February 18, 1977

MEMORANDUM FOR DOUGLAS B. HURON
Associate Counsel to the President

Re: Possible appointment of Mrs. Carter as
Chairman of the Commission on Mental Health

You have asked for our opinion on the question whether the President could appoint Mrs. Carter to be Chairman of a Commission on Mental Health proposed to be established in a forthcoming Executive Order. It is our opinion that he may not. The applicable statute is 5 U.S.C. § 3110, subsection (b) which provides:

> A public official may not appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position in the agency in which he is serving or over which he exercises jurisdicition or control any individual who is a relative of the public official.

The definition of the term "public official" in subsection (a)(2) expressly includes the President, and a public official's wife is among those listed in the definition of "relative" in subsection (a)(3). The term "agency" is defined in 5 U.S.C. § 3110(a)(1)(A) to include an "Executive agency" which in turn includes any "establishment" in the Executive Branch. See 5 U.S.C. §§ 104, 105. The comprehensive term "establishment" would clearly cover the Commission on Mental Health, which will be comprised of persons who will be regarded as government employees (section 7) and be authorized, through its Chairman, to conduct hearings and procure independent services pursuant to 5 U.S.C. § 3109 (sections 4 and 7(b)). See also 5 CFR 310.101. Therefore, since the President "exercises jurisdiction or control" over the Commission, his appointments to that "agency" are squarely covered by the terms of 5 U.S.C. § 3110.

Moreover, the legislative history of the statute shows that the prohibition in 5 U.S.C. § 3110(b) applies whether or not the appointee will receive compensation. However, we do not believe that 5 U.S.C. § 3110(b) would prohibit the President from appointing Mrs. Carter to an honorary position related to the Commission if she remained sufficiently removed from the Commission's official functions. Attached hereto is a memorandum discussing in more detail the legal basis for our conclusions.

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

Enclosure

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Acting Assistant Attorney General
Office of Legal Counsel

February 17, 1977

Edwin S. Kneedler
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Office of Legal Counsel

Legality of the President's appointing Mrs. Carter as Chairman of the Commission on Mental Health

The appointment of Mrs. Carter to be Chairman of the Commission on Mental Health proposed to be established by Executive Order would violate 5 U.S.C. § 3110, subsection (b). 1/

1/ In a memorandum to files dated October 15, 1968, former Deputy Assistant Attorney General Richman of this office suggested that 5 U.S.C. § 3110 may not apply to appointments to titled positions by the President, acting under his constitutional duty to appoint "officers of the United States." Art. II, Sec. 2. He based this suggestion on the belief that because of possible constitutional questions in limiting the President's power of appointment and because Congress was no doubt aware that President Kennedy had appointed relatives to high positions, it was unlikely that the provision was intended to reach such appointments without specific mention of this fact in the legislative history. But in fact, the Kennedy appointments were specifically discussed during the Senate hearings on the legislation, and the Chairman of the Civil Service Commission expressed the opinion, with which no member of the Committee disagreed, that the provision would prohibit appointment of a relative to a Cabinet position. Hearings on Federal Pay Legislation before the Senate Committee on Post Office and Civil Service, 90th Cong., 1st Sess. 360, 366 (1967). On the question of legislative intent, then, the 1968 memorandum appears to be wrong. The possible constitutional argument does not seem substantial in the present case.

The only possible argument that the appointment of Mrs. Carter would be lawful might be that the statute does not apply if the appointee will serve without compensation. 2/ The language of the substantive prohibition in 5 U.S.C. § 3110(b) is written in broad terms which on their face attach no significance to the matter of compensation. However, subsection (c) provides:

> An individual appointed, employed, promoted, or advanced in violation of this section is not entitled to pay, and money may not be paid from the Treasury as pay to an individual so appointed, employed, promoted, or advanced.

It might be argued that because the statutory remedy for a violation is to deny the appointee pay, the statute must be regarded as being directed only to those situations where the appointee receives compensation.

