign data on state computers, and developing and implementing campaign strategy, the result was "public financing of private campaigns without the public's permission. There is no reasonable argument that this alleged activity serves any legitimate legislative duty or purpose." Id. at 253.

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State v. Chvala involved similar charges of felony misconduct in public office—this time against the senate majority leader—for requiring legislative staff, including staff working for the party caucus, to engage in election-related activities for various senators and senate candidates. The *Chvala* court relied heavily on the provisions of the Senate Policy Manual and other senate guidelines which barred political activity during working hours to conclude that "using discretionary powers to obtain a dishonest advantage over others by waging partisan political campaigns with state resources violates one's duty as a public official." 678 N.W.2d at 890. In effect, the Senate's rules established judicially enforceable criteria for determining whether Chvala "violated his discretionary duty as a public official by directing caucus and legislative staff to run political campaigns." Id. at 897.

Many, but certainly far from all, states and local governments have laws dealing with the election-related activities of public employees. These may distinguish between elected and nonelected personnel, and between the executive and legislative branches. Some legislatures have their own internal rules addressing such political activity. There are far too many such laws and regulations to summarize or synthesize. Some laws are relatively brief and general. Kansas, for example, simply prohibits the use of "the time of any officer or employee" of the state or any municipality "for which the officer or employee is compensated by such governmental agency, to expressly advocate the nomination, election or defeat of a clearly identified candidate to state office or local office" with an exception for "an incumbent officer campaigning for nomination or reelection to a succeeding term to such office or to members of the personal staff of any elected officer." Kans. Stat. § 25-4169(a). Similarly, Louisiana's law dealing with "abuse of office" succinctly states: "No public servant shall use the authority of his office or position, directly or indirectly, in a manner intended to compel or coerce any person or other public servant to engage in political activity," defined as "an effort to support or oppose the election of a candidate for public office." La. Stat. § 42:1116B. Michigan lists the political activities that public employees may undertake but then provides that such activities "shall not be engaged in by a public employee during those hours when that person is being compensated for the performance of that person's duties as a public employee." Mich. Consol. Laws § 15.404(4). Pennsylvania's laws prohibiting theft of services and misapplication of property were used to convict State Supreme Court Justice Joan Orie Melvin and her sister State Senator Jane Orie of improperly requiring state employees in their offices to work on Justice Orie Melvin's campaigns for election and reelection to the supreme court.

By contrast, some states have very detailed rules. See, e.g., Fla. Stat. § 104.31 ("political activities of state, county, and municipal officers and employees"), § 106.15, § 112.313(6) (misuse of public position); 5 Ill. Con. Stat. 430/1-5, 430/5-15 (listing 15 "prohibited political activities" that may not be undertaken by state employees "during any compensated time" and that may not be required of state employees by a superior as part of that employee's state duties, during any compensated time off, or as a consideration for a benefit, promotion, or bonus). Many state laws give particular attention to the role of public officers and employees in making, soliciting, or receiving campaign contributions. See, e.g., Mass. Gen. Laws, Part I, ch. 55,

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§§ 13-17; Rev. Code Wash. Ann. § 42.17A.565 ("solicitation of contributions by public officials or employees").

