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February 19, 1953

MEMORANDUM FOR THE ATTORNEY GENERAL

[redacted]

Re: Applicability of conflict-of-interests statutes to uncompensated, nominally compensated, or per diem compensated individuals.

You have asked me to prepare a memorandum of law which can be distributed to the various Cabinet members as to the restrictions (including applicable conflict-of-interests statutes) covering the following:

1. Individual serves in advisory capacity to a Cabinet member or Government agency but does not accept any title as a public official and does not draw any compensation or expenses of any kind.

2. Same as above except that the individual is reimbursed by the Government for his expenses.

3. The individual becomes a Government official with no salary or just a nominal salary and is reimbursed for his expenses.

4. The individual becomes a Government official and works part time on a per diem basis.

I think it unlikely that any question of a legal nature could arise with respect to the category of individual whom you mention first unless, of course, it was desired to give to such individual access to classified information, direction of Government employees, authority over the expenditure of Government funds, or other duties which might be listed ad infinitum and which cannot be anticipated in this memorandum. Assignment of such duties would raise questions in fields of law unrelated to the scope of your inquiry, as I understand that inquiry. An individual serving in an advisory capacity without title, position, compensation, or defrayal of expenses, would be in the status of a friend giving advice, and the conflict-of-interests statutes would have no application to such person.

I have doubt concerning the general availability of appropriations to defray the expenses of persons who have no official status or position in the Government. The case of any individual who might come within the second category you mention would, I believe, have to be considered in the light of the pertinent appropriation act, any related statutes, and facts and

circumstances which cannot be identified in advance. Accordingly, I believe we must pass to the categories of hypothetical individuals whom you have described as in the paragraphs numbered "3" and "4", above.

There is no question but that, subject to the existence of statutory authority and the availability of appropriations therefor, and to the absence of statutory proscription, Cabinet members have the authority to employ persons under the several arrangements described in paragraphs 3 and 4. Indeed, such arrangements have not been unusual. I understand your memorandum as requesting an opinion as to whether the conflict-of-interests statutes are applicable to persons engaged in Government service under such arrangements.

As you know, the provisions of law which are commonly referred to as the conflict-of-interests statutes are six in number: (1) R.S. 190 (5 U.S.C.99); (2) 18 U.S.C. 281; (3) 18 U.S.C. 283; (4) 18 U.S.C. 284; (5) 18 U.S.C. 434; and (6) 18 U.S.C. 1914. Reply to your inquiry requires analysis of the terms used by these statutes in defining the individuals to whom they are applicable. The following such terms appear pertinent:

R.S. 190 (5 U.S.C.99): "* * * any person appointed as an officer, clerk, or employee in any of the departments".

18 U.S.C. 281: "* * * officer or employee of the United States or any department or agency thereof".

18 U.S.C. 283: "* * * officer or employee of the United States or any department or agency thereof".

18 U.S.C. 284: "[persons] having been employed in any agency of the United States".

18 U.S.C. 434: "[person who is] * * * employed or acts as an officer or agent of the United States".

18 U.S.C. 1914: "[person who is] * * * a Government official or employee".

It is to be noted that in each of the conflict-of-interests statutes there is used the term "officer" or, in the case of 18 U.S.C. 1914, the equivalent (for our present purposes) term "official", except in 18 U.S.C. 284. The last mentioned statute must be construed as applying to an "officer" as well as to an "employee". This, I think, frames the answer to your query concerning the application of these statutes to an individual who becomes a Government official, whether with no salary, with only nominal salary, or on a part-time per diem compensated basis. And, should there be question whether the status of a particular individual might not be technically that of an "employee" rather than of an "officer", it is to be noted that each of the conflict-of-interests statutes is by terms also applicable to employees.

