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United States Senate

OFFICE OF THE SECRETARY

MEMORANDUM

TO: Glen D. Nager, Chair of the Board of Directors
Office of Compliance

FROM: Kelly D. Johnston
Secretary of the Senate

DATE: April 11, 1996

RE: Response of the Secretary of the Senate to Advance Notice of Proposed Rulemaking

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The Office of the Secretary of the Senate submits the attached comments to the Board of Directors of the Office of Compliance in response to the Advance Notice of Proposed Rulemaking, 142 Cong. Rec. S1547 (daily ed. March 6, 1996), and withdraws the comments it submitted dated April 5, 1996.

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OFFICE OF COMPLIANCE

CHAPTER 71 OF TITLE 5 OF THE UNITED STATES CODE

I. Issues on Which the Board Requested Comment

A. What is the meaning of the term "substantive regulations" under sections 220 and 304 of the CAA?

Section 220(d) of the Congressional Accountability Act ("CAA") directs the Board to issue regulations pursuant to section 304 of the CAA that implement the provisions of chapter 71 of Title 5 of the United States Code ("chapter 71"), made applicable to Congress through section 220 of the CAA. Section 220 further directs that such regulations "shall be the same as substantive regulations promulgated by the Federal Labor Relations Authority [FLRA]."[1]

The Secretary contends that the term "substantive regulations" means only those regulations promulgated by the Federal Labor Relations Authority ("the FLRA regulations") that are necessary to implement the provisions of chapter 71 made applicable to the CAA and excludes those FLRA regulations that address certain procedural processes already provided for by the CAA. See Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977). For example, FLRA regulations that concern the procedures to be followed in petition and unfair labor practice hearings or the procedures to be followed in obtaining review of a decision that results from such hearings should not be considered "substantive." Section 220 of the CAA already provides that such hearings and review procedures are to be conducted pursuant to the provisions of section 405 and 406 of the CAA. Thus, the FLRA regulations that relate to such procedures are not required to implement the provisions of chapter 71 made applicable by the CAA and should not be considered "substantive."

Other FLRA regulations that also are procedural in nature, such as those addressing filing and service procedures, should not be considered substantive because their adoption is not necessary to implement the provisions of chapter 71 made applicable by the CAA. The Board already has issued regulations pursuant to section 303 of the CAA that provide procedures for charges filed under Part A of the CAA. To the extent possible, the same procedures should be utilized for submissions filed under Part D of the CAA. If any modifications to the section 303 regulations are required to conform to any peculiarities of section 220, then the Secretary suggests that the Board issue additional procedural regulations pursuant to section 303 rather than adopt non-substantive regulations promulgated pursuant to the FLRA.

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[1] Of course, this is subject to sections 220(d)(2)(A) and (B), which state that such regulations should be modified to the extent either good cause or a conflict of interest is shown.

B. Which FLRA regulations should be considered "substantive regulations" within the meaning of section 220 of the CAA?

It is the Secretary's position that, other than the regulations identified in this section and discussed below, all regulations set forth in Subchapters C and D of the FLRA regulations are substantive and should be adopted by the Board, subject to the modifications discussed in Part C of this memorandum.[2]

The FLRA regulations that should not be considered "substantive regulations" within the meaning of section 220 of the CAA and thus should not be adopted by the Board are sections 2422.18 - 22, 2422.30(c)-(e), 2422. 31, 2423.14, 2423.17, 2423.20 - 2423.30, 2429.17 and 2429.18. These FLRA regulations (discussed in more detail in Part C of this memorandum) relate to the procedure of hearings conducted to resolve petitions and unfair labor practice complaints, as well as appeal procedures and standards of review. As stated above, the language of section 220 of the CAA suggests that Congress did not intend the Board to adopt these regulations as part of the "substantive" FLRA regulations. Rather, section 220 directs that the petition and unfair labor practice matters that arise pursuant to section 220 be referred to "a hearing officer for decision pursuant to subsections (b) through (h) of section 405." 2 U.S.C. §§ 1351(c)(1) and (2). Thus, the procedures set forth in section 405 of the CAA, rather than the procedures set forth in the FLRA regulations identified above, should govern the procedures for hearings conducted pursuant to section 220(c)(1) and (2) of the CAA.[3]

In addition, sections 220(c)(1) and (2) provide that the decisions of the hearing officers issued pursuant to these sections are subject to review by the Board pursuant to section 406 of the CAA. Thus, it is apparent that Congress did not intend the review process to be the process as stated in the FLRA regulations cited above. Rather, Congress intended the review of a hearing officer's decision to be guided by the provisions of section 406 of the CAA.[4] Because section

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[2] The Secretary agrees that the regulations set forth in Subchapter B should not be adopted because they do not appear to implement the statutory provisions of chapter 71 made applicable by the CAA.