Many local governments also have adopted detailed restrictions on political activity by municipal officers and employees. The regulations of the Philadelphia Board of Ethics, for example, prohibit appointed City officers and employees from (i) engaging in political activity while on duty, in uniform, using any City-owned or leased resources, or on City property; (ii) using their authority, influence, title, or status as a City officer or employee for any political purpose; (iii) collecting, receiving, or soliciting campaign contributions; (iv) being a member of a political party committee, an officer of a political party, or actively engaged in the "management or affairs of any political party, political campaign or partisan political group," including involvement in an election campaign. Philadelphia's rules, however, do not apply to elected officials. See Philadelphia Board of Ethics, Regulation No. 8, http://www.phila.gov/ethicsboard/PDF/Board_Ethics_Regulation_8_(Political%20Activity_Effective_3282011.pdf. The City of Los Angeles provides that "no City official or employee of an agency shall engage in campaign-related activities, such as fundraising, the development of electronic or written materials, or research for a campaign for any elective office or ballot measure" "during the hours for which he or she is receiving pay to engage in City business" or while using City resources, and that no person shall "induce or coerce, or attempt to induce or coerce any other person" to engage in such campaign-related activities during the hours paid to engage in City business. See City of Los Angeles, Governmental Ethics Ordinance, Los Angeles Municipal Code, § 49.5.5 B, D. The City of Chicago imposes extensive restrictions on the political activities of employees (defined to exclude elected officials), and bars both employees and elected officials from requiring such political activities from employees as part of their official duties, as a condition of employment, as consideration for additional compensation or benefit, or during compensated time off. Chicago also restricts the solicitation or acceptance of campaign contributions by city officials or employees from other city officials or employees. See City of Chicago, Governmental Ethics Ordinance, ch. 2-156, Municipal Code of Chicago, §§ 2-156-010 (v-1), 2-156-135, 2-156-140. New York City prohibits all "public servants"—defined as all officials, officers, and employees of the city—from coercing or attempting to coerce other public servants to engage in political activities, and from requesting any subordinate public servant to participate in a political campaign. New York also specifically prohibits public servants from coercing the payment of campaign contributions, or even requesting subordinate public servants to make campaign contributions, and it bars certain high-level appointees—agency heads and officials "charged with substantial policy discretion"—from engaging in any fundraising for a City elected official or a candidate for City office. See New York City Charter, § 2604(b)(9), (11), (12).

As the wide range of federal, state, and local rules indicate, the imposition of restrictions on public employee participation in election campaigns and partisan activities involves striking a balance between, on the one hand, assuring that public employees devote their time to and use public resources for the performance of their public duties, vindicating the public

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interest in assuring the political neutrality of government resources and government actions in elections and protecting public employees from being pressured by their government superiors to participate in election campaigns and, on the other hand, the interest of public employees in being able to participate in political activity. The principles presented here are intended as the minimum necessary to protect the public interest while respecting the ability of more political employees—elected officials, their senior employees, and their immediate staffs—to engage in those electoral and partisan activities appropriate to their positions. Governments could choose to be more restrictive with public employee participation in election campaigns and partisan activities provided such restrictions are consistent with constitutional protections of freedom of speech and association.

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Appendix

Black Letter of Tentative Draft No. 1

§ 401. Prohibition on the Use of Public Resources in Election Campaigns

(a) Except as provided in subsections (b) and (c), public servants may not use public resources to promote, attack, support, or oppose the campaign of any candidate for elected office, to assist or oppose any political party, or to assist or oppose any other organization in its support for or opposition to candidates for elected office.

(i) "Elected office" includes any federal, state, or local office.

(ii) "Public resources" include but are not limited to

(A) public funds;

(B) space in buildings, offices, or rooms owned, rented, or leased by a public entity;

(C) office equipment and supplies, such as stationery, postage, mailing lists, and office files; furniture; computer hardware, software, and e-mail systems; printers, copiers, fax machinery, telephones, and personal digital assistants; and

(D) publicly maintained websites.

(iii) Campaign-related activities subject to this prohibition include but are not limited to the solicitation, receipt, or acceptance of campaign contributions; planning campaign strategy; solicitation of endorsements or other statements of support; solicitation to work on an election campaign; and solicitation of votes.

(b) The use of public resources for campaign-related activity is permitted when such resources are generally available to competing candidates or political organizations, or to the public.

(c) An elected official, or staff to an elected official, may use public resources for campaign-related activity if such use

(i) is incidental and subordinate to the public use or is, as a practical matter, unavoidable, and

(ii) involves minimal public expense, or, if the cost is more than de minimis, the public is reimbursed for the cost of the campaign-related use.

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§ 402. Prohibition on the Use of Public Resources for Communications in Election Campaigns

(a) Communications financed by public resources may not be used to promote, attack, support, or oppose the campaign of any candidate for elected office, or to assist or oppose any political party or other organization that supports or opposes candidates for elected office.

(b) Public resources may not be used to finance advertisements or the preparation or dissemination of mass communications that use the name, voice, or likeness of a public official who is running for office during the period preceding the election—including primaries, general elections, runoffs, and special elections—in which the official is a candidate.

(i) For purposes of this subsection, "mass communications" shall mean radio, television, mass mailings of printed communications (such as letters, newsletters, pamphlets, or brochures), use of telephone banks or robocalls, bulk e-mails, text messages, websites, social media accounts and other forms of telecommunication.

