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THE NEW YORK TIMES
Thursday, September 18, 1986
op ed page

ESSAY | William Safire

Moon of My Delight

WASHINGTON

A pop is occasionally taken in this space at parasitic nepotism. That is a virulent strain of favoritism in which spouses, siblings or offspring of the powerful or celebrated reap undeserved profits from their exploitation of closeness to famous names who wish only they would shut up.

Billy Carter was the classic case. The flirtation of "First Brother" with oil interests linked to Libya's Colonel Qaddafi, even more than his willing commercialization of the family name, was a source of profound embarrassment to his brother, the President.

Not that such fraternal difficulty was unique to the Carters: Sam Houston Johnson caused eyes to roll in the Great Society, and the partisan blasts at Donald Nixon's "Hughes loan" resulted in the assignment of a crack lawyer, Jack Wells, to keep the deal-prone older brother totally inaccessible in the 1960 campaign.

Nor is the Sign of the Nepot — an extended palm on a blotted escutcheon — native to America. In South Korea today, an investigation churned up by the doings of a U.S. cigarette company and its famous lobbyist threatens to focus on the brother of President Chun Doo Hwan.

America in the 80's, however, has become resigned to the advantage relatives take of people in power. Indeed, celebrity-hungry media often put the heat on family members to spill all for megabucks (formerly "big dough"), and real estate tycoons seek to hire the innocent children of public officials, fresh from their first jobs out of law school, retaining them at big fees to gain influence.

Under this onslaught of predatory relations, whipsawed by ethicists within the sensation-seeking media, what's a politician to do?

New York Governor Mario Cuomo, for one, has decided to keep his cool. Needled here for getting his domestic policy from blood relatives only, he replies: "Please be assured that while my blood relatives are helpful to me — especially Momma who helped run a successful grocery store for years without ever being accused of a conflict of interest — I get help from many other sources."

Fair enough; but what of all those in political life less confident of their value systems, and slightly less trustful of Momma? Where are the rules?

Rules for relatives of the powerful

You have come to the right place. I have closets loaded with ethical rules.

1. *It is right, praiseworthy and in the highest tradition of American politics to exploit your famous family's name in gaining political office.* John Quincy Adams, Benjamin Harrison, the Roosevelts — all were members of dynasties, and everybody should stop feeling guilty. A hearty welcome to the next generation of Kennedys to Congress.

2. *It is wrong, blameworthy and deserving of the shudders of repugnancy for anybody to cash in by appearing in a TV do-you-know-me? commercial purely on the basis of relationship to a political figure.* Selling somebody else's name is not up to the level of picking pockets, which at least requires manual dexterity.

3. *Writing a book about your famous relative is right or wrong depending on how much work you put into it.* A ghosted book — more "as sold to" than "as told to" — is a tawdry thing, but a roman à clef really written by a Presidential daughter, even if sold on the association with celebrity, is within the ethical pale.

In this regard, a relative can sometimes enhance the family name as well as contribute to the public good. "Eisenhower: at War," by his grandson, David Eisenhower, this week received a rave front-page review for its "illuminating perspective" from the historian Arthur Schlesinger Jr. Later this fall, Julie Nixon Eisenhower's "Pat Nixon: The Untold Story," a poignant and passionate triumph of personal history (and if that's a blurb, make the most of it) will go right to the top of the best-seller list.

4. *A pristine place of honor in ethical heaven is set aside for siblings who help Presidents get their start and then don't lean on them.*

The best example of this is Neil (Moon) Reagan, 77, who lives in Rancho Santa Fe in California, plugs no products, represents no foreign governments and throws no weight around. As an ad man two decades ago, he persuaded a client to hire his unemployed kid brother to be host of "Death Valley Days," and has never demanded an embassy in return.

Moon Reagan makes the papers only when his medical history reassures us about his brother. Moon, too, had intestinal polyps removed, and it did not stop him, and his head of thick, real, undyed hair stands on end as testimony to the hirsute credibility of the President of the United States.

I doff my cap (gift of a publicity-craving pol) to this ethical hero. □

Office of Legal Counsel

Jan. 26, 1981

TO: John Bolton
Office of the Counsel to
the President

FROM: Herman Marcuse
Attorney-Advisor
Office of Legal Counsel

RE: Nepotism

Pursuant to your request, I am sending you copies of the following memoranda: Oct. 15, 1968; Jan. 25, 1971; April 11, 1972; April 21, 1972; July 17, 1972; Aug. 28, 1972; Nov. 14, 1972; March 15, 1974; Feb. 18, 1977; March 15, 1977; Aug. 25, 1977.

MFR:agg

cc: Dep. Atty. Gen.
Mr. Lindenbaum
Mr. Richman
Mr. Susman
Mrs. Copeland

The Files

Martin F. Richman
Deputy Assistant Attorney General
Office of Legal Counsel

OCT 15 1968

Restriction on employment of relatives; effect on Presidential appointment

Under 5 U.S.C. 3110, added by section 221 of the Postal Revenue and Federal Salary Act of 1967, P.L. 90-206, 81 Stat. 640, no federal official (expressly including the President) may appoint or employ any of a broadly defined class of relatives in a "civilian position" in the agency in which the appointing official is serving "or over which he exercises jurisdiction or control." A question has been raised as to whether this new statute would bar the President from appointing an individual defined therein as a relative to an unpaid position as a member of the governing Board of one of the constituent units of the Smithsonian Institution.

The provision was a minor part of the extensive postal rate and salary revisions enacted in P.L. 90-206, hence there is very little explanatory legislative history. It was introduced as a floor amendment by Representative Smith of Iowa and adopted after a brief explanation. See 113 Cong. Rec. H13264 (daily ed., October 11, 1967). At that time the provision did not expressly refer to the President.

When the bill went to the Senate, the committee reported out this provision in new language conforming it to the terminology of codified Title 5 of the U.S. Code. See S. Rept. 801, 90th Cong., 1st Sess., p. 28. The redrafted provision added a parenthetical inclusion of the President and Members of Congress in the definition of officials covered by the prohibition. The Senate version was adopted by the conference committee, but the conference report has no further explanation helpful on the point at issue. See H. Rept. 1013, 90th Cong., 1st Sess. Upon final passage in the Senate, Senator Randolph

commented that he had caused the reference to the President to be added to show the bill applies equally throughout the Government. See 113 Cong. Rec. S18421 (daily ed., December 12, 1967). However, neither his statement or the original explanation by Mr. Smith, nor either committee report, describes the bill except in terms of clerical and other conventional employment in the Government.

