

JUN 15 1954

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Application of the Hatch Act to Top Government Executives.

Reference is made to a letter addressed to you from Mr. Philip Young, Chairman, Civil Service Commission, dated April 26, 1954, requesting your views on the application of the Hatch Act to top government executives. Mr. Young enclosed a copy of a memorandum from the Chief Law Officer of the Civil Service Commission setting forth his views as to the application of the Hatch Act to such officials and pointing out certain classes of officials as to which some doubt exists to the applicability of the Act. Since the Civil Service Commission has the duty of ruling as to whether or not given Federal officers or employees are covered by Section 9(a) of the Hatch Act, the following comments will be confined largely to general observations upon the classes of officers who are excepted from the Hatch Act prohibitions against political activity on the part of Federal officers and employees.

Section 9 (a) of the Hatch Act (53 Stat. 1148 as amended by 54 Stat. 767; 5 U.S.C. Supp. V 118 i) among other things, prohibits officers and employees in the executive branch of the Federal Government from participating in political activity, and construes the term "officer" or "employee" as not including the following:

- "(1) The President and Vice President of the United States;
- (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal Laws."

Before commenting upon each of the four categories of excepted officials, I believe that it will be helpful to examine the general purpose of the Congress in excepting the enumerated classes. An understanding of this purpose is necessary in order properly to comprehend the composition of each class.

The Hatch Act was intended in part to prohibit all except a few important Federal officials from taking an active part in political activities. The prohibitions of Section 9(a) which prevent an officer or employee from taking an active part in political management or in political activities were not directed against policy-making officials of the Government. Senator Hatch, who together with Senators Sheppard and Austin, introduced S. 1871, "a bill to prevent pernicious political activities," which became the Hatch Act, so stated in the Senate on April 17, 1939:

" . . . It was my thought that that section, applying only to administrative or supervisory employees, eliminated policy-making employees in the Government, such as members of the President's Cabinet. I do not consider that they are administrative or supervisory employees. However, if there is any doubt about the question, I will say frankly that it is my opinion that a person holding a policy-making position not only should have the right and opportunity, but he ought to go out and defend his administration and its policies. Certainly it is not my intention to prohibit such action. I should gladly have agreed to an amendment exempting policy-making officials, and had myself planned to go to the House Committee and request that the House write in such a reasonable amendment." (84 Cong. Rec. 4303)

On July 21, 1939, referring to the House Amendment which included the exceptions, Senator Hatch left no mistake as to its meaning. He told his colleagues:

" . . . I myself drew an amendment to section 9 of the bill which did exactly what I told the Senator from Pennsylvania I would do. It specifically exempted all policy-making officials of the United States from the prohibition of section 9." (Italics supplied) (84 Cong. Rec. 9672)

4 This was consistently the position of Senator Hatch. See, for example, the Senator's statements before the Senate in 84 Cong. Rec. 4424 (April 19, 1939); 84 Cong. Rec. 7708 (June 22, 1939); 84 Cong. Rec. 7709 (June 22, 1939); 84 Cong. Rec. 11154 (August 5, 1939); 86 Cong. Rec. 2432 (March 6, 1940); and 86 Cong. Rec. 2438 (March 6, 1940). On August 5, 1939, three days after the Hatch Act became law, Senator Hatch had printed in the Congressional Record his written statement that "Officials who determine policies of the Government" are "excepted from the prohibitions of the law" (84 Cong. Rec. 11154). Congressman Dempsey, who introduced the amendment to 9(a) which specified what officials should be exempted from the political activities prohibition, took a position similar to Senator Hatch's:

"The amendment . . . clearly exempts the President and Vice President of the United States, as well as the staff of the President and those who obtain their salaries from the appropriation made for White House purposes. It also exempts all heads of executive departments, Cabinet members and their assistants, and all policy-making officials that have a national scope, [such as, for instance, the head of the Work Relief Agency.] That has a national scope." (84 Cong. Rec. 9626, July 20, 1939). 7

Congressman Dirksen made similar remarks in the House on the same day (84 Cong. Rec. 9629).

