Note: In light of *Crandon v. United States*, 494 U.S. 152 (1990), the analysis regarding the application of 18 U.S.C. § 209 to legal defense funds was revised in OGE Informal Advisory Letter 93 x 21.

# Office of Government Ethics
## 85 x 19 -- 12/12/85

### Letter to a Private Attorney dated December 12, 1985

We have received your letter regarding your representation of a senior career official of an executive branch agency who is currently engaged in a grievance with the agency where he is employed. You have asked whether there would be any prohibitions on the establishment of a legal defense fund by some friends of the employee to assist him in paying legal fees and other costs related to the grievance process. More specifically, you inquire as to this Office's views on the applicability of 18 U.S.C. § 209, or any other prohibition, to the establishment of a defense fund.

Your letter states that as you envision the defense fund, it would be established by a group of the employee's friends who are not in the employ of the Federal Government (either permanently or in any part-time position) and who do not do any business with the branch of the agency with which the employee is connected. In addition, all contributions to the fund would be blind contributions so that the names of people who made donations would not be disclosed to the employee. Finally, although the fund would pay legal expenses, the entire course of legal representation would be dictated solely by the employee. The fund would simply pay costs that are charged to the employee for representation.

For the reasons discussed below, we are unable to say that 18 U.S.C. § 209 would not apply to the situation which your letter outlines. Further, we are unable to conclude that the unidentified Federal employee could receive distributions from the fund without contravening any other Federal law or regulation.

18 U.S.C. § 209 is the central Federal conflict of interest statute to be considered in analyzing the establishment of a defense fund. It provides in relevant part:

> (a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government . . . from any source other than the Government of the United States, except as may be contributed out of

any State, county, or municipality; or

Whoever, whether an individual, partnership, association, corporation, or other organization pays or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection --

Shall be fined not more than $5,000 or imprisoned not more than one year, or both.**1**

Thus, section 209 establishes both a "recipient" and a "payor" offense. It has four elements. It prohibits (1) an officer or employee of the executive branch or an independent agency of the United States Government from (2) receiving salary or any contribution to or supplementation of salary from (3) any source other than the United States (4) as compensation for services as an employee of the United States.**2**

Because the first three elements are relatively straightforward, the question whether a payment is "compensation for services as an employee of the United States" is often the focus of a section 209 inquiry. The answer depends on examination of all the surrounding circumstances, keeping in mind the purpose underlying section 209 and its predecessor, 18 U.S.C. § 1914. Broadly stated, the underlying purpose of section 209 is "that no Government official or employee should serve two masters to the prejudice of his unbiased devotion to the interests of the United States."**3**

Three basic concerns underlie this rule prohibiting two payrolls and two paymasters for the same employee on the same job. First, the outside payor has a hold on the employee deriving from his ability to cut off one of the employee's economic lifelines. Second, the employee may tend to favor his outside payor even though no direct pressure is put on him to do so. And third, because of real risks, the arrangement has a generally unwholesome appearance that breeds suspicion and bitterness among fellow employees and other observers.**4**

Although it may be argued that donor anonymity and lack of direct business with the branch of the agency with which the employee is connected strengthens significantly the inference that the creation of a defense fund is not intended to provide compensation for the performance of Government service, these factors must be weighed against the fact that the fund benefits only one individual Government employee and is related to an activity which arose directly from the performance of Government service. The totality of the circumstances must be examined in each individual case. No one factor is determinative. There need not be a connection between the payor and the employee's agency, for example, to make out a violation under section 209, although such a connection may be an important consideration in assessing the true purpose of a payment. Nor need the employee be in a position to, or actually attempt to, influence the Government on behalf of the payor, although again this might prove to be an important consideration. All that the statute actually requires is that a Government employee receive outside compensation for his or her Government work, not that there be actual or apparent influence. "Although if there is any substantial relationship or pattern of dealings between the employee's agency and the payor, the likelihood is substantially increased that a court or other deciding authority will find a violation."**5**

Any Federal employee receiving benefits under a defense fund such as that which you envision must comply with applicable regulations regarding the receipt of outside compensation and gifts. The applicability of these regulations may differ depending on the identity of the employing agency and the nature of the employee's job. Thus, individual agency regulations should be examined on a case-by-case basis. However, the principles set forth in Executive Order 11222 prescribing standards of ethical conduct for Government officers and employees would be applicable to your client, specifically section 201(a) which provides in part:

> [N]o employee shall . . . accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from any person, corporation, or group which --
>
> (1)has, or is seeking to obtain, contractual or other business or financial relationships with his agency;
>
> (2)conducts operations or activities which are regulated by his agency; or

(3)has interests which may be substantially affected by the performance or nonperformance of his official duty.

Section 201(c) of the Executive Order goes on to state that:

> It is the intent of this section that employees avoid any action, whether or not specifically prohibited by subsection (a), which might result in, or create the appearance of --
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> (1) using public office for private gain;
>
> (2) giving preferential treatment to any organization or person;
>
> (3) impeding government efficiency or economy;
>
> (4) losing complete independence or impartiality of action;
>
> (5) making a government decision outside official channels; or
>
> (6) affecting adversely the confidence of the public in the integrity of the Government.

Since the proscriptions of the order go to both direct and indirect activities, no person involved in setting up the fund, soliciting on behalf of the fund, or actually contributing to the fund may be a person who is disqualified by the provisions of the order. Further, although a policy of anonymity is sound, we believe that the Executive Order as well as all agency implementing regulations prohibit your client's receipt of any gift from a disqualified donor when anonymity has not been preserved, even if the defense fund itself is not responsible for disclosing the information. It would not be the defense fund itself which would be regulated by the provisions of the order, but rather your client, whose responsibility under the order must be met regardless of the fund's conduct.

Finally, 5 U.S.C. § 7351 must be considered. This statute provides that an employee may not --

(1)solicit a contribution from another employee for a gift to an official superior;

(2)make a donation as a gift to an official superior; or

(3)accept a gift from an employee receiving less pay than himself.

An employee who violates this section shall be removed from the service.

The views expressed in this letter have not been concurred in by any other governmental agency and are based solely on representations which you have made in your letter of inquiry.

Sincerely,

David H. Martin
Director

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**1** Section 209 does not apply to special Government employees or to those serving without compensation. See action 209(c).

**2** United States v. Raborn, 575 F. 2d 688, 691-92 (9th Cir. 1978).

**3** See 33 Op. Att'y Gen. 272, 275 (1942).

**4** Report of Association of the Bar of the City of New York, Conflict of Interest and Federal Service 211 (1960).

**5** B. Manning, Federal Conflict of Interest Law 165 (1964).