Aug. 28, 1974

8/28/74

MEMORANDUM FOR RICHARD T. BURRESS
Office of the President

Re: Conflict of Interest Problems Arising out of the President's Nomination of Nelson A. Rockefeller to be Vice President under the Twenty-Fifth Amendment to the Constitution

This responds to your request to consider various conflict of interest questions which may arise out of the nomination by the President of Mr. Nelson A. Rockefeller to the office of Vice President in accordance with the Twenty-Fifth Amendment.

Preliminarily, we have no knowledge of the extent, scope, or nature of Mr. Rockefeller's financial interests, nor do we know to what degree the President will delegate functions to the Vice President, the discharge of which may possibly give rise to an actual conflict of interest or create the appearance of a conflict of interest. Moreover, the legislative history of the Twenty-Fifth Amendment, pursuant to which Mr. Rockefeller has been nominated as Vice President, is silent as to possible conflicts of interest; the subject does not appear to have been of any concern to the Congress when it proposed the Amendment.

If there is any statutory provision which deals with possible conflicts of interest of a Vice President, it is 18 U.S.C. 208 (Appendix A). In brief, 18 U.S.C. 208(a) requires an officer or employee of the "executive branch" to refrain from participating personally and substantially in any particular matter in which "to his knowledge," he, his spouse, minor child, partner or organization in which he is serving as officer, director or trustee has a financial interest. Provision is made in section 208(b) for waiver of the disqualification requirement where the outside financial interest is deemed not substantial enough to affect the integrity of the employee's services. By official interpretation, a waiver is also available if the employee renders services of a general nature from which no preference or advantage may

be gained by any particular person or organization. In addition, a "blind trust" procedure has been developed to deal with situations in which the divestment of financial interests by an employee at the time of his Government employment is not feasible.

In this setting, our discussion hereafter may be summarized as follows:

1. Section 208 does not expressly apply to either the President or the Vice President. The legislative history shows no such intention, and contains some indication to the contrary. The text of subsection (b) of section 208, by referring to "the Government official responsible for appointment to his position" tends to indicate that the section applies only to appointed officials--which category, at the time section 208 was enacted, could not include the Vice President. Some doubt exists as to the constitutionality of applying section 208 to the President; and such doubt is avoided with respect to the Vice President only because his single constitutionally enumerated function (presiding over the Senate) is not an "executive branch" function--which fact removes it from the reach of section 208, but also arguably removes the Vice President from coverage. For these reasons, it seems likely that section 208 would not be interpreted to apply to the President or Vice President.

2. If section 208(a) should be construed to apply to the Vice President, he can disqualify himself from participating in a particular matter in which he, members of his family or business associates have a financial interest. If the Vice President's interests in a matter are so insignificant as not to affect the integrity of his services or if he will render advice of a general nature from which no preference or advantage over others might be gained by any particular person or organization, the President may grant the Vice President a waiver from the coverage of section 208.

3. Mr. Rockefeller may execute a blind trust of his financial holdings, which may negate the element, essential to establishment of a section 208 violation, that "to his knowledge," he, members of his family, or his business associates have a financial interest in a particular matter. He is not, however, required to take this step, so long as he disqualifies himself as section 208(a) demands.

4. Following the precedent established by David Packard, when confirmed as Deputy Secretary of Defense, Mr. Rockefeller may agree to devote any profits derived from his financial holdings while he serves as Vice President to charity. Once again, he is not required to take this step so long as he disqualifies himself as section 208(a) demands.

5. Of course whether or not section 208 is applicable or is avoided by one of the above-described devices, Mr. Rockefeller will as a practical matter have to provide whatever financial assurances the House and Senate require as a condition of his confirmation.

1. The language of section 208.

Section 208(a) prohibits an "officer or employee of the executive branch" from participating as such in a particular matter in which, "to his knowledge," he, his spouse, minor child, partner or other business associates with which he is connected, have a financial interest. In this respect section 208 is unqualified. However, section 208 does not refer to, or specifically cover, the President or Vice President. Moreover, the legislative history of sections 202-209 (the conflict of interest provisions), as evidenced by committee reports and debates in the Senate and the House of Representatives, fails to demonstrate that section 208 was intended to apply to the Chief Executive and his immediate successor. In seeking to ascertain the intention of Congress, reference may be made to the report, Conflict of Interest and Federal Service (1960), prepared by the Special Committee on the Federal Conflict of Interest Laws, the Association of the Bar of the City of New York (Bar Association Report), where it was said (pp. 16-17):

> The role of the Presidency is a vital aspect of the administration of conflict of interest restrictions in the executive branch, and the proper function of the Chief Executive in this field is a major center of consideration in this study. But the conflict of interest problems of the President

> and the Vice President as individual persons must inevitably be treated separately from the rest of the executive branch. For example, as Chief of State, the President is the inevitable target of a running stream of symbolic gifts pouring in from all over the world, for reasons ranging from the best to the worst. The uniqueness of the President's situation is also illustrated by the fact that disqualification of the President from policy decisions because of personal conflicting interests is inconceivable. Personal conflict of interest problems of the Presidency and the Vice Presidency are unique and are therefore not within the scope of this book.

