NOTE: THE PRIMARY FINDING ABOUT THE LIMITED APPLICABILITY OF 18 U.S.C. § 209 TO PAYMENTS MADE FOR AN EMPLOYEE'S LEGAL EXPENSES HAS NOT CHANGED. HOWEVER, BECAUSE EACH ANALYSIS IS VERY FACT-SPECIFIC, AGENCY ETHICS OFFICIALS SHOULD CONSULT WITH THEIR OGE DESK OFFICER BEFORE ADVISING EMPLOYEES ON THIS TOPIC.

Office of Government Ethics
93 x 21 -- 08/30/93

Letter to an Alternate Designated Agency Ethics Official dated August 30, 1993

This is in response to your February 19, 1991, letter to the General Counsel of this Office. You requested that the Office of Government Ethics (OGE) reexamine its position on legal defense funds with respect to 18 U.S.C. § 209 as stated in OGE informal advisory letter 85 x 19**1** in view of the Supreme Court decision in Crandon v. U.S., 494 U.S. 152, 108 L.Ed.2d 132, 110 S. Ct. 997 (1990) (hereinafter referred to as "**Crandon** "). In your letter you expressed the view that the Supreme Court's decision and the concurring opinion by Justice Scalia "cast significant doubt on assumptions . . . about the breadth of this statute [§ 209(a)]."

QUESTION

Specifically, you sought an opinion on whether payments from a legal defense fund to or on behalf of a Federal employee would violate 18 U.S.C. § 209.

BACKGROUND

It is my understanding that an employee of your department, although subsequently vindicated, incurred considerable legal expenses in his defense during an administrative disciplinary proceeding with respect to charges brought against him by the department. I understand that a fund would be established for the benefit of this individual to pay his legal expenses. The fund would be administered by persons having no connection with the employee's official duties. The employee would have no knowledge of the contributors' identities. The money in the fund would not be in the employee's possession, but would go directly to payment of the employee's legal fees. Moreover, the contributors would not be prohibited sources, nor subordinates of the employee.

Two considerations, not discussed in your letter, need to be addressed with respect to the operation of a legal defense fund. First, although your question posits that the employee will have no knowledge of the contributors' identities, the employee will know the identity of the administrator of the legal defense fund. Moreover, there is no practical way to prevent individual donors

from informing the employee of their contributions. Second, provision must be made for the possibility that funds may be collected in excess of the costs of the employee's legal defense. These aspects of a legal defense fund will also be considered.

ANSWER

For the reasons stated below, it is the opinion of this Office that, under the circumstances you described, with some modifications to be discussed hereafter, the donations to a legal defense fund and the payments from such a fund to or on behalf of a Government employee are not prohibited by 18 U.S.C. § 209(a).

DISCUSSION

18 U.S.C. § 209(a)

18 U.S.C. § 209(a) states 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, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury 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 subject to the penalties set forth in section 216 of this title.

Paragraphs (b) through (f) of section 209 provide for five exceptions to coverage under the statute. These exceptions are not relevant to your question.

Crandon Case

In the Crandon case several Boeing employees resigned or took early retirement to accept employment in the executive branch of the Federal Government. Before they became Government employees, Boeing made a lump-sum payment to each employee which was intended to mitigate the financial loss each expected to suffer due to his change in employment. The United States sought to recover the payments, arguing that they violated 18 U.S.C. § 209(a).

The majority of the Supreme Court in Crandon decided the case on the basis that Government employment was an element of the offense under 18 U.S.C. § 209(a). Since section 209(a) applied to Government officers and employees, it did not apply to a severance payment that was made before the payee became a Government employee. In construing the reach of the statute, the Court examined the legislative history of section 209 and the underlying policies that motivated the enactment of the statute. Finally, the Court applied the rule of lenity**2** to any remaining ambiguity about the payments prohibited by section 209(a).

The lower court, which had relied on the legislative history to support an expansive reading of 18 U.S.C. § 209(a), stated: "The public policy underlying § 209 and the conflict of interest laws in general also support a broad interpretation of its coverage." United States v. Boeing Company. Inc., 845 F.2d 476, at 480 (4th Cir. 1988). The Supreme Court, in rejecting that view, stated:

> Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text.

108 L.Ed.2d 132, 141 (1990).

A separate opinion concurring in the judgment written by Justice Scalia, who was joined by Justices O'Connor and Kennedy, reached a different conclusion on whether section 209(a) applied to payments made prior to employment and argued such payments were not necessarily excluded from the reach of the statute. Nevertheless, the concurring opinion expressed the view that payments which are neither made periodically during the term of Federal service nor calculated with reference to periodic compensation are excluded

from section 209(a).

As Compensation for Services

In light of Crandon, which limited 18 U.S.C. § 209(a) to what was "clearly warranted by the text," id. at 141, we do not believe that the statute covers the proposed payments from the defense fund.

