DCN: 12332

Attorney Client Privileged Communication

MEMORANDUM

To: Chairman Dixon
From: Mary Ann Hook, General Counsel
Re: Special Government Employee
Date: October 13, 1994
October 17 additions in bold on page 2.

A special government employee, SGE, is one who is retained, designated, appointed or employed either with or without compensation, to perform temporary duties for not to exceed 130 days out of any period of 365 consecutive days.[1]

You were designated as a special government employee. Even if you exceed the 130 day mark in a 365 day period you will nevertheless continue to be considered a special government employee for the remainder of that 365 period.[2] A new estimate (regarding designation as a special government employee) should be made at the expiration of each 365 day period thereafter.[3]

Other facts about SGEs:

1- All days you work count toward the 130 day limit. Payment is immaterial for calculation of the 130 day period.

2- Any part of a day worked should be counted as a full day for the purposes of counting days, including weekends or holidays.[4]

3- The 365 day period begins on your first day worked.

4- After 60 days worked, your SF278 is available for public inspection at its request.

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[1] Title 18 U.S.C. section 202 (a).

[2] Office of Government Ethics, The Informal Advisory Letters and Memoranda and Formal Opinions of the United States Office of Government Ethics, 1979-1988, 84 x 4, pages 451-452.

[3] Id.

[4] Office of Government Ethics, The Informal Advisory Letters and Memoranda and Formal Opinions of the United States Office of Government Ethics, 1979-1988, 84 x 4, pages 451-452. Federal Personnel Manual, 735-C-02.

5- If the agency believes that the employee will work more than 130 days, he should be classified as a full-time employee and not a SGE. In the past, Commissioners have received the SGE classification. This classification permits the employee to maintain full-time outside employment and is less restrictive in regards to the employee's ability to work on matters before the government.

6- As long as you are performing official government business, and the appropriate travel orders are completed by the Commission's Administration Department, you will receive travel cost reimbursement for travel and expenses. Exceeding your 130 appointment designation will not affect reimbursement.

7. You can aggregate your pay and bill for an eight hour period. For example, you work 3 hours on Friday and 5 hours on Saturday. You can bill the Commission for one day (Friday) worked and report two days (Friday and Saturday) for 130 designation.

Another recommendation is to try and restrict return of telephone calls, media etc. one day a week until 1995.

If you do not inform the Commission otherwise, we will assume your billable hours constitute your total work period for 130 reporting and for billing purposes.

Sources of Information

Federal Personnel Manual, Chapter 735, Appendix C at 2.

Department of Justice Opinion, Memorandum Opinion for the Counsel to the President, August 1979, page 323.

Office of Government Ethics, The Informal Advisory Letters and Memoranda and Formal Opinions of the United States Office of Government Ethics, 1979-1988. Opinions 81 x 24 and 84 x 4.

Telephone confirmation with the Office of Government Ethics, Oct. 14, 1994, Stewart Rick and Kent Wayland.

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specific party or parties (1) in which he, at any time, participated personally and substantially while in Government or (2) which is pending in the Department in which he is serving. Moreover, the latter prohibition applies only to a special Government employee who has served in the Department for more than 60 of the preceding 365 days. You have not served in the Department of Justice during the last year. Therefore, the prohibition against your acting as agent or attorney in matters pending in the Department of Justice and receiving compensation for services rendered before a Federal Department in relation to such matters will not go into effect until you have actually performed services as Independent Counsel on all or part of 60 of the next 365 days. Until that time, you could personally represent clients in matters pending before the Justice Department, and you could share in your law firm's fees for its services performed in matters before the Department.

If you should perform duties as Independent Counsel on all or part of 60 days, however, you would be barred from personally representing a client in a matter "pending in" the Justice Department, and your firm would have to take measures to ensure that any compensation you might continue to receive from the firm was not attributable to services the firm performed in relation to matters pending in the Justice Department and was not compensation for any advice or assistance you might render to your partners or associates who were prosecuting claims pending in the Department.

