

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT

IN THE MATTER OF REPRESENTATIVE
E.G. "BUD" SHUSTER

REPRESENTATIVE BUD SHUSTER'S VIEWS REGARDING
THE INVESTIGATIVE SUBCOMMITTEE'S FINAL DRAFT REPORT

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[*Committee note: Notwithstanding use of the term "Draft" in this document, these Views of Representative Shuster incorporate changes made by counsel to Representative Shuster in response to the Investigative Subcommittee's *final* Report.]

I. INTRODUCTION

After a four-year investigation involving 150 subpoenas, 75 witness interviews, and 33 depositions, the Investigative Subcommittee and Representative Shuster have agreed to put this controversy to rest with a negotiated settlement fundamentally involving an "appearance of impropriety." Sparing all concerned the destructive ordeal of lengthy hearings to debate allegations involving his conduct back to 1993, Representative Shuster agreed to a single count charging essentially that public perception of his conduct did not reflect creditably on the United States House of Representatives. The charge bears no relationship to the broad and sensational allegations of a Ralph Nader group complaint that initiated this process. More fundamentally, the Investigative Subcommittee ("Subcommittee") acknowledges that there was no merit to those sensational allegations, and that there is not a single instance when Representative Shuster took legislative action to benefit private interests instead of the public good.

Representative Shuster has served in the House for a quarter of a century, and he is devoted to it as an institution that serves the public good. Out of respect for the House and for his colleagues, Representative Shuster has put aside his natural inclination to protest the injustice and untruth of so much that has been said against him, and to accept a letter of reproof to end this lengthy process. Having given his pledge that he would accept a letter of reproof – for the good of the House, of his colleagues and of his family – Representative Shuster was disappointed that the Subcommittee Report chose to digress into whether such a letter was a satisfactory resolution. After all, Representative Shuster could just as easily explain here why a letter of reproof is, in his judgment, overkill for the charge of causing misguided public perceptions – particularly when those subjective perceptions were contrary to the objective truth. The truth is that – under every statute Congress has adopted to regulate contacts between lobbyists and Members – Representative Shuster's interaction with Ann M. Eppard (his former Chief of Staff and chief campaign advisor) complied with the law, and with his understanding of what was right. The truth is that Representative Shuster made every effort to properly account for the expenses of his fact-finding trips, and to publicly disclose his accounting, in keeping with the conduct of his colleagues. The truth is that Representative Shuster always welcomed the fact that his staff chose to volunteer in his re-election campaigns, and made sure official work came first and was never sacrificed for campaign work. The truth is that Representative Shuster's campaign successfully raised substantial funds, used them for proper purposes, and protected the taxpayer from

paying a penny for any expense that could just as properly be paid from campaign funds. Fundamentally, the fact that both Representative Shuster and the Subcommittee believe that they could debate these issues endlessly shows – perhaps better than any legal argument – why respect for the House, for history, and for the ethics process is best served by a negotiated armistice.

Of greater concern to Representative Shuster than the debate over the past is whether other Members can truly learn from the Subcommittee's Report how not to fall into a future charge that their own conduct did not reflect creditably on the House. The subjective standards by which Representative Shuster's past conduct have been criticized in the Report cannot be distilled into any clear and objective formulation for future guidance of Members. Indeed, the Subcommittee Report repeatedly acknowledges that Members may continue, without violating any rule, to:

- Seek political advice from former senior staff, get information from them, and attend social functions with them.
- Make fact-finding trips that are reimbursed by the private sector, rather than at taxpayer expense.
- Allow official staff to use their free time to volunteer in Members' re-election campaigns.
- Expend campaign funds for a wide range of political purposes, within the broad discretion of the Members or their campaign officials.

Unclear, however, is when the limits of those principles are reached – other than by subjective assessment. If anything of lasting use is to emerge from this lengthy and costly process, then the rules going forward deserve clear articulation.

Until this investigation, charges that a Member's conduct did not reflect "creditably" on the House were reserved primarily for the type of personal misbehavior that unquestionably is not involved here. *See, e.g., In the Matter of Representative Gus Savage, H.R. Rep. No. 101-307, at 14 (1990) (using Rule 43(1) to sanction a Member's sexual harassment of a Peace Corps volunteer); In the Matter of James C. Howarth, H.R. Rep. No. 98-548, at 4 (1983) (sanctioning sexual relationship with female page and narcotics-related misconduct); In the Matter of Representative Gerry E. Studds, H.R. Rep. No. 98-295, at 1 (1983) (sanctioning sexual advances towards and a relationship with various male pages); In the Matter of Representative Daniel B. Crane, H.R. Rep. No. 98-296, at 1 (1983) (sanctioning sexual relationship with female page).*

If the House now intends to use that rule more broadly to regulate a Member's official and political actions, then Members deserve the benefit of clear standards for compliance. Given the rule's current lack of objective – or even articulable – standards, we can respond to the Subcommittee Report only by explaining why – on the facts – Representative Shuster believed his conduct met the standards of the House and of governing law. In doing so, moreover, we can only speak to the facts as we understand them, given that the Subcommittee consistently has denied our repeated requests for access to the documents and testimony it has gathered over the last four years. Representative Shuster was never, at any point during this lengthy investigation, afforded the opportunity to view the evidence, if any, against him. Nor was he allowed to confront the witnesses, if any, against him. If he had chosen to put his family, friends, and the House through the ordeal of adjudicatory proceedings, Representative Shuster believes the allegations aired throughout this process would be seen as misunderstandings and misapprehension.

In accepting a letter of reproof as a negotiated settlement, Representative Shuster believes that the specific actions at issue here should be placed in the context of his full career of service to the public and to the House. By any benchmark, Representative Shuster's career of service in the House has been one that has brought credit to the House, and that has benefited the public. In the 14 terms that Representative Shuster has been in Congress, he has

served his country in every capacity that he could find. He has served on the Committee on the Budget and its Defense Task Force, the Committee on Education and the Workforce and its Subcommittee on Higher Education, as Chairman of the Republican Policy Committee, and as a delegate to NATO's North Atlantic Assembly. Using the knowledge that he gained during Army service, he has also been Ranking Member of the Select Intelligence Committee. During this time, Congressman Shuster served on the Subcommittees on Human Intelligence, Analysis & Counterintelligence, and Technical & Tactical Intelligence, where he supported and authored several important pieces of intelligence legislation, including a highly classified project which was credited with making a significant contribution to America's success in the Gulf War.

Currently, Representative Shuster serves as the Chairman of the Committee on Transportation & Infrastructure, which includes jurisdiction over highways, transit, railroads, aviation, water resources, economic development, Merchant Marine, Coast Guard, and public buildings and grounds. The largest Committee in Congress, it is this Committee which builds America; this Committee which oversees our nation's great highway, aviation, rail and maritime transportation systems; this Committee which constructs our environmental infrastructure, which oversees our Coast Guard, the Smithsonian Museum and all of our nation's public buildings. The Committee's role extends across the entire spectrum of American life, from coastal lighthouses to towering river dams, from the building of rural post offices to erection of the monumental John F. Kennedy Center for the Performing Arts that stands on the Potomac shore. The Committee's concerns embrace seashore erosion, rural and urban watershed, disaster relief, and the economic development of depressed areas around the country, where Federal help must be provided to bring jobs to American citizens, and new life to their communities.

In his capacity as Chairman, Representative Shuster has worked tirelessly, and has been a principal author of most of America's transportation legislation during the past two decades. Representative Shuster helped author the Surface Transportation Act of 1982, the Surface Transportation and Uniform Relocation Assistance Act of 1987, and the landmark Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), an historic, six-year, \$157 billion transportation law that affirmed the interstate legacy of transportation as the lifeblood of the American economy, and personal mobility as an American ethos. Representative Shuster's work for the American people did not stop, or even slow, during the course of the Subcommittee's wide-ranging inquiry. Rather, Representative Shuster oversaw passage of the Transportation Equity Act for the Twenty-First Century of 1998 (TEA-21), an historic \$218 billion law to unlock transportation trust funds so that those funds could be spent as they were intended, and without increases in taxes. This year Representative Shuster is credited with being the driving force behind The Aviation Investment Reform Act of the 21st Century ("AIR-21"), an historic \$40 billion law that unlocks the aviation trust fund and reforms the air-traffic control system to deal with the growing demands on America's air transportation network, without raising taxes.

With each bill that Representative Shuster has authored, supported, and helped pass through Congress, he has endeavored to keep faith with the American people by improving roads, bridges, and transit systems, protecting the environment and national landmarks. It is no exaggeration to say that most of the highways on which more than 200 million Americans drive their cars every day owe their continued existence in significant part to the efforts of Representative Shuster.

Sponsoring legislation is, of course, only a fraction of the work that Representative Shuster has performed in his tenure as a Congressman. Representative Shuster has tirelessly traveled to visit numerous cities, in an effort to see firsthand America's tremendous transportation needs. Representative Shuster's tours have shined a spotlight on some of the nation's major infrastructure needs, and focused attention on the Federal, state, and local partnerships required to meet those needs. Representative Shuster has worked to give a higher profile to transportation issues in

the federal budget, emphasizing that the key fuel behind a growing economy is a modern, efficient transportation system that moves goods quickly, cheaply and safely.

Representative Shuster's legislative accomplishments lay alongside his truly unique political achievements. He is the only Pennsylvanian in history to win both Republican and Democratic Congressional nominations nine times. He has authored an award winning book, "Believing in America" (Morrow, 1983), a first novel, "Double Buckeyes" (White Mane Books, 1999) and a forthcoming novel, "Secret Harvest," the royalties of which are being donated to Children's Miracle Network. He has received numerous awards, including: "Watchdog of the Treasury Award" for his efforts to control government spending; "Guardian of Small Business Award" for his efforts on behalf of the free enterprise economy; the "Golden Age Hall of Fame Award" for his efforts on behalf of senior citizens; the "National Security Leadership Award" for his support of a strong national defense; and special awards from the Pennsylvania Academy of Science and the American Society of Highway Engineers. In short, Representative Shuster is a man whose legislative work for almost three decades has been the building of the American infrastructure, the protection of the weak and the wronged, and the development of America's resources for the betterment of all its people.

II. EXECUTIVE SUMMARY

Representative Shuster has agreed to accept a letter of reproof from the Committee on Standards that fully resolves the single allegation against him and closes the investigation. The Statement of Alleged Violation ("SAV") to which Representative Shuster agreed states that he engaged in conduct that did not reflect creditably on the House of Representatives in violation of former House Rule 43, Clause 1. This charge is based on the "appearance of impropriety" created by apparent failures to closely supervise employees, maintain detailed campaign expense records, and *de minimis* violations of two House Rules. While the brief SAV accurately states the minor violation at issue, the accompanying Subcommittee Report ("Report") overstates the facts and law on which the Subcommittee relies. Representative Shuster will take this opportunity to clarify the law and the facts relevant to the Subcommittee's Report. It is also Representative Shuster's hope that the Committee will take note of the areas where ethical requirements are not well defined. By clarifying the ethical obligations of each Member, the Committee can ensure that no other Member can similarly be criticized based on largely subjective standards, applied after-the-fact.

The single charge in the SAV raises five different issues. Count I(a) states that Representative Shuster engaged in a pattern and practice of knowingly allowing Ann M. Eppard to appear before or communicate with him in his official capacity, during the 12-month period following her resignation as his chief of staff, on occasions and in a manner that could create an appearance that his official decisions may have been affected. However, the Investigative Subcommittee expressly disavowed any finding that 18 U.S.C. § 207 was violated, meaning that Mrs. Eppard did not in fact communicate with or appear before Representative Shuster with the intent to influence his official action on any matter during a twelve month cooling-off period following the end of her government service. The Investigative Subcommittee further concluded that Representative Shuster did not provide any improper legislative benefits to any of Mrs. Eppard's clients. Consequently, this part of the SAV rests on only the misguided conclusions drawn by observers of Mrs. Eppard's access to Representative Shuster during the twelve months after she left his office - access that was primarily based on her ongoing role as his chief campaign advisor, and the need for her knowledge and expertise during the difficult transition to her replacement as Chief of Staff. These are common events on Capitol Hill. The Report finds no evidence that Mrs. Eppard attempted to influence or "lobby" Representative Shuster on any official matter during the cooling-off period. To the contrary, the evidence received by the Subcommittee revealed that Mrs. Eppard and Representative Shuster sought to understand the restrictions imposed during Mrs. Eppard's cooling-off period, and to comply in good faith with their ethical requirements.

Representative Shuster's official decisions were not improperly affected as a result of Mrs. Eppard's "access." But Representative Shuster acknowledges that his contact with Mrs. Eppard during the cooling-off period could have created an **appearance** of impropriety.

Count I(b) concerns House Gift Rules implicated by Representative Shuster allowing the Outdoor Advertising Association of America ("OAAA") and Daniel, Mann, Johnson and Mendenhall ("DMJM") to defray certain expenses related to a trip with his family to Puerto Rico in late December 1995 and early January 1996. Although the Report suggests that Representative Shuster should not have accepted any expenses from private sponsors because the trip was "recreational," it acknowledges that Representative Shuster had fact-finding meetings relating to transportation and infrastructure needs and projects in Puerto Rico. The Puerto Rico trip was a legitimate fact-finding trip directly related to Representative Shuster's official duties, and he believed in good faith that his acceptance of his and his wife's travel expenses from the two private sponsors that arranged the trip was permissible. Contrary to any insinuation that Representative Shuster believed the trip was an impermissible gift, Representative Shuster reported the trip and its sponsors on his 1995 and 1996 financial disclosure reports. While Representative Shuster was also accompanied on the trip by other family members who stayed in the accommodations provided by his sponsors, the cost of the accommodations provided was comparable to the cost of a hotel room at an area resort, and thus Representative Shuster's sponsors did not incur any significant additional expense as a result of these family members sharing his accommodations. Representative Shuster chose to agree to this portion of the SAV because he acknowledges, in retrospect, that the sharing of accommodations with other family members constituted an unintentional, *de minimis* violation of the gift rule.

Count I(c) alleges a *de minimis* violation of former House Rule 45, because Representative Shuster supposedly authorized or accepted the scheduling and advisory services of Ann M. Eppard on matters that were official in nature for several months after she resigned from his congressional office. Mrs. Eppard resigned as Representative Shuster's chief of staff after twenty-two years of service, in September 1994, **before** the 1994 elections, as did many Federal employees who had a one-time chance to receive a pay-out of their retirement funds. After the elections placed Representative Shuster as Chairman of the Transportation and Infrastructure Committee, there were vastly increased demands on Representative Shuster's time, occurring simultaneously with the transition to a new chief of staff in his office. Representative Shuster's office staff sought out the advice and assistance of Mrs. Eppard on scheduling matters during this transitional period because of Mrs. Eppard's experience and familiarity with the vastly increased number of individuals and organizations that requested appointments with Representative Shuster. In addition, Mrs. Eppard remained Representative Shuster's political advisor and legitimately offered her advice on the scheduling of appointments with political or campaign-related ramifications. Although the Report alleges that appointment requests from Mrs. Eppard's clients were among the many requests she reviewed, the Subcommittee elsewhere concluded that neither Mrs. Eppard nor her clients received any improper legislative benefits from Representative Shuster. The Report also contains no evidence that Mrs. Eppard sought to give her scheduling advice in order to advance her clients' interests. Thus, at no point did any of this scheduling activity improperly influence the outcome of Representative Shuster's official duties. These circumstances amount to no more than a *de minimis* infraction of House Rule 45, involving conduct considerably less noteworthy than conduct that has passed prior scrutiny by House and Senate ethics committees.

