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United States Senate

OFFICE OF THE SECRETARY

MEMORANDUM

TO: Glen D. Nager
Chair of the Board of Directors
Office of Compliance

FROM: Kelly D. Johnston
Secretary of the Senate

DATE: July 1, 1996

RE: Response of the Secretary of the Senate to the Notice of Proposed Rulemaking

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The Secretary of the Senate submits this memorandum to the Board of Directors of the Office of Compliance in response to the Notice of Proposed Rulemaking, 142 Cong. Rec. S5563-67 (daily ed. May 23, 1996).

Section 220(e)(1) of the Congressional Accountability Act of 1995 ("CAA") requires the Board of Directors of the Office of Compliance ("Board") to issue regulations regarding the manner and extent to which the requirements and exemptions of chapter 71 of Title 5 of the United States Code ("chapter 71") should apply to employees in various offices enumerated in section 220(e)(2) of the CAA. These offices include Senators' personal offices, Senate leadership and Committee offices, numerous offices under the jurisdiction of the Secretary of the Senate, the Offices of Senate Legal and Legislative Counsel, and Senate offices that perform comparable functions. Section 220(e)(1)(B) of the CAA requires that the employees in these offices be excluded from coverage under section 220 of the Act if the Board determines that such exclusion is required because of an actual or perceived conflict of interest or Congress's constitutional responsibilities.

In response to the Board's Advance Notice of Proposed Rulemaking ("ANPR"), 142 Cong. Rec. S1547 (daily ed. March 6, 1996), the Secretary of the Senate ("Secretary") asserted that many of the employees in section 220(e)(2) offices must be excluded from coverage because of conflicts of interest and Congress's constitutional responsibilities. In its Notice of Proposed Rulemaking ("NPR"), the Board rejected the Secretary's arguments and concluded that neither of the statutory criteria set forth in section 220(e)(1)(B) requires that any groups of covered employees in section 220(e)(2) offices be excluded from coverage. Instead, the Board proposed regulations that may allow particular employees to be excluded from coverage under section 220 only on a case-by-case basis.

The Secretary contends that the proposed regulations do not fulfill the Board's obligations under section 220(e) of the CAA, will seriously impede the Senate's ability to fulfill its constitutional responsibilities, and do not protect adequately against actual and perceived conflicts of interest. The Secretary reasserts but will not restate here his response to the ANPR. Rather, as set forth below, the Secretary identifies his disagreement with some of the points raised in the NPR.

1. In the NPR, the Board contends that no groups of Senate employees in section 220(e)(2) offices should be excluded from coverage under section 220. Relying on Webster's Third New International Dictionary and Black's Law Dictionary, the Board concludes that section 220(e)(1)(B) does not allow exclusions that merely further the stated statutory criteria; rather, exclusions should be allowed only where the application of chapter 71 would "defeat Congress's constitutional responsibilities or cause insoluble conflicts of interest (real or apparent)." 142 Cong. Rec. at S5566. The Board further implies that exclusions under section 220 should be allowed only where the application of chapter 71 would bring a Member of Congress to his or her "constitutional knees." *Id.*

The Board's position misconstrues the language of section 220(e)(1). That section provides that an exclusion can be required *"because of"* a real or apparent conflict or Congress's constitutional duties. That is, the fact that a real or apparent conflict exists or that Congress has constitutional duties can form the basis of an exclusion. The standard established by the Board -- i.e., that not only must an apparent or real conflict exist but also that it must be insoluble, and that the right to organize must defeat constitutional responsibilities -- is higher than that established by Congress.

2. The Board contends that a union's influence over section 220(e)(2) employees will not have a significant impact on Congress's constitutional functions because supervisors, managers, confidential employees and personnel employees are exempted from the provisions of chapter 71 as applied by the CAA. 142 Cong. Rec. at S5566. The Board's argument appears to ignore the fact that many of the employees who directly assist Members in fulfilling their constitutional duties, such as legislative aides, are not necessarily supervisors, managers and/or confidential employees. If such legislative employees are to be exempted as a group, it must be pursuant to section 220.

3. In the NPR, the Board concludes that no groups of employees in section 220(e)(2) offices should be excluded from coverage under section 220 because of any actual or apparent conflict of interest. The arguments raised by the Board in support of this position overlook the conflicts inherent in allowing labor unions to represent employees whose duties directly relate to the functioning of the legislative process.