A case or other matter is not regarded as pending in the Department for purposes of these restrictions if it is within the jurisdiction of a court. Thus, if an information or indictment has been filed in a criminal case or a complaint has been filed in a civil case, the matter is no longer pending in the Justice Department. Even after expiration of the 60-day period mentioned above, then, you could personally represent a client in court or before the Department in such criminal cases, and your partnership

draw could include fees for these cases. The prohibitions mentioned above would only apply to a grand jury or other investigations or discussions with the Justice Department prior to the filing of an information or indictment in a criminal case and to administrative and civil matters pending in the Department prior to the filing of a law suit.

Please feel free to contact me if you wish to further discuss these matters.

Sincerely,

David H. Martin
Director

**Memorandum is
and amended
from David H.
to Designated Age
General Counsels an
Regarding Summary of A
of Travel Expense**

Because this Office has r
regarding the acceptance and
employees of travel reimburs
private sources and because
public financial disclosure rep
believe it is important to pr
outline of the considerations
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Office of Government Ethics

81 x 24

Letter to a Government Officer
dated July 23, 1981

You have asked this Office for an opinion on the impact of the Federal conflict of interest statutes upon a prospective course of action which you are interested in pursuing outside your Government employment. We have undertaken a review of this matter in light of the information which you have provided for our consideration, as well as additional information developed in conversations with representatives of the Office of General Counsel [of your agency].

You have provided the following information:

(1) You are currently serving a three year term as a member of [a Federal Board which governs an agency].

(2) You are a principal in a small consulting firm which handles matters totally unrelated to your responsibilities at [your agency].

(3) You desire personally to contact and represent your firm in negotiations on a contract matter before [a] Department [not related in any way to your agency] (hereinafter "the Department").

We will first review the three conflict statutes which bear on your situation. Chapter 11 of Title 18 of the United States Code contains criminal restraints which you as a Federal official must be aware of in your private business dealing in matters in which the United States Government has a direct and substantial interest. More specifically, 18 U.S.C. § 203 is essentially a prohibition against an officer

or employee of the executive branch receiving compensation from a private source for working on a particular matter in which the Government has an interest and which is pending before any Department or agency.[1]

18 U.S.C. § 205 is similar to section 203 and overlaps it in some respects. Section 205 prohibits an officer or employee of the executive branch from acting as agent or attorney for anyone with or without compensation before any Department or agency in any particular matter in which the United States is a party or has a direct and substantial interest.[2] Included in "particular matters" are applications

[1]18 U.S.C. § 203 states:

> (a) Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receives or agrees to receive, or asks, demands, solicits, or seeks, any compensation for any services rendered or to be rendered either by himself or another . . . in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court-martial, officer, or any civil, military, or naval commission . . . shall be fined not more than $10,000 or imprisoned for not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

[2]18 U.S.C. 205 states in part:

> Whoever, being an officer or employee of the United States in the executive . . . branch of the Government or in any agency of the United States . . . otherwise than in the proper discharge of his official duties--
>
> . . . .
>
> (2) acts as agent or attorney for anyone before any department, agency, court, court-martial, officer, or any civil, military, or naval commission in connection with any proceeding, application, request

(continued...)

and contracts. Clearly, this part of the statute standing alone would constitute a bar to your personal involvement in any negotiations on behalf of a private firm before the Department. However, both sections 203 and 205 provide an exemption of limited application to the above mentioned restrictions in the case of special Government employees, an employment status which is defined in 18 U.S.C. § 202. In short, this exception precludes a special Government employee from representing private firms as an agent or attorney only in a matter involving a specific party or parties (i) in which he has participated personally and substantially in his Government capacity, or (ii) which is before his Department or agency if he has served therein more than 60 days in the past year.[3]

From the above, we determine that the critical issue in your case is whether or not you and the other members of

[2](...continued)

> for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest --
>
> Shall be fined not more than $10,000 or imprisoned for not more than two years or both.

[3]18 U.S.C. 205 states in part:

> A special Government employee shall be subject to the preceding paragraphs only in relation to a particular matter involving a specific party or parties (1) in which he has at any time participated personally and substantially as a Government employee or as a special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, or (2) which is pending in the department or agency of the Government in which he is serving: *Provided*, That clause (2) shall not apply in the case of a special Government employee who has served in such department or agency no more than sixty days during the immediately preceding period of three hundred and sixty-five consecutive days.