There is no suggestion that it was intended to deal with the rather special situation of appointment to titled positions by the President, with or without Senate confirmation, acting under his constitutional authority to appoint "officers of the United States." Art. II, Sec. 2. In view of the familiarity of the Congress with the actions of President Kennedy in appointing relatives to high positions, and since an attempt by the Congress to limit the President's discretion in exercising his appointive power would raise constitutional questions, it seems unlikely that this provision would have been intended to reach appointments of this level without some comment to that effect having been made in the course of its enactment. 1/

The foregoing analysis is reinforced with respect to the type of position about which inquiry was made. The members of a governing Board of this type serve intermittently, and either without compensation or with a nominal per diem. Thus, they are not on the Federal "payroll" in any realistic sense.

More fundamentally, such a governing Board has by statute the powers and obligations of a trustee (with statutory powers to receive and administer property contributed from private sources as well as appropriated funds), and in other respects it appears to be largely independent

1/ It may be noted in this connection that the new section 3110 was enacted to be added at the end of chapter 31 of codified Title 5, which contains provisions dealing with miscellaneous types of employees, none of whom are presidential appointees or would be considered "officers of the United States."

of Executive control. Thus, it may not be an agency over which the President "exercises jurisdiction or control" in terms of the new provision, even though he initially appoints the members. Moreover, if the "agency" referred to in the provision were deemed to be the Smithsonian Institution as a whole, the case against the existence of "jurisdiction or control" is even stronger. The Board of Regents of the Smithsonian is composed of the Vice President, the Chief Justice, six members of Congress, and six other persons appointed by joint resolution of the Congress. 20 U.S.C. 42-43. 2/

Accordingly, I concluded that an appointment of this type is not barred by the new statute. I discussed the matter with Carl Ruediger of the Office of the General Counsel of the Civil Service Commission (except for the Smithsonian aspect, of which I was not then informed), who had little further light to shed on the meaning or history of the statute. He informed me that the Commission's regulations issued under it, insofar as the coverage of positions is concerned, merely paraphrase the law. See 33 F.R. No. 172 (Sept. 4, 1968), Part II, which includes a new Part 310 for 5 CFR. He suggested that the phrase "civilian position" might be contrasted with the phrase "office or employment" used in some other places in codified Title 5 where the intent is to cover officers as well as employees, but since the terminology of Title 5 is not fully consistent in this respect, I did not attempt to collect examples in support of this point.

2/ Indeed, it is not even clear to me that the Smithsonian Institution is in the Executive Branch. If not, it may not be an "agency" within the definition of subsection (a)(1) of this provision. Cf. 5 U.S.C. 105 and 104. However, I did not follow up on this question.

LU:HM:rsn

JAN 25 1971

cc: Files
Copeland
Ulman
Marcuse

MEMORANDUM FOR THE HONORABLE JOHN W. DEAN III
Counsel to the President

Cut by messenger 1/25 @ 11:45 am

This will confirm the oral advice which I gave you on January 22 to the effect that we are not aware of any legal obstacle to the appointment of a relative of the President to a position in a proposed organization to be funded jointly by the Ford Foundation and the National Science Foundation. As we understand it, the organization will study environmental problems and will have no connection with the Federal government other than as recipient of governmental funds through the National Science Foundation.

The only possibly pertinent provision of which I am aware is 5 U.S.C. (Supp. V) 3110, pursuant to which an official may not appoint or advocate the appointment of a relative in an agency in which he is serving or over which he exercises jurisdiction or control. The proposed organization, however, would appear not to be within any of the three branches of the Federal government or the District of Columbia, and, hence, not an "agency" as defined in 5 U.S.C. 3110.

For your information I am attaching a copy of a memorandum previously prepared in this Office which discusses the legislative history of 5 U.S.C. 3110.

Leon Ulman
Deputy Assistant Attorney General
Office of Legal Counsel

MCL:NS:vd

cc: Files
Mrs. Gauf
Mr. Siegel

APR 11 1972

Harlington Wood
Associate Deputy Attorney General

Mary C. Lawton
Deputy Assistant Attorney General
Office of Legal Counsel

Request for Legal Interpretation of Employment of Relatives Provision

This is in response to your memorandum of March 30, 1972, as to whether 5 U.S.C. 3110 precludes the Assistant Attorney General of the Civil Rights Division from recommending promotion of his wife, Miss H. Monica Gallagher, to the position of a Supervisory Attorney GS-15. You also raise the question whether her prior promotions may be in violation of 5 U.S.C. 3110 and the Federal Personnel Manual, Chapter 310.

A decision of the Comptroller General*, B 163686, of May 13, 1968, construing 5 U.S.C. 3110, bars Miss Gallagher's promotion to Grade GS-15 upon recommendation of her husband. The Civil Service Commission has followed this decision. For reasons to be discussed, since the Comptroller General's interpretation is a permissible one, and the matter is primarily within the jurisdiction of the Civil Service Commission, we feel that the Department of Justice should abide by it until it is reversed or overruled. We conclude, on the basis of available information, that Miss Gallagher's prior promotions are not in violation of 5 U.S.C. 3110.

Miss Gallagher was appointed to a position in the Department of Justice under the Honor Law Graduate Program on September 1, 1966, as a Legal Assistant GS-9. As a result of various promotions she now holds the rating of Supervisory Trial Attorney GS-14. Subsequent to her appointment in 1966,

* 47 Comp. Gen. 636, 638.

Miss Gallagher married Mr. Norman. We understand that her prior promotions, including her promotion to GS-14, effective March 21, 1971, occurred while she was serving in sections over which Mr. Norman (who was not then Assistant Attorney General) exercised no jurisdiction or control; and that recommendations for her prior promotions came from persons other than Mr. Norman. Although the request for Miss Gallagher's promotion to Grade GS-15 is signed by Mr. William O'Connor, Deputy Assistant Attorney General, Civil Rights Division, for Mr. Norman, we treat this matter as if Mr. Norman himself has made the recommendation for Miss Gallagher's promotion.

5 U.S.C. 3110 was intended to prohibit nepotism in the Federal service. It provides in subsections (b) and (c), as follows:

> "(b) 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 jurisdiction or control any individual who is a relative of the public official. An individual may not be appointed, employed, promoted, or advanced in or to a civilian position in an agency if such appointment has been advocated by a public official, serving in or exercising jurisdiction or control over the agency, who is a relative of the individual.
>
> (c) 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, promoted, or advanced."

A "public official" is defined to include an employee in whom is vested the authority "to appoint, employ, promote, or advance individuals, or to recommend individuals for . . . promotion . . . in connection with employment in an agency."

5 U.S.C. 3110(a)(2). "Relative" is defined to mean, among other things, a "wife". 5 U.S.C. 3110(a)(3). The effective date of the Act is December 16, 1967.