That an individual receives no salary from the United States is not the test for determining whether he is subject to the conflict-of-interests statutes. Attorney General Biddle held, on a question relating to certain of these statutes, that they would be applicable to a contemplated temporary appointee as an Expert Consultant to the Secretary of War without compensation other than for expenses (40 Op. A.G. 289). Certain of these statutes as to which question was raised also have been held applicable to members of the War Price and Rationing Boards which existed during World War II, which individuals were, of course, uncompensated. (40 Op. A. G. 294). I discern no basis for distinguishing, so far as legal principle is concerned, the hypothetical situations which you describe from the situations to which the conflict-of-interests statutes were held applicable in those opinions. Further, I discern no basis for distinguishing, as concerns their application to uncompensated individuals, the conflict-of-interests statutes not involved in these opinions from such of these statutes as were involved.

The fact that the status of an individual is such that the conflict-of-interests statutes are applicable to him does not mean, of course, that he is ipso facto in violation of them. These statutes are applicable to more than two million persons. There is no doubt, however, that the categories of individuals contemplated by your questions, because of their business or professional connections, generally have greater cause for concern as to the effect upon them of the conflict-of-interests statutes than most Government officers and employees.

It may be pointed out, however, that the Federal law does not prohibit a public employee from carrying on a private business activity for private compensation except when the private industry touches upon some interest of the Government and falls within the statutes and principles of law aimed at improper conflict of interests or when the employee is subject to one of the several statutes forbidding specific officers to engage in private business activities (40 Op. A.G. 187). Indeed, there is no general prohibition which prevents Executive employees from contracting directly with the Government, as principals, in matters entirely separate from their offices and in no way connected with the performance of their Government duties (14 Op. A.G. 484).

The conflict-of-interests statutes are quite limited and specific as respects the conduct and activities which they proscribe. I think it will be found that the statutes will not in the usual case constitute a serious impediment to Government service. A person in the Government service cannot, of course, act as an attorney or agent for transacting any claim against the United States during the period when he is employed by the Government (18 U.S.C. 283). Further, he cannot for two years after the termination of such employment prosecute any claims against the United States involving any subject matter "directly connected with which"

he had been employed (18 U.S.C. 284), or for the same period, if his employment had been in one of the "departments," act as counsel, attorney, or agent in prosecuting any claim against the United States pending during the term of his employment in any of the executive departments (R.S. 190; 5 U.S.C. 99). Most important if such person is an attorney, but otherwise probably of little importance, a person involved could not, during his employment, receive any compensation, directly or indirectly, for services relating to any matter in which the United States is a party or directly or indirectly interested before any department, agency, or officer, or any civil, military, or naval commission (18 U.S.C. 281), but I have no doubt that many persons would be willing to make the sacrifice involved in order to render a service to their country. 18 U.S.C. 434 and 18 U.S.C. 1914, the two remaining conflict-of-interests statutes, would not raise any problems in the usual case but should, of course, be considered.

The generalizations made above are, I believe, well founded in law. I would like to point out, however, that application of the conflict-of-interests statutes is so completely dependent upon the facts in individual cases, facts peculiarly within the knowledge and control of the person who may be affected, that each such person should assume the responsibility of determining whether prospective action by him would or would not constitute a violation of these statutes and expose him to the criminal penalties which may attach. That this is the safest course is illustrated by the result in United States v. Dietrich, 126 Fed. 671, in which the court held a penal statute applicable to certain transactions by a United States Senator who professed to rely upon a contrary ruling by the Attorney General. Also for consideration is the fact that an opinion rendered by the Department of Justice on any case may result in embarrassment to the Department should subsequent developments suggest the advisability of a prosecution.

There are, of course, instances in which it is in the public interest for the Government to assist individuals in ascertaining the impact which the conflict-of-interests statutes may have upon them. I believe that each such case should be separately considered. The legal staffs of the several departments of the Government are experienced in appraising such cases.

I recommend that you advise your colleagues generally concerning the matters covered above and that you suggest to them that the facts in any individual cases upon which the conflict-of-interests statutes may have an impact be submitted to their legal staffs and that, should their staffs have any difficulty in resolving any such case, my office will, upon request, assist them in cases where the specific facts are made available.

J. Lee Rankin
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Executive Adjudications Division