Count I(d) relates to Representative Shuster's role as an office manager, and concerns whether the employee absence procedures in his office allowed for an **appearance** that congressional employees worked for his political campaign, the "Bud Shuster for Congress Committee" ("BSCC"), to the **apparent** detriment of the time they were required to spend on official duties. However, any **"appearance"** that congressional employees were paid official salaries for time spent volunteering for the BSCC is directly contradicted even by the testimony set forth in the Report. Representative Shuster's employees consistently testified that office policy permitted employees to

volunteer for the BSCC so long as they completed their official duties on schedule, using evenings and weekends when necessary. The Committee on Standards has recognized that such a policy is appropriate given the unconventional nature of congressional work hours. Representative Shuster acknowledges that the lack of detailed documentation made it impossible to conclusively demonstrate that his congressional employees completed all of their official duties on schedule while volunteering for the BSCC. Despite any "appearance" of impropriety, however, the SAV does not charge that any of Representative Shuster's employees in fact worked for the BSCC to the detriment of their official duties.

Count I(e) states that the number and dollar amount of expenditures by the BSCC contained in Federal Election Commission ("FEC") reports for meals designated as political meetings, and for transportation on chartered airplane flights, combined with inadequate record-keeping by the campaign, created the appearance that certain expenditures may not have been attributable to bona fide campaign or political purposes. Juxtaposed with this "appearance" finding, however, the Subcommittee found no evidence that Representative Shuster made improper personal use of campaign funds. Seemingly, the Subcommittee instead required Representative Shuster to "prove his innocence" with respect to more than 675 expenses over a six year period. While the Report faults Representative Shuster for "inadequate" record-keeping, it cites no House Rule or FEC regulation that required members to maintain the detailed documentation apparently desired by the Investigative Subcommittee. In fact, the BSCC expenditures were legitimate and reported to the FEC as required. Nonetheless, Representative Shuster acknowledges that the BSCC could have eliminated any mistaken appearance of impropriety by maintaining more detailed documentation concerning its expenditures, had it been aware of the heightened standards that would be applied after-the-fact.

The charges contained in the Subcommittee's SAV bear no resemblance to the overblown allegations conveyed to the Committee under questionable circumstances in order to initiate this investigation. Consequently, the decision to conclude this investigation was not an easy one for Representative Shuster to make. But with this four-year long ordeal finally at an end, and with the Subcommittee rejecting the many wild accusations that have been made against him by political detractors and reprinted in the media, Representative Shuster is pleased to continue the work of the American people, and to stand for re-election before the constituents he has served and the people who know him best.

HISTORY OF PROCEEDINGS

The investigation into Representative Shuster's conduct began on September 5, 1996, the last hour of the last day that complaints could be filed before the pre-election moratorium of the second session of the 104th Congress, when the Ralph Nader-led Congressional Accountability Project filed its complaint ("Complaint"). Despite the fact that the Complaint was both procedurally and substantively deficient, the Committee decided against its dismissal.

The Complaint repeated almost verbatim fanciful stories that had been told in the press regarding the actions of Mrs. Eppard, following her tenure working for the Congressman. Among the most spurious of these allegations was the insinuation that Mrs. Eppard, while working as a lobbyist, had sought to obtain "special favors" for her clients that were not available to members of the public. See Letter from Gary Ruskin to Honorable Nancy Johnson, Chairwoman, House Committee on Standards of Official Conduct, *Re: Ethics Complaint Against Representative Bud Shuster*, September 5, 1996. The complaint also made several other baseless allegations:

- That Mrs. Eppard had provided improper gifts to the Congressman. See *id.* at 6-7.
- That Mrs. Eppard's clients had received significant legislative benefits from Chairman Shuster and the House Transportation and Infrastructure Committee. See *id.* at 7-10.

- That Representative Shuster had violated a federal gratuity statute. *See id.* at 10-12.
- That Representative Shuster improperly intervened with federal agencies on behalf of a private individual. *See id.*

The Subcommittee Report now rejects all of these allegations.

Despite House Rule 10's prohibition against accepting unsworn complaints, or complaints filed by non-Members prior to submission to, and a written refusal signed by, three Members for transfer to the Committee, the Committee pursued the complaint. On November 9, 1997, the Committee formed an Investigative Subcommittee, which later expanded its investigation into areas not mentioned in the original Complaint. By letter dated February 17, 1998, the Subcommittee notified Representative Shuster that it was authorizing the issuance of subpoenas. During the course of the investigation, the Subcommittee issued no less than 150 subpoenas, which were extremely broad and burdensome. The Subcommittee issued subpoenas to members of Representative Shuster's family, to his political supporters and to the clients of Mrs. Eppard. In all, the Subcommittee interviewed 75 individuals, and deposed 33 of these individuals. The Subcommittee also deposed Mrs. Eppard over the course of two days. In order to avoid inflicting on his colleagues, family, and the House of Representative what would no doubt have been a contentious hearing process, Representative Shuster accepted the invitation to have settlement negotiations with the Subcommittee. On July 26, 2000, Representative Shuster agreed to accept the single-count SAV involving the subjective standard of old House Rule 43(1). The nucleus of the negotiated settlement was the Subcommittee's agreement that a letter of reproof would be the sanction for the infraction charged in the SAV.

The Subcommittee found no credible evidence that any of Mrs. Eppard's clients ever received inappropriate legislative benefits. Report at 120-29, 133-38. The Subcommittee found no credible evidence that Representative Shuster received illegal gratuities or gifts from Mrs. Eppard. Report at 129-32, 138-39. And finally, the Subcommittee found no credible evidence that Representative Shuster improperly intervened with federal agencies on behalf of certain citizens. Report at 139-42. In short, the Subcommittee confirmed that the principal allegations of the original complaint were entirely baseless.

In November 1999, while the Subcommittee continued this investigation, federal prosecutors in Boston dropped all charges of an indictment against Mrs. Eppard and accepted in its place a plea to a single misdemeanor. The prosecutors also insisted on Mrs. Eppard's agreement not to sue the federal government for malicious prosecution. Earlier on, it had been made clear that Representative Shuster was neither a subject nor a target of the grand jury investigation. With the misdemeanor plea and the dismissal of the indictment against Mrs. Eppard, federal prosecutors also publicly announced that their investigation was at an end and would not involve Representative Shuster in any way.

IV. RESPONSE TO THE SUBCOMMITTEE'S STATEMENT OF ALLEGED VIOLATIONS AND ACCOMPANYING REPORT

After more than six weeks of preparation, on September 14, 2000, the Subcommittee delivered to Representative Shuster its final draft Report summarizing its views. In order to assure that this process was brought to its negotiated conclusion at the earliest possible time, Representative Shuster agreed to submit this response by September 25, 2000. Because the document that Representative Shuster received from the Subcommittee was styled a draft report, this response must be understood as a draft as well. Should the Subcommittee's final Report be altered from the draft, it is only fair that Representative Shuster be afforded the opportunity to respond to such alterations.

A. SAV ¶4(a)

The Subcommittee's Allegation:

The first allegation of the SAV charges that Representative Shuster's conduct did not reflect creditably on the House of Representatives, in violation of former Rule 43, Clause 1 when he:

engaged in a pattern and practice of knowingly allowing Ann. M. Eppard to appear before or communicate with him in his official capacity, during the 12-month period following her resignation as his chief of staff, on occasions and in a manner that created the appearance that his official decisions might have been improperly affected.

SAV ¶4(a).

Response:

The Report identifies several instances where the Subcommittee believes Representative Shuster's and Mrs. Eppard's contacts constituted activities that, while not in violation of 18 U.S.C. § 207(e)(2), nevertheless appeared to the Subcommittee to run afoul of a previously unidentified "underlying policy" of Section 207. Although the Subcommittee made reference to some 40 events (Report 10-31), they easily fall into no more than five commonplace scenarios, none of which violates Section 207, its spirit, or its underlying policy:

Scenario 1: Mrs. Eppard helped to organize and participated in factual briefings for Representative Shuster concerning a government funded transportation project managed in part by one of her clients, DMJM. (Report at 14-18, Trip to Puerto Rico).

Scenario 2: Mrs. Eppard organized and/or attended meals involving her clients and Representative Shuster, at two of which clients of Mrs. Eppard, in her presence, did nothing more than "discuss[] issues of interest" or "problems" with Representative Shuster. (Report at 14-18, Puerto Rico; 18, Amtrak Lunch; 18-19, Conrail Dinner; 19-21, Other Dinners; and 29-30, Dinners in Rayburn).

Scenario 3: Mrs. Eppard traveled with Representative Shuster and others at a time when she was retained by clients interested in legislative issues within the general jurisdiction of the Committee on Transportation and Infrastructure. (Report at 14-18, Trip to Puerto Rico; 25-29, travel on Federal Express Corporate Jet).

Scenario 4: Mrs. Eppard scheduled meetings involving her clients and Representative Shuster. (Report 21-24, Meetings on behalf of Amtrak, Pennsylvania Turnpike Commission and Carmen Group).

Scenario 5: Mrs. Eppard introduced certain of her clients to Representative Shuster, in his office, and then excused herself from the meeting that took place. (Report at 24-25, Introduction of Clients).

Each scenario is discussed below, after a review of the applicable legal guidelines.

The Subcommittee invokes the "underlying policy" of 18 U.S.C. Section 207(e)(2) as the fulcrum for finding a violation of Rule 43, Clause 1. Report at 31. By importing Section 207 and its "underlying policy" into the House rules, however, the Subcommittee is constrained to interpret Section 207 consistent with its plain language and with the longstanding interpretive guidance issued by the agencies that administer it. The

Subcommittee concluded that Representative Shuster did not violate Section 207, but that he acted inconsistently with the Subcommittee's view of Section 207's supposed underlying policy, in such a way as to create an **appearance** of impropriety. The Subcommittee never explains how Representative Shuster could violate the underlying policy without violating the law. Members of Congress know that their legislative work is to draft clear laws, and that legislative policy is expressed in the plain language of those laws.

The "underlying policy" of Section 207, therefore, must be determined in the first instance by reference to the plain language of the statute, as it has been enforced by the agencies with jurisdiction over it. Under the plain language of Section 207(e)(2) and longstanding Office of Government Ethics ("OGE") interpretive guidance, all of the interaction between Representative Shuster and Mrs. Eppard fell outside the scope of "lobbying," and thus did not violate either the letter or the spirit of Section 207. Indeed, the Subcommittee Report itself takes pains – as it should – to disavow any suggestion that either Representative Shuster or Mrs. Eppard violated the law. Report at 11-12, 30-31.

As the Subcommittee is aware, both Representative Shuster and Mrs. Eppard repeatedly sought and obtained guidance from the Committee's own counsel regarding the scope of their permissible communications following her retirement from government service. At base, the advice was that Mrs. Eppard was free to communicate with and appear before Representative Shuster in the political and social spheres, but could not "lobby" him. The central question, then, is: What is lobbying? In his guidance to them, Committee counsel did not provide Representative Shuster or Mrs. Eppard any definition of lobbying, leaving them to believe that lobbying meant what they – correctly – knew it to mean based on each of their nearly quarter century of experience in the House as of 1994, and based on their common sense.

Committee counsel specifically advised Representative Shuster that, because Mrs. Eppard was a personal friend, as defined by the Committee, and also served as his re-election campaign's Assistant Treasurer, it was permissible for Mrs. Eppard to attend political dinners, discuss campaign information, and to charge those expenses to the campaign committee. Response Exhibit 1. Additionally, according to Committee counsel, social dinners with Mrs. Eppard, despite her status as a lobbyist, were permissible under House Rules. *Id.* Committee counsel never advised Representative Shuster that this type of conduct, although lawful, could nevertheless violate old House Rule 43, Clause 1 by creating an **appearance** of misconduct. *Id.* Representative Shuster understood, therefore, based on Committee counsel's advice, that so long as Mrs. Eppard did not lobby him, he would not be in violation of any rule.

Historically "lobbying" has generally meant advocacy for a particular legislative outcome. "Lobbying" has never encompassed every interaction between a lobbyist and a Member. In the Lobbying Disclosure Act of 1995, for example, Congress defined "lobbying contact" to mean "any oral or written communication . . . on behalf of a client" concerning legislation or resulting government programs and policies. 2 U.S.C. § 1602(8)(A) (repealed). Congress excluded from the definition of "lobbying contact" any "communication that is – (B)(v) a request for a meeting, a request for the status of an action, or any other similar administrative request, if the request does not include an attempt to influence . . . a covered legislative branch official." 2 U.S.C. § 1602(8)(B)(v). The Lobbying Disclosure Act of 1995 is particularly compelling evidence of what Congress itself thought was necessary for a communication to constitute lobbying at the precise time of Mrs. Eppard's 12-month cooling-off period. Under this standard, Mrs. Eppard did not lobby Representative Shuster at any point during the cooling-off period. The Subcommittee has not alleged, and the contacts did not encompass, any discussion of "the formulation, modification, or adoption," of Federal

legislation, rules, regulations or orders; or the administration of federal programs; or executive appointments.

The Supreme Court itself has interpreted the word lobbying only in its "commonly accepted sense – to direct communication with members of congress on pending or proposed federal legislation." *United States v Harriss*, 347 U.S. 612, 620 (1954) (internal citations omitted); *see also Zweidler v Koota*, 290 F. Supp. 244, 256 (E.D.N.Y. 1968) (recognizing that the Supreme Court had restricted the definition of lobbying to direct communications with members of Congress, designed to influence, directly or indirectly the passage or defeat of any legislation by the Congress).

1. Because Section 207 Prohibits Only Advocacy, the Evidence Before the Subcommittee Makes Clear that No Violation of Section 207 Occurred.

By its plain language, Section 207(e)(2) prohibits only those cooling-off period communications or appearances by a Member's former staff that are knowingly made with "intent to influence . . . action" on a "matter" within the "official capacity" of the former employer-Member:

(2) Personal staff. – (A) Any person who is an employee of a . . . Member of the House of Representative and who, within 1 year after the termination of that employment, knowingly makes, with the intent to influence, any communication to or appearance before any of the persons described in subparagraph (B), on behalf of any other person (except the United States) in connection with any matter on which such former employee seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(B) The persons referred to in subparagraph (A) with respect to appearance or communications by a person who is a former employee are the following:

- (i) the Senator or Member of the House of Representatives for whom that person was an employee; and
- (ii) any employee of that Senator or Member of the House of Representatives.

18 U.S.C. § 207(e)(2).

In short, Section 207(e)(2) prohibits only **knowing** and **intentional** advocacy concerning the outcome of a legislative matter. Even then, former staff remain free to engage in such advocacy immediately after retirement in communications and appearances before any Member (and all Committees) other than the former employer. And, even then, former staff remain free to engage in such advocacy in communications and appearances before the former employer once the cooling off period expires.

a. OGE Interpretations.