Mr. Healey, Chairman of the Subcommittee of the House Judiciary Committee which reported the Hatch bill to the House with the Dempsey amendment, also expressed his belief that the bill was not intended to prohibit political activity on the part of policy-making persons. Speaking in the House on July 20, 1939, he said:

"... If a Republican administration comes into power again, there are certain policy-making people it will embrace in its administration, and I know the Republicans believe that such persons ought to be permitted to defend the administration, to make speeches over the radio and on the public platform, and, therefore, it seems to me that the Committee on the Judiciary acted with reason and sense, and we have now presented a bill that the House ought to support. (Applause.)" (84 Cong. Rec. 9601)

Congressman White of Ohio the same day made similar reference to policy-making officials:

"... A President of the United States should have the right to defend his record in the arena of politics, and the same thing is true of a Cabinet member or policy-making officials, who naturally must defend the policies for which they are responsible in the field of political activity." (84 Cong. Rec. 9630)

See also remarks of Senator Miller on S. 3046, an act to amend the Hatch Act (86 Cong. Rec. 2358, March 5, 1940).

There is no evidence in the Congressional debates that any member of Congress held a contrary view as to the general class of officials exempted from the prohibitions of Section 9(a) against political activity.

Further evidence of the intent to exempt all policy-making officials is found in the references to an intention to except political appointees. Senator Hatch pointedly referred to such officials during debate on the 1940 amendments to the Hatch Act:

"Mr. President, there is a distinction between ordinary Government employees and officers who are charged with the high duty and responsibility of formulating programs and policies, because the latter must not only sell those policies - if I may use that expression - to the country, but they must be able to defend their policies against attack. Everyone knows that to be so. Such officers are distinctly political officers, and it is not difficult to distinguish between them and other governmental employees, the great mass of whom perform merely clerical duties, which are not political in any sense. . ."
(86 Cong. Rec. 2432, March 6, 1940)

The Senator said that the "political" officers should be exempt from the prohibitions against political activity. The District Court for the District of Columbia in United Federal Workers of America v. Mitchell, 56 F. Supp. 621 (1944), upholding the constitutionality of the Hatch Act, made a similar reference to the difference between "political" employees, who are exempt, and non-political employees, who are not exempt. The Court said:

"It is perfectly obvious that these classes of employees [those exempted by 9 (a)] are in very large measure political. No one supposes that they would not change with the changing of administrations. There is no need nor desire to protect them from political activity, and hence there is no corresponding occasion to restrict such activity on their part." (p. 627)

It is clear the Court is referring to policy-making officials even though it speaks of them in terms of "political officials."

The first of the four categories of exceptions listed in the Act is "(1) The President and Vice President of the United States." As the Civil Service Legal Officer points out in his memorandum to Mr. Young, "this exception is self-explanatory and covers only President Eisenhower and Vice President Nixon."

The second exception relates to "(2) persons whose compensation is paid from the appropriation for the office of the President." The Civil Service memorandum to Chairman Young makes the following comment on this category:

"This is also a rather clearly defined group as the White House staff has a separate appropriation as a part of Title I of the Independent Offices Appropriation Act. Anyone who is paid from this appropriation which is entitled 'The White House Office' is not subject to Section 9(a). Please note that the exception is specifically tied in with the fact that the individual is paid from that particular appropriation. This means that persons detailed to the White House but paid from other appropriations would not fall within the exception."

The above view coincides with that of former Assistant Attorney General Wendell Berge as expressed in a memorandum dated November 17, 1941, addressed to Acting Assistant Solicitor General W.A. Townsend, regarding the application of exception (2) to the Office for Emergency Management. The staff of the latter office were compensated from funds appropriated for the "Executive Office of the President." Mr. Townsend concurred in Mr. Berge's views and informally advised the Office for Emergency Management as follows:

"I advised Mr. Rauh by telephone that considering the purpose and history of the Hatch Act I doubted whether the Attorney General would hold that the many thousands of employees of the Office for Emergency Management and other agencies in the Executive Office of the President are exempt from its provisions. The safer view seems to be that the exemption of 'persons whose compensation is paid from the appropriation for the Office of the President' applies only to members of the White House staff. The author of the

amendment which included those words in the statute stated that this was its purpose." (Memorandum for the Files dated November 19, 1941, 11 Unpublished Opinions 554)

Despite the above contrary views of Mr. Berge and Mr. Townsend, a very persuasive argument can be made based on the Congressional debates that the intention of Congress was that persons paid out of appropriations for the President's Executive Office should be included within the exemption. This argument is stated in detail on pages 14 to 18 of a legal memorandum prepared in the Office for Emergency Management and sent to Mr. Townsend with a letter dated November 13, 1941 from Joseph L. Rauh, Jr. of that office. In essence the argument is that Congress had notice of the scope of activities in the Office of the President before Section 9(a) of the Hatch Act was passed and that, therefore, Congress intended that exception (2) should be construed subject to this notice and should, therefore, include personnel paid from appropriations for the "Executive Office of the President" as well as those paid from the appropriation for the "Office of the President" (as expressed in the Act), or, as it now is called, "The White House Office." (For clear and unambiguous support of this viewpoint, see debate in 84 Cong. Rec. 9610 and 9633).

