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June 22, 1990

Senator Michael Crapo
President Pro Tem
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THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Participation of legislative employees in campaign
activities

Dear Senator Crapo:

In your letter dated May 15, 1990, you requested an opinion from this office as to possible restrictions on legislative staff members from participating in political or campaign activities on behalf of elected officials. You also requested information relating to any guidelines regulating the employment duties of legislative staff members.

ANALYSIS:

This office has been unable to identify any relevant guidelines that would impact the employment functions of the Idaho Legislature's staff. Idaho Code § 67-610 states:

The selection, removal, duties and compensation of employees of the legislature shall be prescribed by the rules of the house of representatives and the senate.

This statute has never been addressed by the judiciary in Idaho. Clearly, hiring legislative staff members and defining their duties is within the province of the respective legislative bodies. The following discussion, however, indicates some limitations placed upon this discretionary power.

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Staff members in the Idaho Legislature are not significantly restricted by federal or state statute from personally engaging in political activities on their own time. 5 U.S.C. § 7324; Idaho Code § 67-5311. Although the issue of legislative staff members being utilized for political purposes while on the public payroll has not arisen in Idaho, the issue has been the subject of limited litigation in federal court. In each instance, the courts have held that without express statutory guidance, e.g., franking privilege regulations, the judiciary will not infringe upon the purely internal matters of the legislative branch.

The case which crystalizes a legislature's separate and independent power to define and regulate internal affairs is United States ex rel. Joseph v. Cannon, 642 F.2d 1373, (D.C. Cir. 1981) *cert. denied*, 455 U.S. 999 (1982). In Cannon, the plaintiff brought an action against Senator Howard Cannon, pursuant to the False Claims Act, 31 U.S.C. § 231, alleging that Senator Cannon's administrative assistant worked exclusively for the Senator's 1976 reelection campaign while on the public payroll.

The United States District Court for the District of Columbia dismissed the case. In affirming the district court on other grounds, the Court of Appeals for the District of Columbia noted the lack of statutory, administrative or case law on the issue. The court further stated that there were no discernible rules or standards for the judiciary to rely upon in making a decision. The court therefore held the claim brought by the plaintiff was a "political question" and not justiciable:

In the absence of any discernible legal standard -- or even of a congressional policy determination -- that would aid consideration and decision of the question raised by appellant's first count, we are loathe to give the False Claims Act an interpretation that would require the judiciary to develop rules of behavior for the Legislative Branch. We are unwilling to conclude that Congress gave the courts a free hand to deal with

so sensitive and controversial a problem, or invite them to assume the rule of a political overseer of the other branches of Government.

Cannon, supra, 642 F.2d at 1385.

The Cannon case stands for the proposition that unless a legislature enacts a statute granting the judiciary the ability to review the employment affairs of the legislative branch, the issue of legislative personnel engaging in political activities remains within the discretion of the legislature. If control or guidance becomes necessary, each legislative body must address the issue and develop internal rules.

You have provided us with the Ethics Manual for members of the United States House of Representatives, published in 1987 by that body's Committee on Standards of Official Conduct. The Committee's discussion of political and campaign participation by legislative staff members provides useful guidance for the Idaho Legislature.

The manual addresses the dubious conduct raised in the Cannon case:

The underlying standard for the receipt of compensation by an employee of the House is that the employee has regularly performed official duties commensurate with the compensation received. Employees are paid United States Treasury funds to perform public duties. Appropriated funds are to be used solely for the purposes for which appropriated (31 U.S.C. § 1301(a)). Funds appropriated for congressional staff to perform official duties should be used only for assisting a Member in his legislative and representational duties, working on committee business, or performing other congressional functions. Employees may not be compensated from public funds to perform nonofficial, personal, or campaign activities on behalf of the Member, the employee, or anyone else.

Ethics Manual at 84 (emphasis added). In direct response to the Cannon decision and the judiciary's refusal to monitor congressional staff activities, the Committee cautioned:

The absence of definitive ruling should not be read as suggesting that it is appropriate under the House rules to compensate an employee for campaign or other nonofficial work.

Id.

In particular instances, Congress has enacted statutory prohibitions against diverting public funds and resources to personal profit. Given specific authority, the judiciary will enforce laws regulating the use of certain public resources. U.S. v. Diggs, 613 F.2d 988 (D.C. Cir. 1979) cert. denied, 466 U.S. 982 (1980); U.S. v. Bramblett 348 U.S. 503 (1955) (mail fraud and falsifying payroll authorization forms); Common Cause v. Bolger, 512 F.Supp. 26 (D.D.C. 1980) (franking privilege abuse). By enacting such statutes, Congress acknowledges that public resources may not be used to fund nonofficial, personal or campaign activities.

The principle that a public officer should not personally profit from public resources is also found in article 7, § 10, of the Idaho Constitution:

The making of profit, directly or indirectly, out of state, county, city, town, township or school district money, or using the same for any purposes not authorized by law, by any public officer, shall be deemed a felony, and shall be punished as provided by law.

This provision is applicable to the legislature and its staff. Although the judiciary defers to the legislative branch to establish standards and procedures for internal regulation of conduct, the use of public funds for nonofficial, personal or

campaign purposes is improper and unacceptable.

The Ethics Manual further addressed the natural and inevitable overlapping of employee duties in an official legislative or representational capacity with campaign-related activities:

Concern has been expressed over the potential, and arguably unavoidable, "overlap" or intrusion of some minimal campaign related activities into official operations when dealing with the practical, day-to-day realities of a Member's functioning office. In responding to the "official" inquiries from the press or inquiries from constituents, for example, congressional staff may need to respond to issues that relate to a Member's political campaign as well as his official duties. Similarly, scheduling assistance and information from the Member's official staff may be requested by the campaign staff to ensure that the Member's campaign schedule does not conflict with his official agenda. This Committee has recognized that it may not be possible to have an absolute separation of duties during the workday but that the "Committee expects Members of the House to abide by the general proposition" that staffers are to work on campaign-related matters during their "free time" after the completion of their official duties.

Id. at 87.

The Committee makes no attempt to delineate which staff functions are "sufficiently official" or "too political." The standards are deliberately flexible to meet the realities of Congress' official/political environment. Yet the underlying premise is clear: public employees on a House Member's staff are paid their salaries to perform legislative and representational work, not to work on political campaigns for a party or any individual member thereof.

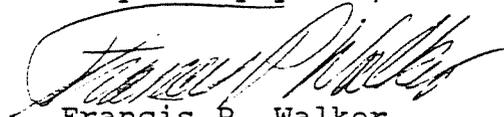
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CONCLUSION:

Staff members of the Idaho Legislature are not restricted by the Hatch Act, 5 U.S.C. § 7324, or its Idaho counterpart, Idaho Code § 67-5311, from participating in most political activities during their free time. There are presently no statutory or administrative guidelines in Idaho regulating legislative staff members in regard to political or campaign activities. The establishment of standards and administrative guidelines in relation to the duties of legislative staff members is within the province of the legislative branch and, for the most part, beyond judicial review.

To the extent that public employees (legislative staff members) work in an unavoidably political arena, the matter is subject to the control and discretion of the legislature and its leaders. Despite this discretion, the legislature must be mindful of restrictions placed upon it by the Idaho Constitution as well as the principle that it is inappropriate to compensate an employee from public funds for performing non-official, personal or campaign-related tasks.

Very truly yours,



Francis P. Walker
Deputy Attorney General

FPW/dks