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THE WHITE HOUSE

WASHINGTON

September 28, 1976

MEMORANDUM FOR:

James A. Baker
Chairman
President Ford Committee

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SUBJECT: Campaign-Related Activities Performed by Members of the White House Staff

This memorandum is in followup to our recent conversations concerning campaign-related activities performed by White House staff members and the impact of Federal statutes regulating elections and the conduct of Federal employees on such activities.

As you are aware, the current state of the law is such that the issue to what extent staff members to candidates who are paid from public funds may undertake campaign-related activities does not lend itself to a definitive answer. The Federal Election Commission purposely avoided deciding this issue in its decision dismissing, in effect, complaints made regarding Secretary Morton's joint role as Counsellor to the President and as the White House liaison with the President Ford Committee.[1] However, there are several key factors which must be examined in determining the propriety of White House staff members performing campaign-related activities. First, whether Federal funds are being used for purposes other than those for which the funds were appropriated. Second, whether staff activities may be considered to be either contributions or expenditures under the Federal Election Campaign Act, as amended, 2 U.S.C. 431, et seq. With regard to this latter factor, comments should be sought from the PFC General Counsel. However, it would appear from the discussion that follows that no contribution or expenditure problem is raised.

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A. Relevant provisions of law governing the activities of persons paid by the White House Office

The relevant provisions of the current appropriation for the White House Office are found at the Executive Office Appropriations Act, 1977, Title III of P.L. 94-363. The

[1] In the Matter of the President Ford Committee (Morton), MUR 077 (76), dec'd., July 26, 1976. (Attached at Tab A)

controlling language of this Act is as follows:

> For expenses necessary for the White House Office as authorized by law, including not to exceed $3,850,000 for services as authorized by 5 U.S.C. 3109, at such per diem rates for individuals as the President may specify and other personal services without regard to the provisions of law regulating the employment and compensation of persons in the Government service...." [emphasis added]

Appropriations to the White House Office for prior fiscal years contain similar provisions. While there is no permanent authorization for the entire White House Office, certain permanent provisions contained in Title 3 of the United States Code indicate that the President is to have considerable latitude in the assignment of duties to the members of his staff. For example, 3 U.S.C. 106 authorizes six administrative assistants for the President, and further states that "....Each such administrative assistant shall perform such duties as the President may prescribe." Section 105 of this Title authorizes "...eight other secretaries or other immediate staff assistants in the White House Office." By inference, it would appear Congress intended that these eight assistants, as well as all persons paid from the appropriations to the White House Office, were to perform such duties as the six assistants specifically named in Section 106, i.e., "such duties as the President may prescribe."

In addition to the above-referenced provisions of law, those of the so-called Hatch Act, 5 U.S.C. 7321, et seq., governing political activities by Executive Branch employees are also relevant. Section 7324(a)(2) of Title 5 provides that an Executive Branch employee may not "...take an active part in political management or in political campaigns." However, employees "paid from the appropriation for the Office of the President" are exempted from this proscription (5 U.S.C. 7324(d)). This appears to be Congressional recognition of the traditional and necessary role of members of the White House staff in political campaigns, and a clear statement of Congressional intent to allow such activities by employees of the White House Office. Moreover, this is consistent with the campaign role allowed to the members of the personal staff of a Senator or Congressman.

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In Public Citizen and Ralph Nader v. William E. Simon,[2] plaintiffs asserted that campaign activities performed by certain members of the White House staff during the 1972 Presidential election required reimbursement to the Treasury for at least a portion of their salary for the period spent on campaign-related activities. Plaintiffs' suit was brought on the basis that, as taxpayers, they had been injured by the expenditure of appropriated funds in violation of 31 U.S.C. 628 which provides:

> "Except as otherwise provided by law, sums appropriated for the various branches or expenditures in the public service shall be applied solely to the objects for which they are respectively made, and for no others."

The suit was dismissed by the District Court for lack of standing and affirmed by the Court of Appeals, in a 2-1 decision. Although Circuit Judges Leventhal and MacKinnon refused to look beyond the issue of standing, Judge McMillan (United States District Judge for the Western District of North Carolina), dissenting, indicated he would have found for the plaintiffs on the question of standing. However, his view on the merits was that White House Office employees could properly perform at least some campaign activities. He stated, in part:

> "In summary, I would find that plaintiffs have standing to bring the suit and that the case should be decided on the merits in favor of those defendants who may be covered by the express exemptions under 5 U.S.C. 7324(d), but against any defendants not expressly so covered, including any person whose salaries come from sources other than 'appropriations for the Office of the President.'"

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Similar questions concerning the performance of campaign-related activities by members of the White House staff were raised in complaints to the Federal Election Commission relative to the appointment of Secretary Morton as Counsellor to the President. Although the actual decision of the Commission was limited to a finding that there was no reason to believe that any violation of the Federal Election Campaign Act had been raised by the complaints, the

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[2] D.D.C., Civil Action No. 2280-72, dec'd Sept. 30, 1974, aff'd., __ U.S. App. D.C. __ (1976), No. 74-2025, dec'd. June 25, 1976.

