

MAR 23 1977

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Employment of relatives who will serve without compensation

Following our meeting with Bob Lipshutz on March 17, you have asked for my views as to whether 5 U.S.C. § 3110, which prohibits a public official from appointing or employing a relative in a civilian position in an agency over which he has jurisdiction or control, applies in situations in which the relative will serve without compensation.

This question was recently presented to the Office of Legal Counsel in connection with the proposed appointment of Mrs. Carter to be Chairperson of the Commission on Mental Health. After researching the legislative history of the statute, we concluded that the statute applied to uncompensated positions and advised by memorandum dated February 18 against the contemplated appointment of Mrs. Carter.

Subsequently, a question was raised as to whether the President's son could be given office space and support services in the West Wing of the White House in connection with his part-time work for the Democratic National Committee. We orally advised Mr. Lipshutz's office that funds appropriated for the White House Office should not be used for this purpose.

Finally, the Office of Legal Counsel was asked whether there would be any legal objection to the President's son volunteering his time to work as an assistant to a regular member of the White House staff. Mr. Lipshutz's office specifically requested that the Office of Legal Counsel consider the points raised in a letter from the General Counsel of the Civil Service Commission to the Vice President's transition staff on December 29, 1976, which concluded that 5 U.S.C. § 3110 does not prohibit the President or Vice President from appointing relatives to their personal staffs. After re-examining the matter, we concluded that 5 U.S.C. § 3110 does apply to positions on the President's staff.

In this connection, a memorandum prepared by Ed Kneedler of the staff of the Office of Legal Counsel and sent to Mr. Lipshutz on March 15, 1977, noted that the Chairman of the Civil Service Commission informed the Senate Committee during hearings on the nepotism provision in 1967 that had it been in effect, the provision would have prevented President Roosevelt from appointing his son as a civilian aide in the White House. No member of the committee disputed the Chairman on this point. This comment by the head of the agency charged with administering laws relating to Federal employment generally is particularly persuasive on the application of the statute to the President's son here, especially in view of the fact that Congress specifically rejected the Chairman's suggestions to exempt Presidential appointments from the prohibition now contained in 5 U.S.C. § 3110.

Similarly, we concluded that the argument that there would be constitutional difficulties in applying the statute to positions on the President's staff was not substantial. This was in accord with the position taken by the Office of Legal Counsel in a 1972 memorandum, which assumed that the statute applied to the White House staff and found no constitutional infirmity in its doing so.

At your request, I have now re-examined the specific issue of whether the statute applies to uncompensated positions. It is my conclusion that it does. The reasons for my conclusion are discussed in the attached legal memorandum which I recommend that you forward to Bob Lipshutz with the attached cover letter.

John M. Harmon
Acting Assistant Attorney General
Office of Legal Counsel