On the other hand, as previously emphasized, the real purpose of the exceptions was to exempt policy-making officials from the prohibition of 9 (a) against political activity. This would tend to limit the scope of exception (2) to only the few policy-making officials who may be attached to the White House and paid from funds other than the specific appropriation now entitled "The White House Office," (in addition to persons paid from the latter.)

I believe that the general scope of the exception is correctly outlined in a memorandum from Joseph C. Duggan, Assistant Attorney General, Executive Adjudications Division, to Charles S. Murphy, Special Counsel to the President, dated April 24, 1952, regarding application of section 9 to members of the President's Commission on the Health Needs of the Nation. The expenditures of that Commission, including per diem compensation to its members, were paid from an allotment made by the President from the "Emergency Fund for the President, National Defense." The Assistant Attorney General expressed the view that "members of the Commission are not subject to the provisions of Section 9(a) of the Hatch Act because they may be regarded as covered by the exception relating to 'persons whose compensation is paid from the appropriation for the Office of the President'." Mr. Duggan supported his conclusion with the following argument:

"It would be possible to read this exemption literally and to conclude that since the compensation of the members of the Commission is paid from the "Emergency Fund for the President," and not from an appropriation for the "Office of the President" they are not exempt. However, I believe that a literal reading is neither desirable nor consistent with the legislative intention. In fact, if the phrase "office of the President" were read literally it would confer an exemption on no one at this time, for there is

no longer an appropriation so entitled, as there was at the time of the enactment of section 9(a). Since 1944 that appropriation item has been replaced by an item for the "White House office." In the absence of any indication of a legislative intent to abolish the exemption, I believe it should be concluded that employees now performing similar functions to those formerly performed by persons compensated from the "office of the President" appropriation are included within the exemption even though the label for the appropriation from which they are compensated has changed. To reach this result, however, the exemption must be read in terms of its general purpose rather than its precise wording.

"The appropriation for the 'office of the President' as it existed at the time of the enactment of the Hatch Act applied to a small group of individuals who worked closely with the President and intimately shared with him responsibility for determining and executing major national policies. In my opinion it would be justifiable, in the absence of any indication of a contrary legislative intent, to include within the exemption persons paid from appropriation items not in existence at the time of the Hatch Act, e.g., the 'White House office' appropriation, and used for the compensation of individuals in a similar relationship to the President. Like the 'White House office' appropriation, the 'Emergency Fund' came into existence after the Hatch Act. It evolved from World War II emergency appropriations to the President for his use in the national security and defense. Expenditures have been made from the fund for varying purposes to meet emergencies as they arose. In some cases these expenditures have been used to compensate employees who do not have an intimate and close relationship to the President. However, the Fund may also be properly used for the compensation of a small group of officers and employees who do have such relationship to the President. As to such persons I believe it would be appropriate to conclude that the exemption under discussion is applicable.

"In the instant case the President has determined that it would be of assistance to him in executing the laws and reporting and recommending legislation to the Congress for the Commission to study and report on the health needs of the Nation. Accordingly, the functions which its members perform are intimately related to the presidential function and closely resemble the other types of activities expressly exempted from the Hatch Act. In addition, the members of the Commission are few in number. They are for the most part only intermittently engaged in their function. Their services are to be performed during an emergency and will continue for but a brief period. They thus differ in character from the large classes of government officers and employees against whom the prohibitions of section 9(a) are intended to operate. In my opinion, therefore, it is justifiable to conclude that the members of the President's Commission on the Health Needs of the Nation are covered by the Hatch Act exemption relating to 'persons whose compensation is paid from the appropriation for the office of the President.'"

The foregoing interpretation of exemption (2) is broader than the view of the Legal Officer of the Civil Service Commission and in my view is consistent with the legislative intention. Without attempting to define the precise limits of the exception, I think that exemption (2) properly may be held to embrace policy-making officials compensated from appropriation items other than that now known as "The White House Office."