The Board acknowledges that tensions and potential conflicts of interest may arise from union membership in Member's offices but defends its position on the ground that Congress has not imposed a blanket prohibition on an "employee's membership and participation in other special interest groups, such as the Sierra Club, the National Rifle Association, the National Right to Work Foundation, or the National Organization [for] Women," which may also create conflicts between the employee's interests and a Member's legislative positions. 142 Cong. Rec. at S5567. The Board's analysis overlooks two points. First, a Member has no statutory obligation to negotiate with, recognize, or otherwise work with outside special interest groups to which his or her employees belong; however, a Member would be required to do so with a union. Second, while the Board is correct in asserting that Congress has not imposed a blanket prohibition on employee membership and participation in outside special interest groups, Members *are* permitted to make employment decisions based on an employee's political compatibility with the Member, which may include the employee's membership in certain groups. *See* 2 U.S.C. § 1432. However, Members would be subject to an unfair labor practice charge under the CAA for taking action against an employee based upon his or her union sympathies.

4. The Secretary raised numerous concerns in response to the ANPR regarding actual or perceived conflicts of interest that may surface whenever a Senator who is voting on legislation that affects labor unions has employees who are union members. The Board dismisses these concerns in the NPR by asserting that the situation does not differ from that faced by the President when he or Executive Branch officials acting on his behalf take a position on pending labor legislation. 142 Cong. Rec. at S5567. The Board's position ignores several important distinguishing facts. First, employees in the Executive Office of the President are *not* permitted to join labor unions because they are not subject to the provisions of chapter 71.[1] Accordingly, it is entirely inappropriate

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[1] *See* 5 U.S.C. § 7103(a)(3) (chapter 71 applies only to "Executive agencies"). *See also Haddon v. Walters*, 43 F.3d 1488 (D.C. Cir. 1995) (complaint of White House Chief Usher under Title VII dismissed because Executive Residence did not qualify as an "executive agency" within the meaning

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to compare the President's situation with the problems a Member may face if his or her personal, Committee or leadership staff is permitted to join a labor union. Second, executive branch employees are engaged in administrative rather than legislative functions and are not subject to the same conflicts of interests that are inherent in the legislative process, as explained in the Secretary's response to the ANPR. Third, to the extent executive branch employees are subject to potential conflicts of interest in the exercise of their *administrative* functions, they may not be represented by a labor organization involved in the conflict. Section 7112(c) of Title 5 of the United States Codes provides:

> Any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization -- (1) which represents other individuals to whom such provision applies; or (2) which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.

Neither the regulations proposed by the Board nor the provisions of chapter 71 provide the same protection against conflicts of interest that arise in the performance of *legislative* functions. At a minimum, the Board must adopt regulations analogous to 5 U.S.C. § 7112(c) that prohibit Senate employees who are involved with labor-management legislation from being represented by any labor organization that represents other individuals to whom such legislation may apply.

5. The Board asserts that any concerns regarding the effect that union activity would have on Congress's constitutional responsibilities, such as preserving confidentiality of information and ensuring loyal performance of duties, can be addressed through "neutral work rules" rather than through excluding employees from coverage under section 220. According to the Board, these rules can be "designed to assure productivity, discipline, and confidentiality and to discipline and/or discharge any employee who violates those rules." 142 Cong. Rec. at S5566. The Board further contends that a "Senator would violate section 220 of the CAA if he or she simply forbid inconsistent conduct that related to union membership or activities or enforced a facially neutral rule in a discriminatory manner." *Id.*

The Secretary contends that the mere fact that an employee occupies a position where his or her union affiliation can adversely affect the Senate's constitutional functions should provide ample basis for excluding that employee from coverage under section 220. Further, as the Board acknowledged, "[A] Senator would . . . violate section 220 of the CAA if he or she . . . forbid inconsistent conduct that related to union membership or activities." *Id.* An office should not be

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of 42 U.S.C. 2000e-16, as defined by reference to civil service statutes). *Cf.* 2 U.S.C. § 1433(a) (incorporates anti-discrimination provisions of the Government Employee Rights Act of 1991 for White House employees, but does not provide coverage for such employees under other federal labor and employment statutes); 2 U.S.C. § 1434 (directing the Judicial Conference to report on the application of chapter 71 to the judicial branch only).