[your] Board are to be considered special Government employees under 18 U.S.C. § 202.

In two separate internal memoranda, the Office of General Counsel of [your agency] has concluded that it is "doubtful" whether or not the [members of this Board] are special Government employees. These memoranda seem to rely on the following factors as being dispositive of the issue:

(A) the definitional language of 18 U.S.C. § 202 does not exactly describe a member of [this] Board; and

(B) the payment of an annual salary to the [members of this] Board.[4]

[4] *See, e.g.*, the Office of General Counsel's ([of your agency]) memorandum to file of September 14, 1970:

> It might be argued from the $300-a-day salary authorized to each [Board member] (not to exceed 30 or 60 days)([citation omitted]), that a [Board member's] employment does not exceed "one hundred and thirty days" during the year. On the other hand, however, a [board member] is also authorized a salary of $10,000 *a year* (emphasis added). [citation omitted]. This suggests an annual salary, presumably pro-rated as such, notwithstanding the additional $300 per diem. In addition, the per diem allowance is not to be "construed to limit the number of days of meetings each year to 30 days." *Id.* Thus, the [Board members] are not precluded from meeting more than 130 days a year -- only their per diem allowance may not be paid for more than 30 or 60 days.

See also the memorandum of June 24, 1974 from Assistant General Counsel, Legal Affairs Office to General Counsel:

> A [Board member] simply does not fit within the language of 18 U.S.C. 202 as "an officer . . . of the executive branch . . . who is . . . appointed . . . to perform . . . temporary duties . . . ." nor within the sense of the statute in creating that category.

For the reasons set forth below, we are of the opinion that the [members of this] Board *are* special Government employees and therefore *do* fall within the exceptions enumerated under sections 203 and 205 of Title 18.[5]

18 U.S.C. § 202 defines a special Government employee as:

> an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States . . . who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis. . . .

Guidelines for obtaining and utilizing the services of special Government employees are found in the Federal Personnel Manual at Chapter 735, Appendix C.[6]

[5] By letters dated September 24, 1980 and January 28, 1981, this Office advised the General Counsel of [your agency] that officials such as the [members of this] Board who serve sixty days or less were not subject to the public financial reporting requirements of Title II of the Ethics in Government Act of 1978 (Pub. L. No. 95-521) but are instead subject to the confidential financial reporting requirements of Executive Order 11222.

[6] An Attorney General's Opinion of January 31, 1962 to the President set forth some mechanical rules for executive agencies to follow on the application of the conflict of interest laws to intermittent and part-time consultants and advisers, 42 Op. Att'y Gen. 6. After Public Law No. 87-849, 76 Stat. 1119, came into force in January 1963, the President rescinded his memorandum of February 9, 1962 and replaced it with a similar memorandum of May 2, 1963 entitled "Preventing Conflicts of Interest on the Part of Special Government Employees," 28 Fed. Reg. 4539. This second Presidential Memorandum was rescinded by Executive Order 11222, of May 8, 1965, 28 Fed. Reg. 6469, but its provisions were preserved as

(continued...)

The following rules are set forth to assist each agency in making the necessary determinations:

(a) At the time of the original appointment, the agency should make its best estimate of the number of days during the following 365 days on which it will require the services of the appointee. A part of a day should be counted as a full day for the purposes of this estimate.

(b) Unless otherwise provided by law, an appointment should not extend for more than 365 days. When an appointment extends beyond that period, an estimate as required by paragraph (a) should be made at the inception of the appointment and a new estimate at the expiration of each 365 days thereafter.

(c) If an agency estimates, pursuant to paragraph (a) or (b), that an appointee will serve more than 130 days during the ensuing 365 days the appointee should not be carried on the rolls as a special Government employee and the agency should instruct him that he is regarded as subject to the prohibitions of sections 203 and 205 to the same extent as if he were to serve as a full-time employee. If it is estimated that he will serve no more than 130 days during the following 365 days, he should be carried on the rolls of the agency as a special Government employee.

