

MAINE STATE LEGISLATURE

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May 14, 1976

Honorable David R. Ault
House of Representatives
State House
Augusta, Maine

Dear Dave:

This responds to your letter of April 26, 1976, in which you posed the question of whether there would be any conflict involved in a Maine Legislator serving as a special assistant in charge of a Maine Congressman's office. Consideration of your request requires addressing two questions:

1. Is such employment an incompatible office prohibited by the provisions of Article IV, Part Third, § 11, of the Maine Constitution?

2. If such employment is not prohibited by Article IV, Part Third, § 11, of the Maine Constitution, is it, nevertheless, prohibited as a conflict of interest by the provisions of 1 M.R.S.A. § 1011, et seq.?

Initially, this question requires address of the provisions of Article IV, Part Third, § 11, of the Maine Constitution, which states:

"No member of Congress, nor person holding any office under the United States (post officers excepted) nor office of profit under this State, justices of the peace, notaries public, coroners and officers of the militia excepted, shall have a seat in either House during his being such member of Congress, or his continuing in such office."

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The key question, therefore, is whether employment by a member of the United States Congress on that particular member's staff is an "office under the United States," the holding of which is prohibited by Section 11. We conclude that the employment as a member of a Congressman's staff in the circumstances of this case is not an "office under the United States" such as would be prohibited under Section 11. Both Federal and State law require something more than simply employment by the government to constitute an office. Thus, in one of its earliest decisions the Maine Supreme Court held that:

"There is a manifest difference between an office and an employment under the government. We apprehend that the term 'office' implies a delegation of a portion of sovereign power to, and possession of it by the person filling the office." Opinion of the Justices, 3 Me. 481, 482 (1822).

Thus, in Maine a person holds an "office" when that person is in a position directly or through delegation to exercise the powers of the sovereign. In the case of a Legislator, that power is voting or otherwise acting on legislation. This power is not delegable either under the Maine or the United States Constitutions. Therefore, individual employees of individual Legislators do not hold "office" as such (although certain legislative employees may also be officers, e.g., Clerk of the House, Secretary of the Senate).

Further, there is no reason for a different interpretation based on Federal law addressing the word "office." The United States Supreme Court has held, for example, that an employee of a judge is not an officer of the United States. Miller v. United States, 317 U.S. 192, 197 (1942). Thus, under either State or Federal interpretations, mere employment without authority to exercise sovereign power does not constitute an "office."

As to the question of conflict, the matter should be initially addressed by the Commission on Governmental Ethics and Election Practices. I understand they have reviewed the matter at your request and found no conflict of interest in the situation you posed.

Sincerely,

JOSEPH E. BRENNAN
Attorney General

JEB/ec

cc: Commission on Governmental
Ethics and Election Practices