In addition there are several instances in the sparse legislative history of the provision where individual Members of Congress spoke of the provision in the context of compensated positions. For example, Representative Smith, who introduced the measure on the House floor as an amendment to a Federal pay bill, stated that a primary place one would find violations was in smaller post offices, where postmasters often refused to hire a permanent clerk unless their wives were on the eligibility list and found other ways to "maneuver to hire their relatives." 113 Cong. Rec. 28659 (Oct. 11, 1967). Other Members of Congress used words such as "hire" and "payroll" when speaking of the prohibition, again suggesting the element of compensation. Id.; 113 Cong. Rec. 37316 (Dec. 15, 1967); Hearings, supra, at 369, 371-72. However, I do not believe that the fact that Congress may have been thinking in terms of compensated services can have the effect of limiting the plainly broader reach of the language of the statute itself absent a clear indication of congressional intent to do so. That indication is lacking here.

2/ Section 7 of the proposed Executive Order provides that the Members of the Commission "may" receive compensation for their services. I assume this would permit Mrs. Carter to serve without compensation.

Indeed, there are several factors which affirmatively suggest that the statute should not be construed to apply only to situations in which the employee will receive compensation. First, the Senate Report on the legislation 3/ describes the present 5 U.S.C. § 3110 in broad terms which contain no suggestion that only compensated positions are covered, except for a reference to 5 U.S.C. § 3110(c), which denies pay to a person appointed in violation of the section. S. Rep. No. 801, 90th Cong., 1st Sess. 29 (1967). The Civil Service Commission's description of the provision in its submission to the Senate Committee, stated that the "amendment permits no exceptions." Hearings, supra, at 387. 4/ See also id. at 359.

Also, one rationale of focusing on compensated positions would apparently be that the statute's purpose is to prevent the public official from realizing any indirect financial benefit in appointing a relative. This purpose makes sense if the employee involved is the public official's spouse, as in the case of the Postmaster's wife mentioned by Representative Smith when he introduced the amendment. But the persons included in the definition of "relative" under the statute include many persons, such as first cousins, nephews, nieces, and others whose compensation would be unlikely to redound to the financial benefit of the appointing official. Thus, the prohibition must have a broader rationale.

3/ The House Report does not discuss the provision involved here because it was added as an amendment on the House floor.

4/ The exceptions later included in the bill following the testimony of the Chairman of the Civil Service Commission only permit "temporary employment, in the event of emergencies resulting from natural disasters or similar unforeseen events or circumstances" and the appointment of veterans who are entitled to a preference in appointments in the civil service, 5 U.S.C. §§ 3110(d) and (e); these obviously would not apply to Mrs. Carter's appointment.

The broader rationale appears to be to prevent the detriment to the government when appointments are based on favoritism -- i.e., familial ties -- rather than merit. For example, Congressman Smith stated:

> This is bad for morale where it is practiced. Many of these relatives, including some on congressional payrolls may do a good job, but the overall interest of the Government is against the practice and those good employees can get a job in some office on their merits rather than using relationship as a leverage. 113 Cong. Rec. 28659.

The Civil Service Commission's submission to the Senate Committee described the provision as a prohibition against favoritism, Hearings, supra, at 387, and the discussion in the course of the hearings focused on favoritism as such and the possible detriment or loss of "efficiency" to the Government when a family member is appointed. Id. at 359, 365-68, 372. Obviously the injury to the Government in terms of the reduced quality of the services it receives is the same whether or not it pays compensation to the employee who is appointed because of familial ties rather than merit. 5/ Therefore, I do not believe that the purposes sought to be furthered by the statute require or even suggest that its plain language should be construed so as not to apply to employees who receive no compensation. I have been informally advised by the Office of the General Counsel at the Civil Service Commission that while the issue has apparently not arisen in the past, the Commission would construe 5 U.S.C. § 3110 to apply even where the employee receives no compensation.

5/ Another possible purpose of the section might be to prevent public officials from rewarding their relatives with appointments; but such a reward could be in the form of the prestige of an appointment as well as compensation.

It has also been suggested that the prohibition may not apply here because the Commission will be funded out of appropriations available to the President under the Executive Office Appropriations Act of 1977 for "Unanticipated Needs," which may be expended for personnel "without regard to any provision of law regulating employment and pay of persons in the Government service." 90 Stat. 968. However, I do not believe that the quoted language makes 5 U.S.C. § 3110 inapplicable.