The Act also contains a savings clause, to reflect the congressional intention that the prohibition in 5 U.S.C. 3110(b) shall operate prospectively only. Section 221(c) of Public Law 90-236 (in which 5 U.S.C. 3110 is embodied), provides that the amendments made by "this section [now 5 U.S.C. 3110] do not apply to an appointment . . . or promotion made or advocated by a public official of any individual who is a relative of the public official if, prior to the effective date of this section, the individual was appointed by the public official, or received an appointment by the public official, and is serving under the appointment on such effective date." (Underscoring added.) See note following 5 U.S.C. 3110.

The savings clause is open to two possible interpretations. One is based on the use of the different articles prior to the word "public official", underscored above. Under that interpretation, the savings clause would not apply to all relatives employed when the law became effective on December 16, 1967. It would apply only in a situation in which a public official, after December 15, 1967, undertook to promote a relative whom he himself had appointed prior to December 16, 1967, or whose appointment he had recommended prior to that date. This is the construction which was given to the savings clause by the Civil Service Commission (Federal Personnel Manual 310-9, added July 1969). It is in accord with the conclusion reached without elaboration in a Comptroller General's opinion (B 163686, May 13, 1968), supra.

The other possible interpretation of 5 U.S.C. 3110(b) is that the terms "a public official" and "the public official" were used interchangeably in the savings clause and therefore no significance should be attached to the different articles; and that both terms merely relate back to the definition of "public official" in 5 U.S.C. 3110(a)(2) and to the use of

the term "a public official" in the prohibition clause of 5 U.S.C. 3110(b). Upon that basis, an employee employed by a non-relative public official prior to the effective date of the Act, would not thereafter be frozen in her job and deprived of promotion, however merited, merely because she happened to be married or otherwise related to the public official in a position to promote her at a later date.

Under the Comptroller General's interpretation of the savings clause, if Mr. Norman had appointed Miss Gallagher in 1966, he could now promote her, but since she was appointed by someone other than Mr. Norman, her promotion now is forbidden. It is not at all clear that Congress intended such a result. The Report of the Senate Post Office and Civil Service Committee (S. Rept. 801, 90th Cong., 1st Sess. 1967, p. 28) states that "a saving provision is included which will permit the continued employment of a relative appointed by a public official prior to the effective date of the provision, and to make clear that the subsequent promotion or advancement of such an individual would not be prohibited so long as he continued to serve." (Underscoring added.)

It may be noted that the Senate Committee's Report lays no stress whatever on the article "a" or "the". It speaks of the situation broadly as to allow an employee who was appointed prior to the effective date of the Act to qualify for the subsequent promotion so long as he was still serving under the original appointment. Nor is there any condition laid down in the Senate Committee's report that the official responsible for the promotion must also be the same official who made the original appointment. On the other hand, the Committee's Report in this regard is not by any means conclusive nor does it expressly preclude the opinion of the Comptroller General or the interpretation of the Act by the Civil Service Commission.

If this were a case of first impression in which the Department of Justice had primary jurisdiction, it might warrant a more liberal interpretation of the savings clause than has been given it. However, the matter is one essentially for the jurisdiction of the Civil Service Commission which follows the Comptroller General's opinion on this question.

While we may have differed from the Comptroller General's opinion if asked to interpret the statute in the first instance, the Department is not at liberty to disregard it, particularly where, as we are advised, the office of the Civil Service Commission in charge of administering the provision is of the view that it is correct and fulfills the aims of the Act.

As a practical matter, moreover, in view of the prohibition against payment for an unauthorized promotion (5 U.S.C. 3110 (c)), and the explicit caveat in the Federal Personnel Manual (Chapter 310-9) against such payment, it is most unlikely that an authorized officer of the Department would wish to certify payments required by approval of the promotion.

Accordingly, we do not believe that the Department has any alternative but to follow the Federal Personnel Manual and the Comptroller General's decision.

As to your second question, since Mr. Norman apparently had nothing whatever to do with Miss Gallagher's past promotions or any responsibility for them, we do not think those promotions violate 5 U.S.C. 3110.

Miss Gallagher's personnel folder is returned herewith.

Enclosure

Mr. Ralph E. Erickson
Assistant Attorney General
Office of Legal Counsel

March 30, 1972

Harlington Wood
Associate Deputy Attorney General

Request for Legal Interpretation:
Employment of Relatives

Miss H. Monica Gallagher was appointed in the Department of Justice, Civil Rights Division, under the Honor Law Graduate program on September 1, 1966, as a Legal Assistant GS-954-9. She has subsequently progressed within the Civil Rights Division to her current rating of Supervisory Trial Attorney GS-905-14.

There is now pending a request by the Civil Rights Division, signed by Mr. William O'Connor, Deputy Assistant Attorney General, Civil Rights Division, for Mr. David Norman, Assistant Attorney General, Civil Rights Division, to promote Miss Gallagher to a Supervisory Attorney GS-15. (Recommendation and Miss Gallagher's Official Personnel Folder attached)

It has come to my attention that subsequent to her appointment in 1966, Miss Gallagher married Mr. David Norman, who has served in several supervisory positions within the Civil Rights Division from the date of Miss Gallagher's appointment to present, and is now serving as the Assistant Attorney General.

Because of Mr. Norman's position and his relationship to Miss Gallagher, it appears that this current promotion request and possibly other prior promotions may be in violation of Section 3110 of Title 5 and the Federal Personnel Manual, Chapter 310.

I request your legal interpretation of this matter.

REE:NS:vd

cc: Files
Harlington Wood-DAG
William O'Connor
Civil Rights Div.
Mrs. Gauf
Mr. Siegel

APR 2 6 1972

Outto Staats 4/24/72
To Harlington Wood 4/21/72

Honorable Elmer B. Staats
Comptroller General of
the United States
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Staats:

The Department of Justice requests your reconsideration and clarification of a decision of the Comptroller General, B 163686 of May 13, 1968 (47 Comp.Gen. 638), construing 5 U.S.C. 3110, as that decision may relate to a proposed promotion of an attorney in the Department of Justice under facts to be discussed.

Miss H. Monica Gallagher was appointed to a position in the Department of Justice under the Honor Law Graduate Program on September 1, 1966, as a Legal Assistant GS-9. As a result of various promotions she now holds the rating of Supervisory Trial Attorney GS-14 and is serving as Deputy Chief of the Criminal Section, Civil Rights Division, a position normally classed as GS-15. On December 23, 1968, while serving as a trial attorney in the Eastern Section, Civil Rights Division, Miss Gallagher married Mr. David L. Norman. At that time Mr. Norman was Director of Planning and Coordination in the Civil Rights Division. He is presently Assistant Attorney General in charge of the Civil Rights Division.