The limited scope of Section 207(e)(2) is well established by OGE interpretations of comparable Executive Branch provisions of Section 207. As OGE has summarized the scope of Section 207, "the statute only prohibits representational activity, *i.e.*, communications or appearances made to a Government employee with the intent to influence." Letter from OGE, to A Division Chief of a Departmental Component, 1996 WL 931730 ...[go to text](#)4

(Nov. 5 1996) (herein, "11/5/96 OGE Letter"). It is this "intent to influence" requirement that limits Section 207's prohibition to advocacy, *i.e.*, the kind of "representational activity" that involves advocating a specific outcome on a discretionary or disputed matter under government consideration.

OGE has made clear that "[a]n intent to influence is an essential element of the criminal statute." *Id.* OGE has said that:

[A]n intent to influence may be found if the communication or appearance is made for the purpose of seeking a discretionary Government ruling, benefit, approval or other action, or is made for the purpose of influencing Government action in connection with a matter which the former employee knows involves an appreciable element of dispute concerning the Government action to be taken.

Id. In other words, unless the former staffer is pleading for a discretionary government ruling (dispositive action) or for discretionary government benefits (beneficial action), or for favorable resolution of a dispute, the interaction is not lobbying and is not prohibited.

Members of Congress make hundreds of decisions every day, but not all of them involve dispositive action, beneficial action or taking a position on a dispute through a vote, bill sponsorship or the like. For example, Members decide whether they need facts from, or want to provide facts to, constituents, the public or special interests in order to perform their official functions. When not focused on work, Members decide whether to socialize, and with whom. Naturally, Members also make decisions that affect their political role as incumbent candidates for re-election. Former staff may permissibly communicate with their employer-Member in connection with any of these activities during their cooling off period, and such communications do not amount to prohibited advocacy regarding government decision-making.

Under longstanding interpretations of Section 207 – at least one of which had been issued when Mrs. Eppard retired from government service – former staff may:

- Provide advice and counsel to clients on how to lobby Congress;
- Have factual communications with the former employer-Member, whether asking for factual information relevant to pending legislation, or providing such information – even when directly requested to do so by the Member;
- Have social contact with the Member, including at fundraisers.

Memorandum from OGE to Designated Agency Ethics Officials, General Counsels, and Inspector General Regarding Revised Post-Employment Restrictions of 18 U.S.C. § 207, 1990 WL 485695 ...*go to text3* (Oct. 26, 1990); *Memorandum from Committee on Standards of Official Conduct to All Congressional Employees* (Oct. 22, 1998) ("10/22/98 Memo"); 11/5/96 OGE Letter, at ...*go to text4*.

b. OGE Regulations.

OGE's formal regulations concerning comparable Executive Branch provisions of Section 207 further corroborate that Section 207(e)(2) prohibits only advocacy in support of dispositive or beneficial discretionary government action, or favorable resolution of disputes. Like Section 207(e)(2), Section 207(c) prohibits advocacy communications "in connection with any matter" on which the relevant official can take "action." 18 U.S.C. § 207(c). OGE regulations make clear, however, that "any matter" does not mean everything that a government

official may think about or do during the day. In interpreting language found in Section 207(c) – and repeated in subsection (e)(2) – OGE regulations state, "the restriction does not encompass every kind of matter, but only a particular one similar to those cited in the statutory language, *i.e.*, any judicial or other proceeding, application, request for a ruling or determination, contract, claim, controversy, investigation, charge, accusation, or arrest." 5 C.F.R. § 2637.204(d).

Further, in delineating the spheres of permissible and impermissible interaction between the former staff and the employer-Member during the cooling-off period, OGE has recognized that any given conversation might leave the realm of the permissible and head toward the impermissible. When that occurs, however, OGE makes clear that the former employee can remain in compliance with the statute simply by "avoid[ing] further participation in the meeting or communication." *11/5/96 OGE Letter at ...go to text4 (citing 5 C.F.R. § 2637.201(b)(5)).*

c. Statutory Exceptions.

The scope of Section 207(e)(2) is still further confined by the carve-outs from prohibited conduct, which are found in Section 207(j). Recognizing that lobbyists may have co-existing political responsibilities, Section 207(j)(7) allows former staff who are officials of the Member's campaign committee to communicate with the Member in that capacity.

d. The Committee's Issuance of Guidance in 10/98 Regarding the Cooling-Off Period Restrictions.

For the first time, in October 1998, the Committee issued guidance concerning Section 207, which vastly expanded the potential reach of the statute's prohibitions. *10/22/98 Memo*. From October 1998 forward, the Committee expressed the view that – although it had no jurisdiction to enforce Section 207 – the statute should be read to prohibit a former House employee from "openly associat[ing]" with a lobbying client before the former-employer Member during the 12-month cooling-off period. Of course, by the time this advice was given in October 1998, the events described in the Report had long since occurred.

Although the 10/22/98 Memo was an expansion of prior interpretive guidance concerning Section 207, the Subcommittee apparently has applied those after-the-fact standards to the 1995 actions described in the Report. These new standards should not be applied retroactively to conduct that took place years before the interpretive memorandum. *See In the Matter of Representative Robert L.F. Sikes, H. Rep. No. 94-1364, 94th Cong., 2d Sess. 6-7 (1976)* ("Conduct which was not improper at the time must not be made to appear improper by retroactive application of standards which were not then in existence."); *see also Wilson v Layne, 526 U.S. 603, 617 (1999)* (holding police officers not liable for violation of 42 U.S.C. §1983 where they followed internal police policies and the state of the law "was at best underdeveloped").

e. The Subcommittee Report's Standards.

The Subcommittee Report appears to be expanding the scope of the prohibition even beyond the full Committee's October 1998 interpretation. According to the Report, even those former staff who avoid "open association" with clients now may run afoul of the rules if their former employer "is made aware" of the involvement of the former staff in providing advice on legislation. Report at 11-12. This newly articulated "made aware" standard is broad and amorphous, and contradicts the longstanding OGE guidance that former staff may provide advice and counsel to clients on legislative issues before their former employers even during the cooling-off period. Indeed, given the requirement that lobbyists register and publicly disclose their clients and their client's objectives, it is hardly possible to keep the fact of association with a client's legislative cause a secret.

Elsewhere in the Report, the Subcommittee expresses concern that certain social events "were held in almost immediate proximity to, indeed in conjunction with, events at which, outside of her presence, Mrs. Eppard's clients did discuss matters of official interest to them with Representative Shuster." Report at 13. What are Members to make of this observation in guiding their own future conduct? Longstanding OGE and Committee guidance has exempted social contact from the reach of Section 207. A new rule that condemns social events with former staff held in "immediate proximity" to lobbying contact not involving former staff calls the whole social contact exception into question. The Report does not indicate how much of a time interval must occur, before or after social events, to avoid criticism. The only clarity that the Report does provide is the certainty that – no matter what the nature and the extent of Mrs. Eppard's cooling-off period activities – they had no improper effect on the outcome of legislation.

2. The Subcommittee's Rejection of a "Legislative Benefits" Charge Proves That There Was No Substance to Any Appearance of Impropriety.

The Subcommittee Report comprehensively rejects all allegations that Mrs. Eppard improperly secured legislative benefits for her clients. *See, e.g.*, Report at 120-29, 133-38. The Subcommittee's conclusion necessarily means that – whatever the nature of Mrs. Eppard's communications with or appearances before Representative Shuster – they did not steer the legislative process away from the public good to serve private interests. If anything, that conclusion means that the "underlying policy" of Section 207 has been vindicated. It is also clear that the letter of the law has been upheld. Section 207 addresses only lobbying contact – that is, contact with an intent to influence official action. The Report alleges no contact with an intent to influence official action.

3. An Analysis of Each of the Report's Five Scenarios Demonstrates That Mrs. Eppard's Contact with Representative Shuster Did Not Involve Intent to Influence Legislation.

Absent proof that a lobbyist secured "legislative benefits" because of contacts with a Member, the requisite "intent to influence" must be established by other circumstances. In general, the plainest way of determining intent to influence is to consider the content of the communications between a lobbyist and a Member. None of the Report's five basic scenarios involving cooling-off period contact between Representative Shuster and Mrs. Eppard evidences any intent to influence official action.

Scenario 1: Mrs. Eppard helped to organize, and participated in, factual briefings for Representative Shuster in February 1995 concerning a government funded transportation project partially managed by one of her clients, DMJM. Report at 14-18 (Trip to Puerto Rico). Factual briefings – whether given to Members, or received from Members – are not lobbying. *Supra* at 20. Because the briefings at issue here were permitted, there was also nothing wrong in helping to organize them.

The evidence cited by the Report concerning this trip confirms that it was a proper fact-finding event. That evidence includes: Representative Shuster's trip itinerary, showing Representative Shuster attended an official dinner hosted by the Puerto Rican Government, Report Exhibit 13; the dinner guest list (Report Exhibit 14), showing eight of the twelve dinner guests were Puerto Rican government officials; a 2:00 pm Tren Urbano Alignment briefing, a 3:30 pm Tren Urbano aerial tour, and a 5:00 pm meeting with the Governor of Puerto Rico, immediately followed by a 7:00 return flight to Washington, D.C. Response Exhibit 2. Coupled with this evidence is the Subcommittee's own recognition that DMJM employee Nancy Butler testified that the "purpose of the trip was to educate Representative Shuster on the Tren Urban project." Report at 16.

To the extent that any lobbying took place during the trip, it was done by the Puerto Rican Government. A letter sent to the Puerto Rican Government by DMJM officers during that time period, however, confirm that no one thought Mrs. Eppard was a lobbyist for the Puerto Rican Government. Response Exhibit 3. As we understand it, the Tren Urbano project was fully authorized and funded even before Mrs. Eppard left Representative Shuster's staff, and as far as we know, no one tried to alter the funding formula thereafter.

Scenario 2: Mrs. Eppard organized and/or attended meals involving her clients and Representative Shuster, and at two such events clients of Mrs. Eppard did nothing more than "discuss[] issues of interest" or "problems" with Representative Shuster. Report at 14-18 (Puerto Rico); 18 (Amtrak Lunch); 18-19 (Conrail Dinner); 19-21 (Other Dinners); and 29-30 (Dinners in Rayburn). The Report contains no allegation that Mrs. Eppard – or, indeed, her clients – advocated for any legislative outcome during these meals, or otherwise intended to influence government action. Indeed, the meals would not have been "lobbying" if they involved only an exchange of factual information, or just a social occasion. *Supra* at 20-21. In any event, the clients remained free to lobby directly themselves, so long as Mrs. Eppard did not serve as the advocate during the cooling-off period.

Regarding the Amtrak Lunch, the Report states only that "problems" were discussed with Representative Shuster in the presence of Mrs. Eppard. *Id.* at 18. The Report specifically states that the Amtrak representative, not Mrs. Eppard, spoke with Representative Shuster. No allegation is made that Mrs. Eppard participated in the discussion. *Id.* Nor is there any suggestion that any specific legislation was discussed.

Regarding the Conrail Dinner, the Report concedes that, prior to the dinner, the Conrail representative met with Representative Shuster out of Mrs. Eppard's presence. During the dinner, the Subcommittee alleges that the Conrail representative discussed issues of interest to Conrail. *See id.* The Report offers no explanation as to why Representative Shuster would need to meet privately, out of Mrs. Eppard's presence, if "lobbying contact" was going to continue when the three people ate dinner. Clearly Representative Shuster and the Conrail representative met privately so as to avoid even an appearance of a problem under Section 207.

Regarding the "other dinners," the Report concedes that, at a BSCC fundraiser, Mrs. Fletcher specifically recalled that "no legislation was discussed with Representative Shuster at the dinner." Report at 20. Beyond that the Subcommittee does not allege what, if anything was discussed. At base, nothing more was involved than a political fundraiser, appropriately attended by all concerned. At another dinner, Mr. Hamberger specifically recalled that "Mrs. Eppard left the room for about twenty minutes when business was mentioned." Report at 20. Similarly, Mr. Schenendorf confirmed that, at the same dinner, Mrs. Eppard "excused herself when the topic of conversation turned to business relevant to" her clients. *Id.* at 21. The Report does not specify what "business" was discussed. In any event, the Report confirms that Mrs. Eppard properly followed OGE guidance to recuse or excuse herself from discussions that might involve topics prohibited during the cooling-off period. The Report tells us nothing more about the remaining dinners other than that some of Mrs. Eppard's clients attended what apparently were social functions.

Scenario 3: Mrs. Eppard traveled with Representative Shuster and others at a time when she was retained by clients interested in legislative issues within the general jurisdiction of the Committee on Transportation and Infrastructure. Report at 14 (Trip to Puerto Rico); 25-29 (travel on Federal Express corporate jet). The Report contains no allegation that Mrs. Eppard advocated for any legislative outcome when she and others traveled with Representative Shuster. Absent advocacy on her part, there is no intent to influence government action merely by being aboard an aircraft with Representative Shuster.

The trips aboard Federal Express jets involved campaign activities paid for by the BSCC and attended by Mrs. Eppard in her role as a campaign official, a capacity in which Mrs. Eppard was allowed to communicate with Representative Shuster even during the cooling-off period. Federal Express explained to the Subcommittee that it had a no-lobbying rule on its aircraft. Federal Express had representatives on board solely because of their internal policy that company officials had to be present when company aircraft was used. Federal Express testified that their objective was relationship-building, on which there is no prohibition. Report at 26.

Scenario 4: Mrs. Eppard scheduled meetings involving her clients and Representative Shuster. Report at 21-25 (Meetings on behalf of Amtrak, Pennsylvania Turnpike Commission and Carmen Group). As we understand the evidence – even though our requests for the transcript of her testimony before the Subcommittee were rejected – Mrs. Eppard vigorously denies that any of her clients ever discussed its legislative objectives with Representative Shuster in her presence, as confirmed even by the evidence before the Subcommittee. Had one of her clients done so, however, Mrs. Eppard's presence during her clients' advocacy would not amount to prohibited advocacy on her part. Ultimately, her scheduling of appointments for clients amounts to nothing more than her "open association" with her client's legislative cause – something that the Committee did not advise against until 1998. The requirement that lobbyists register and publicly disclose their clients and their client's objectives in any event makes "open association" with a client's legislative cause inevitable.

Congress itself expressly recognized in the Lobbying Disclosure Act of 1995 that "a request for a meeting" does not constitute lobbying unless additionally there is evidence of an "intent to influence" the outcome of legislation. The Report contains no allegation that Mrs. Eppard – or, indeed, her clients – did anything more than request a meeting. That mere request – as a matter of law – is not evidence of an intent to influence the outcome of legislation.

Scenario 5: Mrs. Eppard introduced certain of her clients to Representative Shuster, in his office, and then excused herself from the meeting that took place. Report at 24-25. Here, too, the Report does not allege that, after Mrs. Eppard introduced her clients to Representative Shuster, those clients advocated for any legislative outcome. Moreover, Mrs. Eppard absented herself from the ensuing discussions. Although her clients' own direct advocacy would not amount to advocacy on her part, Mrs. Eppard nonetheless took the step approved by OGE guidance, and declined to participate further in the part of the meeting that might have involved advocacy. Years after the events alleged in the Report, this Committee issued a memorandum advising – for the first time – that former staff "must not permit their name to be openly associated with such [lobbying] contact by other person." *10/22/98 Memo* at 4. As of 1994-1995, however, no Committee guidance or OGE interpretation had prohibited mere public association of former staffer's name with the direct lobbying contact of their clients. Indeed, the Committee stated that the "purpose" of its 1998 Memo was "to acquaint" recipients "with key issues of concern to departing staff." *Id.* at 1.