[3] One significant difference between the hearing procedure in the FLRA regulations and the hearings conducted pursuant to the CAA is that the FLRA regulations require open hearings, while the CAA requires hearings to be conducted in closed sessions. See Section 405(d)(1). Because section 220 directs that the hearing procedures of section 405(b) through (h) be followed, all hearings conducted pursuant to section 220 must be in closed session.

[4] To maintain consistency, the Secretary suggests that this same procedure be followed for review of a decision even when no "hearing" is required. Thus, whether a party appeals from a decision issued in the absence of a hearing or from a decision of a hearing officer issued pursuant to section 405, the process for obtaining review by the Board would be the same. (It is

220 provides its own procedures for hearings and review of decisions, adoption of the FLRA regulations that provide for such procedures is not necessary to implement the provisions of chapter 71 made applicable by the CAA, and thus those FLRA regulations should not be considered "substantive regulations."

To the extent the Board determines that the procedures delineated in sections 405 and 406 of the CAA need to be amplified or supplemented to better implement procedurally the sections of chapter 71 made applicable by the CAA, the Secretary suggests that the Board issue such procedural regulations pursuant to section 303 of the CAA, rather than adopt the procedural regulations of the FLRA. Adoption of such procedural FLRA regulations is not provided for in the CAA.

In addition to those regulations cited above, the following FLRA regulations should not be considered to be "substantive" within the meaning of section 220 of the CAA because, as discussed in Part A of this memorandum, they concern matters of basic procedure (such as filing and service) that are already addressed by the regulations promulgated pursuant to section 303 of the CAA and which should be made applicable to section 220 to the extent possible. These FLRA regulations include: 2422.5, 2422.6, 2423.6, 2429.2, 2429.7, 2429.11, 2429.12, 2429.14, 2429.18, 2429.21 - 2429.28. Each of these is discussed in more detail in Part C of this memorandum.

C. To what extent should the substantive regulations of the FLRA be modified pursuant to section 220(d) of the CAA?

Universal Modifications

Certain terms referred to throughout the FLRA regulations should be changed to conform to the terminology and structure of the CAA, as described below.

1. References to "chapter 71 of title 5" should be changed to "chapter 71 of title 5, as made applicable by the CAA."

2. References to "the Authority" and "the Impasses Panel" should be changed to "the Board."

3. References to "agency" and "activity" should be changed to "employing office."

4. While the FLRA regulations provide that unfair labor practice hearings will be conducted before an Administrative Law Judge, the CAA provides in section

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unclear at this stage who would issue a decision when no hearing is required because, as discussed later in this memorandum, the person charged with authority to issue such decisions - the Regional Director - has no equivalent under the CAA.)

220(c)(2) that unfair labor practice complaints "shall be submitted to a hearing officer for decision pursuant to subsections (b) through (h) of section 405, subject to review by the Board pursuant to section 406." 2 U.S.C. § 1351(c)(2). Thus, all references to "Administrative Law Judge" or "Chief Administrative Law Judge" should be changed to "hearing officer" in the FLRA regulations adopted by the Board.

5. References to "Regional Director" need to be modified because the CAA does not provide a comparable position. Pursuant to section 7105 of chapter 71, the FLRA may delegate to Regional Directors its authority to determine appropriate bargaining units, conduct investigations and provide for hearings, determine questions concerning representation, direct and conduct elections, and certify election results. There is no reference in the CAA to Regional Directors. While section 220(c)(1) of the CAA provides the Board the authorities provided the FLRA in section 7105 of Chapter 71, section 220(c)(1) of the CAA also provides that "[t]he Board may direct that the General Counsel carry out the Board's investigative authorities under this paragraph." (emphasis added). Thus, it appears that Congress may have contemplated that the General Counsel, pursuant to the CAA, would exercise the same investigative duties and authorities involved in petition and election proceedings as those delegated to the Regional Director under chapter 71. This, however, would be in addition to the duties and authorities explicitly assigned to the General Counsel pursuant to section 220(c)(2) with respect to unfair labor practice charges. The Board may want to consider whether it would be more appropriate to assign the Regional Director duties to someone other than the General Counsel given the roles he already plays under section 220(c)(2).

Section by Section Modifications

The Secretary suggests that the following modifications be made to the substantive FLRA regulations for the reasons stated.

Part 2421

2421.4

The Board should replace this section with a definition of "employing office," and for this purpose use the same definition provided in section 101(9) of the CAA.

2421.5

This definition should be deleted because it is inapplicable to the CAA.

2421.6

This section should be changed and made consistent with the Board's decision as to who will assume the duties of the "Regional Director."

2421.7

This section should be changed to define "Chairman" as "Chair of the Board of Directors of the Office of Compliance."

