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SENATOR MITCH MCCONNELL

Senate Minority Leader Mitch McConnell (R-KY) is a five-term senator from Kentucky. His ethics issues stem from his possible use of Senate staff and resources to conduct opposition research for his campaign. He was included in CREW's 2007, 2008, and 2009 reports on congressional corruption for unrelated matters.¹

Misusing Senate Staff and Resources for Political Activity

On February 2, 2013, Sen. McConnell had a meeting with aides in his Kentucky campaign office during which they discussed research some of the aides had conducted about Sen. McConnell's potential campaign opponents, including actress Ashley Judd and Kentucky Secretary of State Alison Lundergan Grimes.² Apparently, one or two members of a group called Progress Kentucky surreptitiously recorded the conversation.³ A copy of the recording was given to *Mother Jones*, which posted it on its website and published a transcript of it.⁴

According to the transcript, at the beginning of the meeting, an unnamed "presenter" thanked the individuals who conducted the research, saying:

So I'll just preface my comments that this reflects the work of a lot of folks: Josh, Jesse, Phil Maxson, a lot of LAs, thank them three times, so this is a compilation of work, all the way through.⁵

Later, in discussing a clip of Ms. Judd saying San Francisco "is my, my American city home," the presenter said: "So Phil Maxson found that."⁶ Similarly, referring to an interview of

¹ Sen. McConnell's ethics issues stemmed from inserting earmarks into legislation for clients of his former chief of staff in exchange for campaign contributions, and misusing his nonprofit at the University of Louisville. For more information, see *Beyond DeLay: The 22 Most Corrupt Members of Congress (and Two to Watch) 2007*, available at <http://www.crewsmostcorrupt.org/mostcorrupt/entry/most-corrupt-2007>, CREW's Most Corrupt Members of Congress: The 20 Most Corrupt Members of Congress (and four to watch), available at <http://www.crewsmostcorrupt.org/mostcorrupt/entry/most-corrupt-2008>, CREW's Most Corrupt 2009: The 15 Most Corrupt Members of Congress 2009, available at <http://www.crewsmostcorrupt.org/mostcorrupt/entry/most-corrupt-2009>.

² David Corn, *Secret Tape: McConnell and Aides Weighed Using Judd's Mental Health and Religion as Political Ammo*, *Mother Jones*, April 9, 2013.

³ Rachel Weiner, *Democrat Links Liberal Group to McConnell Tape*, *Washington Post*, April 12, 2013; Jason Riley and Joseph Gerth, *Democrat Backtracks on Part of Tape Story*, *Louisville Courier-Journal*, April 13, 2013. In May 2013, Curtis Morrison said he was responsible for making the secret recording and providing it to *Mother Jones*. The Federal Bureau of Investigation is investigating the circumstances surrounding the recording. See Curtis Morrison, *Why I Secretly Recorded Mitch McConnell*, *Salon.com*, May 31, 2013; Brett Barrouquere, *US Attorney Recused from McConnell Taping Case*, *Associated Press*, June 21, 2013.

⁴ *Full Transcript and Audio of Mitch McConnell Campaign's Meeting on Ashley Judd*, *Mother Jones*, April 9, 2013.

⁵ *Id.*

Ms. Judd, the presenter asserted: “Phil Maxson found this, which sort of I think is a pretty revealing interview.”⁷ The presenter then credited “Josh” with putting together footage about Ms. Judd, saying: “And then Josh has sort of put this together. And this is, if you see a lot of footage of her, she definitely has a very sort of self-centered, sort of egotistical aspect. And Josh, this is just one of many that we put together.”⁸ Similarly, in discussing a clip of Ms. Judd talking about Obamacare, the presenter stated: “And Josh found this nugget.”⁹ The presenter further credits “Jesse” for going through Ms. Judd’s autobiography and tracking down clips.¹⁰

Mr. Maxson appears to have been employed as a legislative aide in Sen. McConnell’s office since early 2011.¹¹ In addition, Sen. McConnell’s then-chief of staff, James Sherman Holmes, Jr., is nicknamed Josh.¹² The recording also refers to the assistance of “a lot of LAs,” but the presenter does not specifically name them.¹³ “LA” is a common acronym for a legislative assistant or aide.¹⁴ At the time, only “Jesse” appeared to be a campaign aide, as Sen. McConnell’s campaign manager is Jesse Benton.¹⁵

None of Sen. McConnell’s legislative aides or assistants, including Mr. Maxson or Mr. Holmes, were listed as paid employees of Sen. McConnell’s principal campaign committee or his leadership political action committee in recent Federal Election Commission reports.¹⁶

When first asked whether Sen. McConnell’s staff members were used to conduct opposition research, his aides refused to answer the questions.¹⁷ Sen. McConnell’s aides later said the tape was transcribed incorrectly, and claimed the presenter did not say “thank them three times” about the staff members who conducted the campaign research, but rather said “in their free time.”¹⁸ In addition, one news story said Sen. McConnell’s aides claimed all of the campaign research referenced at the meeting had been done on weekends and out of the office.¹⁹

⁶ *Id.*

⁷ *Id.*

⁸ Full Transcript and Audio of Mitch McConnell Campaign’s Meeting on Ashley Judd, *Mother Jones*, Apr. 9, 2013.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Legistorm, Philip B. Maxson (Phil). Sen. McConnell’s most recent statement of expenditures, which covers October 2012 through March 2013, lists Mr. Maxson as a legislative aide. *See Report of the Secretary of the Senate*, October 1, 2012 – March 31, 2013.