Past analyses, including the joint memorandum by the Office of Legal Counsel and the Office of Government Ethics dated February 2, 1982, and OGE Informal Advisory Letter 85 x 19,**3** have described section 209(a) as having the four elements set forth in United States v. Raborn, 575 F.2d 688, 691-92 (9th Cir. 1978). Section 209(a) 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. In these analyses the first three elements were considered to be relatively straightforward. The focus of the inquiry then shifted to the fourth element, i.e., whether payment was "as compensation for services as an employee of the United States."**4** We believe that the arrangement proposed here would not fall within this fourth element of the prohibition and thus would be permissible under section 209.

Both the majority and concurring opinions in Crandon read section 209(a) narrowly and refused to extend the provision beyond what they determined was clearly warranted by the text. Given this reading of section 209(a), we do not believe that the legal defense fund at issue here would pay a Government employee for doing his Government work within the meaning of the statute. The work involved is the employee's defense of charges brought against him by his department. This defense is not paid for by the Government, but by the employee. The department does not exercise either supervision or control over the employee's work product during the preparation of his defense. The department is required to grant a reasonable amount of time to the employee in preparing an answer to the charges against him, and time spent on an employee's own defense does not appear to be part of the employee's Government work. See 5 U.S.C. §§ 7503(b)(2) and 7513(b)(2); 5 C.F.R. §§ 752.203(c) and 752.404(c). The employee and the department stand in an adversarial relationship to each other. If the

employee's defense is not part of his work, then accepting contributions from a legal defense fund would not be "as compensation for services."

In any event, such a view of what constitutes the employee's Government work seems consistent with the policies underlying section 209(a). With respect to the meaning of 18 U.S.C. § 209(a), the Supreme Court in Crandon stated:

> In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.

108 L.Ed.2d 132, 140 (1990). The Court in Crandon in identifying the policies behind the statute quoted a report prepared in 1960 by the Association of the Bar of the City of New York:

> The rule is really a special case of the general injunction against serving two masters. 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 these real risks, the arrangement has a generally unwholesome appearance that breeds suspicion and bitterness among fellow employees and other observers. The public interpretation is apt to be that if an outside party is paying a government employee and is not paying him for past services, he must be paying him for some current services to the payor during a time when his services are supposed to be devoted to the government.

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

It is difficult to see how any of these three policies would

be violated where there is donor anonymity, where the fund would be administered by persons having no connection with the employee's official duties and no discretion about whether to pay, where the employee would not have possession of the money, and where no funds would be accepted from prohibited sources,**5** nor from subordinates in accordance with 5 U.S.C. § 7351.

To reduce the likelihood of individual donors informing the employee of their donation, legal defense fund administrators should make efforts to discourage such notification and stress the importance of donor anonymity.

Anonymous private paymasters do not have an economic hold on an employee because the employee does not know who the paymasters are. Moreover, the employee has no way to favor these outside anonymous donors. The employee will, however, know the identity of the individual who administers the legal defense fund, who has collected funds from the anonymous donors, and who is authorized to make payments from the fund. To ensure that the fund administrator does not have an economic hold on the employee, the legal defense fund should be structured to restrict the discretion to make defense fund payments to matters within the fiduciary responsibility of the administrator of the legal defense fund. Such defense fund payments must not be dependent upon the employee or the employee's department taking official action on any matter except with respect to the case giving rise to the need for a defense fund.

Finally, to the extent that no soliciting of funds from coworkers takes place, there is little basis for concern of a generally unwholesome appearance that would breed bitterness among fellow employees. Thus, a legal defense fund operating under the restrictions described herein would not, in our opinion, be contrary to the policies underlying section 209.

This view is in contrast to the position stated in our Informal Advisory Letter 85 x 19, where we said:

> 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 the payment.

The Informal Advisory Letters and Memoranda and Formal Opinions of the United States Office of Government Ethics, at 603-604 (1989). That opinion concluded "[W]e are unable to say that 18 U.S.C. § 209 would not apply [to a Federal employee receiving distributions from a legal defense fund]." Id. at 601. We now believe that in light of Crandon the analysis in Informal Advisory Letter 85 x 19 is, to that extent, no longer correct.

Rule of Lenity

The majority in Crandon states that it would resolve any ambiguity about whether a particular activity constitutes criminal conduct prohibited by section 209(a) by applying the rule of lenity:

> [B]ecause the governing standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage. To the extent that the language or history of § 209 is uncertain, this "time honored interpretative guideline" serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability.

108 L.Ed.2d 132, 140 (1990). The rule of lenity was discussed more fully by the Supreme Court in a subsequent case, Moskal v. United States, 111 S. Ct. 461, 112 L.Ed.2d 449, 59 U.S.L.W. 4025 (1990).