2421.8

The section should be changed so that the definition of a hearing officer is consistent with the definition of a "hearing officer" contained in section 405 of the CAA.

2421.9; 2421.10

These sections should be deleted because the CAA requires that unfair labor practice complaints be referred to a hearing officer for decision, pursuant to section 405 of the CAA. Thus, there is no need for an Administrative Law Judge or Chief Administrative Law Judge.

Part 2422

2422.4; 2422.5

These sections are solely procedural and thus should not be adopted by the Board. The Board should apply the same filing and service procedures contained in the regulations promulgated pursuant to section 303 of the CAA.

2422.7

This section should be changed to prohibit the publication of any material relating to a labor organization in any area open to the public. Display of such material in public view creates, at the very least, an appearance of a conflict of interest insofar as it may appear that Congress is unduly influenced by particular labor organizations.

2422.9; 2422.10

For the reasons set forth in footnote 4 in Part B of this memorandum, these sections should be modified, to the extent necessary, to allow for appeal of the Regional Director's decision to the Board, consistent with the procedures set forth in section 406 of the CAA concerning the Board's review of a decision issued by a hearing officer.[5]

2422.16

This section should be changed to state that hearings will be conducted by a hearing officer in accordance with section 405 of the CAA, as provided in section 220(c)(1) of the CAA.

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[5]All references to "Regional Director" are intended to include whoever will assume the duties and authorities of the Regional Director as provided by the Board.

2422.18-22

As stated in Part B of this memorandum, these sections should not be adopted because they are not "substantive regulations" but rather concern the procedures for conducting a hearing pursuant to petitions filed under chapter 71. Section 220(c)(1) of the CAA explicitly states that petition hearings are to be conducted pursuant to section 405 of the CAA. Any procedural regulations required to amplify or supplement the procedures in section 405 must be promulgated by the Board pursuant to section 303 of the CAA.

2422.23

This section should be modified to prohibit the posting of any material relating to a labor organization in any area open to the public. Display of such material in public view creates, at the very least, an appearance of a conflict of interest insofar as it may appear that Congress is unduly influenced by particular labor organizations.

2422.27

This section should be changed to state that hearings will be conducted by a hearing officer in accordance with section 405 of the CAA, as provided in section 220(c)(1) of the CAA.

2422.30(c)-(e)

These sections should not be adopted for the reasons stated in Part B of this memorandum. Section 220(c)(1) provides that hearings on petitions will be conducted pursuant to the procedures set forth in section 405 of the CAA.

2422.31

This section should not be adopted for the reasons stated in Part B of this memorandum. Section 220(c)(1) of the CAA directs that decisions of the hearing officer are subject to review pursuant to the procedures provided in section 406 of the CAA.

Part 2423

2423.2(b)

The reference to a six-month statute of limitations should be changed to 180 days, the applicable statute of limitations under the CAA.

2423.4(a)(4)(ii)

Other than the Federal Mediation and Conciliation Service, all the entities in this section should be deleted and replaced with "the Board in its capacity as an impasse panel."

2423.6

This section is purely procedural and thus should not be adopted by the Board. Rather, the Board should issue regulations pursuant to section 303 of the CAA to address the procedures appropriate for filing unfair labor practice charges under the CAA or should adopt the section 303 regulations already in place.

2423.9(b)

This section should not be adopted because it sets forth procedures implementing 5 U.S.C. §7123(d). Section 7123 of chapter 71 was not adopted by the CAA.

2423.14; 2423.17

These sections should not be adopted because they relate merely to the procedure to be followed with respect to unfair labor practice hearings. As discussed above, the CAA provides that unfair labor practice hearings will be conducted pursuant to the procedures set forth in section 405 of the CAA.

2423.20

This section should not be adopted because it solely concerns Administrative Law Judges, and, as discussed above, the CAA requires all hearings under section 220 to be conducted by a hearing officer.

2423.21-2423.30

These sections should not be adopted because they concern the procedural aspects of an unfair labor practice hearing and the procedures available for review of a decision and order issued pursuant to such hearing. As discussed above, section 220(c)(2) specifically provides that unfair labor practice hearings shall be conducted pursuant to section 405 and that decisions of the hearing officer are reviewable by the Board pursuant to section 406. To the extent the Board wishes to supplement or refine these procedures, it should do so pursuant to section 303 of the CAA.

2423.31

Any hearing conducted pursuant to this section should be conducted pursuant to sections 405 and 406 of the CAA, consistent with all other hearings conducted pursuant to section 220.

Part 2424

All references in this section to "government-wide rule" should be changed to "government-wide rule applicable to the Senate," because not all government-wide rules are applicable to the Senate.

Part 2425

Section 2425.3(b) should not be adopted because it relates to civil service employees, and the Senate does not have civil service employees.