¹² *Id.*; Legistorm, James Sherman Holmes Jr. (Josh); *see also, e.g.*, David M. Drucker, Hands-On McConnell Helps Round Out NRSC, Roll Call, January 22, 2013 (referring to Sen. McConnell’s “Chief of Staff Josh Holmes”). Mr. Holmes later switched jobs, leaving Sen. McConnell’s congressional office and taking on a dual role as an advisor to both Sen. McConnell’s campaign and the National Republican Senatorial Committee. *See* Manu Raju, Mitch McConnell Chief of Staff Josh Holmes to NRSC, *Politico*, August 1, 2013.

¹³ Full Transcript and Audio of Mitch McConnell Campaign’s Meeting on Ashley Judd, *Mother Jones*, Apr. 9, 2013.

¹⁴ Shushannah Walshe, Was McConnell’s Senate Staff Digging Up Dirt on Ashley Judd?, *ABC News*, April 9, 2013.

¹⁵ *Id.*

¹⁶ McConnell Senate Committee ’14, FEC Form 3, 2011-July Quarterly 2013 Reports; Bluegrass Committee, FEC Form 3X, 2011-Post-Special 2013 Reports.

¹⁷ Joseph Gerth, Sen. Mitch McConnell’s Campaign Continues to Attack Source of Anonymous Audio Recording, *Louisville Courier-Journal*, April 10, 2013; Walshe, *ABC News*, Apr. 9, 2013.

¹⁸ Jack Brammer, Group Seeks FBI, Ethics Investigations of McConnell’s Campaign, *Lexington Herald-Leader*, April 11, 2013; Rick Klein, FBI Visits McConnell Campaign Headquarters in Ashley Judd Tape Investigation, *ABC News*, April 10, 2013.

¹⁹ Trip Gabriel, McConnell Recording is Linked to a PAC, *New York Times*, April 12, 2013.

Potential Violations

Improper Use of Appropriated Funds

Pursuant to 31 U.S.C. § 1301(a), “[a]ppropriations shall be applied only to the objects for which the appropriations were made.” The Senate Ethics Manual expounds upon this principle, providing:

This principle of federal appropriations law has been interpreted in Congress to mean that congressional employees receive publicly funded salaries for performance of official duties and, therefore, campaign or other non-official activities should not take place on Senate time, using Senate equipment or facilities. . . .

Senate employees are compensated from funds of the Treasury for regular performance of official duties. They are not paid to do campaign work. In the words of the United States District Court for the District of Columbia: “It is clear from the record that Congress has recognized the basic principle that government funds should not be spent to help incumbents gain reelection.”²⁰

Senate ethics rules, however, permit Senate employees to engage in campaign activities on their own time, “provided they do not do so in congressional offices or otherwise use official resources.”²¹

Using taxpayer dollars to pay congressional employees for time they spent working on campaign-related activities also constitutes theft of government property pursuant to 18 U.S.C. § 641. The statute provides that anyone who “embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof” may be punished by up to ten years in prison and fined.²² In 1993, a former House employee pleaded guilty to a charge of theft of government property after he was found doing campaign work at a time that he claimed he was conducting official business.²³ In addition, paying

²⁰ Senate Select Committee on Ethics, Senate Ethics Manual, at 139-40 (108th Cong., 1st Sess., 2003 ed.) (quoting *Common Cause v. Bolger*, 574 F. Supp. 672 (D.D.C. 1982), *aff’d*, 461 U.S. 911 (1983)). *See also id.* at 150-51 (“Use of official resources to assist campaign organization—Senate space, equipment, staff time, and resources generally should not be used to assist campaign organizations.”).

²¹ *Id.* at 140.

²² If the combined value of the property is less than \$1,000, the punishment is up to one year in prison and a fine. 18 U.S.C. § 641.

²³ *United States v. Bresnahan*, Criminal No. 93-0409 (D.D.C. 1993). *See also* Senate Ethics Manual, at 157.

congressional staff for campaign work may constitute mail fraud pursuant to 18 U.S.C. § 1341. In 1979, a former House member was prosecuted for mail fraud for putting campaign workers on his congressional payroll.²⁴

Regardless of the claims by Sen. McConnell's aides that the tape was incorrectly transcribed, and that they conducted the opposition research on weekends and out of the office, if members of Sen. McConnell's congressional staff were engaged in campaign activities during office hours and using Senate resources, Sen. McConnell likely violated 31 U.S.C. § 1301(a), Senate ethics rules, and federal law.

Senate Rule Prohibiting Improper Conduct

The Senate Ethics Manual provides that “[c]ertain conduct has been deemed by the Senate in prior cases to be unethical and improper even though such conduct may not necessarily have violated any written law, or Senate rule or regulation. Such conduct has been characterized as ‘improper conduct which may reflect upon the Senate.’”²⁵ This rule is intended to protect the integrity and reputation of the Senate as a whole.²⁶ The Ethics Manual explains that “improper conduct” is given meaning by considering “generally accepted standards of conduct, the letter and spirit of laws and Rules . . .”²⁷ The Senate may discipline a member for any misconduct that reflects unfavorably upon the Senate as a whole.

If Sen. McConnell used Senate staff or resources to conduct opposition research against potential campaign opponents, he may have engaged in conduct reflecting unfavorably upon the Senate.

²⁴ *United States v. Clark*, Criminal No. 78-207 (W.D. Pa. 1978). See also Senate Ethics Manual, at 156-57.

²⁵ Senate Ethics Manual, Appendix E, at 432 (citation omitted).

²⁶ *Id.*

²⁷ *Id.* at 433.