Miss Gallagher's prior promotions, including her promotion to GS-14, effective March 21, 1971, occurred while she was serving in sections over which Mr. Norman then exercised

no direct responsibility. Recommendations for all of her prior promotions came from persons other than Mr. Norman.

The recommendation for the promotion under consideration here was originated by Mr. William O'Connor, Deputy Assistant Attorney General, Civil Rights Division, to whom Mr. Norman has delegated all responsibility for supervision of the Criminal Section and its personnel.

5 U.S.C. 3110 was intended to prohibit nepotism in the Federal service. It provides in subsection (b) and (c), as follows:

> "(b) 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 jurisdiction or control any individual who is a relative of the public official. An individual may not be appointed, employed, promoted, or advanced in or to a civilian position in an agency if such appointment, employment, promotion, or advancement has been advocated by a public official, serving in or exercising jurisdiction or control over the agency, who is a relative of the individual.
>
> (c) 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."

A "public official" is defined by 5 U.S.C. 3110(a)(2) to include an employee in whom is vested the authority by law, rule or regulation "to appoint, employ, promote, or advance individuals, or to recommend individuals for . . . promotion . . . in connection with employment in an agency."

This provision, which became effective December 16, 1967, contained a savings clause. Section 221(c) of Public Law 90-206 (5 U.S.C. 3110 note) provides:

> "The amendments made by this section do not apply to an appointment, employment, advancement, or promotion made or advocated by a public official of any individual who is a relative of the public official if, prior to the effective date of this section, the individual was appointed by the public official, or received an appointment advocated by the public official, and is serving under the appointment on such effective date."

Your opinion of May 13, 1968, construed the savings clause upon the request of the Postmaster General, who asked whether your office would object if:

> "The Department permits public officials to promote, etc., relatives who had received appointments prior to December 16, 1967, and who were performing duty on December 16, 1967, even though the public officials had not themselves appointed their relatives."

Your office answered this question, without discussion of the Act or its legislative history, as follows:

> "However, contrary to the position stated in your Department's letter, our opinion is that by its express terms section 221(c) creates an exception to the restriction only in a situation in which a public official, after December 15, 1967, undertakes to appoint, employ, advance or promote a relative or recommend a relative for appointment, employment, advancement or promotion whom he, himself, had appointed prior to December 16, 1967." (Underscoring added.)

That decision has been followed by the Civil Service Commission. Under the decision, as adhered to by the Commission, the savings clause does not apply to all relatives employed when the law became effective on December 16, 1967. It would apply only in a situation in which a public official, after December 15, 1967, undertook to promote a relative whom he himself had appointed prior to December 16, or whose appointment he had recommended prior to that date.

This is, to be sure, one permissible interpretation of the Act. However, the Department of Justice is of the view that there is another equally permissible interpretation of the Act which not only fulfills its objectives, but also does not lead to unduly harsh or inequitable results.

As the Department interprets 5 U.S.C. 3110, read together with the savings clause, Congress used the terms "a public official" and "the public official" interchangeably in the savings clause and therefore no significance should be attached to the different articles. Both terms merely relate back to the definition of "public official" in 5 U.S.C. 3110(a)(2) and to the use of the term "a public official" in the prohibition clause of 5 U.S.C. 3110(b). Upon that basis, an employee employed by a non-relative public official prior to the effective date of the Act, would not thereafter be frozen in her job and deprived of promotion, however merited, merely because she happened to be married or otherwise related to the public official who, because of his own promotions, came into a position to promote her at a later date.

Under the interpretation of the savings clause advanced in your May 13, 1968, opinion, if Mr. Norman had appointed Miss Gallagher in 1966, he could now promote her, but since she was appointed by someone other than Mr. Norman, her promotion now is forbidden. It is not at all clear that Congress intended such an anomalous result which, in effect, prefers appointments made by relatives to those made by other parties. Rather, it seems to us that the savings clause was intended to apply to persons appointed prior to the effective

date of the Act, saving their right to promotion on the merits thereafter without regard to who made the original appointment. This view finds support in the legislative history. The Report of the Senate Post Office and Civil Service Committee (S. Rept. 801, 90th Cong., 1st Sess. 1967, p. 28) states that "a saving provision is included which will permit the continued employment of a relative appointed by a public official prior to the effective date of the provision, and to make clear that the subsequent promotion or advancement of such an individual would not be prohibited so long as he continued to serve." (Underscoring added.)

It may be noted that the Senate Committee's Report lays no stress whatever on the article "a" or "the". It speaks of the situation broadly as to allow an employee who was appointed prior to the effective date of the Act to qualify for the subsequent promotion so long as he was still serving under the original appointment. Nor is there any condition laid down in the Senate Committee's report that the official responsible for the promotion must also be the same official who made the original appointment. Upon this construction of the Act, the objective of eliminating nepotism in the Government, prospectively, is achieved, as we think that the Act intends. At the same time, full effect is given to the savings clause of the Act so that it does not operate retroactively, unfairly or oppressively on persons who were already employed by the Government when the Act became effective. The Department is of the view that such an interpretation is consistent with the intention of the savings clause, and that this interpretation is less vulnerable to judicial challenge.

Your early consideration and advice in the matter would be appreciated.

Sincerely,

Richard G. Kleindienst
Acting Attorney General

MCL:gg

cc: Files
Mr. Erickson
Mrs. Gauf
Miss Lawton

To Dep. AG 7/17/72

Miss H. Monica Gallagher
Deputy Chief, Criminal Section
Civil Rights Division

Dear Miss Gallagher:

Having considered the grievance filed by you with respect to the cancellation of your promotion to GS-15, I regretfully advise you that I am unable to take the corrective action of reinstating the promotion to GS-15.

As you have already been advised, the original promotion was cancelled because it was found to be in violation of 5 U.S.C. 3110, as interpreted by the Comptroller General (47 Comp. Gen. 636) and the Civil Service Commission (Federal Personnel Manual 310-9). Following the cancellation, this Department requested the Comptroller General to reconsider his interpretation in light of contrary arguments which this Department considered persuasive and of the facts in your case. The Comptroller General responded on July 10, 1972 (B-163686) reaffirming his earlier interpretation of the law. Since the Comptroller General's interpretation is followed by the Civil Service Commission with respect to 5 U.S.C. 3110 and since this Department must follow applicable Civil Service Regulations on personnel actions, I cannot take the corrective action you seek.

I want you to know that I recognize the inequity which results in this case. Your outstanding performance and record of service in the Civil Rights Division certainly

merit this promotion, particularly since you are already performing the duties of a position normally classified as GS-15. I deeply regret that this legal obstacle prevents your promotion.