Part 2426

2426.1

This section would require an employing office to consult on terms and conditions of employment with any labor organization that represents only 10% of the employees in the office. This would require the employing office to consult with several different unions - none of which represents a majority of the employees - on any topic that may affect terms of employment, before taking any action with respect to that topic. Due to the small size of many of the employing offices covered by section 220, an employing office could be required to engage in such consultation when only one or two employees are represented by a labor organization. Such forced consultation would interfere with the rights of the unrepresented employees because it necessarily would cause delay in implementation of new terms of employment - even those that may be beneficial to employees. The Secretary contends that good cause exists either to delete this section or to increase substantially the percentage of exclusive representation required.

2426.2(b)(3)(vii); 2426.12(b)(3)(vii)

These sections should be changed to provide that hearings pursuant to these sections will be conducted pursuant to the procedures set forth in section 405 of the CAA, and further that the hearing officer's decision is subject to review pursuant to section 406 of the CAA, consistent with all other hearings conducted pursuant to section 220 of the CAA.

Part 2427

It would be helpful to both employing offices and covered employees if the Board would clarify the type of guidance available from the Board pursuant to this Part.

Part 2428

This section should not be adopted because the Assistant Secretary has no enforcement authority over the provisions of the CAA, and neither covered employees nor employing offices are bound by decisions of the Assistant Secretary.

Part 2429

2429.2

This section, concerning transfer of cases, should not be adopted because it is inapplicable to the CAA and the structure of the Office of Compliance.

2429.7

This is solely a procedural regulation; it does not constitute a "substantive regulation" within the meaning of section 220 and should not be adopted. The Board already has issued a regulation concerning subpoenas pursuant to section 303. The same procedure should be utilized for subpoenas issued pursuant to proceedings initiated under section 220.

2429.11

This is solely a procedural regulation which should not be adopted by the Board. The Board already has issued a regulation concerning interlocutory appeals, which should be made applicable to section 220.

2429.12; 2429.14

These regulations, which address methods of service and witness fees, should not be adopted because they are not substantive in nature but concern only procedural issues.

2429.17; 2429.18

These sections should not be adopted because they concern reconsideration of a decision of the Board. As discussed in Part B, section 220 specifically provides the procedures for review of the Board's decision.

2429.21-2429.28

These sections are solely procedural and concern procedures already addressed in regulations issued by the Board pursuant to section 330 of the CAA. For the reasons stated in Part B of this memorandum, they should not be adopted.

Part 2430

This section should not be adopted because section 225 of the CAA already sets forth the procedure for an award of attorney fees with respect to any claim under the CAA, including claims brought pursuant to section 220.

Part 2472

This section should not be adopted by the Board because it relates to flexible or compressed work schedules, and such schedules do not apply to the Senate.

D. How Should Section 220 of the CAA Be Applied to Offices of the Senate Identified in Section 220(e)(2)?

Section 220(e)(1) of the CAA requires the Board to issue regulations regarding the manner and extent to which the requirements and exemptions of chapter 71 should apply to covered employees in the following offices, delineated in section 220(e)(2) of the Act:

(1) the personal office of any Senator;

(2) a standing, select, special permanent, temporary, or other committee of the Senate or a joint committee of Congress;

(3) Senate leadership offices, including the Office of the Vice President (as President of the Senate), the Office of the President pro tempore of the Senate, the Office of the Majority Leader of the Senate, the Office of the Minority Leader of the Senate, the Office of the Majority Whip of the Senate, the Office of the Minority Whip of the Senate, the Conference of the Majority of the Senate, the Conference of the Minority of the Senate, the Office of the Secretary of the Conference of the Majority of the Senate, the Office of the Secretary of the Conference of the Minority of the Senate, the Office of the Secretary for the Majority of the Senate, the Office of the Secretary for the Minority of the Senate, the Majority Policy Committee of the Senate, and the Minority Policy Committee of the Senate;

(4) offices within the Office of the Secretary of the Senate, including the Offices of the Parliamentarian, Bill Clerk, Legislative Clerk, Journal Clerk, Executive Clerk, Enrolling Clerk, Official Reporters of Debate, Daily Digest, Printing Services, Captioning Services, and Senate Chief Counsel for Employment;

(5) the Office of the Legislative Counsel of the Senate and the Office of the Senate Legal Counsel; and

(6) other Senate offices that perform comparable functions.

2 U.S.C. § 1351(e)(2).

Section 220(e)(1) of the CAA requires the Board to issue regulations for employees of these offices that are consistent with the provisions and purposes of chapter 71 and the CAA and that are the same as substantive regulations issued by the FLRA, **except that**: (1) the Board may determine that good cause exists to modify such regulations; and (2) the Board must exclude these employees from coverage under section 220 if the extension of chapter 71 rights to these employees would create an actual or perceived conflict of interest or would interfere with Congress's constitutional responsibilities.

