

Justice Dept  
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April 14, 1969

MEMORANDUM

Re: Appointment of Congressman to the Office of  
Director of the Office of Economic Opportunity

It has been proposed that a member of the 91st Congress be appointed Director of the Office of Economic Opportunity, with the President fixing the compensation of that office at zero, and that the same individual be appointed by the President as an advisor under the authority contained in the special projects provision of the Executive Office Appropriation Act, 1969. The compensation for the latter position would be fixed at \$42,500 per year.

Article 1, section 6, United States Constitution, provides as follows:

"No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time . . . ."

42 U.S.C. 2941(c) provides:

"The compensation of the Director of the Office of Economic Opportunity shall be fixed by the President at a rate not in excess of the annual rate of compensation payable to the Director of the Bureau of the Budget."

Question of Constitutional Disqualifications as OEO Director.

The compensation payable to the Director of the Bureau of the Budget was increased to \$42,500 pursuant to the Federal Salary Act of 1967, and thereby the statutory ceiling on the salary of the Director of the Office of Economic Opportunity was likewise increased. However, nothing in the Act altered





the authority of the President to fix the salary at any amount under the existing ceiling. Therefore, the President plainly has authority to fix the compensation of the Office of the Director of the Office of Economic Opportunity at zero. Clearly, the Office of Director of the Office of Economic Opportunity has not been "created" during the term of the 91st Congress, and if the President sets the compensation of that office at zero, just as clearly its emoluments have not been increased as of the date of the proposed appointment.

Question of Constitutional Disqualification as Presidential Advisor.

Nor is the proposed plan subject to any serious claim that the position of presidential advisor, pursuant to the Executive Office Appropriations Act, is itself a "civil office" which has either been created, or the emoluments of which have been increased, during the term for which the appointee was elected to serve in Congress. 1 Hinds' Precedents of the House of Representatives, 604-611, contains a lengthy report from the Judiciary Committee of the House of Representatives to the House, discussing the meaning of the term "office" as used in the above described constitutional provision. The report cites numerous precedents and court decisions prior to its date (December 21, 1898) and contains the following observation:

"A public office is the right, authority, and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the Government to be exercised by him for the benefit of the public."  
(Mechem's Public Offices and Officers, § 1; . . . .)."

United States v. Hartwell, 6 Wall. 385, while holding that a clerk in the regional office of the Treasury Department, hired by the Assistant Secretary of the Treasury, was an "officer" within a statute making it a crime for "officers of





the United States" to appropriate public monies to their own use, stated:

"An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties." 6 Wall. at 393.

Analyzing the position to which the appointee will be named, it is clearly a transient position. It is created neither by act of Congress nor by formal Executive Order. The analysis does not rest simply on the fact that the incumbent lacks fixed tenure; such is true of cabinet members, who are quite obviously by any test officers of the United States. But the position itself, as a position and apart from the particular incumbent, has no fixed duration. See Corwin, The President, Office and Powers (1957), p. 70 (An office is "an institution distinct from the person holding it and capable of persisting beyond his incumbency."). Similarly, the position has neither emoluments nor duties that are fixed by act of Congress or by formal Executive Order. Undoubtedly, the appointee will have duties, but these are at the pleasure of the President and would doubtless vary substantially from day to day. Without burdening the matter with further detailed analysis, it is fair to conclude that the proposed position as presidential advisor does not sufficiently embrace "the ideas of tenure, duration, emolument, and duties" to come within the category of a "civil office" within the constitutional prohibition.

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