> We have repeatedly emphasized that the

> touchstone of the rule of lenity is statutory ambiguity. Stated at this level of abstraction, of course, the rule provides little more than atmospherics, since it leaves open the crucial question--almost invariably present--of how much ambiguousness constitutes ambiguity. Because the meaning of language is inherently contextual, we have declined to deem a statute ambiguous for purposes of lenity merely because it was possible to articulate a construction more narrow than that urged by the Government. Nor have we deemed a division of judicial authority automatically sufficient to trigger lenity. If that were sufficient, one court's unduly narrow reading of a criminal statute would become binding on all other courts, including this one. Instead, we have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute. [A] court should rely on lenity only if, after seizing every thing from which aid can be derived, it is left with an ambiguous statute.

111 S. Ct. 461, 465 (1990). (Quotation marks and citations omitted.)

In this case, we believe that "after resort to the language and structure, legislative history, and motivating policies" of section 209(a), there is no "reasonable doubt" about the conclusion that the proposed arrangement would not violate the statute. Nevertheless, if any ambiguity remained, the rule of lenity would support our conclusion.

Gifts

Although not addressed by the Court in Crandon, consideration of gifts may be included as a part of the analysis of questions concerning the propriety of legal defense funds. One of the prominent commentators on conflict of interest law made the following statement with respect to gifts:

> Section 209 does not prohibit gifts to government officers or employees. It may be debatable in a particular case whether a transfer of an item of value to the government employee was a gift or was a supplementation of the employee's salary "for" his services. But to make out an offense under Section 209, it is essential to establish the linkage between the transfer of the thing of value and the services rendered.

B. Manning, Federal Conflict of Interest Law 163 (1964).

Given the circumstances outlined in your letter, we are unable to establish such a linkage. Anonymous donors contribute to a fund, not administered by the employee, to pay the fees of the attorney who represented the employee in a disciplinary action. Although the employee benefits, he does not receive the money directly. The services rendered are those of the attorney, not the employee. Such donations are in the nature of gifts rather than payment for services.

However, as we stated in our informal advisory letter 85 x 19, any Federal employee receiving benefits under a defense fund must comply with applicable regulations regarding the receipt of outside gifts.

Excess Legal Defense Funds

In the event a legal defense fund collects funds in excess of the costs of legal defense, such excess cannot be transferred to or accepted by the employee. A premise of your question was that the money in the fund would not be in the employee's possession, but would go directly to payment of the employee's legal fees. Disposition of any excess legal defense funds is a matter left to the administrator of the legal defense fund.

CONCLUSION

The payments at issue here are not "as compensation for the employee's services" to the United States. The services performed are not considered part of the employee's normal work for the purposes of section 209(a). This interpretation is consistent with the policies underlying section 209(a). In addition, the payments involved can more properly be considered as gifts that are outside

the statutory proscription of section 209(a). However, the employee must comply with applicable standards of conduct regulations regarding the receipt of outside gifts and with the prohibitions on accepting gifts from subordinates set forth in 5 U.S.C. § 7351.

For these reasons it is our conclusion that payments from a legal defense fund to or on behalf of a Federal employee under the circumstances you described in your letter would not violate 18 U.S.C. § 209(a). To the extent that this opinion differs from our Informal Advisory Letter 85 x 19 in the analysis of payments from a legal defense fund, that portion of the prior opinion is superseded.

This opinion has been issued after consultation with the Office of Legal Counsel, Department of Justice.

Sincerely,

Stephen D. Potts
Director

---

1 The Informal Advisory Letters and Memoranda and Formal Opinions of the United States Office of Government Ethics, at 601 (1989).

2 The rule of lenity may be formulated as "Where the intention of Congress is not clear from the act itself and resonable minds might differ as to its intention, the court will adopt the less harsh meaning." Black's Law Dictionary 1196 (5th ed. 1979).

3 The Informal Advisory Letters and Memoranda and Formal Opinions of the United States Office of Government Ethics, at 601 (1989).

4 The analyses discussed the subjective intent of the parties, and a decision would be based upon and examination of all the surrounding circumstances. Justice Scalia, in his concurring opinion, dismissed this "we'll-look-at-all-the-circumstances-and- see-if-it-looks-dangerous" approach as and unprecedented way of interpreting the criminal law. 108 L. Ed. 2d 132, 154 (1990). The majority of Crandon did not address all the "surrounding circumstances" approach, nor the method of analysis described above.

5 A prohibited source is "any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties." Section 101 (d) of Executive Order 12674 of April 12, 1989, Principles of Ethical Conduct for Government Officers and Employees of Ethical Conduct for Government Officers and Employees, as modified by Executive Order 12731 of October 17, 1990. See also 5 C.F.R. § 2635.202 (d).

6 See OGE informal advisory letter 81 x 31, The Informal Advisory Letters and Memoranda and Formal Opinions of the United States Office of Government Ethics, at 209 (1989).