4. Considerable Evidence Shows that Both Representative Shuster and Mrs. Eppard Sought to Understand and to Comply with Cooling-off Restrictions.

Beyond the individual episodes identified by the Subcommittee is the broader context – the evidence that Representative Shuster and Mrs. Eppard sought to understand and to comply fully with Mrs. Eppard's post-employment restrictions. Specifically, the evidence shows not only their knowledge of and attempt to comply with cooling-off restrictions, but also: (1) that Representative Shuster's office used a "firewall" to prevent lobbying contact by Mrs. Eppard during the cooling-off period; (2) that the language in Mrs. Eppard's contracts and other documents clearly limited her services to advice, not advocacy; and (3) that Mrs. Eppard refused to take clients from Shuster's district in order to avoid any appearance of impropriety.

Although we have been denied access to transcripts of the testimony before the Subcommittee, we understand that the witnesses support these conclusions. We believe that Carol Wood testified Mrs. Eppard was aware of the rules and ensured that she did not discuss legislation with Representative Shuster during the cooling-off period. We understand that Ms. Wood testified that Mrs. Eppard would leave meetings when the subjects of her clients or their legislative objectives arose.

We understand that Tim Hugo testified to the following: Mr. Hugo saw Mrs. Eppard simultaneously in the company of both her clients and Shuster **only** in social settings. Moreover, Mrs. Eppard left the area if official business was raised in Representative Shuster's presence. Finally, we also understand that Mr. Hugo testified that Mrs. Eppard specifically discussed with Mr. Hugo the fact that she was prohibited from lobbying Representative Shuster during the cooling-off period.

We understand that this testimony was corroborated by numerous other witnesses. We understand that when Tom Leibensperger was interviewed by the Subcommittee, he testified that he was certain that Mrs. Eppard knew of the cooling-off period restrictions and abided by them. We also understand that Ed Hamberger testified that he never witnessed Representative Shuster and Mrs. Eppard discuss her transportation clients during the cooling-off period, and that she excused herself from conversations that began to approach legislative topics. We believe that Jack Schenendorf testified before the Subcommittee that Mrs. Eppard did not exert any improper influence over Representative Shuster, and that he never saw Mrs. Eppard try to influence legislation during this cooling-off period.

The testimony of these individuals is also corroborated by our understanding of the testimony of Ann Eppard herself. We understand that Mrs. Eppard testified that she had several conversations with Committee counsel, Ed Hoskens, in which she received advice that she could contact Representative Shuster for any purpose except lobbying during the cooling-off period. When asked by the Subcommittee her definition of lobbying, we understand Mrs. Eppard explained that lobbying occurs when a person provides information to a Member of Congress with the intent to affect or originate legislation. It is our understanding that the Subcommittee chose not to ask Mrs. Eppard whether she had ever communicated with Representative Shuster during the cooling-off period with the intent to influence legislation. It is our understanding that, had she been asked, Mrs. Eppard would have replied that she had not done so. Likewise, we understand that Mrs. Eppard specifically testified that she did not think that the prohibition included seeing Representative Shuster and her clients in a social setting.³

In sum, as we understand it, the testimony of the witnesses before the Subcommittee is that Mrs. Eppard and Representative Shuster sought to understand the cooling-off period restrictions and made good faith efforts to fully comply with their legal and ethical obligations. Nevertheless, Representative Shuster acknowledges that his contact with Mrs. Eppard during the cooling-off period could have created the appearance of impropriety.

A. SAV ¶4(b)

The Subcommittee's Allegation:

SAV ¶4(b) alleges in its entirety that:

Representative Shuster violated House Gift Rules [former Rule 43(3) for 1995 and Rule 52 for 1996] by accepting expenses from the Outdoor Advertising Association of America ("OAAA") and Daniel, Mann, Johnson and Mendenhall ("DMJM") related to a trip with his family to Puerto Rico in December 1995 and January 1996.

Report at 6.

Response:

1. Introduction.

On December 26, 1995, Representative Shuster traveled to Puerto Rico for nine days on a fact-finding trip. During the trip, Representative Shuster had official meetings relating to transportation and infrastructure projects in Puerto Rico directly related to his responsibilities as Chairman of the Transportation and Infrastructure Committee.⁶ As explicitly permitted by House Rules, Representative Shuster's travel expenses were paid in part by two private sponsors of the trip (DMJM and OAAA), who had an interest in educating Representative Shuster about the status of transportation projects and activities in Puerto Rico. Representative Shuster properly reported the trip and its sponsors on his 1995 and 1996 financial disclosure reports and appropriately allocated and paid for a portion of the trip expenses as personal. In sum, the Subcommittee's assertion that Representative Shuster's trip was recreational, and that his acceptance of any travel expenses from DMJM and OAAA therefore violated House Rules, is incorrect.

Representative Shuster was accompanied on the trip by not only his wife, but also other family members. The Subcommittee also alleges that it was improper for Representative Shuster to allow these other family members to stay in the accommodations DMJM and OAAA provided for him. However, Representative Shuster's sponsors did not incur any significant additional expense as a result of these family members sharing his accommodations, and the cost of the accommodations in which Representative Shuster and his family stayed was comparable to the cost of a hotel room at one of the area resorts. Accordingly, this sharing of accommodations did not constitute a material violation of the gift rules.

2. The Gift Rules Permit Members To Accept Up To Seven Nights' Reimbursement For Travel Expenses Related To Fact-Finding Trips.

Representative Shuster was in Puerto Rico from December 26, 1995 to January 3, 1996. Because the House "gift rules" changed effective January 1, 1996, it is necessary to analyze Representative Shuster's conduct under both the 1995 rules and the 1996 rules.

a. 1995 Rules.

The gift rule in effect through December 31, 1995, provided that a "Member . . . shall not accept gifts (other than personal hospitality of an individual or with a fair market value of less than \$100 or less) . . . in any calendar year aggregating more than . . . \$250" without a written waiver from the Committee on Standards. Former House Rule 43(4). However, the rule was by its terms inapplicable to acceptance of travel expenses from private sources for a "fact-finding" trip taken for "educational purposes directly related to official duties." **House Ethics Manual** (April 1992), at 38. The House Ethics Manual provided that "the responsibility rests with the

Member . . . to determine whether a particular event or activity is directly related to official duties" such that it can be considered a fact-finding mission. *Id.*

Rule 43(4) allowed Members to accept travel expenses for up to seven consecutive days, excluding travel days, for fact-finding trips. *Id.* at 40-41. In addition, the House Ethics Manual provided that a Member could accept reimbursement from two private sources if the Member attended two independent events in the same geographical location. *Id.* at 42. Finally, the Committee on Standards explicitly permitted Members to extend fact-finding trips at their own expense and still accept return transportation from a private source. *Id.*

b. 1996 Rules.

Effective January 1, 1996, the House gift rule was amended and renumbered as House Rule 52. As the Committee on Standards noted shortly before this rule became effective, "[t]he new rule continues to allow Members . . . to travel at the expense of private sources to . . . fact-finding trips and similar events in connections with their official duties." Memorandum from Committee on Standards of Official Conduct to House of Representatives re "New Gift Rule," (Dec. 7, 1995). The new rule maintained the same limits on the number of days of travel expenses that a Member could accept. In addition, the Committee on Standards recently reconfirmed that "the rule places on individual Members and officers -- and not on [the Ethics] Committee -- the burden of making the determination that a particular trip is in connection with official duties." Gifts and Travel Booklet, Committee on Standards of Official Conduct, at 72 (April 2000).⁷

3. The Puerto Rico Trip Was A Legitimate Fact-Finding Mission Connected To Representative Shuster's Official Duties.

As Chairman of the Transportation and Infrastructure Committee, Representative Shuster's official duties involve issues relating to highways, transit, railroads, aviation, water resources, economic development, and public buildings and grounds. Representative Shuster traveled to Puerto Rico to meet with a Puerto Rican government official and representatives of two private organizations to learn about two projects in Puerto Rico directly related to Representative Shuster's official duties.

The Tren Urbano light rail project, for example, was within the jurisdiction of the Committee on Transportation & Infrastructure. The project involved the construction of a light rail transit system to serve San Juan, Puerto Rico and surrounding areas, and was designed and managed, in part, by DMJM. It was an innovative electric train system that would connect major commercial and residential areas in San Juan where population density and traffic congestion were high. Tren Urbano was eligible to receive federal funding, and its designers and representatives of the Puerto Rico Department of Transportation and Public Works wanted to introduce the project to Representative Shuster in an attempt to convince him that the project was worthy of such funding.⁸ On December 29, 1995, Representative Shuster met with a DMJM architect, Janos Hegede, and Carlos Pasquera, Secretary of the Department of Transportation. These individuals made a presentation to Representative Shuster regarding the project and provided him with written materials that Representative

Shuster studied during the remainder of his trip, including a lengthy and complex Environmental Impact Statement on the Tren Urbano project that was prepared in November 1995 – well after Representative Shuster's initial trip to Puerto Rico. This briefing was directly related to Representative Shuster's official duties.

Likewise, the OAAA arranged for Representative Shuster to meet with Marc Voigt, a representative of an R.J. Reynolds manufacturing facility, to discuss billboard advertising in the San Juan area. The R.J. Reynolds company was the second largest advertiser on billboards in the United States and Mr. Voigt provided Representative Shuster with important information about billboard advertising in Puerto Rico. Once again, this meeting was directly related to Representative Shuster's duties as Chairman of the Transportation and Infrastructure Committee.

In sum, given the significance of the Tren Urbano project and the operations of the R.J. Reynolds company, and the direct relationship between these activities and Representative Shuster's official duties, Representative Shuster appropriately determined that the Puerto Rico trip was a worthwhile fact-finding mission.⁹

4. Representative Shuster Appropriately Permitted DMJM and OAAA to Pay Certain Expenses and Allocated Other Expenses as Personal.

As set forth above, the House Rules allowed Members to accept up to seven days of travel expenses in connection with a fact-finding mission outside of the continental United States. **House Ethics Manual** (April 1992), at 40-41. As such, Representative Shuster was permitted to accept reimbursement from the two sponsoring private organizations for his and his wife's traveling expenses. Representative Shuster personally paid the cost of accommodations for the two nights during the trip that constituted personal vacation.

The fact that Representative Shuster carefully apportioned three of the nights to each of the organizations with which he was meeting, and paid the accommodation expenses for the remaining nights as a personal expense, demonstrates that Representative Shuster was attempting in good faith to comply with the requirements of the gift rules. Moreover, Representative Shuster's financial disclosure forms for 1995 and 1996 openly reported the Puerto Rico trip and the identities of the organizations that had provided funding.¹⁰ This open disclosure belies any suggestion that Representative Shuster believed the trip was an impermissible "gift."¹¹

5. Representative Shuster's Sharing Accommodations With Family Members Did Not Constitute a Material Violation of the Gift Rules.

Representative Shuster's wife and several other family members accompanied him on the trip. Representative Shuster paid for his own and his family members' air fare, and allowed his family members to stay in the accommodations provided for him and Mrs. Shuster.

The gift rules permitted a spouse or one family member to travel with the Member on a fact-finding mission at the expense of the private sponsors of the event. **House Ethics Manual** (April 1992), at 43 (Member may bring one relative at sponsor's expense on fact-finding

trip); Former Rule 52(2)(d)(4) (necessary travel expenses include expenses incurred on behalf of either the spouse or a child of the Member). Representative Shuster now recognizes that permitting more than one family member to stay with him in the accommodations provided by his private sponsors could be viewed as improperly permitting the private sponsor to pay for the expenses of more than one family member. At the time, however, Representative Shuster believed in good faith that there was no significant "marginal cost" to the sponsors by allowing his family members to share the accommodations. Moreover, the rent paid for the accommodations for the week (\$4,228) was comparable to the amount that his private sponsors would have had to pay for him and his wife to stay at one of the area resorts.¹² Accordingly, Representative Shuster believed at the time that permitting his family members to share the rental property complied with the spirit of the gift rules.¹³

6. Conclusion.

Representative Shuster's acceptance of travel expenses from DMJM and OAAA for his and his wife's trip to Puerto Rico did not violate the gift rules, because the Puerto Rico trip was a legitimate fact-finding mission directly related to Representative Shuster's official duties. Nevertheless Representative Shuster agreed to this portion of the SAV because he acknowledges, in retrospect, that the sharing of accommodations with other family members was an unintentional, *de minimis* violation of the gift rule.

C. SAV ¶4(c)

The Subcommittee's Allegation:

SAV ¶4(c) alleges in its entirety that:

Representative Shuster violated former House Rule 45 by authorizing and/or accepting the scheduling services of Ann M. Eppard on matters that were official in nature for approximately 18 months after she resigned from his congressional office

Report at 6.

Response:

The Subcommittee Report states that former House Rule 45 seeks to prevent a private party from potentially advancing "his or her own agenda" by providing volunteer service to a Member. Report at 45. Here, of course, the Subcommittee Report itself eliminates any basis for such a concern. The Report is emphatic that Mrs. Eppard did not improperly secure legislative benefits for her clients by responding to requests from Representative Shuster's staff for advice concerning the scheduling of appointments.

The Subcommittee acknowledges that Mrs. Eppard served as Representative Shuster's Chief of Staff for nearly 22 years and that, when she retired, she was "succeeded as chief of staff by an individual who had far more limited experience in managing a congressional office." Report at 49. The Subcommittee further acknowledged "that once Representative Shuster commenced duties as Chairman of the Committee on Transportation and Infrastructure . . . demands for his attention

increased dramatically, and necessarily increased the volume of work in his personal office to manage appointments, correspondence and telephone calls." Report at 49. Fundamentally, Mrs. Eppard offered assistance at the request of Representative Shuster's staff who were struggling with a difficult transition, and because many of the scheduling issues involved campaign or political issues on which her advice was both proper and valuable.

The Subcommittee nonetheless found old House Rule 45 relevant in large part because of the 1995 investigation of former Speaker Newt Gingrich's practice of permitting Joseph Gaylord, a political advisor to Representative Gingrich, to have a regular presence in the Speaker's congressional office.¹⁴ The Committee concluded in that investigation that the "routine presence of

Mr. Gaylord in congressional offices creates the appearance of the improper commingling of political and official resources and is inappropriate. The Committee concluded that these actions taken together violate House Rule 45." *Id.* at 50.

The Subcommittee Report, however, overlooks the significantly different conclusion in the Fortson-Gingrich matter, an investigation into the participation by Jane Fortson in Representative Gingrich's official activities. Despite (1) Mrs. Fortson's position as an unofficial policy advisor, attending official meetings; (2) providing substantive advice on urban issues to Representative Gingrich and his staff; and (3) Representative Gingrich and his staff specifically soliciting Mrs. Fortson's views with "respect to official matters," "the Subcommittee did not find that Mrs. Fortson's individual activities violated House Rules" **In the Matter of Representative Newt Gingrich, H.R. Rep. No. 105-1, at 97 (1997).** According to the Subcommittee's findings, Mrs. Fortson, who had experience in urban and housing issues, moved from Atlanta to Washington in January, 1995 and became a Senior Fellow at The Progress and Freedom Foundation ("PFF") in April, 1995. "The Subcommittee determined that Mr. Gingrich sought Mrs. Fortson's advice on urban and housing issues on an ongoing and meaningful basis." *Id.* at 96 (emphasis added). During an interview with Special Counsel, Speaker Gingrich admitted that he often requested Mrs. Fortson's "assistance in connection with urban issues in general and issues pertaining to the District of Columbia in particular." *Id.* at 97.

