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MEMORANDUM TO: Ben Cohen
FROM: Stephen A. Justino
RE: QUESTION: IS IT LEGAL TO STAMP U.S. CURRENCY WITH POLITICAL MESSAGES?

Clearly, the act of stamping political messages to raise awareness of the corrupting impact of the Supreme-Court-created doctrines of "Corporate Personhood" and "Money as Free Speech" would be considered "expressive conduct" within the meaning of the First Amendment. ***United States v. O'Brien***, 391 U.S. 367 (1968).

This question raises important First Amendment considerations, and is a question of first impression, as I have not been able to find any reported cases on point at the District Court, Appellate Court, or Supreme Court level.

There are two federal statutes relevant to the question **18 USC 333** and **18 USC 475**.

a. Defacement of U.S. currency is regulated by **18 USC 333**, which states:

> [w]hoever mutilates, cuts, **deface**s, disfigures, or perforates, or unites or cements together, or does any other thing to any bank bill, draft, note, or other evidence of debt issued by any national banking association, or Federal Reserve bank, or the Federal Reserve System, **with intent to render such bank bill**, draft, note, or other evidence of debt **unfit to be reissued**, shall be fined under this title or imprisoned not more than six months, or both. (**Emphasis added).**

18 USC 333 would likely survive constitutional review because it contains no "contains no explicit [or implicit] content-based limitation[s] on the scope of prohibited conduct. Instead, the statute is "content neutral" and appears to have been drafted to protect the owner of the bank note (the Federal Reserve, in the case of U.S. currency) from having to incur the expense of withdrawing paper currency from circulation ahead of schedule.

In the absence of a content-based limitation, a less stringent standard for the review of noncommunicative conduct controls. See, ***O'Brien,*** supra, at 377. **18 USC 333** is likely to survive that less stringent review.

The question then turns to whether a person participates in this bill-stamping campaign can be convicted of defacing the bills under **18 USC 333**. In my opinion obtaining a conviction would be extremely difficult.

In order for a person to be found criminally liable under **18 USC 333** the government must

prove: a) that the person charged was the person who actually defaced the bill in question; and, b) that the person who stamped the bill in question did so with the specific intent to "render the bill . . . unfit to be reissued."

Unlike people who the participate in the "Where's George" project, who actually record the serial numbers of the bills they mark, it will be almost impossible for the Secret Service to identify individuals participating in this campaign, in that most people will stamp bills outside the presence of police authorities and then put the bills into the stream of commerce.

An exception to this would be people who stamped their bills in public, such as at festivals, or, using the mobile "Rube Goldberg Machine." It is conceivable, but unlikely (given limited government resources), that the Secret Service could "stake-out" such public stampings in order to identify the stampers.

Even if the government can prove the identity of the stamper, a conviction for defacing currency under **18 USC 333** will be difficult for the government to obtain**,** because of the need for the government to prove that the stamper acted "with the intent to make the bill unfit for reissue." Specific intent, as the term implies, means more than the general intent to commit the act.

The fact that the stamp might, indeed, make the bills unfit for reissue, is not relevant. In the case of **18 USC 333,** Congress defined the crime to punish only those persons who act "with the intent to make the bill unfit for reissue." It is that specific mental state, rather than the actual withdrawing of the bill from circulation, that the Government is required to prove beyond a reasonable doubt in order to win a conviction. see ***Patterson v. New York***, 432 U.S. 197, 211, n. 12, (1977).

People stamping bills in this case would actually have the opposite intent. Rather than trying to get the bills taken out of circulation, stampers would be acting with the hope, and the intent, that the bill would remain in circulation for as long as possible, to promote the stamp's message to as many recipients as possible.

For those reasons, I believe that conviction under 18 USC 333 is unlikely.

b. Using paper money to create advertising is prohibited by **18 USC 475** which states:

[w]hoever . . . writes, **prints, or otherwise impresses** upon . . . to any [coin or currency] of the United States, **any** business or professional card, notice, or **advertisement, or any notice or advertisement whatever**, shall be fined under this title. (**Emphasis added**).

It is unlikely that **18 USC 475** would be applicable to this bill marking campaign. The statute, on its face, appears to prohibit marking, or otherwise altering, U.S. currency for the purpose of turning it into a vehicle for commercial advertising. Participants in this campaign would be marking, or otherwise altering, U.S. currency for the purpose of engaging in expressive conduct protected by the First Amendment.

Assuming, for the sake of argument, that **18 USC 475** is applicable to this case, **18 USC 475** is different from **18 USC 333**, in that **18 USC 475** is not "content- neutral." Instead it appears to

be an effort by the Federal Government to protect the "physical integrity" of a privately owned bank note in order to preserve the bank note's status as a symbol of the Nation.

This is evidenced by the fact that **18 USC 475** pertains to U.S. currency, only (**18 USC 333** applies to bank notes owned by any nation's federal reserve banking system); and, by the fact that the statute is not a blanket prohibition of any forms of defacement, but, instead appears to be an attempt to protect the symbol value U.S. currency, by keeping it from becoming a mere vehicle for commercial advertising.

In ***United States v. Eichman***, 496 U.S. 310 (1990), the U.S. Supreme Court considered the **Flag Protection Act of 1989** (FPA), a federal law passed in reaction to the Supreme Court's decision in ***Texas v. Johnson***. 491 U.S. 397 (1989), which upheld the right of a political protestor to burn the American flag, In ***Eichman***, the Supreme Court held that, even though the FPA contained no explicit content-based limitation on the scope of prohibited conduct," it is nevertheless clear that the Government's asserted interest is "related `to the suppression of free expression," 491 U.S. at 410.

The ***Eichman*** Court then went on to hold that statutes which place content-based restrictions on expression must be subjected to "the most exacting scrutiny," quoting ***Boos v. Barry***, 485 U.S. 312, 321 (1988). Applying that "most exacting scrutiny," the Court found that the Government's stated interest - protecting the "physical integrity" of a privately-owned flag in order to preserve the flag's status as a symbol of the Nation interest [could not] justify its infringement on Mr. Eichman's First Amendment rights. ***United States v. Eichman***, 496 U.S. 310 at 318.

18 USC 475, on its face, is a content-based restriction on expression, in that it restricts commercial advertising. Applying it, wrongfully, to prohibit the expressive conduct envisioned by this bill-stamping campaign, would also be a content-based restriction.

Applying *Eichman's* "most exacting scrutiny" would likely result in the statute being struck down as it relates to this clearly protected political speech.