Exclusion from Coverage

In the ANPR, the Board invites comment on whether and to what extent it should modify the regulations promulgated by the FLRA for application to covered employees of the offices identified in section 220(e)(2) and how such modification would meet the "good cause" standard of the CAA. The Board further invites comment regarding which regulations should be issued under section 220(e)(1) concerning the manner and extent to which the requirements and exemptions of chapter 71 should apply to covered employees who are employed in the offices identified in section 220(e)(2).

Before considering whether and to what extent FLRA regulations should apply to employees in these offices, the Board must first identify any employees who are excluded from coverage under section 220 of the CAA because of an actual or perceived conflict of interest or

because of Congress's constitutional responsibilities. As explained above, section 220(e)(1)(B) of the CAA mandates that such employees be excluded from coverage under section 220. This finding does not require a showing of good cause under section 220(e)(1)(A).

The Board acknowledges in the ANPR that sections 7103 and 7112 of chapter 71 preclude certain groups of employees from participating in bargaining units. This includes managerial and supervisory employees, confidential employees, employees engaged in personnel work, certain employees who conduct internal investigations, and employees engaged in intelligence or national security work. In addition, section 7120 of chapter 71 excludes from coverage any employee whose involvement with a labor organization "would result in a conflict or apparent conflict of interest or would otherwise be incompatible with law or with the official duties of the employee." This memorandum does not attempt to identify all Senate employees who qualify for the statutory exclusions under chapter 71. Rather, it focuses on groups of covered employees identified in section 220(e)(2) who must be excluded from coverage under section 220 because their participation in bargaining units would create an actual or perceived conflict of interest or would impede Congress's constitutional responsibilities.

Conflict of Interest

A conflict of interest, as it relates to section 220, should include any activity or association involving a labor organization that would, in fact or appearance, compromise the integrity of the Senate's constitutional responsibilities or the performance of a Member's, officer's or employee's official duties.

The Senate's Constitutional Responsibilities

The primary function of both Houses of Congress, as mandated by the Constitution, is to exercise the legislative authority of the United States (art. I, § 1) and to "make all laws which shall be necessary and proper for carrying into Execution" its enumerated powers (art. I, § 8, cl. 18). The Constitution requires the Senate to perform the additional legislative functions of advising and consenting to treaties and to certain nominations by the President (art. II, § 2, cl. 2) and sitting as a court to try impeachments (art. I, § 4, cl. 6). In fulfilling these constitutional responsibilities, it is imperative that the Senate be free from improper influence from outside sources so that Members can fairly represent the interests of the United States and its citizens.

The Constitution specifically reserves to each House of Congress the authority to determine its Rules of Proceedings (art. I, § 5, cl. 2). The Rules adopted by the Senate reflect its concern that the legislative process be insulated from improper influence by outside parties. In fact, a substantial portion of the Senate Code of Official Conduct, which comprises Rules 34 through 43 of the Standing Rules of the Senate, prescribes the ethical conduct of Members, officers and employees of the Senate as the conduct relates to outside parties and interests. For example, Rule 34 requires all Members, officers, and certain employees of the Senate to file annual financial disclosure forms to ensure that these persons' financial interests do not conflict with their official duties. Rule 35 imposes strict restrictions on gifts to all Members, officers and

employees of the Senate. Rule 36 restricts the outside earned income of these persons, and Rule 37 prohibits engaging in outside business, professional or other activities that would create a conflict of interest or would otherwise compromise the integrity or operations of the Senate.

In determining which employees in the offices identified in section 220(e)(2) should be permitted to organize, the Board must cautiously balance the independence of the Senate, consistent with the Constitution and principles set forth in the Senate Rules, against employee rights. Such a balance should not result in unions obtaining an undue advantage in the legislative process or being perceived as exerting improper influence over the Senate.

Employees in Senators' Personal Offices

The Secretary contends that all employees in each Senator's personal office must be excluded from coverage under section 220 of the CAA. As explained above, many Senate employees will be excluded from bargaining units because they qualify as managerial, supervisorial, confidential or personnel employees under the provisions of chapter 71. This is true of numerous employees in Senators' personal offices, such as the Chief of Staff, Office Manager, Legislative Director, Legislative Assistants, Press Secretary and others. The remaining employees in Senators' personal offices should also be excluded from coverage under section 220, regardless of their specific office duties. Their participation in labor organizations will interfere with the Senator's constitutional responsibilities, will allow unions to obtain an undue advantage in the legislative process and to exercise improper influence over Members, and will create conflicts of interest. These obstructions far outweigh organizational rights.