[6](...continued)
follows: Those derived from ethical considerations were, in condensed form, included in Executive Order 11222 as Part III. The remaining portion was mandated by the Civil Service Commission (OPM) for continuing agency compliance governmentwide by inclusion in the Federal Personnel Manual at Chapter 735, Appendix C.

The members of [this] Board are appointed by the President by and with the advice and consent of the Senate.[7]

The enabling legislation, establishing the Board, is silent as to the actual status of the [members] and there is little in the legislative history surrounding the establishment of the [agency] which suggests that Congress focused on the status of the [members] in any determinative way.[8] However, there is some insight to be gained from looking at the effect that 18 U.S.C. § 202 has upon the Government officers or employees whose services are intermittent. The major purpose of this 1963 legislation was to remedy the failure of the existing conflict of interest statutes to deal with the special problems of intermittent officers and employees of the Government.[9] The formal act by which one is "retained, designated, appointed, or employed" is of crucial importance under section 202. The officer or employee's status as a regular or a special Government employee is determined by the terms of his appointment or retention. That is to say, section 202 defines special Government employee on the basis of whether the employee (officer) was appointed to serve no more than one hundred and thirty days out of any consecutive three hundred and sixty-five days. For purposes of this classification it is immaterial whether he is paid or not paid for his governmental work.

[7]The Board was established under the provisions of [citation omitted]. Each [member] receives a salary of $10,000 a year plus $300 a day for not more than 30 days of meetings each year and is reimbursed for travel and reasonable expenses incurred in attending meetings of the Board. There is no limit on the number of days on which meetings of the Board may be held.

[8]In floor debates, Congressman Udall did express the opinion that the [members of the Board] would be "special Government employees" who were "expressly permitted to engage in outside employment." [Citation omitted.]

[9]H.R. Rep. No. 748, 87th Cong., 1st Sess. 4, 13-15 (1961). S. Rep. No. 2213, 87th Cong., 2d Sess. 6-7 (1962).

The facts and form of the appointment are the critical elements.[10]

Under [the applicable provisions of the United States Code] the members of the Board are appointed by the President. The agency has advised us that the Board normally meets once a month on call of the Chairman. These meetings usually consist of an afternoon session on one day and a morning session on another day. Special meetings are held occasionally as policy matters dictate and separate committees of the Board meet on an intermittent basis. Since establishment of the Board, experience has shown that none of the [members] has served more than 130 days within a 365 calendar day period. More particularly, you have not served more than 130 days within the prior 365 day period, nor is it contemplated that you will serve more than 130 days during the current 365 day period.

For all of the foregoing reasons, we conclude that for purposes of the conflict statutes Board members are special Government employees.

Having concluded that you should be classified as a special Government employee, we are of the further opinion that you may enter into negotiations with the Department as a principal on behalf of your private consulting firm. You should be aware, however, that under [specific] provisions of [the regulations of this Department], the Department must make a further determination relative to contracting with a business concern which is substantially owned or controlled by a Government employee. We have no jurisdiction over that procurement issue.

[10] *See* Bayless Manning, *Federal Conflict of Interest Law* § 1A-3.2.2b (1964).

A copy of this advisory opinion will be made available both to [your agency] and the Department.

Sincerely,

J. Jackson Walter
Director

Appendix C. Conflicts of Interest Statutes and Their Effects on Special Government Employees (Including Guidelines for Obtaining and Utilizing the Services of Special Government Employees)

Public Law 87-849 repealed the six existing basic conflict of interest laws and replaced them with six new sections of title 18 numbered 202, 203, 205, 207, 208, and 209. Sections 203 and 205 contain prohibitions affecting the activities of Government employees in their private capacities. The prohibitions applicable to special Government employees are less stringent than those which affect regular employees-- i.e., those who are appointed to serve more than 130 days a year. Section 207 contains prohibitions affecting the activities of persons who leave the service of the Government. It applies with the same force to former special Government employees as it does to former regular employees. Section 208 puts a restriction on the activities of a Government employee in performing his functions as such. This section also applies with the same force to both categories of employees. Section 209, which prohibits a regular employee's receipt of pay from private sources in certain circumstances, specifically excludes special Government employees from its coverage.