General Counsel's Report to the Commission on these complaints and a separate statement issued by Vice Chairman Harris offer further clarification of the law in this regard.

The General Counsel construed the Hatch Act exemption for employees "paid from the appropriation for the Office of the President" to permit "...an exempt employee to engage in campaign-related activities in non-business hours." However, he proceeded to note that "...there is no standard definition of ordinary business work day for a person at Mr. Morton's level," i.e., Presidential appointees.[3]

On the other hand, Vice Chairman Harris took the position that Congress never intended the Federal Election Commission to have the responsibility for monitoring political activity of Federal employees. With respect to the general coverage of the Hatch Act, this is the responsibility of the Civil Service Commission. He also noted that the CSC has the general responsibility to enforce Executive Order 11222, "Prescribing Standards of Ethical Conduct for Government Officers and Employees." In particular, he indicated that Section 204 of this Order may be applicable to campaign activities performed by Federal employees in that it provides:

> "An employee shall not use Federal property of any kind for other than officially-approved activities."

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However, as long as campaign activities are undertaken without additional cost to the Government, it would appear that there is no violation of this provision.

In addition, Mr. Harris noted that the General Accounting Office would have the authority to deal with questions concerning campaign activities by Federal employees on the basis of 31 U.S.C. 628. Finally, he expressed the view that as long as the services performed by an exempt employee were volunteered and in addition to the employee's normal work day, they are without compensation and, thus by statutory definition,[4] would not raise a question for the Federal Election Commission.

B. Policy of the Ford White House

While the above discussion of the law does not offer guidelines setting forth absolute limits on campaign activities which can be performed by members of the White House

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[3] 5 U.S.C. 6301, et seq.
[4] 2 U.S.C. 431(e)(5)

staff, the policy of the White House in this Administration has long been on the public record. In his letter to the Federal Election Commission of September 3, 1975[5] Philip Buchen, Counsel to the President, stated the following:

> "No precise dividing line now exists, nor is one likely to be drawn, which clearly indicates when such employees [the personal staffs of incumbent candidates for Federal office] are performing official duties and when those duties are political. So long as these employees expend a substantial majority (an average in excess of forty hours per week) of their time on official duties, there is no need to attribute any portion of the salaries of such employees to a political committee."

This has commonly been referred to as the forty-hour rule, and was discussed by the FEC in dismissing the Morton complaints. Moreover, the FEC's proposed regulations governing voluntary personal services clearly recognize the general validity of this approach. While these regulations would not necessarily control the activities of Federal employees, by analogy, they effectively moot any questions concerning the activities currently performed by exempt employees. In particular, Section 100.4(a)(5) of the proposed regulations provides that there is no contribution to a campaign when compensation is paid to an employee:

> "(i)(A) who is paid on an hourly or salaried basis;
>
> (B) who is expected to perform duties for an employer for a particular number of hours per period; and
>
> (C) who engages in political activity during what would otherwise be a regular work period; if the taken or released time is made up or completed by that employee within a reasonable period; or
>
> (iii) where the time used by the employee to engage in political activity is bona fide, although compensable, vacation time or other earned leave time." [emphasis added]

Accordingly, there is no question but that employees can properly engage in campaign-related activities as long as they devote at least forty hours per week, on an average

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[5] At Tab B

basis over a reasonable time period, to their official Government duties.

Even with the proposed FEC regulations, the law governing the activities of employees on the public payroll has yet to be fully interpreted. The questions that we now face in this regard are ones of first impression for which we are most likely setting the standard for other office holders to follow in the future. Our use of the so-called forty-hour rule appears to be in full compliance with the law as it now stands, particularly in view of the transfer to the PFC's roles of personnel whose duties are expected to be primarily campaign-related rather than official in nature for the period through the election. Persons so transferred include those working on the Advocates program, advance personnel, and others in similar situations.

In addition, the Counsel's Office has met with other members of the White House staff and reviewed the duties of these officials and their staffs. As described to us, we have found that such staff members are devoting substantial portions of time, consistent with the above discussion, on matters which are official in nature, and thus in accord with even the most narrow readings of the FEC regulations and its decision on the Morton complaints.

It is expected that these staff members will continue to perform substantial official duties through the election, although the amount of time each week will vary. In the event that White House Office employees assume campaign duties which do not allow them to continue to devote substantial amounts of time to official duties, we will re-examine the question of whether such employees should be transferred to the roles of the PFC. Moreover, we are taking steps to assure that members of the senior staff are fully aware of the responsibility that is placed on each of them and their staffs in continuing to perform official duties. We are also reminding these employees that questions in this regard are to be raised immediately with this office.

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I trust that this is responsive to your concern that we take all practical steps to ensure that the President's campaign is conducted in the highest possible manner and that questions concerning the activities of the White House staff should not ever be raised.

Edward C. Schmults
Deputy Counsel to the President