The third exception refers to "(3) heads and assistant heads of executive departments." The memorandum prepared by the Chief Law Officer of the Civil Service Commission states in part:

"This exception would definitely cover Cabinet officers such as the Secretary of Interior, Secretary of Commerce, Attorney General, etc., and the assistant heads of these departments. The true assistant heads of the departments are generally serving under the title of Under-Secretary. . . . The Law Officer was of the opinion that the exception does not cover assistant secretaries as under the various reorganization acts the occupant of such a position is merely a division chief and is not in fact the assistant head of the department . . ."

It seems to me that there is no warrant in the express language of exception (3) to justify restriction of the exception insofar as it relates to assistant heads to Undersecretaries only. The term used is "assistant heads." There is also no basis in the legislative history of the act for the narrow construction placed upon the term by the Commission's Legal Officer. Furthermore, any change in the status of "assistant heads" under various executive reorganization plans should not be regarded per se as a basis for concluding that today's "assistant heads" of departments are not the "assistant heads" contemplated by the exception. As previously emphasized, the political activities prohibition of the Act was never intended to apply to policy-making officials. So long as an assistant head is a policy-making official, there would appear to be nothing in the reorganization plans which would require confining exception (3) to an Under-Secretary in one department or to an officer of comparable status in another department.

The debates in Congress prior to the enactment of the provision in question contain little illumination upon precisely what Congress meant by assistant heads, other than the many statements that all policy-making officials should be exempt. Congressman Michener, in offering a clarifying amendment to the Dempsey amendment, explained each of the four exemptions to the House on July 20, 1939. His reference to exception (3) which follows appears to be the most detailed of any of the references to it in Congress:

"Subdivision (3) of the Dempsey amendment exempts Cabinet officers and all their assistants." (Italics added)
(84 Cong. Rec. 9633)

This apparently broad interpretation of the exemption was not disputed. Mr. Dempsey, who introduced the amendment containing the exemption, told the House on July 20, 1939, that the exemptions excepted

"all heads of executive departments, Cabinet members and their assistants" (Italics supplied) (84 Cong. Rec. 9626).

Later the same day Congressman Dirksen explained that the Dempsey amendment exempted inter-alia "those administrators who are administering in a Nation-wide capacity." (84 Cong. Rec. 9629). Also on the same day Congressman Nichols, speaking in opposition to the Dempsey amendment, interpreted the exceptions as applying "to a man who was appointed by the President, to the Cabinet and to all men who must be confirmed by the United States Senate." (84 Cong. Rec. 9631).

During the Congressional debates on S. 3046 in 1940 there were also some pertinent references to the exemptions contained in 9(a). This bill was an amendment to the Hatch Act which in no way affected the exemption provisions of 9(a). In the Senate on March 5, 1940, Senator Miller, referring to the third exemption, remarked:

"And it would be interesting to see a roster of the assistant heads of the various departments -" (86 Cong. Rec. 2358)

There was reference on the same day to the status of a certain official (almost certainly Assistant Attorney General O. John Rogge, then in charge of the Criminal Division of the Department of Justice). Senator Miller remarked that this officer

"occupied a policy-making position. He was an assistant to the head of a department of the Government. Therefore, he would have been excused." (Italics supplied) (86 Cong. Rec. 2360)

On March 12, 1940, the status of this same officer was again raised. Senator Johnson of Colorado referred to him as follows:

"That is what Mr. Rogge is - assistant head of a department - and he acted in everything that he did under the exemption, which made his actions legal and lawful under section 9 of the Hatch Act." (86 Cong. Rec. 2706)

Senator Hatch stated subsequently with reference to Mr. Rogge that

"A deputy attorney general of the United States is not an assistant head of a department." (86 Cong. Rec. 2707)

It should be pointed out that Mr. Rogge was not then a deputy attorney general but an assistant attorney general. There was no such position as deputy attorney general in the Department of Justice at that time. Under these circumstances, Senator Hatch's statement seems too obscure to be considered significant. It is conceivable that the Senator had in mind someone who had a status comparable to that of a special assistant to the attorney general since the conduct of Mr. Rogge which occasioned the Congressional reference was in regard to his personal investigations in the field of certain alleged frauds in Louisiana.