Sincerely,

Ralph E. Erickson
Deputy Attorney General

MCL:rmd

cc: Miss Lawton
Mrs. Gauf
File

AUG 28 1972

out 8/28

Miss H. Monica Gallagher
611 G Street, S. W.
Washington, D. C. 20024

Dear Miss Gallagher:

This is in response to your letter of August 16, 1972 presenting a formal grievance with respect to the cancellation of your promotion to GS-15. I have reviewed the facts and the legal arguments contained in your memorandum of June 23, 1972 and, while I regret it, I must advise you that I conclude your promotion was properly cancelled in light of the provisions of 5 U.S.C. 3110.

I am fully satisfied that Mr. Norman had no personal involvement in recommending your promotion. Knowing him, I would be sure of that even without reference to Mr. O'Connor's affidavit. However, the question is whether the recommendation of your promotion must be considered as a matter of law as coming from Mr. Norman.

As you point out, there is no statute, rule or regulation pertaining to this Department which specifies that recommendations for attorney promotions shall be made by the Assistant Attorney General in charge of the appropriate Division. Nevertheless, this has long been the practice, and it is clearly authorized. Our regulations specify that the Deputy Attorney General is authorized to take final action on attorney personnel matters (28 C.F.R. § 0.135), thus recognizing that preliminary action may originate elsewhere. The regulations also provide that

each Assistant Attorney General, as head of an organizational unit, shall

> "Direct and supervise the personnel, administration, and operation of the office, division, bureau, or board of which he is in charge." 28 C.F.R. § 0.130(a).

I understand these duties to encompass the recommendation of personnel changes, including promotion.

Each Assistant Attorney General may delegate some responsibilities and designate a Deputy to perform others. But when a Deputy performs the functions of an Assistant Attorney General, he acts "in [the Assistant Attorney General's] stead." 28 C.F.R. § 0.133. Thus, when Mr. O'Connor recommended your promotion, he was acting in Mr. Norman's stead, as the signature on the recommendation recognizes.

While there may be other circumstance in which this agency theory does not apply, I think it must be applied with respect to the impact of 5 U.S.C. 3110 on promotion recommendations. The nepotism provision is designed to prevent favoritism in federal employment and promotion. Our own standards of conduct enjoin Department employees to "Avoid any action which might result in or <u>create the appearance of</u> --- *** Giving preferential treatment to any person." 28 C.F.R. § 45.735 - 2(c)(2). If we were to construe the nepotism provision narrowly to exclude situations where a subordinate, rather than the relative himself, recommends promotion, we would risk the appearance of preferential treatment.

While Mr. O'Connor would not recommend promotion solely to please Mr. Norman, and Mr. Norman would not tolerate such favoritism, it must be remembered that any construction of the statute in this matter constitutes a precedent. There may be some subordinates who would favor a relative of their superior as a means of currying favor. I think we must construe the statute broadly enough to foreclose that possibility.

With respect to the question you raised as to whether Mr. Norman is a "public official" within the meaning of 5 U.S.C. 3110, I conclude that he is. He has been vested with authority under 28 C.F.R. § 0.130 to supervise personnel and administration in his Division and, as indicated above, this includes authority to recommend promotion of personnel in the Civil Rights Division. Thus, he is vested with authority to recommend individuals for promotion within the meaning of 5 U.S.C. 3110.

I hope you understand that my conclusion that your promotion was barred by 5 U.S.C. 3110 does not in any way reflect personally on you or on Mr. Norman. The record of service to this Department of both of you is truly outstanding, and it is most unfortunate that the law operates to deny you a promotion well-deserved.

Best of luck in your new teaching career.

Sincerely,

Richard G. Kleindienst

Richard G. Kleindienst
Attorney General

November 14, 1972

MEMORANDUM FOR THE HONORABLE JOHN W. DEAN, III
Counsel to the President

Re: Applicability to President of Restriction on Employment of Relatives.

Under 5 U.S.C. 3110, no federal official (expressly including the President) may appoint or employ any of a broadly defined class of relatives in a "civilian position" in the agency in which the appointing official is serving "or over which he exercises jurisdiction of control." A question has been raised as to whether this 1967 enactment would bar the President from appointing an individual therein defined as a relative to permanent or temporary employment as a member of the White House staff.

The legislative history of 5 U.S.C. 3110, which is discussed in more detail in the memorandum of October 15, 1968, which is enclosed, does not contain a detailed discussion of the applicability of this provision to the Office of the President. It is arguable that the section is an unconstitutional restriction on the President's appointive authority, especially if construed to limit his discretion in appointing members of his Cabinet or other high officials, acting under his constitutional authority to appoint "officers of the United States" with or without Senate confirmation. Article II, section 2. The language of 5 U.S.C. 3110, however, extends to any appointment to a "civilian position" over which the President exercises jurisdiction or control. Whatever its constitutionality may be as applied to an appointment by the President of a relative

Ltr 8/28/72 to Monica Gallagher
Memo 4/11/72 to Harrington Wood
Memo 3/30/72 to Erickson
Memo 1/25/71 to John Dean
Memo 10/15/68 to Files from A.E.

to a Cabinet or other high-level position, it seems clearly applicable to subordinate positions on the White House staff, which fall within the category of "inferior officers" subject to Congressional control.

I am enclosing several memoranda which the Office of Legal Counsel has prepared on this subject. If I can be of further assistance, please let me know.

Roger C. Cramton
Assistant Attorney General
Office of Legal Counsel

MCL:gg

cc: Files
Mrs. Gauf
Miss Lawton

Mr. Jack Rottman, Chief
Personnel Section
Office of Legal Administration

MAR 15 1974

out 3/15/74

Mary C. Lawton
Deputy Assistant Attorney General
Office of Legal Counsel

Application of 5 U.S.C. 3110 to promotion of Judith O'Connor

I have reviewed the papers concerning the promotion of Judith O'Connor and concluded that the fact that her husband is a Deputy Assistant Attorney General in the Civil Rights Division does not bar her promotion under 5 U.S.C. 3110. The papers indicate rather clearly that the promotion is being recommended by the Executive Officer of the Civil Rights Division, upon delegation of authority from the Assistant Attorney General. Mr. O'Connor does not have the legal responsibility for the recommendation, nor has he in fact participated in it. Thus, the plain language of the statute does not apply.

This is not to say that we are happy with the situation. As a matter of appearances it would be preferable if Mrs. O'Connor were transferred to another Division with which her husband was not connected.

JMH:EK:rmd

cc: Harmon
Kneedler
Gauf
File

February 18, 1977

Out 2-18-77
@ 10:30am

MEMORANDUM FOR DOUGLAS B. HURCH
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

ESK:bb

cc: Files
Gauf
Kneedler

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

February 17, 1977

Edwin S. Kneedler
Attorney-Adviser
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. C rter 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

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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.

