SEP 20 1974

Honorable Howard W. Cannon
Chairman, Committee on Rules
and Administration
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your letter to the Attorney General of September 16 in connection with the hearing to be held by your committee on the nomination of Nelson A. Rockefeller to be Vice President of the United States.

You have asked for a summary and analysis of the Federal conflict of interest law, 18 U.S.C. 208, and of any other statutes which might apply to Mr. Rockefeller if he were confirmed as Vice President. In addition, you have specifically requested an opinion as to whether it would be lawful for Mr. Rockefeller, while serving as Vice President, to be an officer, director or stockholder of, or to hold any other beneficial interest in, any company having contracts with any agency of the United States Government.

I should note at the outset that the legislative history of the Twenty-Fifth Amendment, pursuant to which Mr. Rockefeller has been nominated as Vice President, is silent as to the question of conflict of interest; the subject does not appear to have been of any concern to the Congress when it proposed the amendment. There are, however, two statutes which are relevant to the questions you raise. One, as noted in your letter, is 18 U.S.C. 208; the other is 18 U.S.C. 431.

18 U.S.C. 208

In substance, 18 U.S.C. 208(a) prohibits an officer or employee of the "executive branch" 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. Section 208(b) authorizes a waiver of the prohibition by the "official responsible for appointment" where the outside financial interest is deemed not substantial enough to affect the integrity of the officer's or employee's services.

To summarize the views expressed in detail below: Section 208 does not expressly apply to the Vice President. Some of its language and its legislative history indicate the contrary. Moreover, serious doubt as to constitutionality urges against an interpretation which would render Section 208 applicable to the President; and it seems almost certain that the President and Vice President were intended to be treated alike.

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. The section 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, does not demonstrate that section 208 was intended to apply to the Chief Executive and his immediate successor. In seeking to ascertain the intention of Congress, it is useful to refer 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 were not entirely accepted in the conflict of interest legislation as enacted, both the House and Senate committees reporting on the bill and members of Congress in debate acknowledged the contributions made by the Bar Association in the ultimate formulation of the legislation. 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 an aspect of the Bar Association's report -- 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 by both committees and in floor debate. I believe it more reasonable to conclude that Congress in speaking of an "officer or employee of the executive branch" in section 208 meant to include only those "officers of the United States" who receive their appointment from the President under Article II, section 3, of the Constitution and those subordinate officials who are employed by departments and agencies in the executive branch.

My belief is strengthened by the fact that the waiver provision in subsection (b) of section 208 assumes the existence of an "official responsible for appointment" of the officer or employee in question. At the time the statute was enacted, of course, the Vice President was elected; and the subsequent Twenty-fifth Amendment to the Constitution does not use the term "appointment" in describing the President's role in the selection of his successor. It is conceivable, of course, that the provision of a waiver procedure exercisable only by the "official responsible for appointment" was merely meant to indicate by omission the unavailability of a waiver for nonappointed officers or employees; but one would think that an exempting mechanism would be more necessary for the President and the Vice President (if they were covered) than for other officials. On balance, subsection (b) tends to negate coverage of the President and Vice President.

These considerations derived both from the statutory language and its legislative history are buttressed by two applicable canons of statutory construction. 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 certainly either to disable him from performing some of the functions prescribed by 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 203 because it is not an executive act. In any event, whether or not application of section 203 to the Vice President is constitutionally permissible, it would seem that any reasonable construction of the statute would treat the President and the Vice President alike. In light of the weighty constitutional problems with respect to the President, the statute should 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 argue strongly against interpreting the statute to apply to the President and Vice President in light of what must be conceded to be (at very least) the textual uncertainty described above.

Although, as I see it, these considerations are dispositive, without regard to them it might be asserted that the Vice President is not an officer of the executive branch for purposes of section 208. The Vice President's only constitutionally prescribed function is that of presiding over the Senate. Article I, sec. 3, cl. 4.

18 U.S.C. 431

As to your specific question concerning the permissibility of a Vice President's financial or managerial connection with a Government contractor: The only possibly relevant statute of which we are aware is 18 U.S.C. 431, dealing with contracts by a "Member" of Congress. It prohibits the member "directly or indirectly, himself or by any person in trust for him, or for his use or benefit, or on his account" from undertaking, executing, holding, or enjoying, in whole or in part, any contract made on behalf of the United States or any agency thereof, by any officer or employee authorized to make contracts on its behalf.

The key issue thus is whether the Vice President is a "Member of . . . Congress" within the meaning of 18 U.S.C. 431. I do not so regard him. Certainly the Vice President is not a Member of Congress as that term is used in the Constitution. To be sure, for certain purposes he can be regarded as being in the legislative branch. Thus, for example, the Vice President is empowered to be President of the Senate and to vote in the event of an equal division in the Senate. Art. I, sec. 3, cl. 4. Unlike Members of the Senate, however, the Vice President (like the President) is subject to impeachment. Art. II, sec. 4. Moreover, while clauses 1 and 2 of section 5 of Article I provide that each House shall be the judge of the elections, returns and qualifications of its own "members" and may punish them for disorderly behavior and expel them, these clauses plainly do not apply to the Vice President. The Constitution also provides that no person holding "any Office under the United States" (which, of course, includes the Vice President), shall be a "Member of either House" during his continuance in office. Art. 1, sec. 6, cl. 2. Considered as a whole, these provisions indicate that the Vice President has a unique status in the legislative branch, but not the status of a "Member" of the Congress within the meaning of the Constitution.

Turning next to the meaning of "Member . . . of Congress" in the precise context of 18 U.S.C. 431: Since it is a criminal statute, to be strictly construed, I cannot interpret it to apply to the Vice President when it makes no specific reference to him, and when he is not regarded as a "Member" of either the House of Representatives or the Senate (the Congress) under the Constitution. It should be noted that the statute in question was passed less than twenty years after the Constitution was written, so that it is not unreasonable to assume a parallel use of terminology. This is particularly the case since our examination of the legislative history of that section discloses no mention whatever of the Vice President. Congress has not been at a loss for words when it intends a statute, criminal or civil,

to reach offenses against a Vice President or to apply to him in other respects. */ For these reasons, I conclude that the statute does not apply to that office.

If you have any further specific questions, I will be glad to be of whatever help I can to the Committee.

Sincerely,

Laurence H. Silberman
Acting Attorney General

---

*/ See, e.g., 18 U.S.C. 871, 1751; 10 U.S.C. 888, 9342(a); 5 U.S.C. 2106. For example, in 5 U.S.C. 2106, which deals with Government organization and employees, it is provided: "For the purposes of this title, 'Member of Congress' means the Vice President, a member of the Senate or the House of Representatives . . . ."