MAR 15 1977

MEMORANDUM FOR HONORABLE ROBERT J. LIPSHUTZ
Counsel to the President

Attached is a copy of a memorandum prepared by Ed Knoedler of this Office on the question of the appointment of the President's son to a position on the White House staff. Mr. Knoedler has concluded that such appointment is prohibited by 5 U.S.C. § 3110. I concur in that conclusion.

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

Encl:

cc: Ms. Margaret McKenna
Mr. Douglas Huron

March 15, 1977

Edwin S. Kneedler
Office of Legal Counsel

Appointment of President's Son to Position in the White House Office

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

Margaret McKenna, Deputy Counsel to the President, requested our views on whether the President is prohibited by 5 U.S.C. § 3110 from appointing his son to an unpaid position on the White House staff. It is my conclusion that the statute prohibits the contemplated appointment.

By memorandum dated February 18, 1977, this office advised Doug Huron, Associate Counsel to the President, that this same statute prohibited the President from appointing Mrs. Carter to be Chairperson of the recently established Commission on Mental Health. As Ms. McKenna pointed out to me, a number of the conclusions in our February 18 memorandum are contrary to those expressed by Carl F. Goodman, General Counsel of the Civil Service Commission, in his letter of December 28 to Mr. Michael Berman, Transition Director for the Vice President. I had reviewed Mr. Goodman's letter to Mr. Berman in connection with the proposed appointment of Mrs. Carter. However, at Ms. McKenna's request, I have again considered the points raised by Mr. Goodman to determine whether they should alter the conclusion reached in our February 18 memorandum or permit the appointment of the President's son here. After doing so, I believe that our earlier interpretation was correct.

The Civil Service Commission's letter advances three possible arguments in support of its position that 5 U.S.C. § 3110 can be construed to be inapplicable to appointments to the personal staffs of the President and Vice President. First, the Commission suggests that 5 U.S.C. § 3110 is

inapplicable to the President's and Vice President's staff by virtue of language in the Executive Office Appropriations Act of 1977 permitting the President and Vice President to obtain personal services "without regard to the provisions of law regulating the employment and compensation of persons in the Government services." 90 Stat. 966. We specifically considered and rejected this argument in connection with Mrs. Carter's proposed appointment.

As pointed out at pages 5-6 my memorandum on Mrs. Carter's appointment, which you sent to Doug Huron, Chairman Macy of the Civil Service Commission informed the Senate Committee during hearings on the provision later enacted as 5 U.S.C. § 3110 that had it been in effect, the section would have prevented President Franklin Roosevelt from appointing his son as a civilian White House aide, as President Roosevelt apparently had done. Hearings on Federal Pay Legislation before the Senate Committee on Post Office and Civil Service, 90th Cong., 1st Sess. 366 (1967). No member of the committee present at the hearings disagreed with this conclusion. Chairman Macy even suggested that, as a matter of policy, the prohibition should be made altogether inapplicable to the President in order to preserve broad Presidential discretion in making appointments.

In the face of this suggestion to exempt the President and Chairman Macy's statement that the prohibition would apply to the President's personal staff, the Senate Committee chose to amend the House bill expressly to include the President among the "public officials" covered by the bill (the President was not expressly mentioned in the House version), and the bill was enacted in this form. Because the Senate Hearings contain the only extended discussion of the provision and the only discussion at all of its application to the President, it seems appropriate to attach particular significance to the Civil Service Commission's interpretation of the statute in the course of the hearings. It is reasonable to assume that the Senate Committee and eventually the Congress acted on the basis of Chairman Macy's interpretation of the prohibition as drafted.

The language in the appropriation for the White House Office for fiscal year 1977, permitting the President to obtain personal services "without regard to the provisions of law regulating the employment and compensation of persons in Government service," was also contained in the appropriation for the White House Office for fiscal 1967, the year in which 5 U.S.C. § 3110 was enacted. 81 Stat. 117. It appears to have been carried forward from prior years without comment. There is nothing in the legislative history of 5 U.S.C. § 3110 that sheds any light on the interaction of that section and the language in the White House Office appropriation, quoted above. However, although the question is not wholly free of doubt (in view of the broad language in the appropriation for the White House Office), it is my opinion that the specific prohibition should be construed to be an exception to the general rule that limitations on employment do not apply to the White House Office. As the Supreme Court recently stated, "It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976). Here this rule has even greater force, because although the language in the current White House appropriation is "later enacted," it has simply been carried forward from acts predating the passage of 5 U.S.C. § 3110.

The second argument advanced by the Civil Service Commission is based on the language in 5 U.S.C. § 3110 that prohibits appointments to a civilian position in an "agency" over which the appointing official has control. In the Commission's view, while some components within the Executive Office of the President may properly be viewed as "Executive agencies," the President's personal staff would not. In the face of the evidence of legislative intent, discussed above, to apply the prohibition to the President's personal staff, I do not believe that the term "Executive

agency" may properly be construed in such a narrow fashion. It is not apparent to me why the White House Office or the entire Executive Office of the President cannot be considered to be the appropriate "Executive agency" under 5 U.S.C. § 3110(a)(1). Cf. 5 U.S.C. § 552(e) (1975 Supp.).

Finally, the Civil Service Commission suggests that there might be serious constitutional questions involved in interpreting the statute to apply to appointments to the President or Vice President's staff. I believe this argument is of dubious validity. The cases the Commission cites in support of the proposition deal with the power of a court to conduct a post hoc examination of the motives behind a specific appointment made by a State official in whom the discretionary power of appointment is vested. Mayor v. Educational Equality League, 415 U.S. 605, 613-14 (1974); Jones v. Wallace, 386 F. Supp. 815 (M.D. Ala. 1974), aff'd 533 F.2d 963 (5th Cir. 1973). Neither case addresses the power of the Legislative Branch of the Federal Government to establish the qualifications necessary to hold a position in the Federal Government, which is the purpose of 5 U.S.C. § 3110. The political and practical difficulties and potential for embarrassment to a coordinate branch inhering inna court's second-guessing of a specific appointment by an elected official are obvious. But these same problems do not exist in Congress' establishing the threshhold qualifications of the persons from whom the President may select in making a particular appointment. This is especially true where, as here, the effect of the qualification requirement is to eliminate only a handful of persons from the pool of possible appointees.

It is generally thought that Congress does not impermissibly invade the President's constitutional power of appointment by establishing qualifications for an office or position to which the President makes appointments. E. Corwin, The President, Office and Powers, 1787-1957 (1957), at pp. 74-75. I see no reason why the limitation in 5 U.S.C. § 3110 should stand on a different footing. In fact, in a memorandum dated November 14, 1972, from Assistant Attorney

General Roger C. Cramton to John Dean, Counsel to the President (copy attached), this office took the position that 5 U.S.C. § 3110 prohibited the President from appointing a relative to a temporary or permanent position on the White House staff. The memorandum noted that whatever the constitutional difficulties in applying the statute when the President exercises his authority under Article II, Section 2 of the Constitution to appoint "officers of the United States" -- such as Cabinet or other high-level officials --, the statute seemed clearly to apply to subordinate positions on the White House staff, which fall within the category of inferior officers or employees subject to congressional control.

For the foregoing reasons, it is my conclusion that 5 U.S.C. § 3110 prohibits the President from appointing his son to a White House staff position. As pointed out in our memorandum of February 18 regarding Mrs. Carter, it makes no difference that he would serve without compensation.