This language was included in the appropriation for the Executive Office under the heading "Emergency Fund for the President" in the Executive Office Appropriation Act of 1968, 81 Stat. 118 (which was in effect when 5 U.S.C. § 3110 was enacted) and in prior appropriations act as well. Then, as now, the separate appropriations available for the White House Office under the same act contained a virtually identical provision for obtaining personnel services without regard to laws governing employment and pay. 81 Stat. 117; 90 Stat. 966. Although there is no mention in the legislative history of 5 U.S.C. § 3110 of the effect of the appropriations act language, the application of the prohibition in the present 5 U.S.C. § 3110 to appointments by the President was fully discussed in the Senate hearings. In fact, in response to an inquiry from Senator Yarborough, Chairman Macy of the Civil Service Commission stated that had it been in effect, the provision would have prevented President Franklin Roosevelt from appointing his son as a civilian White House aide, as the President apparently had done. Hearings, supra, at 366. Chairman Macy even suggested that the prohibition should be inapplicable to the President in order to maintain his discretion in making appointments. Id. Nevertheless, the Senate Committee chose to amend the House bill expressly to include the President among the "public officials" covered by the bill, and the section was enacted in this form. In view of this legislative history, the language in the appropriation for the White House Office, which merely has been carried forward from prior years, should not be construed to override the express prohibition in 5 U.S.C. § 3110. 6/

6/ By memorandum dated November 14, 1972, Assistant Attorney General Roger Crampton of this office advised the White House that 5 U.S.C. § 3110 does apply to appointments to the White House staff, although the appropriations acts were not considered in the memorandum.

The result should be no different with respect to the almost identical language in the appropriation for "Unanticipated Needs," from which the Commission will be funded.

For the reasons stated, 5 U.S.C. § 3110(b) prohibits the President from appointing Mrs. Carter as Chairman or a member of the proposed Commission.

On the other hand, although the matter is not wholly free from doubt, I do not believe that 5 U.S.C. § 3110 would prohibit Mrs. Carter from holding an essentially honorary position, such as Honorary Chairman, related to the Commission's work. Subsection (b) as enacted prohibits appointments to a "civilian position" in an agency over which the public official has jurisdiction or control. The term "civilian position" appears to have been intended to cover all positions occupied by an "officer" or "employee" of the United States under the civil service laws and to exclude positions in the military. See Hearings, supra, at 363-64, 365.

For purposes of Title 5 of the United States Code, an officer or employee is a person who is (1) appointed in the civil service by an officer or employee; (2) engaged in the performance of a Federal function under authority of law; and (3) subject to the supervision of an officer or employee while engaged in the performance of his duties. 5 U.S.C. §§ 2104 and 2105. Presumably the President's designation of Mrs. Carter as an Honorary Chairman of the Commission would constitute an appointment for purposes of the first of the factors mentioned above. However, it would seem that Mrs. Carter's role as Honorary Chairman could be fashioned in such a manner that she would not necessarily be engaging in a Federal function when she lends her prestige, insights, and support to the Commission's work. 7/ To accomplish the

7/ It could also be argued that as an Honorary Chairman Mrs. Carter would not be subject to the supervision of an officer as contemplated in the third factor mentioned above. This argument is of doubtful validity, however, in view of the President's authority to appoint an Honorary Chairman and establish and direct that person's official duties, however insubstantial they may be.

required detachment from the Commission's Federal function, Mrs. Carter should at least have no formal authority or duties relating to the Commission's work and avoid being the moving force behind its operations -- e.g., in selecting staff, convening meetings, conducting hearings, establishing policy, or formulating recommendations. This would not, however, prohibit Mrs. Carter from attending meetings or hearings (although perhaps she should not do so on a regular basis), submitting her ideas to the Commission for consideration, or offering her support and soliciting support from others for the Commission's work. It is my understanding that First Ladies have in the past assumed this type of advocate's role in connection with Government programs in which they were especially interested, and it would seem to make no difference here that Mrs. Carter may have an honorary title that really only serves to highlight her interest.