It will be noted that all but 18 U.S.C. 202, which is devoted to the definition of terms, carry criminal penalties. The restraints imposed by the four criminal sections which are applicable to temporary and intermittent advisers or consultants, and to other persons falling within the definition of a special Government employee, are onsidered below.

18 U.S.C. 203 and 205. These two sections in general operate to preclude a regular Government employee, except in the discharge of his official duties, from representing another person before an agency or court, whether with or without pay in a matter in which the United States is a party or has a direct and substantial interest. The two sections, however, impose only the following major restrictions upon a special Government employee:

1. He may not, except in the discharge of his official duties, represent anyone else before a court or Government agency in a matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest and in which he has at any time participated personally and substantially in the course of his Government employment.

2. He may not, except in the discharge of his official duties, represent anyone else in a matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest and which is pending before the agency he serves. This restraint, however, is not applicable if he has served the agency no more than 60 days during the past 365 days. He is bound by the restraint, if applicable, regardless of whether the matter is one in which he has ever participated personally and substantially.

These restrictions prohibit both paid and unpaid representation and apply to a special Government employee on the days when he does not serve the Government as well as on the days when he does.

Each agency should observe the following rules in obtaining and utilizing the services of a consultant, adviser, or other temporary or intermittent employee:

(a) At the time of his original appointment and the time of each appointment thereafter,

the agency should make its best estimate of the number of days during the following 365 days on which it will require the services of the appointee. A part of a day should be counted as a full day for the purposes of this estimate, and a Saturday, Sunday, or holiday on which duty is to be performed should be counted equally with a regular work day.

(b) Unless otherwise provided by law, an appointment should not extend for more than 365 days. When an appointment extends beyond that period, an estimate as required by paragraph (a) should be made at the inception of the appointment and a new estimate at the expiration of each 365 days thereafter.

(c) If an agency estimates, pursuant to paragraph (a) or (b), that an appointee will serve more than 130 days during the ensuing 365 days, the appointee should not be carried on the rolls as a special Government employee and the agency should instruct him that he is regarded as subject to the prohibitions of sections 203 and 205 to the same extent as if he were to serve as a full-time employee. If it is estimated that he will serve no more than 130 days during the following 365 days, he should be carried on the rolls of the agency as a special Government employee and instructed that he is regarded as subject only to the restrictions of sections 203 and 205 described in paragraphs 1 and 2 above. Even if it becomes apparent, prior to the end of a period of 365 days for which an agency has made an estimate on an appointee, that he has not been accurately classified, he should nevertheless continue to be considered a special Government employee or not, as the case may be, for the remainder of that 365-day period.

(d) An employee who serves two agencies shall inform each of his arrangements with the other. If both his appointments are made on the same date, the aggregate of the estimates made by the agencies under paragraph (a) or (b) shall be considered determinative of his classification by each. Notwithstanding anything to the contrary in paragraphs (a), (b), or (c), if after being employed by one agency, a special Government employee is appointed by a second to serve it in the same capacity, each agency should make an estimate of the amount of his service to it for the remaining portion of the 365-day period covered by the original estimate of the first. The sum of the two estimates and of the actual number of days of his service to the first agency during the prior portion of such 365-day period shall be considered determinative of the classification of the appointee by each during the remaining portion. If an employee serves more than two agencies, they shall classify him in a manner similar to that prescribed in this paragraph for two agencies. Each agency which employs special Government employees who serve other agencies shall designate an officer to coordinate the classification of these employees with such other agencies.

(e) When a person is serving as a member of an advisory committee, board, or other group, and is by virtue of his membership thereon an officer or employee of the United States, the requirements of paragraphs (a), (b), (c), and (d) should be carried out to the same extent as if he were serving the sponsoring agency separately and individually.

(f) The 60-day standard affecting a special Government employee's private activities before his agency is a standard of actual past service, as contrasted with the 130-day standard of estimated future service discussed above. As in paragraph 2 above, a special Government employee is barred from representing another person before his agency at times when he has served it for an aggregate of more than 60 days during the past 365 days. Thus, although once having been in effect, the statutory bar may be lifted later by reason of an intervening period of nonservice. In other words, as a matter of law the bar may fluctuate in its effect during the course of a special Government employee's relationship with his agency.