UNITED STATES GOVERNMENT

memorandum

DATE: March 15, 1977

REPLY TO ATTN OF: Edwin S. Kneedler
Office of Legal Counsel

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

TO: 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 in a 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.

JMH:MOE:bow

cc: File
Gauf ✓
Eastwood

AUG 25 1977

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

Marriage of Department employees--nepotism restrictions

Michael J. Egan
Associate Attorney General

We have reviewed the July 14, 1977, memorandum from James P. Turner, Deputy Assistant Attorney General, Civil Rights Division, and Anita J. Stephens, Research Analyst, Civil Rights Division, concerning their marriage. We agree that their present assignments in the Civil Rights Division, as outlined in the memorandum, do not present a conflict or violate nepotism laws or regulations.

Section 3110 of Title 5, United States Code, provides that a public official may not appoint or promote, or advocate the appointment or promotion, of a relative, defined to include a wife, in an agency in which the public official is serving or over which he exercises jurisdiction or control. A "public official" is defined as one who has authority to appoint, employ, promote or advance individuals, or to recommend individuals for appointment, employment, promotion, or advancement.

Civil Service Commission guidelines on employment of relatives state that under the statute an official is considered to have advocated a relative's appointment or promotion if he simply refers the relative for consideration to one of his subordinates. However, a relative may be employed by a subordinate of the official "if the official himself is in no way involved in the action and if the agency concerned has no regulations prohibiting such employment." Federal Personnel Manual, Ch. 310, Subch. 1. With respect to promotions, the Department's Merit Promotion Plan (DoJ order 1335.2A, July 26, 1972, ¶1(b)) simply restates the statutory proscription that "an official of the Department may not appoint, promote or advance a relative to a position in the Department, nor may an official propose a relative for appointment, employment, promotion, or advancement in the Department."

The Turner/Stephens memorandum states that "as Deputy Assistant Attorney General, Mr. Turner does not participate in or control hiring, assignment or personnel action with respect to paralegal employees." We assume that Mr. Turner would not be involved in any way with Ms. Stephen's performance evaluation or any other type of appraisal or other action affecting her career.

ID # _____ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
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Date Correspondence Received (YY/MM/DD) ___/___/___

RESTRICTED - White House Counsel's Office

Name of Correspondent: _____

☐ **MI Mail Report** **User Codes:** (A) _____ (B) _____ (C) _____

Subject: Pemaris H. Miller

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
		ORIGINATOR	/ /			/ /
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ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
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Comments: _____

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
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5/81

THE WHITE HOUSE
WASHINGTON

5/21/86

Dianna,

As we discussed, attached are my memos to Peter on Mrs. Miller. I have them filed under "Nepotism."

Dean

THE WHITE HOUSE
WASHINGTON

Date 5.20.86

Suspense Date _____

MEMORANDUM FOR: Dean

FROM: **DIANNA G. HOLLAND**

ACTION

_____ Approved

_____ Please handle/review

_____ For your information

_____ For your recommendation

_____ For the files

_____ Please see me

_____ Please prepare response for _____ signature

_____ As we discussed

_____ Return to me for filing

COMMENT

Could you call me about where to file this - thanks.

THE WHITE HOUSE

WASHINGTON

May 7, 1986

MEMORANDUM FOR PETER J. WALLISON

FROM: C. DEAN MCGRATH, JR.

SUBJECT: Demaris H. Miller: Interview with Brigitte Schay (Office of Personnel Management)

On April 18, 1986, I learned that Mrs. Miller had been offered and accepted a part-time position at the Office of Personnel Management (OPM). On April 21 I advised Jack Carley (General Counsel, OMB) of this fact.

On April 23, 1986, I contacted Brigitte Schay (OPM) who was responsible for the selection of Mrs. Miller as a graduate student assistant at OPM. Dr. Schay advised me that she had contacted George Mason and George Washington Universities about candidates for the position. Dr. Schay advised that the position is difficult to fill because it requires a person with a background in psychology research, mathematics, and statistics.

Dr. Schay and Kathleen Conley (Chief, Research and Demonstration Staff, OPM) interviewed Mrs. Miller and felt that she was the most qualified candidate for the job. Mrs. Miller's grades and course work matched the position's requirements perfectly. Furthermore, the two other candidates for the position indicated that they were not interested in the position.

Dr. Schay stated that Mrs. Miller's relationship with the Director of OMB played no part in their hiring decision. Dr. Schay indicated that, if anything, Mrs. Miller's relationship was considered a negative factor.

Based on my conversation with Dr. Schay, I am convinced that Mrs. Miller's selection to the position was not influenced by her relationship with Jim Miller (Director, OMB). I informally advised Jim Miller and Jack Carley of my conclusions.

THE WHITE HOUSE

WASHINGTON

April 16, 1986

Thanks, Dean. Please let me know when a decision is made. P.

MEMORANDUM FOR PETER J. WALLISON

FROM: C. DEAN MCGRATH, JR.

SUBJECT: Demaris H. Miller: Status Report

Status

On April 15, 1986, I spoke with Ms. Miller about her application for a part-time position at the Office of Personnel Management (OPM). I learned that Ms. Miller has received no notification that she has been selected. I asked Ms. Miller to notify me as soon as she receives word on whether she has been selected. She promised to do so.

Background

Ms. Miller learned of the OPM opening through a friend at George Mason University. Ms. Miller's friend learned of the job from a professor at GMU, who had been contacted by Bergita Shay at OPM. The friend was not interested and alerted Ms. Miller to the opening. Ms. Miller contacted Ms. Shay directly and submitted her SF-171 and letters of recommendation. Ms. Miller applied for the job to fulfill a practicum requirement for her Ph.D. Apparently, the job was advertised at George Washington University. Ms. Miller did not know if there were any other applicants.

file nepotism

THE WHITE HOUSE

WASHINGTON

June 29, 1983

MEMORANDUM FOR JOHN S. HERRINGTON
ASSISTANT TO THE PRESIDENT
FOR PRESIDENTIAL PERSONNEL

FROM: RICHARD A. HAUSER /s/
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT: Under Secretary of Commerce
for Travel and Tourism

We have been advised that Donna Tuttle, wife of Bob Tuttle, is being considered for appointment to the above-referenced position. The process by which Mrs. Tuttle first came to be considered for this position raises concerns under the anti-nepotism statute, 5 U.S.C. § 3110. It is our understanding that Bob Tuttle made inquiries concerning the suitability of his wife for this position with Joe Ryan and yourself. The anti-nepotism statute prohibits a "public official" -- defined as an officer with authority "to recommend individuals for appointment, employment, promotion, or advancement" in an agency -- from advocating the appointment of a relative for a position in any agency "over which he exercises jurisdiction or control." 5 U.S.C. § 3110(b). Under 5 U.S.C. § 3110(c), an individual who benefits from a recommendation prohibited by § 3110(b) is not entitled to pay.