While the recommendations of the Bar Association Report were not entirely accepted in the bill as enacted, both the House and Senate committees reporting on the bill and members of Congress in debate paid tribute to the contributions made by the Bar Association in the ultimate formulation of the bill. See, e.g., H. Rept. No. 748, 87th Cong., 1st Sess. 8 (1961); S. Rept. No. 2213, 87th Cong., 2d Sess. 4 (1962). It seems most unlikely that disagreement on so important a portion of the Bar Association's position, that personal conflict of interest problems of the President and the Vice President "must inevitably be treated separately from the rest of the executive branch," would have gone without mention in both congressional committees and in floor debate. It seems more reasonable to conclude from this legislative history that Congress in speaking of an "officer or employee of the executive branch" in section 208 meant to include solely those "officers of the United States" who receive their appointment from the President under Article II, section 3, of the Constitution and those subordinate employees who are employed by various departments and agencies of the executive branch. This conclusion is strengthened by the fact that the exceptions contained in subsection (b) of section 208 assume the existence of an "official responsible for appointment" of the officer or employee in question. It is possible, of course, that this was merely meant to indicate by omission, the unavailability of an exception for nonappointed officers or employees; but one would think that an exception mechanism would be more necessary for the President and Vice President (if they were covered) than for other officials. On balance, subsection (b) tends to negate coverage of nonappointed officials--into which category, before the Twenty-Fifth Amendment, the Vice President invariably fell.

These considerations of legislative history and statutory language are buttressed by two canons of statutory construction applicable in this case. The first is that interpretations which give rise to serious questions of constitutionality should be avoided if reasonably possible. The effect of applying section 208 to the President is arguably either to disempower him from performing some of the functions prescribed the the Constitution or to establish a qualification for his serving as President (to wit, elimination of financial conflicts) beyond those contained in the Constitution. The same may be said with respect to the Vice President, unless the Vice President's only constitutionally prescribed function (presiding over the Senate) is not covered by section 208 because it is not an executive act (in which case it can be asserted, as described below, that the Vice President is not an officer of the executive branch and hence not covered by section 208 with respect to any of his activities). In any event, whether or not application of section 208 to the Vice President is constitutionally questionable, it would seem that any reasonable construction of the statute would treat the President and the Vice President alike. Since there are clearly constitutional problems with respect to the President, the statute would probably not be interpreted to apply to either official.

Another canon of construction calls for strict construction of a criminal statute--which is what is at issue here. It would be strange for Congress to subject the President and the Vice President to possible criminal prosecution without naming them explicitly on the basis of such converted issues as those discussed above. This is not a situation like the bribery statute (18 U.S.C. 201), where from the nature of the offense charged, no one, however exalted his position, should safely feel that he is above the law. 1/

1/ It may be noted in this connection that in the proposed new Criminal Code, section 111 of S. 1400 defines "public servant" to include a "United States official" which in turn explicitly includes the President and Vice President. But it is proposed by section 338 of the bill to place the provisions of 18 U.S.C. 202-209 in title 5, U.S. Code, where a clear-cut distinction has always been made between the President on one hand and employees in the executive branch on the other for whose conduct the President is authorized to prescribe regulations. See, e.g., the Hatch Act, 5 U.S.C. 7321, 7322.

Although we think that these arguments are dispositive of the matter, without regard to them it can be argued that the Vice President is not an officer of the executive branch within the meaning of section 208, but rather primarily one in the legislative branch. See Appendix B.

2. Disqualification under section 208(a); waiver under section 208(b).

If section 208(a) were to be construed as applying to a Vice President, this factor does not disqualify Mr. Rockefeller from serving in that office. In order to comply with that provision, he is merely required to disqualify himself from participating in particular matters in which, "to his knowledge," he, members of his family or business associates have a financial interest. However, section 208 does not require the officer subject to it to remove himself from every situation. Section 208(b) authorizes the Government official responsible for the appointment of the officer or employee (here the President) to grant the latter an ad hoc exemption if the outside interest in the matter is deemed not substantial enough to have an effect on the integrity of his services. Financial interests of this kind may also be exempted by a general regulation published in the Federal Register. Moreover, in dealing with waivers under section 208(b), President Kennedy, shortly after the conflict of interest law was enacted, stated (memorandum of May 2, 1963):

> Whether an agency [here the President] should issue a general rule or regulation and, if it [he] does so, what standards it [he] should set are questions which should be resolved by each agency [the President] in the context of its [his] particular responsibilities and activities.