Senator Johnson appears to have regarded the third exemption as including the "secretaries" of "assistants to Cabinet officers:"

"... the existing Hatch Act exempts the President, the Cabinet officers, assistants to Cabinet officers, their secretaries, and Diplomatic Service . . ." (86 Cong. Rec. 2706)

What the Senator meant by "secretaries" is not clear. He may have been referring to the Presidential secretariat or perhaps to the assistants to the assistants to Cabinet officers.

Although the foregoing references to the debates contain no conclusive evidence as to the Congressional intent, it appears that there was no intent to confine "assistant heads" to assistant heads who had the status of undersecretary or comparable rank. Attorney General Jackson did not consider that the exception was to be interpreted so narrowly when he wrote that

"the Secretary of State, the Under Secretary of State, and the Assistant Secretaries of State, are embraced within the clause numbered (3) and reading 'heads and assistant heads of Executive departments.'"

The statement was made in a formal opinion holding that Section 9(a) of the Hatch Act does not prohibit ambassadors and ministers from taking an active part in political campaigns. (39 Op. A.G. 508, 509 (1940)).

The various reorganization plans do not render the statement of your predecessor inapplicable to the present day assistant heads of departments. President Truman's Message of March 13, 1950 accompanying Reorganization Plans Nos. 1 to 13 of 1950 "to Strengthen the Management of Six Executive Departments and Seven Regulatory Commissions" (House Document No. 504, 81st Cong., 2d Sess.), indicates in a general way the purpose and effect of the various reorganization plans to which the Civil Service Commission Legal Officer makes apparent reference.

President Truman said:

"I am transmitting today Reorganization Plans Nos. 1 to 13 of 1950, designed to strengthen the management of six executive departments and seven regulatory commissions. These plans propose a major clarification of the lines of responsibility and authority for the management of the executive branch. They would put into effect the principal remaining recommendations of the Commission on Organization of the executive branch of the Government affecting the location of management responsibility within the departments and agencies.

"A principal finding of the Commission on Organization was that clean-cut lines of authority do not exist in the executive branch. The Commission stated that--

the first and essential step in the search for efficiency and economy in the executive branch of the Federal Government is to correct the present diffusion of authority and confusion of responsibility. The Commission warned that without this action all other steps to improve organization and management are doomed to failure.

"Reorganization Plans Nos. 1 to 13 propose a bold approach to the problem of delineating responsibility and authority for the

management of the executive branch. Clearer lines of responsibility and authority will strengthen our constitutional system and will also help to establish accountability for performance in office - a basic premise of democratic government. I urge the Congress to add its approval to my acceptance of these recommendations of the Commission on Organization.

Reorganization Plans Nos. 1 to 6, relating to six executive departments

10 "Reorganization Plans Nos. 1 to 6, inclusive, relate to the Departments of the Treasury, Justice, the Interior, Agriculture, Commerce, and Labor. With certain exceptions, these plans transfer to the respective Department heads the functions of other officers and agencies of the Departments. They permit each Department head to authorize the functions vested in him to be performed by any officer, agency, or employee of the Department. In addition, Administrative Assistant Secretaries are provided for each of the six Departments, and additional Assistant Secretaries are authorized for the Department of the Interior and the Department of Agriculture.

"In its introduction to its first report, the Commission on Organization stated two 'essentials of effective organization.' These are:

✓ The President, and under him his chief lieutenants, the department heads, must be held responsible and accountable to the people and the Congress for the conduct of the executive branch-

and

The wise exercise of authority is impossible without the aids which staff institutions can provide to assemble facts and recommendations upon which judgment may be made and to supervise and report upon the execution of decisions.

10 "The Commission specifically recommended:

✓ Under the President, the heads of departments must hold full responsibility for the conduct of their departments--

and

✓ Department heads must have adequate staff assistance if they are to achieve efficiency and economy in departmental operations.

✓ "These six reorganization plans put into effect these recommendations.

✓ "Through the years the Congress has repeatedly endorsed the policy of holding agency heads fully accountable for all the functions

of their agencies. Last year this policy was pursued in the legislation authorizing reorganization of the Department of State and establishing the General Services Administration. A reorganization plan applying this principle to the Post Office Department was likewise approved.

"However, in the six departments covered by these plans, all functions are not now uniformly vested in the department heads. Some statutory authority is held independently by subordinate officers and agencies. These plans extend fully to the six departments the principles of strengthening departmental management by eliminating the patchwork exceptions that now exist.