It is not clear whether a technical violation of the anti-nepotism statute occurred in this case. It is of course Mr. Tuttle's job to recommend individuals for Presidential appointment, and while his portfolio does not specifically include the Commerce Department, nor is that area strictly off limits. He may thus be considered to fit the definition of "public official" in the statute. The critical question so far as actual violation of the statute is concerned would thus appear to be whether Mr. Tuttle exercises jurisdiction or control over the Commerce Department. While he obviously does not with respect to the operations of the Department, the Office of Presidential Personnel does exercise jurisdiction with respect to Presidential appointments at Commerce, and such authority may be considered sufficient under the statute.

Quite apart from the question of compliance with the anti-nepotism statute -- on which no definitive answer is possible -- this appointment raises serious appearance problems. The media has focused considerable attention on similar appearance problems in the recent past, and can be expected to do so in this case. While we understand Mrs. Tuttle to be eminently qualified for the position in question, her qualifications are likely to be overlooked by those in the media and on the Hill who are interested in embarrassing the Administration with renewed charges of nepotism. All of the individuals involved have been forthright in raising this question with our office, and we do not mean to suggest the existence of any willful or actual "nepotism." Appearance problems do, however, exist, and at a minimum they should be raised with Messrs. Meese, Baker and Deaver.

RAH:JGR:aw 6/29/83

cc: RAHauser
JGRoberts
Subj.
Chron

file nepotism

THE WHITE HOUSE

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RAH:JGR:aw 6/29/83

cc: RAHauser
JGRoberts
Subj.
Chron

MEMORANDUM

RESTRICTED - White House Counsel's Office

THE WHITE HOUSE

WASHINGTON

To review w/ MKD.

nepotism

file WW

November 5, 1982

FROM: FRED F. FIELDING

PETER J. RUSTHOVEN

SUBJECT: Proposed Appointment of Maureen Reagan to Industry Sector Advisory Committee

As you requested, I have reviewed the above-referenced proposal in light of the anti-nepotism statute, 5 U.S.C. § 3110, a copy of which is attached. My legal opinion is that this statute would not bar this appointment; my best judgment, however, is that it would be a mistake for the appointment to be made.

Since the inquiry to Helene von Damm came from Ambassador Brock's office, I spoke briefly with Don de Kieffer, the General Counsel to the Trade Representative, to get some background information on Industry Sector Advisory Committees ("ISACs"). de Kieffer basically confirmed the information in von Damm's memorandum for you -- including the fact that no payments of any kind are made to ISAC members -- and added that there were hundreds of persons serving on such committees. de Kieffer also indicated that ISAC appointments were not all that significant, although he conceded that ISAC members probably reap from this service a modicum of "prestige" and related benefits within their industries.

With respect to potential legal obstacles to appointment of the President's daughter, the key portion of the anti-nepotism statute is 5 U.S.C. § 3110(b), which provides that a public official may not appoint or advocate for appointment, in or to a civilian position "in the agency" in which he serves or over which he exercises "jurisdiction or control," any relative. ISACs are under the joint auspices of the Trade Representative and the Department of Commerce; both of these are under the jurisdiction and control of the President, and one is even within the Executive Office of the President. It seems highly unlikely, however, that other conditions specified in the statute are present.

First, I doubt seriously that ISAC posts, as part-time positions that do not even provide for expense reimbursement, would be considered to be positions "in" an agency within the meaning of the statute. This reading is underscored by the fact that the only apparent statutory sanction is a prohibition on paying illegally appointed relatives from appropriated funds, 5 U.S.C. § 3110(c). Finally, as a factual matter, the President -- who is, after all, the relevant "public official" here -- is not the one who is appointing his daughter or advocating her appointment.

RESTRICTED - White House Counsel's Office

Nevertheless, I think it inevitable that any appointment of the President's daughter to any position in or related to the Executive Branch will invite adverse public and media reaction of a fairly predictable sort -- a point that requires neither belaboring nor elaboration. Morever, and notwithstanding the arguments noted in the previous paragraph, this criticism may very well include the assertion that the President has "broken the law" to help his daughter. To be sure, the arguments that the anti-nepotism statute does not apply are far from recondite; but it would be naive to expect a Washington Post article about Maureen Reagan getting a Government postion to engage in any close textual analysis of the statute for the purpose of showing that it isn't really applicable.

I see little reason for exposing the President to this kind of criticism, and recommend that von Damm and Brock be advised that the appointment not be made. Before doing so, however, it would probably be prudent to confer briefly with Michael Deaver. Also, it might be wise to discuss with Deaver and von Damm exactly how -- and by whom -- Maureen Reagan should be told of this decision. Finally, I think it might be preferable for you to handle these consulatations orally, rather than by memoranda.

Attachment

Explanatory Notes

In subsection (a), the definitions of "agency" and "appropriation" are added on authority of the Act of Aug. 2, 1946, ch. 744, § 18, 60 Stat. 811.

In subsection (b), the words "the provisions of this title governing appointment in the competitive service" are substituted for "the civil-service laws". The words "chapter 51 and subchapter III of chapter 53 of this title" are substituted for the reference to the classification laws which originally meant the Classification Act of 1923, as amended. Exception from the Classification Act of 1949 is based on sections 202(27), and 1106(a) of the Act of Oct. 28, 1949, ch. 782, 63 Stat. 956, 972.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

Cross References

Community Relations Service, Department of Commerce, authority of Director to procure services as authorized by this section at $75 per diem limitation, see section 2000g of Title 42, The Public Health and Welfare.

Education professions development grants and contracts, see section 1091f of Title 20, Education.

Employment of experts or consultants by Director of Administrative Office of United States Courts, see note set out under section 602 of Title 28, Judiciary and Judicial Procedure.

General Accounting Office authorized to credit accounts of special disbursing agent of Saint Elizabeths Hospital with certain amounts, notwithstanding this section, see section 168 of Title 24, Hospitals, Asylums, and Cemeteries.

International Health Research Act of 1960, application of section to, see sections 2102, 2103 of Title 22, Foreign Relations and Intercourse; section 242l of Title 42, The Public Health and Welfare.

Travel expenses of consultants or experts, see section 5703 of this title.

Notes of Decisions

Evidence 2
Temporary legal services 1

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1. Temporary legal services

Government agency was vested with authority to secure temporary or intermittent services of attorney by contract or appointment and authorized it to enter into independent contractor relationship with attorney as distinguished from employment status. Boyle v. U. S., 1962, 309 F.2d 399, 159 Ct.Cl. 230.