The Subcommittee also found that as an unofficial policy advisor to Gingrich, Mrs. Fortson provided ongoing advice to Gingrich and his staff to assist Gingrich in conducting official duties related to urban issues. *Id.* Mrs. Fortson frequently attended meetings pertaining to the D.C. Task Force. *Id.* During these meetings, Ms Fortson met with members of Congress, District of Columbia Officials, and members of their staff. The Subcommittee discovered that Gingrich and members of his staff specifically solicited Mrs. Fortson's views and assistance regarding official matters. *Id.* At the conclusion of its investigation, despite these findings, the Subcommittee did not find that Mrs. Fortson's individual activities violated House Rules" **In the Matter of Representative Newt Gingrich, H.R. Rep. No. 105-1, at 97.¹⁵** The Committee concluded that "Members may properly solicit information from outside individuals" and although the activity **could** create the appearance of improper commingling of unofficial and official resources, the Subcommittee determined "that these activities did not warrant inclusion as a count in the Statement of Alleged Violation." *Id.*

The Subcommittee has alleged significantly less "meaningful" advice given by Mrs. Eppard. At most, she gave advice on Representative Shuster's schedule during the difficult transition to a new chief of staff, without benefit to herself or her clients. Requesting an appointment with a Member does not

qualify as "lobbying contact"¹⁶ under the 1995 Lobbying Disclosure Act. *Supra* at 17. Therefore, gathering information to properly respond to a request for an appointment could not qualify as lobbying contact either. In fact, asking Mrs. Eppard who is "Mr. ABC and why does he want to meet with Congressman Shuster?" is barely different than asking a former employee (1) "Where did you leave the file on XYZ?"; or (2) "Who should we contact to cater the office Christmas party?" Mrs. Eppard, for twenty-two years, was chiefly responsible for scheduling appointments for Representative Shuster. During the transition to a new chief of staff, it was only natural that Representative Shuster's staff would turn to Mrs. Eppard for guidance.

The Report acknowledges that "a limited amount of involvement by a departing congressional employee with . . . her former employing office following resignation **might** be reasonable under certain circumstances to ensure a smooth transition before . . . her successor becomes familiar with job responsibilities." Report at 49. The Subcommittee does not explain when continuing contact **might not** be reasonable. Those standards must be made clear for the future benefit of Members.

Reliance of former staff for occasional advice is a widespread and longstanding practice in the Congress. In Interpretive Ruling No. 385, the Senate's Select Committee on Ethics, had to decide under what circumstances may a Senator utilize the services of a former employee who is currently employed in the private sector and who would continue that employment while simultaneously acting as a volunteer, uncompensated consultant to the Senator. Under the proposed arrangement, the former employee would work one day per week in the Senator's office, providing advice on the administrative operation of the office; future hiring decisions; and on legislative issues in which the Senator might be interested. Interpretive Ruling No. 385, Select Committee on Ethics, United States Senate, 99th Cong., S. Prt. 99-193 (July 31, 1984).

In that situation, the Senate Committee opined that potential problems could be minimized by the Senator's active monitoring of the situation. The Select Committee concluded that as long as the Senator monitored the situation to avoid conflicts of interests, the proposal could be undertaken. That being said, the Senate Select Committee on Ethics recognized that "in certain circumstances, an appearance of a conflict of interest arising from a consultant arrangement might be offset by a Senate Committee's need to obtain specific expertise in a given area." Interpretive Ruling No. 213, Select Committee on Ethics, United States Senate, 99th Cong., S. Prt. 99-193 (December 22, 1978).

In the case of Representative Shuster and Mrs. Eppard, the particular expertise sought was her twenty-plus years of institutional knowledge – information that could not come from anywhere else. She gave her advice, moreover, at a time when Representative Shuster had just succeeded to the chairmanship of the Transportation and Infrastructure Committee, and thus needed to leave the details of his schedule as much as possible to others so that he could focus on legislation. His schedule, moreover, involved political activities for which he counted on Mrs. Eppard's input. Nevertheless, because these circumstances involve a technical and *de minimis* infraction of former Rule 45, Representative Shuster agreed to this portion of the SAV.

D. SAV ¶4(d)

The Subcommittee's Allegation:

SAV ¶ 4(d) alleges in its entirety that:

While under the supervision and control of Representative Shuster as their employing Member, employees in Representative Shuster's congressional office worked for the Bud Shuster for Congress Committee ("BSCC") to the apparent detriment of the time they were required to spend in the congressional office and performed services for the SCC in his congressional offices.

Report at 6-7.

Response:

The Subcommittee expressed concern with the appearance that Representative Shuster may have violated statutory provisions governing the use of office personnel from 1993-98. See Report at 51-52. The Subcommittee briefly alludes to 2 U.S.C. § 57(b) and 31 U.S.C. § 1301, which taken together, as construed by the Subcommittee, forbid the use of office staff to perform campaign work to the detriment of their official tasks. The Subcommittee also notes that House employees "must fulfill their official Congressional duties and those duties cannot be neglected to pursue campaign activities." Report at 52. The Subcommittee acknowledges that, under the plain text of the **House Ethics Manual**, House employees may engage in campaign activities in their free time so long as official duties are completed. *Id.* The Subcommittee observes that the Committee has recommended to such employees that when they elect to do so they "should keep careful records documenting that campaign work was not done on official time." *Id.* (quoting **House Ethics Manual** at 200-01).

7. The Evidence Shows that Employees of Representative Shuster Never Failed to Perform Their Official Duties.

While Representative Shuster's office did not maintain written documentation regarding the amount of time his employees spent working on the campaign during Congressional office hours, the Subcommittee is wrong in insinuating that his employees ever received payment from the campaign for hours that should have been devoted to official duties. At all times, each of his employees fulfilled all of their official duties, and most spent significant additional time performing official work beyond the minimum required by law. It was, and continues to be, the case that many of Representative Shuster's employees perform sixty and seventy hours or more of official work each week. Like the employees of virtually every Member of the House of Representatives, some employees of Representative Shuster's office also chose to serve as volunteers for his campaign. Such volunteer work does not constitute any grounds for an allegation of misconduct. Under the Hatch Act, 5 U.S.C. § 7324, House employees are permitted to perform work for political campaigns. Consequently, so long as employees fulfill their official duties, they are free to engage in campaign activities without violating any statutory or ethical prohibition. The Committee has recognized this fact on numerous occasions, including in the **Committee on Standards of Official Conduct, House Ethics Manual**, 102 Cong., 2nd Sess., at 200-201 (April 1992) ("**House Ethics Manual**") and, most recently, in the current Report at 51-52.

The Subcommittee alleges that employees of Representative Shuster engaged in campaign work to the **apparent** detriment of their official duties. Even the evidence described by the Subcommittee in the Report at 53-63, however, provides no factual basis to conclude that there was any **actual** detrimental impact on official work. Representative Shuster

understands that some employees occasionally performed campaign work during what would otherwise be considered normal business hours. However, such a practice is entirely consistent with the existing ethics rules. Precedent from the Committee on Standards of Official Conduct acknowledges the fact that "as a practical matter, it may be impossible to have an absolute separation of [official and political] duties." **House Ethics Manual** at 284. As one advisory opinion explains, due to the sporadic time frames in which congressional work is done:

[I]t is unrealistic to impose conventional work hours and rules on congressional employees. At some times, these employees may work more than double the usual work week – at others, some less. Thus employees are expected to fulfill the clerical work the Member requires during the hours he requires and generally are free at other periods. If, during the periods he is free, he voluntarily engages in campaign activity, there is no bar to this. There will, of course, be differing views as to whether the spirit of this principle is violated, but this Committee expects Members of the House to abide by the general proposition.

Committee Advisory Opinion 2, *On a Member's Clerk Hire* (July 11, 1973). What constitutes an employee's "free time" is unclear. The Committee has stated that "what constitutes a staff member's 'own time'" is "determined by the personnel policies that are in place in the employing office." Committee on Standards of Official Conduct, *Rules and Standards of Conduct Relating to Campaign Activity*, at 3 (March 2, 2000). "Time that is available to a staff member, under those policies, to engage in personal or other outside activities may instead be used to do campaign work." *Id.* The Committee has expressly acknowledged that employees may engage in campaign activities while on annual leave, by going on leave without pay, or by working part time. *See id.*

The Subcommittee's conclusion that there was an "inconsistent understanding among [the office] staff of the office policy regarding employee leave," Report at 52, is plainly wrong under any examination of the Subcommittee's own summary of its evidence. Reviewing that evidence, the sole "inconsistency" that can be found between the testimony of the witnesses relates not to the office's administrative leave policy, which was used at all times when employees were performing campaign work, but instead to whether or not there was a limit on the number of vacation and sick days an employee could take each year – a matter entirely irrelevant to the issue of campaign work. *See* Report at 54-56. On the issue of administrative leave, these individuals' testimony is consistent with that of every other witness. As far as we are aware, every witness's testimony before the Subcommittee was completely consistent with the principle that an employee may perform work for a political campaign during whatever free time they have under the policy in place in their employer's office. It is our understanding that no witness before the Subcommittee testified that they ever, even on a single occasion, performed campaign work during time that would be deemed "official time" under the leave policies in place in Representative Shuster's office. Rather, each and every witness uniformly testified that they performed campaign work only while taking administrative leave, which was properly taken pursuant to the office's leave policy.

As a result, any "apparent" detriment to official duties, or "apparent" payment by the campaign for work on performed "official time," is just that – an appearance that its

directly contradicted by a close examination of the substantial evidence before the Subcommittee. For example, it is our understanding that when Judy Giansante, Representative Shuster's Altoona Office Manager, testified before the Subcommittee, she explained to the Subcommittee that she had, in fact, volunteered and performed fundraising work for the campaign every two years. But Giansante also explained to the Subcommittee that she informed the Washington office that she was taking administrative leave whenever she performed this volunteer work. Following the Committee's advice directed to employees who elect to perform campaign work, and acting as a meticulous employee, Giansante made careful records of her campaign work on her calendars.¹⁷ Giansante made quite clear to the Subcommittee that she had never been absent from the office in order to perform her campaign work.

Any "**appearance**" that staff failed to fulfill their official duties is further belied by the testimony of Tom Leibensperger, Representative Shuster's liaison to the district. It is our understanding that Leibensperger explained to the Subcommittee that he sometimes performed driving or other work for the campaign during normal office hours. Leibensperger explained that he took administrative leave anytime he performed driving for the campaign, and anytime he performed work during normal business hours. It is our understanding that Leibensperger plainly told the Subcommittee that he **always** made up any time that he spent working on a campaign, as required by the office administrative leave policy. It is our understanding that Leibensperger further told the Subcommittee that he had always taken less than his allotted three weeks worth of vacation time a year. Consequently, far from failing to fulfill his official duties, the Subcommittee's evidence shows that Leibensperger surpassed his official duties each and every year he was employed in Representative Shuster's office.

It is our understanding that Tim Hugo, Representative Shuster's former Chief of Staff, also testified that he performed campaign work for the BSCC, but explained that he only did so pursuant to the office administrative leave policy. Hugo testified that while he did continue to receive his official salary during the time he was engaging in fundraising activity for the campaign, he made up any official work and hours that he missed. It is our understanding that at one point Members of the Subcommittee asked Hugo about documents showing that Leibensperger performed extensive campaign work on portions of 56 days. In agreement with Leibensperger's testimony, Hugo stated that he believed most of Leibensperger's campaign work was probably performed before or after business hours. Hugo also stated that he was unaware of Leibensperger having ever failed to satisfy his official duties, and that, as far as he was aware, no one had ever made any such complaint.

Finally, when Tracy Mosebey testified before the Subcommittee, it is our understanding that she told that Subcommittee that she, too, had performed volunteer work for the BSCC. She explained that, after 1992 and the adoption of new office rules regarding employee leave for time spent campaigning, she had noted all of the time she spent campaigning as administrative leave. Mosebey clarified that she had never failed to fully perform her required official duties. Mosebey also told the Subcommittee that while she still possessed a regular office calendar with notations reflecting when she was not in the office, she no longer had any records specifically reflecting the time she spent working on the campaigns as opposed to other activities.

Despite this extensive testimony from Mosebey, the Subcommittee appears to have selected from her testimony in a way to insinuate that she neglected her official duties at one point. The Subcommittee's report makes reference to "[o]ne congressional employee from Representative Shuster's Washington, D.C., office [who] worked for the BSOC for three consecutive weeks in Representative Shuster's congressional district, devoted approximately 90% of her time during this three-week interval to campaign activity and received her full congressional salary during the entire three-week period." See Report at 56. This reference is apparently to Tracy Mosebey who, during one election cycle, traveled to Altoona for approximately three weeks to perform campaign work. However, it is our understanding that Ms. Mosebey made clear to the Subcommittee that she was able to keep up with her official responsibilities during this period. The hotel where she stayed during this trip was located directly across the street from Representative Shuster's district office. Therefore she could easily and often return to the district office to conduct official work. During that time period, Ms. Mosebey confirmed that she specifically remembered discussing case work with Doris Allen, an IRS agent in its regional office. In addition, Ms. Mosebey returned to Washington on weekends to perform official work. We understand that Ms. Mosebey does not know how the Subcommittee arrived at the conclusion that she spent 90% of her time in Altoona doing campaign work, but that she did not testify to that fact. On the whole, Ms. Mosebey was one of the hardest working government employees. While her hours in the office while in Washington were normally from 8:30am - 5:00pm, when major issues such as guns or abortion came up, it was not uncommon for her to work late into the night (*i.e.* 12:00 a.m.) and through weekends.

As far as we are aware, there is no evidence that any employee ever failed to fully perform their official duties, even in a single instance. To the contrary, as we understand the uniform evidence before the Subcommittee, each and every employee of Representative Shuster's office performed all of their official duties on every occasion to the best of their abilities. The public record should reflect that in many, if not most instances, employees of Representative Shuster's office far surpassed the amount of official time required by their salary.

8. Representative Shuster's Office Had in Place at all Relevant Times an Established and Universally Understood Oral Policy Regarding Employee Leave.

The Subcommittee alleges that "Representative Shuster failed to establish any fixed policy, written or otherwise, or to maintain any records to reflect the number of days his congressional employees were away from the congressional office for vacation, sick leave or to perform services for the Bud Shuster for Congress Committee." Report at 51. Again, we respectfully disagree with the conclusion drawn by the Subcommittee from the evidence that it summarizes in its Report.