"The transfers recommended in these plans accomplish three principal objectives: First, they provide a clearer line of responsibility and authority from the President through the department heads down to the lowest level of operations in each department. Second, department heads are made responsible in fact for activities within their agencies for which they are now, in any case, held accountable by the President, the Congress, and the people. Third, department heads are enabled to effect appropriate internal adjustments as may be necessary within their departments to permit the most effective organization of departmental resources and bring about continuous improvement in operations.

* * *

"Two of the reorganization plans provide additional Assistant Secretaries, to be appointed by the President and confirmed by the Senate, one in the Department of the Interior and two in the Department of Agriculture. This step is in accord with recommendations of the Commission on Organization. The additional Assistant Secretaries are needed to provide more adequate staff assistance in supervising and directing the policies and programs of these large Departments. At present the Department of the Interior has two such officials and there is one such position in the Department of Agriculture.

"Under the provisions of Reorganization Plan No. 2 the title of the Assistant to the Attorney General is changed to Deputy Attorney General, and an additional Assistant Attorney General is provided in lieu of the Assistant Solicitor General, the latter office being abolished. These changes are designed to reflect more accurately the position and responsibility of these two officials of the Department of Justice.

* * *

"All 13 of these reorganization plans will aid in making a more efficient Government. The plans affecting the departments

will help straighten out the lines of responsibility and authority, improve administrative accountability, and make departmental management sufficiently flexible to meet changing problems. The plans relating to the regulatory commissions will result in the more businesslike and effective administration of the Government's regulatory programs. In short, these plans provide for better management of the executive departments and regulatory commissions and thus will assure to the public the best possible service at the lowest possible costs."

The purpose of these reorganization plans in part was to centralize authority and responsibility in the head of each agency and to increase efficient departmental operation by giving the head of the department power to effect appropriate internal adjustments. Any powers vested in a subordinate by statute were transferred to the department head who was given the power to delegate to subordinates the powers vested in him. It is not apparent that these plans had the effect of changing the status of present-day "assistant heads" of departments in such a way as to make them no longer "assistant heads" within the meaning of 9(a) of the Hatch Act.

The reorganization of the State Department as accomplished by the Act of May 26, 1949, Ch. 143, 63 Stat. 111, cannot be considered as in a different category in this respect from the reorganization of the six departments referred to above.

Thus, an assistant head of a department who is a policy-making official seems to be clearly embraced within exception (3).

The fourth exception relates to "(4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal laws." The Chief Law Officer of the Civil Service Commission comments as follows:

"The Attorney General has held that this exception clearly covers ambassadors and ministers (Opinion of October 19, 1940, 39 A.G. 508).

"This section also clearly covers the heads of independent bureaus and Commissions, such as the U.S. Civil Service Commission. It will be noted that three things are required to bring an individual within the scope of this exception. First, he must be a Presidential appointee; second, he must have Senate confirmation and third, he must determine policies in the Nation-wide administration of Federal laws. It is our opinion that all three must be present or the exception would not apply."

The foregoing comment appears to be a correct construction of the fourth exception and is consistent with the interpretation of that section rendered by the Attorney General in his Opinion of October 19, 1940, ruling that ambassadors and ministers are not prohibited from taking an active part in political campaigns (30 Op. A.G. 508). The correctness of the comment also is confirmed by Senator Hatch's statement of July 21, 1939 (84 Cong. Rec. 9672):

"... I inserted another provision which is, in substance, that the prohibition shall not extend to any official of the United States appointed by the President by and with the advice and consent of the Senate, and - mark the conjunction 'and' - who determines policies to be pursued by the Government in the Nation-wide administration of laws or in the relations of this country with foreign countries; a provision designed to make it certain that no policy-making official is included within the prohibition of the bill."