The same memorandum also stated that the power of exemption may be exercised under section 208(b) if the employee "renders advice of a general nature from which no preference or advantage over others might be gained by any particular person or organization" 2/

2/ Although President Kennedy referred to "special" Government employees, section 208(a) does not distinguish between special and regular employees, and both classes are covered. We are reliably advised that the President intended his statement on waiver in this regard to apply across the board. The substance of President Kennedy's statement has been embodied by the Civil Service Commission in Federal Personnel Manual, App. C, 735-C-1 (Cont'd)

While we do not know at this time precisely what duties the President will delegate to the Vice President, it is entirely possible that the Vice President will be able to discharge many of them efficiently and effectively pursuant to a Presidential waiver under section 208(b), without actual or apparent conflict of interest.

3. The blind trust and the statute

We have seen that section 208(a) requires as an element of the offense that the officer or employee have personal knowledge of his disqualifying interest.

Prior to enactment of the conflict of interest law in 1962, a procedure had been established for President Eisenhower and other officeholders such as John A. McCone of the Atomic Energy Commission, intended to obviate conflict problems arising from substantial stockholdings and other financial interests. This was the so-called "blind trust." The official entering Government service placed his securities in a trust held by an independent trustee, the trust to terminate on the official's completion of his Government service. The official was not informed as to the sale or purchase of securities in the trust, nor did he have any power of control or distribution.

The view has been expressed by a leading authority on the conflict of interest law that the requirement of "knowledge for prosecution under section 208 . . . lends statutory sanction to the 'blind' trust procedure established for President Eisenhower and others to shield them from conflict of interest problems . . . ." 3/ Apparently, the blind trust procedure has been accepted by Senate committees considering nominations of officers in the executive branch, who for various reasons were unable or unwilling to divest themselves of their financial interests.

2/ (Cont'd from p. 6)

of November 9, 1965. This was done pursuant to section 703(e) of Executive Order No. 11222 of May 8, 1965.

3/ Roswell B. Perkins, The New Federal Conflict of Interest Laws, 76 Harv. L. Rev. 1113, 1134 (1963).

This does not mean that in the view of the Department of Justice a blind trust ipso facto immunizes the settlor from the operation of 18 U.S.C. 208. If, for example, Mr. Rockefeller owned $10 million worth of Standard Oil stock, he might be under a legal duty to assume that he still owned the stock unless he received notice that the stock had been sold. Accordingly, if Mr. Rockefeller decides to utilize a blind trust of his financial interests he should disqualify himself from those transactions which possibly relate to companies in which he holds substantial blocks of securities until he ascertains that in fact those securities are no longer held in his portfolio. If he adheres to this principle, he can still discharge many important duties which the President sees fit to delegate to him without fear of violating the conflict of interest statute.

4. The David Packard precedent.

Beginning about 1953, and until David Packard took office as Deputy Secretary of Defense in 1969, it was customary for the Senate Armed Services Committee to require Defense Department appointees to dispose of their stockholdings in companies doing business with the Pentagon.[4/] When David Packard was under consideration by the Senate Committee to serve as Deputy Secretary of Defense, he explained that his holdings in the Hewlett-Packard Company, a Defense contractor, amounted to about 3,550,000 shares, and that the sale of the stock on the open market would have a harmful effect upon the company and its stockholders. Mr. Packard stated that he was willing to establish a charitable trust which would devote all income from this stock to charitable purposes for not less than two years and so long thereafter as his period of government service extended.[5/] This arrangement satisfied the Senate Committee as striking the right balance between the need for recruitment of key executive manpower for the Government and the need for preserving moral and ethical principles.

[4/] This was the so-called "Absolute Principle," developed as a result of the Wilson controversy in 1953. See Manning, The Purity Potlatch, 24 Fed. B.J. 239, 246 (1964).

[5/] Nomination of David Packard, Hearings before the Committee on Armed Services, U.S. Senate, 91st Cong., 1st Sess. (1969). 42-43.

When Mr. Packard left the Government, about $6 million went to charity. The arrangement was relatively free from public criticism. It suggests a possible course of conduct for Mr. Rockefeller which should satisfy both congressional doubts and the strict requirements of section 208. Of course in the case of Mr. Rockefeller the financial interests in question would not merely be those related to defense contracts, and that may render the device impractical as a total solution to the problem. Nevertheless, it might be used with respect to those holdings that raise the most obvious risks of conflict.

5. Accommodation.

The options discussed under paragraph 2 above only meet the legal point at issue and do not attack the practical problem that is at least equally important: Regardless of whether the provisions of section 208 are applicable or are technically satisfied, the Congress may require, as a condition of confirmation, some action on the part of Mr. Rockefeller which would satisfy it that his financial holdings would not create a real or apparent conflict of interest. Such conditions, as discussed in the Committee Reports on confirmation, might well be coupled with a conclusion that section 208 is inapplicable. Should Congress insist on conditions, we do not believe it would be possible to assert that it would be acting against either the spirit or the letter of the Constitution since any such conditions would be presumably related to the nominee's adequate discharge of his responsibilities. Thus, the suggestions contained in paragraphs 3 and 4 must be considered even if other points are dispositive of the narrow legal issue.

Larry Silberman

Laurence H. Silberman
Deputy Attorney General