It is our understanding of the testimony before the Subcommittee that each employee questioned in regard to the office leave policy explained that the office had in place a well-known and understood policy regarding work on campaigns. Each employee explained that employees were permitted to work on campaigns, so long as they did so by taking administrative leave with pay, and made up the hours so taken at another time. This particular form of "flexible" administrative leave policy well-suited Representative Shuster's

office, as it best accounted for the long and irregular hours worked by his staffers (a fact that has been long recognized by the Committee) and because, due to the fact that his offices were small, more formal procedures were simply unnecessary.¹⁸

As the Subcommittee concedes, "all [campaign volunteer] employees took 'administrative leave' during which they received their full congressional salaries" when they "performed campaign services." Report at 54. The Subcommittee cannot have it both ways; if the office "did not have in place any established . . . policy regarding employee leave," then how exactly did each and every employee miraculously manage to independently come to the same conclusion regarding the way in which to account for their campaign work? How did each worker simultaneously understand that when working on campaigns, they should deem all time to be administrative leave, continue to collect their official salary, and ensure that their official work was completed on time? Surely, if the office had indeed lacked an official leave policy regarding campaign work, then some employee, somewhere, at some time would have accidentally taken vacation days, or sick days, or used some other method for accounting for their time spent working on the campaign. As the Subcommittee explains, none did.

We believe that this inconsistency in the Subcommittee's interpretation of the evidence has a simple and straightforward explanation: the office did in fact have a well-known and understood oral leave policy. As far as we are aware, each witness who testified before the Subcommittee explained that the office had an administrative leave policy that was always used to account for campaign work, agreed to the precise contours and details of that policy, and agreed that both they themselves and all other staffers of whom they were aware had followed that policy at all times during the years in question. It is our understanding that Tom Leibensperger, Representative Shuster's liaison to the district, testified that while there was no written policy regarding administrative leave, it had been explained to him and he understood that every staff person, regardless of seniority, was entitled to three weeks vacation plus the week between Christmas and New Year's. Time spent campaigning was designated as administrative leave, which was taken with pay so long as the hours were made up at another time. He explained that the office policy applied to all employees. Mr. Leibensperger told the Subcommittee that the Office Manager and the Chief of Staff processed requests for specific vacation days. Leibensperger explained that Office policy was to allow an employee to volunteer at any time, as long as that person's office work was completed on time. If Representative Shuster's office had in place no established policy regarding employee leave, one is left to wonder how exactly Mr. Leibensperger was able to recall the existence of such a policy and describe its exact contours in such detail.

Other employees described the policy to the Subcommittee in great detail, and their descriptions matched that given by Mr. Leibensperger in all material respects. When Tim Hugo, Representative Shuster's former Chief of Staff, testified before the Subcommittee, we understand that he told the Subcommittee that the official policy was that staff members could take administrative leave to work on political events, so long as all official work was completed on time. We understand Hugo told the Subcommittee that he did not personally keep track of each employee's hours in order to make sure that all official time had been made up, but that Tracy Mosebey was responsible for keeping track of whether or not office work was being done. When Subcommittee members asked how he could be sure that no

one was abusing the leave policy, we understand Hugo made clear that the office was small enough so that if any work was not being completed, he would know about it.

When another witness who worked as Chief of Staff in Representative Shuster's office appeared before the Subcommittee, we understand that she again explained the nature of this leave policy to the Subcommittee, in exactly the same terms as Hugo had done, and further explained that the policy had been well-disseminated to the employees. We understand this witness explained to the Subcommittee that she did not herself keep records of the hours the staff took off for administrative leave. However, in accord with the testimony from Hugo, she explained to the Subcommittee that she had instructed Tracy Mosebey to do so. Tracy Mosebey, in turn, also explained to the Subcommittee that staffers had been instructed to note their time spent campaigning as administrative leave. She informed the Subcommittee that this policy was in place at all relevant times, and even contrasted the existence of this well-disseminated oral office leave policy during the time period from 1993-present with the time prior to 1993, when an official office leave policy regarding employee work on campaigns was not as fully developed.

It is our understanding that the testimony of Judy Giansante, Representative Shuster's Altoona Office Manager, and Mrs. Eppard, both support the testimony of Hugo, Mosebey, Leibensperger, and other witnesses. We understand Giansante explained to the Subcommittee that there was an office policy regarding leave for employees to work on campaigns, that the office policy was that an employee could volunteer as long as time missed from official work hours was made up later, and that this policy had consistently been in place under the Chief of Staff leadership of Ann Eppard, Carol Wood, and Tim Hugo. Giansante even kept records of her campaign hours on her calendars, though these have since been discarded in the intervening years. We understand that Ann Eppard stated to the Committee that she had informed the entire staff that everyone was to perform forty hours a week of congressional service. While Ann Eppard did not maintain formal written records, in an office as small as Representative Shuster's, she explained that she would be aware if an employee were to fail to fulfill his or her official duties.

The Subcommittee asserts that it heard the testimony of several current and former employees "all of whom testified that the office did not have in place any established written or oral standards rules (sic) regarding office vacation policy." *See* Report at 54. Of course, since each employee uniformly testified that campaign work was done on administrative leave, rather than vacation, the lack of a vacation policy would be irrelevant to the matters before the Subcommittee. But even assuming the Subcommittee intends to reference "administrative leave" when it says "vacation" policies, the Subcommittee's own ensuing summary of the evidence does not support its claim. With a solitary exception, none of the witnesses whose testimony is summarized by the Subcommittee, *see* Report at 54-58, says anything other than (1) they performed some volunteer work for the campaign, (2) following the offices leave policies, they continued to collect their regular salary while performing campaign work, and completed their official work during other hours, and (3) the office did not keep written records of the time employees spent on administrative leave. While according to the Subcommittee one witness did testify that the office's policy was that "[y]ou took time if you needed it. If someone was ill, you could take as much time as you needed for that. If you wanted to do volunteer work on the campaign, that was fine with

[Representative Shuster] as long as your work was done," this quote appears to relate to the office's sick leave policies, not administrative leave policies. Report at 55. Each witness agreed, and office policy in fact was, that there was no limit on the amount of administrative leave an individual could take so long as official work was completed. In sum, we understand that each of the witnesses testified before the Subcommittee that they had been informed of the office leave policy, and each stated that they were unaware of any confusion over, or abuse of, that policy.

It is true that the Committee on Standards has advised Members that, in order to ensure that no employee spends official time performing campaign tasks, "it is advisable that office policies on such matters as the work day, lunch hour and leave time be in writing and distributed to all employees." See **House Ethics Manual** at 201. However, it is evident from the use of the word "advisable" in regard to the Commission's statements on written office leave policies that the use of a written leave policy is only a recommendation, not an ethical requirement. So, too, when the Committee discusses the practice of having employees carefully document time spent working on campaign-related activities, the Committee only "recommends" that they keep careful records of the amount of time they spend performing campaign work and their official duties. See **House Ethics Manual** at 201. The Committee's "recommendations" are not stated as ethical obligations. The Subcommittee itself seems to recognize that a well-understood oral leave policy would suffice; the Subcommittee's alleged violation claims the absence of a "written or oral" policy regarding leave, and under any other interpretation the phrase "or oral" would be superfluous. See Report at 54. As he understood them, Representative Shuster's administrative leave policy was permissible under all House ethics rules cast in mandatory terms. He knew of no requirement that a Member maintain "verifiable records" or other such special "safeguards" tracking the time that his staff spent out of the office. See Report at 54.

If the Subcommittee believes that Members should be required to keep such records, then the full Committee should promulgate rules to make this clear. By implementing clear rules cast in mandatory terms, the Committee could assist other Members in avoiding the criticism leveled at Representative Shuster. As the rules are currently phrased, it appears that if a Member believes that, due to the small and close-knit nature of his offices and the inherently sporadic and unpredictable official hours that they worked, a flexible, unwritten leave policy was best-suited to the realities of his office's situation, then he or she is free to make that decision. However, with the benefit of hindsight, Representative Shuster readily concedes that electing to follow the Committee's recommendation that office leave policies be written, and that employees keep meticulous records regarding their campaign work, would have avoided any "appearance of impropriety."

9. Representative Shuster Neither Permitted Nor Encouraged Any of His Employees to Neglect Their Official Duties.

The evidence detailed by the Subcommittee in its Report shows that Representative Shuster neither permitted nor encouraged anyone to forsake their official duties. Representative Shuster never enticed employees to work on the campaign, believing that employees should be free to spend their free time however they choose. Had employees ever abused his administrative leave policy, and had Representative Shuster ever become aware of such

abuse, he would have responded accordingly. In this regard, the Subcommittee's description of its evidence coincides our understanding of the evidence.

It is our understanding that Tim Hugo, Representative Shuster's former Chief of Staff, testified that he never asked any staff members to perform campaign work. We understand he made clear to the Subcommittee that while many people volunteered to work on campaign events, this was due to enthusiasm generated by Ann Eppard, and that there was no requirement that anyone in the office work on campaign events. We understand that Ann Eppard's testimony confirmed that of Tim Hugo. Mrs. Eppard explained to the Subcommittee that the staff were honest and hardworking, and that many people helped on the campaign because there was considerable support for Representative Shuster throughout the office. She also testified that there was no requirement that staff work at campaign events and that she never asked anyone to perform campaign related work. When Tracy Mosebey testified before the Subcommittee, it is our understanding that she also told the Subcommittee that there was never a requirement that staff volunteer, and that there was no punishment if a staff member did not volunteer. As far as we are aware, these three witnesses were the only persons who gave testimony relating to this issue. It is our understanding that Hugo, Eppard, and Mosebey are all in agreement that Representative Shuster was unaware of the hours any particular employee spent working on the campaign or in the office. It is our understanding that this testimony is also corroborated by that of Leibensperger, who stated that he did not know if Representative Shuster was aware that staff members were working on the campaign and taking administrative leave. As Ann Eppard explained, it was the responsibility of office staff, not the Representative, to ensure that office work was completed in a timely fashion. We understand Tim Hugo agreed that Representative Shuster was unaware of whether or not his employees were keeping track of the exact amount of time that staff members were taking to perform campaign work. All of the witnesses testified that they were unaware of any instance in which Representative Shuster had directed or encouraged an employee to perform campaign work at all, much less to do so to the detriment of the employee's official tasks.

For his part, Representative Shuster can assure both the Committee and the public that he has no knowledge of any of his employees having ever failed to complete their official duties. Representative Shuster can also assure the public that, as all of his employees testified, he never directed or encouraged any of his employees to perform campaign work. To the contrary, Representative Shuster stressed to each employee that every employee should fulfill their official job duties. Representative Shuster is a devoted public servant whose offices have run smoothly and efficiently for almost three decades. Representative Shuster feels that his office's policies and practices are similar in pertinent respects to those policies and practices in place in a large number of other House offices. Unwritten administrative leave policies are utilized in a number of other House offices, if not commonplace."

- 10. The Committee Has Never Before Brought Allegations Regarding the Use of Office Staff to Perform Campaign Tasks Unless There Was Direct Participation in, or at Least Knowledge of, the Staff Member's Misconduct on the Part of the Representative.**

On previous occasions, the Committee has alleged violations against certain House members for using their office staff to perform various personal and campaign tasks to the detriment of their official duties. In those investigations, the Committee always had evidence before it that proved a Representative's direct participation in, or at least knowledge of, the fact that the staff was performing work on official time. In this and other ways, the behavior that formed the basis of the allegations in those investigations went far beyond any behavior that the Subcommittee alleges to have been committed by Representative Shuster.

In both prior investigations of a Member's use of office staff to perform campaign work, the Committee had before it direct evidence of knowledge or action on the part of the accused Congressman. Most recently, in the investigation of Representative Barbara-Rose Collins, the Committee made allegations of violations of the identical statutory and ethical rules regarding the use of official staff to perform campaign tasks as those alleged in this case. See **In the Matter of Representative Barbara-Rose Collins, H.R. Rep. No. 104-876, passim** (1997) ("*Collins Report*"). However, unlike the instant investigation, the Committee there had credible evidence, including direct and corroborated eyewitness testimony, that Representative Collins was aware of, directed, and supervised her employees in conducting campaign work during official hours. See *id.* Specifically, one employee-witness who had served as Representative Collins' office manager testified that "Representative Collins sometimes personally directed her to sign campaign checks at times when she would otherwise have been performing official duties." *Id.* at 7. The witness further stated that "Representative Collins personally made clear that [the witness] was responsible for performing bookkeeping functions for the campaign account." *Id.* The office manager's testimony in this regard was corroborated by the accounts of at least two other witnesses, including Representative Collins' former Chief of Staff. *Id.* at 8-11. The former Chief of Staff explained that during her tenure in Representative Collins' office, she was responsible for "logging" incoming campaign checks, listing and depositing those checks, and forward copies to the campaign. See *id.* The former Chief of Staff "testified that Representative Collins personally gave her instructions on how to make the deposits and what follow-up actions to take." *Id.* at 7. The statements by both of these witnesses were corroborated by other witnesses, bank documents, and signatures. As a result, the Committee had before it credible evidence that the fact that campaign work was being done by official staff on official time "occurred with the firsthand knowledge and approval of Representative Collins."

The Committee also had direct evidence of "knowledge" and "direction" on the part of the Congressman in its investigation of Representative Jim Bates -- the only other major investigation of a Member's alleged use of office staff to perform campaign work on official time. In that case, two witnesses⁹ directly testified that they made phone calls to Political Action Committees and stuffed envelopes relating to fundraisers at a time when they would otherwise have been performing official tasks, and on time that was unquestionably official (rather than leave) time. See **In the Matter of Representative Jim Bates, H.R. Rep. No. 101-293, at 4-5** (1989). Both employees' testimony corroborated each other, and both employees testified to the Congressman's knowledge and direction of these activities. One employee testified that she made phone calls "during office time on office phones at the direction of Representative Bates' administrative assistant acting pursuant to the congressman's desires." *Id.* at 4. She explained that the Congressman's participation was so direct that she felt "that her attendance at [a] fundraiser amounted to an implied condition of

her job." *Id.* A second witness, who was a legislative assistant to the Congressman, testified that when she was making fundraising phone calls, she received "specific[] instruct[ions]" from the Representative regarding how to conduct the calls. *See id.* at 4. The testimony of these witnesses regarding the direct knowledge and participation of the Congressman was also corroborated by the testimony of three other individuals. One additional witness testified that she "remembered that [the first witness] had performed campaign work in the back of the office. *Id.* at 6. A second additional witness recalled a time in which the entire office had closed early so that campaign work could be done. *See id.* And a third additional witness remembered the Congressman telling her that the first witness had been hired to perform campaign work. *See id.* at 7. In short, in that investigation, as in Barbara Rose-Collins, the Committee had direct and corroborated evidence of the Congressman's intent with regard to having his staff perform campaign work on official time.

Conspicuously absent from the Subcommittee's Report and SAV here is any evidence that would have support a similar allegation against Representative Shuster. **Indeed, there is not so much as the testimony of one single witness that Representative Shuster ever directed his employees to perform campaign work on official time.** There is not so much as the testimony of a single witness that Representative Shuster even had knowledge of any such activities ever having taken place in his office. Instead, the uniform and uncontroverted testimony of every witness before the Subcommittee is that he did not have any knowledge of his campaign staff having ever performed campaign work to the detriment of their official duties. *See* Report at 53-61.