Congressman Michener made the following comments in the House on July 20, 1939:

"Subdivision (4) exempts all officers who are appointed by the President by and with the advice and consent of the Senate and who determine policies to be pursued by the United States in relation to the foreign powers or in a Nation-wide administration of Federal laws. Here is a lot of language, and no one here at the moment is able to contemplate just who will be exempted, but there will certainly be sufficient political supporters of the party in power to make a showing in any campaign or national party convention. This provision will make it possible for Mr. McNutt, the recently appointed head of the Federal Securities Administration, to pursue his own Presidential aspirations or to use his fine Italian hand in behalf of his political party and his chief. . . ." (84 Cong. Rec. 9633)

The memorandum of the Legal Officer of the Civil Service Commission refers specifically to several positions, namely, Associate Director, Bureau of the Budget, White House staff members, chairmen and commissioners of independent commissions and boards, and general counsels, as well as persons appointed under authority of Schedules A, B or C. The memorandum states the Commission's Legal Officer's views as to whether each of the enumerated positions or groups is exempt from the Hatch Act prohibition against political activity.

With regard to the Associate Director, Bureau of the Budget, as to whom the Commission concludes that he is subject to the prohibition, I do not consider that it is appropriate to comment in the absence of sufficient information as to that officer's duties and functions and without a formal request for a ruling. However, you may want to point out to Chairman Young that his Legal Officer may wish to reexamine the conclusion in the light of the general observations made above.

As to the reference to "White House staff members," it seems unnecessary to elaborate on the comments already made upon the exemption relating to "persons whose compensation is paid from the appropriation for the Office of the President."

As to the reference to "Chairmen and Commissioners of independent Commissions and boards," the Commission's Legal Officer makes this comment:

16) "These are excepted when it can be shown that they (1) are appointed by the President, (2) confirmed by the Senate, and (3) determine policies in the Nation-wide administration of a Federal law. The U. S. Civil Service Commissioners themselves are a good example of this exception. Probably most Commissioners and independent board members would fulfill the three requirements of this exception and thus would be excepted from the Hatch Act."

This seems to be a correct appraisal of the application of the Act to this group.

The final reference is to "General Counsels", as to whom the Legal Officer's memorandum states:

17) "I feel that this group is clearly subject to the Hatch Act as none of the exceptions apply. This would also be true in the case of persons appointed under authority of Schedules A, B or C."

As in the case of the "Associate Director, Bureau of the Budget," I do not consider that it is appropriate for us to comment as to persons appointed under authority of Schedules A, B or C, in the absence of specific information and without a formal request for a ruling. As to "General Counsels," however, you may wish to call to the attention of the Commission an informal determination made in 1942 by Newman A. Townsend, as Acting Assistant Solicitor General, that the provisions of the Hatch Act exception (4) applied to the Bituminous Coal Consumers' Counsel. This conclusion was reached in a memorandum for the Attorney General dated February 25, 1942 (12 Unpublished Opinions 623). It cannot be viewed as holding that General Counsels as a group are not subject to the prohibitions against political activities. However, it does indicate that general counsels are excepted whose status comes within the terms of exception (4) of Section 9(a). The opinion states:

"The provision of the Hatch Act prohibiting officers and employees of the Government from taking 'any active part in political management or in political campaigns' is expressly made inapplicable to 'officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States . . . in the Nation-wide administration of Federal laws.' The Bituminous Coal Consumers' Counsel clearly falls within this

excluded class. He is appointed by the President, by and with the advice and consent of the Senate, and is charged with the duty of taking necessary steps to protect the interests of consumers in the entire country under the Bituminous Coal Act" [cites Act Apr. 26, 1937, Ch. 127, 50 Stat. 72; U.S.C., Title 15, secs. 828-851].

The memorandum of the Commission's Legal Officer concludes with the following observation:

"Other 'Executive Branch' speakers could under certain circumstances cause some trouble or embarrassment. If the speaker is assigned by his agency to explain the agency's policy, procedures, aims, etc., he himself would be protected from being charged with a Hatch Act violation. However, Congressional campaigns are now underway and there would be no control over the manner in which the Congressional candidate may utilize the speech as a part of his campaign or campaign material. This, of course, would be picked up and publicized by the opposition. In such case although the speaker as an individual would be protected as it was a direct assignment as a part of his job, the resulting publicity could become very embarrassing to the agency involved and might lead to legitimate criticism that the agency was aiding or interfering with that particular Congressional campaign."

I do not think this requires comment.

Before concluding this memorandum, to avoid any possible misunderstanding, I want to emphasize that the exceptions discussed herein are exceptions solely to the prohibitions of section 9(a) against active participation in "political management or in political campaigns." There are no exceptions to the further prohibition of section 9(a) against the use of "official authority or influence for the purpose of interfering with an election or affecting the result thereof."

J. Lee Rankin
Assistant Attorney General
Office of Legal Counsel