Thousands of individuals and groups participate in the democratic process in an attempt to influence the legislative activities of the Senate. Constituents, lobbyists and others seek to influence the activities of the Senate through a variety of lawful methods. They express their opinions on legislative issues through letters, telegrams, telephone calls, facsimiles, communications on the Internet, press conferences, public protests and other means. Many of these persons or groups schedule personal meetings with Senators or their staff to discuss legislation, and many make campaign contributions to Senators they believe will support their legislative agendas. A Senator always has complete discretion to determine his or her response to these persons or groups. However, under section 220 of the CAA a Senator would not have the same discretion in dealing with labor unions that represent the employees in his or her personal office. A Senator's key staff would be required by law to meet and to bargain with these unions. This would provide labor unions with unprecedented access to and influence over the operations and legislative activities of Senators' personal offices.

Through representation of a Senator's employees, a labor union might obtain access to information about the internal structure, workings, and communications of the Senate that would otherwise be unavailable to other organizations or to the public. Employees in a Senator's personal office observe firsthand and assist with many legislative functions that are integral to the Senator's duties under the Constitution. Every employee in a Senator's personal office, regardless of his or her duties, is privy to certain information regarding the Senator and his or her

legislative strategy that is not available to outside sources. For example, receptionists, mail clerks, schedulers, secretaries, legislative correspondents and many other employees manage the flow of information to and from a Senator's office. As part of their duties, these employees know with whom the Senator speaks and why; they are aware of invitations received by the Senator and whether the Senator accepts or declines them; they monitor the positions of constituents and others by opening, reading and sorting correspondence and answering telephones; they draft correspondence on legislative issues on behalf of the Senator. Even a Senator's driver, who may have no legislative duties, is privy to conversations that relate to the Senator's position on important legislative issues. All of this information, which a labor union could have access to through its representation of a Senator's employees, could be used by the labor union to exert undue pressure on the Senator with respect to all types of legislation.

The collective bargaining process was not meant to be a lobbying tool of organized labor. Yet it could become such a tool if employees of Members' offices are permitted to organize. Labor unions could use the collective bargaining process to coerce a Senator into taking a particular position on legislation in exchange for making certain concessions at the bargaining table. No other lobbyist or group of constituents would be in a position to exert this level of influence over a Member. Indeed, this is precisely the type of undue influence that the Senate Rules are intended to prohibit. It would be incongruous for the Senate to allow labor unions to have such influence, yet enforce strict rules that govern Members' and employees' receipt of any gift worth more than $10, that require them to divulge all of their financial investments and holdings, and that prevent them from serving on the Board of Directors of outside organizations. See, e.g., Standing Rules of the Senate Nos. 34, 35 and 37.

In short, a Senator's position on a legislative issue must not be dictated, limited or controlled in any way by the demands or concerns of an employee labor union. To perform his or her constitutional duties effectively, a Senator must be free to interact openly with staff and to explore all sides of an issue, including labor issues. If a Senator takes a position on an issue that is inimical to the interests of labor unions, the Senator should be confident that staff will wholeheartedly perform their duties and will put the constituents' interests above the interests of a labor union.

Union representation of employees in a Senator's personal office also could create significant conflicts of interest. Legislation that affects union or management rights may have a direct impact on a Senator's bargaining position with an employee union. This could include labor and employment legislation in general, appropriations bills that affect the office's budget, or any other legislation that affects the Senate workplace. This places a Senator in a no-win situation whenever such legislation is pending before the Senate. If a Senator supports legislation that is favorable to an employee union, he or she could be accused of caving to union pressures rather than properly representing constituents. On the other hand, if the Senator opposes the legislation, he or she could be criticized for seeking to enhance his or her bargaining position with the union. Either instance creates an actual or perceived conflict of interest for Senators whose employees are represented by labor unions.

Likewise, a union leader's interest in particular legislation may create a conflict of interest. For example, when legislation that will directly affect union officials is pending before the Senate, the union will have potentially conflicting interests to protect: the union's interests and the employees' interests. On one hand, the union will endeavor to lobby the Senator to pass the legislation, while on the other hand, the union's representation duties to its members (the Senator's employees) may require the union to take an aggressive or even hostile stand with the Senator.

Even the payment of union dues by a Senator's employees could create the perception of a conflict of interest. Federal criminal law prohibits Senate employees from making political contributions to their employer. See 18 U.S.C. § 603. An employee's payment of dues to a union that, in turn, contributes to a Senator's political campaign, creates an appearance of a violation of this law.

Additionally, if employees of Senators' personal offices are allowed to organize, a strong possibility exists that they will develop conflicting loyalties that render them politically incompatible with the Senator for whom they work. For example, a Senator could oppose legislation that is favorable to unions, while an employee in the office openly and actively supports the legislation. Section 502 of the CAA allows the Senator to discipline or discharge the employee on the basis of political incompatibility. However, because it would be an unfair labor practice for an employer to discharge an employee because of union affiliation, a Senator would be precluded from disciplining or discharging an employee who openly took a political position contrary to that of the Senator. See 5 U.S.C. § 7116(a). This would effectively eviscerate the protections offered by Section 502 of the CAA.