Unlike Representative Shuster, neither Representative Bates nor Representative Collins ever told their employees to use administrative leave when performing campaign tasks, nor did either office have in place an official administrative leave policy so that their employees could do so without violating their ethical obligations. Throughout the time that eyewitnesses claim that Representative Collins directed her employees to engage in campaign tasks on official time, there was testimony from at least two witnesses that "[a]t no point. . . did Representative Collins indicate to [the witnesses] that [they] should take leave time to perform such duties or perform them on her own time." *Collins Report*; *see also In the Matter of Representative Jim Bates, H.R. Rep. No. 101-293, at 10 (1989)* (containing no testimony that the Congressman told his employees to take leave when performing campaign work). This stands in stark contrast to this investigation, in which at least five witnesses – Hugo, Leibensperger, Giansante, Eppard, and Mosebey – all uniformly testified that they knew and understood the office policy that official duties could not suffer as a result of volunteer campaign activities.

11. **The Subcommittee's Characterization that Representative Shuster Permitted Campaign Work to be Done in his Federal Office Is Unfair.**

In its SAV, the Subcommittee states that while working for Representative Shuster, "employees . . . performed services for the BSCC in his Congressional offices." Report at 6-7. Yet in its ensuing Report, the Subcommittee complains that Representative Shuster "permitted" his employees to perform services for the BSCC in his congressional office – a phrase which implies that Representative Shuster was aware that such work was being done in his offices. The Subcommittee explains that "[a]lthough there was no direct evidence that

Representative Shuster was aware that this activity [campaign work done in his office] was taking place, the Investigative Subcommittee determined that he was responsible for permitting this practice to occur for a protracted period of time." Report at 64. This sentence speaks for itself. Notwithstanding the absence of evidence that links him to any misfeasance, the Subcommittee has nonetheless determined, without explanation, that Representative Shuster is responsible for an act of apparent misconduct committed by one of his many employees. Representative Shuster understands that at some point one of his employees stored, and may even have filled out, certain FEC campaign reports in a House office. But the Subcommittee's characterization of this action is unfair for several reasons.

a. **There is no clearly-phrased prohibition against the activity at issue.**

Neither the statutes nor regulations referenced by the Subcommittee prohibit employees from performing campaign work in a federal office, so long as the campaign work is done on the employee's free time and no office resources (*i.e.* fax machines, long distance phone calls, etc.) are used. At the time of the alleged conduct, using a federal office did not transform otherwise permissible campaign work into prohibited activity. Though performed in the office, the Subcommittee does not suggest that office resources were used by the staff. Nor as we have previously addressed is there any real concern that office staff performed campaign tasks on official time.

Near the conclusion of this investigation, the Committee did issue a memorandum specifying that the "official resources" that may not be used for campaign activity "include official staff time, **House offices and rooms**, the computers, fax machines and other office equipment, and office supplies." See Committee on Standards of Official Conduct, *Rules and Standards of Conduct Relation to Campaign Activity* (March 2, 2000) (emphasis added). Though that Memorandum cites to the House Ethics Manual in support of this proposition, neither the Manual nor the Advisory Opinions cited therein expressly stated that the Committee had interpreted 31 U.S.C. § 1301 as barring the performance of campaign work in federal offices, assuming that no official resources were used. At most, such a proposition was an unstated assumption, see **House Ethics Manual** at 283 ("[E]mployees are free to engage in campaign activities . . . so long as they do not do so in congressional offices or otherwise use official resources"), or was directed only at activities covered by 18 U.S.C. § 607, see *id.* at 303; **Investigation of Alleged Improper Political Solicitation, H.R. Rep. No. 99-277**, at 17-18 (1985). Confusion over this issue no doubt prompted the Committee to issue the clarifying Memorandum. Of course, Representative Shuster cannot be faulted for failing to anticipate the direction in which the Committee would move its understanding of the law. See *In the Matter of a Complaint Against Robert L.F. Sikes*, at 6.

Even in light of its most recent Memorandum, the Committee still needs to clarify the statutory basis for, and the extent of, this prohibition against the use of office space. The Committee's assumption relating to the use of office space for political activity seems to stem from concerns over fundraising and the prohibition against fundraising in 18 U.S.C. § 607. See *In the Matter of Representative Jim Bates*, at 11. Section

607 makes it unlawful to "solicit or receive" contributions in any building where federal employees work. *See* 18 U.S.C. § 607. Section 607 concerns are simply not at issue here. The evidence that the Subcommittee relies on consists in its entirety on the testimony of a single witness, who claims that he or she "performed services for Representative Shuster's campaign in the Rayburn House Office Building" and that these services "included completing FEC expenditure and contribution reports and signing campaign checks." Report at 62. These types of campaign services are separate and distinct from fundraising. Further, it is well-settled by this Committee that Sections 602 and 607 "are intended to protect federal employees from coercion vis-à-vis political contributions and insulate the workplace from such solicitations." *See Investigation of Alleged Improper Political Solicitation*, at 18. For this reason, the Committee has clarified that "for § 607 to be invoked, it must be established that a solicitation in a Federal building involves the **intimidation of Federal employees from whom political contributions are sought.**" *See id.* at 17-18 (emphasis added). The Subcommittee makes no finding, nor could it, that any coercive fundraising occurred at any time.

b. **In the face of evidence of significantly more egregious conduct, the Committee has declined to pursue similar allegations in other investigations.**

It is evident from a review of numerous prior investigations that the Committee has been presented previously with substantial evidence that Members either directed or were aware of campaign work being done in their Federal Offices. Yet the Committee declined to allege ethical violations of any prohibition against the mere use of offices in those cases. Reversing this trend when dealing with employees of Representative Shuster singles him out unfairly.

For example, in its investigation of Barbara Rose-Collins, the Committee noted that there was significant corroborated testimony from more than one witness that Representative Collins "personally gave instructions" to her employees that they perform campaign check logging and cashing activities in her federal office. *See Collins Report* at 10. The Committee also had testimony from witnesses that Representative Collins directed her employees to "routinely wr[ite] campaign checks in the Congressional Office." *Id.* at 1. Based on this evidence, the Committee alleged a violation (Count I) that Representative Collins directed her employees to perform work for the campaign on official time in dereliction of their official duties. Conspicuously absent from the Committee's Report concerning Representative Collins was any allegation that her conduct constituted a misuse of official property, or violation of 18 U.S.C. § 607. This absence is even more glaring given the broad scope of the Committee's investigation in that case. The Committee's Report in the Representative Collins matter included no less than eleven counts of alleged violations, encompassing diverse activity that spanned many years and several continents. Had the Committee believed that the facts before it would support a claim for the misuse of a House office by virtue of Representative Collins directing her employees to perform campaign work in that office, it would have included that Report along with the numerous other claims brought in that case. For the Subcommittee to concern itself with such an allegation in this case, when the

Subcommittee has no evidence whatsoever that Representative Shuster was aware of campaign work being performed by a single employee, unfairly singles out Representative Shuster.²⁰

c. It is unfair to hold Representative Shuster responsible for the activities of this particular employee.

The Subcommittee's concerns implicate the activity of a single employee. Yet the Subcommittee provides no evidence that Representative Shuster had knowledge of this particular employee's activities. See Report at 62-63. There is no evidence that Representative Shuster directed, encouraged, permitted or condoned this activity. On these facts, it is unfair to place the blame for this employee's actions, which may well have been innocent and unguided, on Representative Shuster.

Representative Shuster has numerous duties both as a Member of the House of Representatives and as the Chairman of a large Committee. It is not practical for him to simultaneously act as a office manager over each and every one of his employees, especially where the conduct at issue was not at the time clearly prohibited by federal law. Without clear standards from the Committee, the office management practices of few, if any, Members of the House of Representatives could withstand similarly exacting scrutiny. Nor has the Committee applied such an extended form of "strict liability" in the past. Representative Shuster takes his ethical commitments very seriously, and had he been aware of any employee performing campaign work in an improper location, he would have taken steps to prevent the employee from continuing her mistake. He simply never had an opportunity to do so. Nevertheless, Representative Shuster acknowledges that the lack of detailed documentation retained by his office contributed to an erroneous appearance that did not reflect creditably on the House.

E. SAV ¶4(e)

The Subcommittee's Allegation:

SAV ¶4(e) alleges in its entirety that:

The number and dollar amount of expenditures by the Bud Shuster for Congress Committee ("BSCC") for meals designated as "political meetings" and for transportation on chartered airplane flights, as reported in Federal Election Commission reports filed by the BSCC between 1993 and 1998, combined with the record-keeping practices followed by the BSCC inadequate to verify the legitimate campaign purposes of these expenditures, created the appearance that certain expenditures may not have been attributable to bona fide campaign or political purposes.

Report at 7.

Response:

12. Introduction.

The Report unequivocally states that "[t]he Investigative Subcommittee did not find substantial reason to believe that Representative Shuster converted campaign funds to personal use." Report at 66. Indeed, the Investigative Subcommittee received direct evidence that "Representative Shuster played no role in determining the propriety of campaign expenditures." *Id.* at 75. Count I(e) is thus solely an "appearance" violation based on allegedly "inadequate record-keeping practices." *Id.* at 64.

Count I(e)'s charge of an "appearance" of impropriety is based entirely upon inferences from the following allegations:

- Representative Shuster and the BSCC used campaign funds to pay for more than 675 disbursements totaling approximately \$300,000 for political meetings and meals during the six year period between January 1993 and December 1998.
- Representative Shuster and the BSCC used campaign funds to pay for approximately \$400,000 in transportation expenses during this six year period.
- The BSCC did not maintain documentation of the identity of individuals who attended these political meetings or the specific political or campaign purpose for the disbursements.

Report at 64-66. The Report concludes that the "number and dollar amount" of political expenditures, combined with "inadequate" record-keeping, "created the appearance" that "certain" expenditures over a six-year period "may not have been" attributable to political purposes. *Id.* at 64-65.

This astonishingly unsupported allegation does not identify a single specific instance in which campaign funds were improperly used. Nor does the Report offer any direct evidence or testimony supporting its claim that campaign expenditures "may not" have been attributable to bona fide campaign or political purposes. Instead, the Report points to every political and transportation expense incurred by BSCC during the six-year period at issue, and alleges that the "high number and dollar amount" of these disbursements, coupled with the failure to meticulously document the participants and political purposes of such expenditures, "created the appearance" that "certain" expenditures may have been improper. *Id.* at 79.

The Subcommittee's allegations are also defective in several other respects. First, notwithstanding that House Rules give Members broad discretion to determine what constitutes a political or campaign-related expense, the Report improperly attempts to shift the burden to Representative Shuster to "prove his innocence" on every campaign expenditure. Second, the Report ignores the political reality that, given the short two-year election cycle in the House of Representatives, Members must devote significant time on an ongoing basis campaigning for re-election and meeting with constituents. The making of approximately two political expenditures a week is far from excessive and does not support the Subcommittee's speculation that campaign funds may have been converted to personal use. Finally, while Count I(e) faults Representative Shuster for failing to maintain detailed documentation regarding each political expense, neither House Rules nor FEC regulations required political committees to maintain such documentation. Notwithstanding the lack of any evidence of a violation, the Subcommittee stretches to suggest that the lack of documentation permits an appearance of impropriety.

The Report at 67-69 appears to imply, quite mistakenly, that the propriety of campaign expenditures by the BSCC may somehow be determined by reference to the low level of opposition to Representative Shuster in his recent primary and general elections. *Sae* Report at 67-69. We understand that the Subcommittee does not intend to act as a super-campaign manager, second-guessing the wisdom of political expenditures that Representative Shuster's campaign advisors have considered necessary. But the Report's reference to the low level of Representative Shuster's election opposition misses the fundamental point that it was through meticulous, ongoing and expensive

relationship-building in his district that Representative Shuster has achieved such unprecedented electoral success. It is not an accident, nor even a tribute to the power of personality, that Representative Shuster has won the Republican and Democratic nomination for re-election an historic nine times. Only by his campaign advisors' deployment of campaign funds for voter outreach, for complex county-by-county write-in campaigns, and to achieve constant in-district visibility of Representative Shuster, has he established such an enviable record of bipartisan political success. The level of Representative Shuster's ultimate election-day opposition is the result of campaign and political expenditures -- not a reason to question them.

2. A Member Has Broad Discretion To Determine What Constitutes A Campaign Or Political Expenditure.

Under the House Rules and interpretive guidance provided by the Committee on Standards, Members have significant discretion in determining those expenses that may be paid for with campaign funds. Former House Rule 43, clause 6 (in effect during the period at issue) provided:

A Member shall convert no campaign funds to personal use in excess of reimbursement for legitimate and verifiable campaign expenditures and shall expend no funds from his campaign account not attributable to bona fide campaign or political purposes.

Rule 43(6).

Originally, the rule had stated that campaign funds could only be used for "campaign purposes." **House Ethics Manual** at 271. However, in 1989, the rule was expanded to cover expenditures attributable to "bona fide campaign or political purposes." *Id.* (emphasis added). According to the Committee on Standards, this amendment was enacted "to reflect the longstanding interpretation that campaign funds need not be exclusively applied towards an immediate reelection campaign." *Id.* The guidance provided by the Committee on Standards acknowledges that a broad variety of activities may be considered "political" within the meaning of Rule 43, clause 6. For instance:

travel to a Member's home district might be considered a political expense for which private campaign funds could be used if the purpose of the trip was political. Similarly, taking certain individuals to dinner, if it is determined to be a political meeting rather than one relating to official duties, could be paid from campaign accounts.

House Ethics Manual at 219. In sum, the Committee on Standards has long interpreted "political expenditures" for which campaign funds may be used "broadly to encompass the traditional politically-related activities of Members of Congress." *Id.* at 271.²¹

The Committee on Standards has also stated that Members "have wide discretion as to what constitutes a bona fide political purpose" for which campaign funds may be expended. *Id.* The drafters of revised House Rule 43(6) explicitly recognized that it was up to the Members to decide whether expenses are "political" and can be paid for with campaign funds:

What is political is a matter of fact rather than of definition . . .

(W)hat we have tried to do is confine expenses from political accounts or volunteer committee accounts to expenses that are political. **By and large, that definition will be left up to the Member and to his volunteer committee, and as it is broadly defined under the election law.**

House Ethics Manual at 296 (*quoting* Statement of Representative Frenzel during debate on H. Res. 287, 95th Cong., 123 Cong. Rec. 5900 (1977)). The Committee on Standards cited this statement of Representative Frenzel in support of its conclusion in Advisory Opinion No. 6 that "Members should make the determination as to whether gray area expenditures are to be classified as political or official." *Id.*

3. The Report Does Not Even Attempt To Establish That The Cited Expenditures Were For Improper Purposes.

Strikingly, the Report does not contain a single specific allegation demonstrating that a particular expense charged to the campaign was not for legitimate political or campaign purposes. Rather than rely on direct evidence, the Investigative Subcommittee has adopted a "shotgun" approach and alleged that the number of disbursements of the BSCC indicates that at some point during the six-year period at issue the campaign may have expended funds for personal use. Such an unsupported allegation entirely disregards the presumption of innocence or any notion of fairness inherent in a legitimate adjudicative proceeding.