Office of Government Ethics

84 x 4

Letter to a Private Attorney dated April 6, 1984

This letter refers to our meeting of April 6, 1984 and your subsequent correspondence of the same date.

Your letter, as well as our discussion, addressed the question whether your appointment as Independent Counsel pursuant to Title 28 U.S.C. § 593 might follow the form of an order entered by the United States Court of Appeals for the District of Columbia Circuit on February 12, 1982 at the request of Leon Silverman, Esq. You provided a copy of that order for our review.

Further, you sought our explanation of the supplementation of salary prohibition of Title 18 U.S.C. § 209. You also asked whether a special Government employee is forbidden to represent a client in a criminal case.

We have again reviewed the specimen order, and we reiterate that it is our position that the order would be proper to follow in obtaining special Government status pursuant to Title 18 U.S.C. § 202.

Under the Federal conflict of interest laws, the term "special Government employee" is defined as a person who is retained, designated, appointed, or employed, either with or without compensation, to perform temporary duties for not to exceed 130 days out of any period of 365 consecutive days. (Title 18 U.S.C. § 202(a)). A part of a day should be counted as a full day for the purposes of this estimate, and a Saturday, Sunday, or holiday on which duty is to be performed should be counted equally with a regular day. Even if it becomes apparent, prior to the end of the 365

days, that you have not been accurately classified, you will nevertheless continue to be considered a special Government employee for the remainder of that 365-day period. A new estimate should be made at the expiration of each 365 days thereafter. *Federal Personnel Manual*, 735-C-02.

Pursuant to Title 18 U.S.C. § 209(a), it is unlawful for a Federal officer or employee to receive any salary, or any contribution to or supplementation of salary, from a private source as compensation for his services to the Federal Government. However, this prohibition does not apply to a special Government employee who serves with or without compensation. (Title 18 U.S.C. § 209(c)). Therefore, as a special Government employee, you or a member of your staff appointed pursuant to 28 U.S.C. § 594(c) may continue to be compensated by your law firm even during the time that you are performing services for the Federal Government. However, as explained, there will be an independent restriction on your sharing in compensation received by the law firm in matters pending before the Department of Justice.

The restrictions on your outside activities in matters involving the United States are contained in Title 18 U.S.C. §§ 203 and 205. The former prohibits a person from receiving, agreeing to receive, or soliciting compensation for services rendered by himself or another before a Federal Department or agency at the time he is an officer or employee of the United States. Section 205 prohibits an officer or employee from acting as agent or attorney for anyone before a Federal agency or in court in a matter in which the United States is a party or has a direct and substantial interest and from receiving any gratuity or interest in a claim in consideration of his assistance in the prosecution of a claim against the United States. However, sections 203 and 205 both have a more limited application to special Government employees.

A special Government employee is subject to sections 203 and 205 only in relation to a particular matter involving a

specific party or parties
participated personally
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Appendix C. Conflicts of Interest Statutes and Their Effects on Special Government Employees (Including Guidelines for Obtaining and Utilizing the Services of Special Government Employees)

Public Law 87-849 repealed the six existing basic conflict of interest laws and replaced them with six new sections of title 18 numbered 202, 203, 205, 207, 208, and 209. Sections 203 and 205 contain prohibitions affecting the activities of Government employees in their private capacities. The prohibitions applicable to special Government employees are less stringent than those which affect regular employees-- i.e., those who are appointed to serve more than 130 days a year. Section 207 contains prohibitions affecting the activities of persons who leave the service of the Government. It applies with the same force to former special Government employees as it does to former regular employees. Section 208 puts a restriction on the activities of a Government employee in performing his functions as such. This section also applies with the same force to both categories of employees. Section 209, which prohibits a regular employee's receipt of pay from private sources in certain circumstances, specifically excludes special Government employees from its coverage.