(ii) The news or editorial programs of a public radio or television station may use the name, voice or likeness of a public official running for office in the pre-election period, provided that such action is taken independently of the official.

(c) Public resources, as defined in § 401(a)(ii), may not be used to finance mass communications by an elected official to the general public outside the official's constituency.

§ 403. Regulation of Publicly Funded Travel Related to Election Campaigns

(a) Subject to subsection (b):

(i) Public funds may not be used to pay for travel in connection with election-related or partisan activities.

(ii) Vehicles or other transportation equipment, such as motor vehicles or aircraft, that are owned, rented, or leased by a public entity may not be used for travel in connection with activities that promote, attack, support, or oppose the

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campaign of any candidate for elected office, or to assist or oppose any political party, or to assist or oppose any other organization in its support for or opposition to candidates for elected office.

(b) When for reasons of security, protocol, ceremonial functions, or overall demands of time, a government official as a practical matter must use a publicly owned vehicle or transportation equipment for travel, the official may use such vehicle or transportation equipment in connection with election-related or partisan activity, provided that the official reimburses the public entity that owns, rents, or leases the vehicle or equipment for the share of the cost of the travel that is attributable to the election-related or partisan activity. Similarly, an official may use public funds to pay for travel that is partly election-related or partisan, provided that the primary purpose and predominant activity of the travel is not election-related or partisan, and the official reimburses the public entity for the share of the cost of the travel that is attributable to the election-related or partisan activity.

(c) For purposes of this Section, an activity will be considered election-related or partisan if it involves:

(i) soliciting votes, contributions, or support for or opposition to any candidate for elected office, or making public statements promoting, supporting, attacking, or opposing a candidate for elective office;

(ii) soliciting votes, contributions, or support for or opposition to a political party or to a political organization that supports or opposes candidates for elective office;

(iii) attending a national, state, or local political-party convention, the meeting of any political-party committee, or attending an event sponsored by a political party or other political organization;

(iv) attending a campaign or partisan rally or a campaign or partisan fundraising event; or

(v) speaking, during a defined pre-election period, at a public event in a jurisdiction at which candidates for office in that jurisdiction are featured as speakers or attendees; however, speaking at an event that clearly involves an official response to a national, state, or local emergency will not be considered election-related.

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§ 404. Restrictions on Public-Employee Participation in Election Campaigns and Partisan Activities

(a) Except as provided in subsections (b), (c), and (d), a public employee may not

(i) use the authority of his or her office to influence the outcome of an election;

(ii) engage in election-related or partisan activities while

(A) on duty or during normal working hours and receiving government compensation; or

(B) in any room, building, or other location occupied in the discharge of the official duties of a public employee; or

(C) wearing a uniform or official insignia identifying the person as a public employee; or

(iii) require or improperly influence any other public employee to engage in election-related or partisan political activity, whether while on duty or on the other public employee's own time.

(b) An elected official may engage in election-related or partisan activities during normal working hours, provided that

(i) the official does not use the authority of his or her office to influence the outcome of an election or to assist the electioneering activities of a political party;

(ii) the official does not require or improperly influence any other public employee to engage in election-related or partisan activity, whether while on duty or on the other public employee's own time;

(iii) the official does not wear any uniform or official insignia of office while engaged in public election-related or partisan activities, such as speaking at a campaign rally or fundraising event;

(iv) the official does not engage in public election-related or partisan activities in any room, building, or other location occupied in the discharge of the official's official duties;

(v) any such election-related or partisan activity does not impose any additional cost on the government, or, if such activity does so, the official reimburses the government for the additional cost in a timely fashion; and

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(vi) any such election-related or partisan activities do not interfere with the ability of the official to discharge his or her official duties and do not compromise the efficiency and integrity of the official's office or agency.

(c) A senior appointed official such as a cabinet officer, agency head, or other significant policymaking official whose appointment or nomination to office and removal from office is normally determined by an elected official or whose official duties and responsibilities continue outside normal working hours and away from the official's normal workplace may engage in election-related or partisan activities during normal working hours, provided that the conditions stated in clauses (i) through (vi) of subsection (b) of this Section are satisfied.

(d) An employee who works on the immediate staff of an elected official may, while on duty and as part of his or her official responsibilities, engage in minor or incidental election-related or partisan work concerning the election of that employee's employer.

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