Finally, if employees of Members' offices are given the right to join labor unions they would be the only employees of federal elected officials who are organized. It is noteworthy in this regard that in the executive branch of the federal government the employees in the political offices of the executive branch, such as the Executive Office of the President, are not organized. or may not organize?

Employees in Senate Leadership and Committee Offices

The concerns raised above regarding union organization in Senators' personal offices are equally applicable to employees of Senate leadership and committee offices. For this reason, the Secretary contends that all employees of these offices must also be excluded from coverage under section 220 of the CAA.

Senate Leadership, Committee chairs, and Ranking Members of Senate Committees should not be required by law to grant labor unions greater access to and control over their offices than is given to other groups or to open themselves to the enormous potential conflicts inherent in union representation of their staff. Senators who manage leadership or committee offices must be allowed to vote on any labor, appropriations or other legislation without concern that their actions will constitute an actual or perceived conflict of interest because of the effect on their bargaining position with a labor union.

Senate and committee leadership must also be able to converse and interact openly with employees of their offices on all legislative issues, including labor issues, without concern that sensitive information will be disclosed to labor unions. They must also be allowed to take action against employees who are politically incompatible without being subject to unfair labor practice charges.

Employees in Offices Under the Jurisdiction of the Secretary of the Senate

Employees in the Offices of the Parliamentarian, Bill Clerk, Legislative Clerk, Journal Clerk, Executive Clerk, Enrolling Clerk, Official Reporters of Debate, Daily Digest and Printing Services provide essential services for Senate floor proceedings. These employees must be excluded from coverage because they occupy confidential positions that are integral to the Senate's constitutional functions. A description of the duties of these employees is attached as Appendix A.

Under appropriate circumstances, the Senate may conduct proceedings that are not open to the public. The "secret journal" clause of the Constitution permits such proceedings (art. I, § 5, cl. 3), and the Standing Rules of the Senate specifically delineate the requirements and procedures for closed-door sessions of the Senate.[6] Many of the employees from the above-listed offices are required to be present on the Senate floor during these highly sensitive and confidential proceedings of the Senate.

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[6] Rule 19 of the Standing Rules of the Senate provides:

On a motion made and seconded to close the doors of the Senate, on the discussion of any business which may, in the opinion of a Senator, require secrecy, the Presiding Officer shall direct the galleries to be cleared; and during the discussion of such motion the doors shall remain closed.

Rule 29, in turn, provides:

When acting upon confidential or Executive business, unless the same shall be considered in open Executive session, the Senate Chamber shall be cleared of all persons except the Secretary, the Assistant Secretary, the Principal Legislative Clerk, the Parliamentarian, the Executive Clerk, the Minute and Journal Clerk, the Sergeant at Arms, the Secretaries to the Majority and the Minority, and such other officers as the Presiding Officer shall think necessary; and all such officers shall be sworn to secrecy.

All confidential communications made by the President of the United States to the Senate shall be by the Senators and the officers of the Senate kept secret; and all remarks, votes, and proceedings thereon shall also be kept secret, until the Senate shall, by their resolution, take off the injunction of secrecy.

If the employees of these offices were allowed to organize, labor unions would have inappropriate access to the activities of the Senate floor. Because of this potential for abuse and its detrimental effect on the constitutional responsibilities of the Senate, floor staff must be excluded from coverage under section 220.

Another office under the jurisdiction of the Secretary of the Senate that must be excluded from coverage under section 200 is the Office of Senate Chief Counsel for Employment. This office is staffed with attorneys who provide legal advice and representation to Senate offices on labor and employment matters and who will engage in labor negotiations on behalf of management in Senate offices. Because of the privileged and confidential information that is available to all of the employees of this office, including support staff, it would be inappropriate to allow any of the employees of this office to organize.

Employees in the Offices of Legislative Counsel and Senate Legal Counsel

The employees in the Office of the Legislative Counsel of the Senate and the Office of the Senate Legal Counsel must also be excluded from coverage under section 220 of the CAA.

The Office of Legislative Counsel is staffed with attorneys who provide privileged and confidential legal advice and assistance to Senators and their offices in drafting legislation. Likewise, the Office of Senate Legal Counsel provides privileged and confidential advice to Senate offices on a wide variety of issues that directly or indirectly relate to the legislative activities of the Senate. All staff in both of these offices must be excluded from coverage under section 220 because they have direct access to privileged and confidential information relating to the constitutional functions of the Senate.

Employees in Other Offices

Section 220(e)(2)(H) of the CAA requires the Board to identify offices that "perform comparable functions" to those offices listed in section 220(e)(2), which should also be excluded from coverage under section 220 because of conflicts of interest or Congress's constitutional duties.