2. Evidence

In action by temporary appointee against the Secretary of the Army and others for mandatory injunction commanding reinstatement of temporary appointee to position as astronomer in Army Map Service, evidence established that appointing officer accorded to temporary appointee all procedural prerogatives required to be extended in case of temporary appointees, and that valid regulations of the Civil Service Commission authorized separation of temporary appointee from the service. Kameny v. Brucker, 1960, 282 F.2d 823, 108 U.S.App. D.C. 340, certiorari dismissed 81 S.Ct. 802, 365 U.S. 843, 5 L.Ed.2d 809.

§ 3110. Employment of relatives; restrictions

(a) For the purpose of this section—

(1) "agency" means—

(A) an Executive agency;

(B) an office, agency, or other establishment in the legislative branch;

(C) an office, agency, or other establishment in the judicial branch; and

(D) the government of the District of Columbia;

(2) "public official" means an officer (including the President and a Member of Congress), a member of the uniformed service, an employee and any other individual, in whom is vested the authority by law, rule, or regulation, or to whom the authority has been delegated, to appoint, employ, promote, or advance individuals, or to recommend individuals for appointment, employment, promotion, or advancement, in connection with employment in an agency; and

(3) "relative" means, with respect to a public official, an individual who is related to the public official as father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister.

(b) 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 jurisdiction or control any individual who is a relative of the public official. An individual may not be appointed, employed, promoted, or advanced in or to a civilian position in an agency if such appointment, employment, promotion, or advancement has been advocated by a public official, serving in or exercising jurisdiction or control over the agency, who is a relative of the individual.

(c) 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.

(d) The Civil Service Commission may prescribe regulations authorizing the temporary employment, in the event of emergencies resulting from natural disasters or similar unforeseen events or circumstances, of individuals whose employment would otherwise be prohibited by this section.

(e) This section shall not be construed to prohibit the appointment of an individual who is a preference eligible in any case in which the passing over of that individual on a certificate of eligibles furnished under section 3317(a) of this title will result in the selection for appointment of an individual who is not a preference eligible.

Added Pub.L. 90–206, Title II, § 221(a), Dec. 16, 1967, 81 Stat. 640.

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Title IV, § 414(a)(2)(B), (C), Title VIII,
92 Stat. 1178,.1221.

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References to Hearing Examiner in Any Law, Etc., Deemed References to Administrative Law Judge. Section 3 of Pub.L. 95-251 provided that: "Any reference in any law, regulation, or order

to a hearing examiner appointed under section 3105 of title 5, United States Code, [this section], shall be deemed to be a reference to an administrative law judge."

Legislative History. For legislative history and purpose of Pub.L. 95-251, see 1978 U.S.Code Cong. and Adm.News, p. 406.

2. Appointing authority

By reason of provisions inserted by Congress into Department of Labor appropriation acts, Secretary of Labor is authorized to deviate from the requirement of section 919(d) of Title 33 of qualified administrative law judges, and qualified administrative law judges were not the only proper hearing officers for black lung cases. Director, Office of Workers' Compensation Programs, U. S. Dept. of Labor v. Peabody Coal Co., C.A.7, 1977, 554 F.2d 310.

§ 3108. Employment of detective agencies; restrictions

Index to Notes

Character of services to be performed 1
Purpose ½
Similar organizations 2
Standing 3

½. Purpose

This section was intended to prohibit employment by the government of detective agency as it was constituted in 1892, and the prohibition does not extend only to government use of detectives during labor disputes. U. S. ex rel. Weinberger v. Equifax, Inc., C.A.Fla.1977, 557 F.2d 456, rehearing denied 561 F.2d 831, certiorari denied 98 S.Ct. 768, 434 U.S. 1035, 54 L.Ed.2d 782, rehearing denied 98 S.Ct. 1477, 435 U.S. 918, 55 L.Ed.2d 511.

2. Similar organizations

An organization is not "similar" to organization referred to in this section unless it offers for hire mercenary, quasi-military forces as strikebreakers and armed guards. U. S. ex rel. Weinberger v. Equifax, Inc., C.A.Fla.1977, 557 F.2d 456, rehearing denied 561 F.2d 831, certiorari denied 98 S.Ct. 768, 434 U.S. 1035, 54 L.Ed.2d 782, rehearing denied 98 S.Ct. 1477, 435 U.S. 918, 55 L.Ed.2d 511.

3. Standing

Plaintiff who alleged no injury in fact lacked standing to seek declaratory judgment that government employment of credit reporting company to provide information on prospective government employees violated this section. U. S. ex rel. Weinberger v. Equifax, Inc., C.A.Fla. 1977, 557 F.2d 456, rehearing denied 561 F.2d 831, certiorari denied 98 S.Ct. 768, 434 U.S. 1035, 54 L.Ed.2d 782, rehearing denied 98 S.Ct. 1477, 435 U.S. 918, 55 L.Ed. 2d 511.

§ 3109. Employment of experts and consultants; temporary or intermittent

[See main volume for text of (a) and (b)]

(c) Positions in the Senior Executive Service may not be filled under the authority of subsection (b) of this section.

As amended Pub.L. 95-454, Title IV, § 402(b), Oct. 13, 1978, 92 Stat. 1160.

1978 Amendment. Subsec. (c). Pub.L. 95-454 added subsec. (c).

Effective Date of 1978 Amendment. Amendment by Pub.L. 95-454 effective 9 months after Oct. 13, 1978, and congressional review of provisions of sections 401 through 412 of Pub.L. 95-454, see section 415 of Pub.L. 95-454, set out as a note under section 3131 of this title.

Legislative History. For legislative history and purpose of Pub.L. 95-454, see 1978 U.S.Code Cong. and Adm.News, p. 2723.

§ 3110. Employment of relatives; restrictions

[See main volume for text of (a) to (c)]

(d) The Office of Personnel Management may prescribe regulations authorizing the temporary employment, in the event of emergencies resulting from natural disasters or similar unforeseen events or circumstances, of individuals whose employment would otherwise be prohibited by this section.

[See main volume for text of (e)]

As amended Pub.L. 95-454, Title IX, § 906(a)(2), Oct. 13, 1978, 92 Stat. 1224.

1978 Amendment. Subsec. (d). Pub.L. 95-454 substituted "Office of Personnel Management" for "Civil Service Commission".

Effective Date of 1978 Amendment. Amendment by Pub.L. 95-454 effective 90 days after Oct. 13, 1978, see section 907 of Pub.L. 95-454, set out as a note under section 1101 of this title.

Legislative History. For legislative history and purpose of Pub.L. 95-454, see 1978 U.S.Code Cong. and Adm.News, p. 2723.

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