For instance, the Report claims that Representative Shuster engaged in a "pattern" of using chartered flights to his congressional district on holidays and weekends during which it claims that "no verifiable BSCC activities" were listed on Representative Shuster's schedule, yet cites a mere three examples of such flights during the six year period. The Report also questions a political meal that took place on Christmas Eve. Report at 69-71. The Investigative Subcommittee speculates that no political or campaign-related purpose justified these expenditures simply because no specific events were listed on Representative Shuster's calendar. In fact, Representative Shuster routinely met with constituents and political supporters in his district around the holidays, like many politicians. Although the BSCC's Treasurer, Ann Eppard, testified in the investigation, the Investigative Subcommittee apparently failed to question Mrs. Eppard about these allegedly improper expenditures, choosing instead to rest its findings on conjecture and innuendo.²²

The Subcommittee's approach has made it nearly impossible for Representative Shuster to defend himself. In essence, the Report unfairly seeks to shift the burden of proof to Representative Shuster to establish the *bona fides* of nearly every political and travel expense incurred by the BSCC over six years. Such an approach is unrealistic and unfair. Members are given significant discretion to make their own determinations as to what expenses are "political" and may charge such expenses to their campaign committees as long as they are properly reported to the FEC. As the Report acknowledges, each of the expenditures at issue was disclosed to the FEC in publicly-filed reports. Under the theory of liability advanced by the Subcommittee, any Member could be charged with ethical wrongdoing if the Member cannot reconstruct the precise details of every expenditure of the Member's campaign committee over a six-year period.

4. Campaign Committees Are Not Required To Maintain The Documentation Suggested By The Subcommittee.

Count I(e) further suggests that BSCC's records improperly failed to list the individuals associated with, and the specific campaign or political purpose of, each disbursement for meals and travel. Report at 66-67. The Report, however, fails to cite any House Rule or FEC regulation that required a campaign committee to maintain such detailed documentation, and does not specify what "records" would be sufficient to satisfy this purported "requirement." In retrospect, had the BSCC kept the documentation described by the Investigative Subcommittee, it would have avoided the "appearance" problem at issue. However, Representative Shuster cannot be faulted for failure to maintain records that he and the BSCC were under no obligation to maintain.

The FEC requires political committees to itemize disbursements in publicly-filed forms setting forth the purpose of each disbursement. Under the regulations, "purpose" is defined as "a brief statement or description of why the disbursement was made." 11 C.F.R. § 104.3(b)(4)(i)(A). The FEC regulations provide the following examples of permissible statements of purpose under this regulation: "dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs." *Id.* FEC regulations do not require political committees to report the identities of all individuals attending political dinners, or the particular political or campaign issues discussed during political meetings.

In accordance with FEC requirements, the descriptions in the BSCC's FEC reports consisted of terms such as "political meetings," "political meetings and meals," "lodging," "meals," "campaign meeting," "fundraising planning meeting," and "transportation." Report at 65 n.57. The descriptions of disbursements in BSCC's reports were fully in compliance with FEC regulations.

5. The Number Of Disbursements At Issue Is Not Excessive.

The Investigative Subcommittee's claim of an "appearance" violation is based on the fact that the BSCC made a large number of disbursements during the six-year period at issue. However, House Rule 42(6) does not provide a maximum number of political expenditures that are permissible. The BSCC made approximately 675 disbursements for political meals and meetings during a six-year period, as well as several disbursements for political and campaign related travel. These disbursements break down to only one political or campaign expense every three to four days during the six-year period. This level of political activity by a Member of the House of Representatives is far from excessive.

The Report's innuendo ignores political reality. A typical Representative must devote a significant portion of his or her time to fundraising and political activities associated with re-election. The Report suggests that the number of the BSCC's political disbursements was excessive in light of Representative Shuster's electoral success. *See* Report at 67-69.²³ As several witnesses testified before the Investigative Subcommittee, however, Representative Shuster is a 14-term Member of Congress in part because he devotes a great deal of time, energy and resources to fundraising and campaigning. *Id.* at 77. Given the effort required to be elected and re-elected to Congress, it was not unreasonable for the BSCC to pay for an average of two expenses associated with political meetings and meals per week.

6. The Political Meeting And Travel Expenses Incurred By The BSCC Are Legitimate On Their Face.

Almost all of the disbursements for political meals and meetings set forth in the Report occurred in locations in or around Representative Shuster's Congressional District or Washington, D.C. -- precisely the locations where one would expect Representative Shuster to conduct campaign-related events or meetings with political supporters and constituents. All of the listed transportation expenses were paid to charter aircraft carriers operating in Pennsylvania. On their face, therefore, these disbursements appear to be entirely legitimate, and the Report contains no evidence to the contrary.

The overwhelming majority (approximately 92%) of the BSCC disbursements that the Investigative Subcommittee claims "may have" been improper occurred in Representative Shuster's congressional district, the Washington area, or stops somewhere in between.²⁴ Similarly, the challenged transportation expenses consist almost entirely of chartered flights in the Pennsylvania area operated by the Bun Air Corporation of Bedford, Pennsylvania. These are precisely the types of expenditures and locations at which Representative Shuster and the BSCC would be expected to incur expenses for political and campaign-related meetings.

7. Conclusion.

Representative Shuster's political and campaign expenditures were legitimate and documented and reported as required. The Subcommittee does not attempt to prove that any particular expense was improper, and rests its findings of an "appearance of impropriety" solely upon the number and amount of expenditures. Nevertheless, Representative Shuster agreed to this portion of the SAV because he acknowledges that the BSCC could have eliminated any mistaken appearance of impropriety by maintaining more detailed records.

¹In appreciation for his efforts, American soldiers presented Representative Shuster with an Iraqi battle flag captured during the war.

²In order to be sure his conduct was proper, Representative Shuster took the additional step of reducing his understanding of his conversations with Committee counsel to writing, which Committee counsel (Mr. Hoskens) approved. By letter dated February 16, 1996, Representative Shuster wrote to Mr. Hoskens and enclosed a transcript of their December 19, 1995, conversation regarding post-employment cooling off periods. Response Exhibit 1.

³Specifically, the Act defines "lobbying contact" to communications regarding "(i) the formulation, modification, or adoption, of Federal legislation . . . (ii) the formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States government; (iii) the administration or execution of a Federal program or policy . . . ; or (iv) the nomination or confirmation of a person for a position subject to confirmation by the senate." 2 U.S.C. § 1602(8)(A) (repealed).

⁴In any event the "Railfest" event discussed by the Subcommittee was nothing more than an event hosted by the Altoona community, providing Representative Shuster a perfectly permissible opportunity to socialize with his constituents. The groundbreaking ceremony involving the Pennsylvania Turnpike Commission was a similar opportunity for Representative Shuster, although the Subcommittee never concluded that he attended the event. Report at 23.

⁵In addition to the testimony heard by the Subcommittee, we believe that documentation reviewed by the Subcommittee negates any notion that Mrs. Eppard intentionally violated the cooling-off period prohibition. In a letter, Edward R. Hamberger explained to Nancy Butler of DMJM that working with Mrs. Eppard would be advantageous because she is "intimately familiar with the workings of the Public Works Committee and can provide insight and strategy on how to achieve authorization of the Tren Urbano Project." Report Exhibit 9, at 3. In addition, in Mrs. Eppard's consulting agreement with DMJM, the services to be performed were explicitly described as "Advice and counsel on policy and funding decisions regarding transportation projects nationwide." Advisory services rendered by former staff during the cooling-off period were and are entirely appropriate. Report Exhibit 7, at 2.

⁶ Representative Shuster met with Carlos Pasquera, Secretary of the Department of Transportation of Puerto Rico, and Janos Hegede, an architect with Daniel, Mann, Johnson and Mendenhall ("DMJM"), to discuss the Tren Urbano light rail project in Puerto Rico. Representative Shuster also met with Marc Voigt, an employee of an R.J. Reynolds manufacturing facility in Puerto Rico, at the request of the Outdoor Advertising Association of America ("OAAA").

⁷ The Report's unsupported assertion that "[t]he term 'fact-finding event' was intended to be interpreted narrowly," Report at 42, is contradicted by the Committee on Standards' consistent interpretive guidance that Members have discretion to determine whether a trip is in connection with official duties.

⁸ Representative Shuster had previously visited the Tren Urbano project in Puerto Rico in February 1995, to receive an initial briefing regarding the project and conduct a site inspection. The Report makes clear that this trip was a legitimate fact-finding mission directly related to Representative Shuster's official duties. See Report at 16 (DMJM representative testified that "the purpose of the trip was to educate Representative Shuster on the Tren Urbano project and to seek Representative Shuster's support for the project"; Puerto Rico government official testified that purpose of trip was "to demonstrate to Representative Shuster that the Tren Urbano project was worthy of federal investment"). Representative Shuster returned to Puerto Rico in December 1995, at the invitation of DMJM, to receive a more detailed briefing about the Tren Urbano project and the benefits it would provide for the community in San Juan.

⁹ In addition, Representative Shuster met separately with two agents from the Drug Enforcement Agency during his trip to Puerto Rico. Representative Shuster has been a Ranking Member of the Select Intelligence Committee and had a practice of arranging such meetings during fact-finding travel to keep himself informed on issues relating to his official duties. Although these meetings do not directly bear on the propriety of Representative Shuster's receipt of expenses from DMJM and the OAAA, the meetings contradict the Investigative Subcommittee's claim that the "primary purpose" of the trip was recreational.

¹⁰ The Report states that Representative Shuster incorrectly reported on his 1995 disclosure report that R.J. Reynolds paid for a portion of his expenses. Report at 34 n.30. In fact, the OAAA asked Representative Shuster to meet with R.J. Reynolds, an important billboard company, and paid for a portion of his expenses. This technical error in the 1995 disclosure report was corrected in Representative Shuster's 1996 report, in which he disclosed that he received expenses to meet with R.J. Reynolds "through OAAA," demonstrating that any error in the 1995 report was inadvertent. The Report also suggests that Representative Shuster paid for two nights lodgings

while reporting that he paid for three nights. *Id.* In fact, Representative Shuster's 1995 report accurately stated that he spent three "days" in Puerto Rico that were not at his sponsors' expense. See Exhibit 32.

¹¹ The disclosure requirements instituted by the Ethics in Government Act were designed primarily to allow public scrutiny of any potential conflict of interest facing a government official. See *United States v. Oakar*, 111 F.3d 146, 148 (D.C. Cir. 1997) ("These requirements were designed to increase public confidence in the federal government, demonstrate the integrity of government officials, deter conflicts of interest, . . . and enhance the ability of the public to judge the performance of public officials.") (citing S. R. No. 95-170, 21-22 (1978), reprinted in 1978 U.S.C.C.A.N. 4216, 4237-38). By disclosing the Puerto Rico trip in his financial disclosure statements, Representative Shuster satisfied the purpose of the statute and allowed the public to evaluate his performance and any possible conflict of interest arising out of the receipt of travel expenses from these private sources.

¹² In fact, when Representative Shuster traveled to Puerto Rico in February 1995, the cost of his hotel room was \$501.50 per night. The cost to rent the private residence during the December 1995/January 1996 trip, during the peak holiday season, was a comparable \$528.50 per night.

¹³ The Report also asserts that members of Representative Shuster's family inappropriately charged certain expenses to a club membership card owned by an employee of DMJM. Report at 35-37. Although the Report fails to demonstrate that Representative Shuster knew of the use of the card by his family members, Representative Shuster regrets that his family members may have inappropriately taken advantage of this hospitality.

¹⁴ The Committee found that "Mr. Gaylord's alleged activities included attending leadership meetings, interviewing prospective employees, and making salary recommendations in the transition period during which Representative Gingrich was reorganizing his office to assume the responsibility of Speaker." Report at 49-50 (internal citations omitted).

¹⁵ The only mitigating factor cited by the Committee was the fact that sometime prior to the conclusion of the investigation, Representative Gingrich had stopped seeking her advice.

¹⁶ Congress excluded from the definition of "lobbying contact" any "communication that is - (v) a request for a meeting, a request for the status of an action, or any other similar administrative request, if the request does not include an attempt to influence . . . a covered legislative branch official. 2 U.S.C. § 1602(8)(B)(v).

¹⁷ Unfortunately, due to the passage of a considerable amount of time, she had discarded all but the most recent of these calendars.

¹⁸ This administrative leave policy functioned in effect almost identically to "flex-time" policies that are commonplace in numerous corporations throughout America.

¹⁹ These two witnesses were Karen Dryden and Dorena Bertussi.

²⁰ The Committee also declined to bring a Statement of Alleged Violations against Representative Feighan, when one of his employees misused "inside mail" for purposes of furthering a fundraising effort. See *Investigation of Improper Political Solicitation*, at 20-21. Instead, the Committee deferred to the judgment of the Committee on House Administration, which oversaw administration of the inside mail system (and which also oversees the use of House offices at issue in this case). See *id.* The Committee noted that the practice of the House Administration Committee "when appraised of misuse, [is] to inform the wrongdoer of the impropriety and to instruct them to no longer engage in such activity." *Id.* Such action on the part of the Committee would also have been appropriate for the alleged violations of Representative Shuster's employee in this instance if, despite the evidence, the Subcommittee had believed that any violation of House Rules occurred here. Similarly, when Representative Robert Torricelli violated 31 U.S.C. § 1301 by personally using his own office fax machine to send a four page fax containing a political message, the Committee took no action on the complaint after the Representative reimbursed the reasonable cost of the official resources used. See *Summary of Activities - One Hundred Fourth Congress*, H.R. Rep. No. 104-886, at 22 (1997).

²¹ The Investigative Subcommittee's claim that the Committee on Standards "has interpreted these provisions strictly," Report at 66, is contradicted by the Committee on Standards' own guidance in the widely disseminated House Ethics Manual.

²² The Investigative Subcommittee did question Mrs. Eppard about certain political meetings between Representative Shuster and Mrs. Eppard at Washington, D.C. restaurants such as the Capitol Grille. However, the Investigative Subcommittee did not dispute that the meals had a political purpose, and focused instead on whether holding political meetings at "expensive" restaurants was a "good use of campaign funds." Report at 71-72 (during deposition of Mrs. Eppard, the Member stated "[y]es, you talked about the campaign," but questioned why they did so at an "expensive" restaurant). Whether such expenses were a "good use of campaign funds" is wholly irrelevant to the issue of whether campaign funds were spent improperly. Once again, the Report contains no direct evidence that the BSCC improperly paid for these political expenditures.

²³ During the testimony of Mrs. Eppard, the Investigative Subcommittee also suggested that the BSCC should have "buil[t] up a war chest" instead of expending campaign funds on political events and constituent activities designed to help ensure Representative Shuster's re-election. Report at 76-78. This irrelevant line of inquiry has no bearing on whether campaign funds were spent for legitimate purposes. Representative Shuster is the only Member from Pennsylvania who has won both the Republican and Democratic party nominations in his district on nine occasions -- each requiring a time consuming and expensive write-in campaign. Given Representative Shuster's "established [] record of proven success at the polls," *Id.* at 78, the Investigative Subcommittee's attempt to challenge Representative Shuster's campaign strategy rings hollow.

²⁴ For instance, approximately 300 (or 44%) of the expenses occurred in Representative Shuster's congressional district in

Pennsylvania, at locations such as Bruno's Diner in Chambersburg, Denny's in Selinsgrove, and Jethro's in Altoona. Approximately 207 (or 30%) of the expenses occurred in the Washington, D.C. metropolitan area, at locations such as the Capitol Hill Club or the Hyatt Hotel. Approximately 124 (or 18%) of the expenses occurred either in other towns in Pennsylvania or in towns on the route between Washington, D.C. and Representative Shuster's congressional district.