The Secretary contends that the following offices should also be excluded from coverage under section 220 of the CAA:

Executive Office of the Secretary of the Senate. This office manages and provides administrative support for all of the offices under the jurisdiction of the Secretary of the Senate, and establishes all employment policies and practices for these offices. Accordingly, the employees of the office are privy to confidential information about both the legislative functions of the Senate and the labor-management polices of the Office of the Secretary. For this reason, the employees of this office must be excluded from coverage under section 220.

Office of Senate Security. This office is responsible for the administration of classified information, personnel, communications, and computer security programs in Senate offices and committees. It serves as the Senate's liaison to the executive branch in matters relating to security of classified information in the Senate. The employees of this office should be excluded from coverage under section 220 because they have access to highly sensitive and confidential information relating to the constitutional responsibilities of the Senate, as well as to matters of national security.

Senate Disbursing Office. This office compiles Senate budget estimates for presentation to the Committee on Appropriations, maintains and disburses all Senate appropriated funds and all Senate payrolls, interprets and carries out all matters related to budgeting, appropriations, compensation, payroll deductions, retirement, life and health insurance, and other employee benefits authorized for Senators and staff. The employees of this office should be excluded from coverage under section 220 because of their access to and control over confidential financial information, such as Senate budgets and appropriations, that could enhance a labor union's bargaining position. This creates potential conflicts of interest and could also interfere with financial operations that support the Senate's constitutional responsibilities.

Administrative Office of the Sergeant at Arms. This office coordinates protocol responsibilities for the Senate, which includes escorting the President, foreign dignitaries and guests of the Senate who are attending official functions in the Capitol; making arrangements for funerals of Senators, assisting in plans for the Inauguration of the President; and organizing the swearing-in and orientation programs for newly-elected Senators. It provides general management, oversight and coordination of the various departments of the Sergeant at Arms and establishes employment policies and procedures for all Sergeant at Arms' employees. The employees of this office should be excluded from coverage under section 220 of the CAA because of their access to confidential information about the office, as well as the Senate.

APPENDIX A

During floor proceedings, the Parliamentarian advises the Presiding Officer of the Senate on all parliamentary aspects of Senate activity, including points of order and parliamentary inquiries. The Parliamentarian prepares a daily legislative agenda for the Presiding Officer, in whose name he refers to the appropriate Senate committees all legislation, messages, communications and reports from the executive branch. Even when the Senate is not in session the employees of the Office of the Parliamentarian answer questions and give confidential advice to Senators and their staff regarding the procedural aspects of the Senate.

The Bill Clerk records actions of the Senate, keeps an authoritative historical record of Senate business, enters daily legislative activities and votes into the automatic legislative status system, and assigns numbers to all bills and resolutions.

The Legislative Clerk reads aloud bills, resolutions, conference reports, amendments, and other material when directed by the Presiding Officer, calls the roll for quorums and recorded (yea and nay) votes, and prepares the *Calendar of Business* for each daily session of the Senate. In addition, the Legislative Clerk maintains official copies of measures pending before the Senate and receives all proposed and agreed-upon amendments.

The Journal Clerk records the minutes of the daily legislative proceedings of the Senate and prepares them for publication in the *Senate Journal*, as required by Article I, section 7 of the Constitution.

The Executive Clerk prepares an accurate record of actions taken by the Senate during executive sessions (proceedings on nominations and treaties) and also prepares the *Executive Calendar*, which is printed daily when any nominations, treaties or resolutions pertaining to executive business are pending before the Senate. The Executive Clerk also prepares all nomination and treaty advice and consent resolutions for transmittal to the President.

The Enrolling Clerk prepares for printing and proofreads all Senate-passed legislation prior to its transmittal to the House of Representative, the National Archives, the Secretary of State, the United States Claims Court, and the White House. The Enrolling Clerk physically transmits all Senate messages to the House of Representatives and arranges for delivery of all enrolled bills and resolutions to the White House.

The Official Reporters of Debates prepare and edit for publication in the *Congressional Record* a substantially verbatim report of the proceedings of the Senate and serve as liaison for all Senate personnel on matters relating to the content of the *Record*.

The Daily Digest office prepares a concise accounting of all official actions taken by the Senate on a particular day for the *Congressional Record*. All Senate hearings and business meetings (including joint meetings and conferences) are schedules through the Daily Digest.

The Office of Printing Services coordinates and schedules the printing and delivery of materials used in Senate floor proceedings. This includes bills, resolutions, reports, amendments and other documents that must remain confidential until they are introduced on the Senate floor. The Office of Printing Services performs other confidential printing functions for the Senate, including the printing of briefs for legal counsel who represent the Senate and its offices.