It will be noted that all but 18 U.S.C. 202, which is devoted to the definition of terms, carry criminal penalties. The restraints imposed by the four criminal sections which are applicable to temporary and intermittent advisers or consultants, and to other persons falling within the definition of a special Government employee, are onsidered below.

18 U.S.C. 203 and 205. These two sections in general operate to preclude a regular Government employee, except in the discharge of his official duties, from representing another person before an agency or court, whether with or without pay in a matter in which the United States is a party or has a direct and substantial interest. The two sections, however, impose only the following major restrictions upon a special Government employee:

1. He may not, except in the discharge of his official duties, represent anyone else before a court or Government agency in a matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest and in which he has at any time participated personally and substantially in the course of his Government employment.

2. He may not, except in the discharge of his official duties, represent anyone else in a matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest and which is pending before the agency he serves. This restraint, however, is not applicable if he has served the agency no more than 60 days during the past 365 days. He is bound by the restraint, if applicable, regardless of whether the matter is one in which he has ever participated personally and substantially.

These restrictions prohibit both paid and unpaid representation and apply to a special Government employee on the days when he does not serve the Government as well as on the days when he does.

Each agency should observe the following rules in obtaining and utilizing the services of a consultant, adviser, or other temporary or intermittent employee:

(a) At the time of his original appointment and the time of each appointment thereafter,

the agency should make its best estimate of the number of days during the following 365 days on which it will require the services of the appointee. A part of a day should be counted as a full day for the purposes of this estimate, and a Saturday, Sunday, or holiday on which duty is to be performed should be counted equally with a regular work day.

(b) Unless otherwise provided by law, an appointment should not extend for more than 365 days. When an appointment extends beyond that period, an estimate as required by paragraph (a) should be made at the inception of the appointment and a new estimate at the expiration of each 365 days thereafter.

(c) If an agency estimates, pursuant to paragraph (a) or (b), that an appointee will serve more than 130 days during the ensuing 365 days, the appointee should not be carried on the rolls as a special Government employee and the agency should instruct him that he is regarded as subject to the prohibitions of sections 203 and 205 to the same extent as if he were to serve as a full-time employee. If it is estimated that he will serve no more than 130 days during the following 365 days, he should be carried on the rolls of the agency as a special Government employee and instructed that he is regarded as subject only to the restrictions of sections 203 and 205 described in paragraphs 1 and 2 above. Even if it becomes apparent, prior to the end of a period of 365 days for which an agency has made an estimate on an appointee, that he has not been accurately classified, he should nevertheless continue to be considered a special Government employee or not, as the case may be, for the remainder of that 365-day period.

(d) An employee who serves two agencies shall inform each of his arrangements with the other. If both his appointments are made on the same date, the aggregate of the estimates made by the agencies under paragraph (a) or (b) shall be considered determinative of his classification by each. Notwithstanding anything to the contrary in paragraphs (a), (b), or (c), if after being employed by one agency, a special Government employee is appointed by a second to serve it in the same capacity, each agency should make an estimate of the amount of his service to it for the remaining portion of the 365-day period covered by the original estimate of the first. The sum of the two estimates and of the actual number of days of his service to the first agency during the prior portion of such 365-day period shall be considered determinative of the classification of the appointee by each during the remaining portion. If an employee serves more than two agencies, they shall classify him in a manner similar to that prescribed in this paragraph for two agencies. Each agency which employs special Government employees who serve other agencies shall designate an officer to coordinate the classification of these employees with such other agencies.

(e) When a person is serving as a member of an advisory committee, board, or other group, and is by virtue of his membership thereon an officer or employee of the United States, the requirements of paragraphs (a), (b), (c), and (d) should be carried out to the same extent as if he were serving the sponsoring agency separately and individually.

(f) The 60-day standard affecting a special Government employee's private activities before his agency is a standard of actual past service, as contrasted with the 130-day standard of estimated future service discussed above. As in paragraph 2 above, a special Government employee is barred from representing another person before his agency at times when he has served it for an aggregate of more than 60 days during the past 365 days. Thus, although once having been in effect, the statutory bar may be lifted later by reason of an intervening period of nonservice. In other words, as a matter of law the bar may fluctuate in its effect during the course of a special Government employee's relationship with his agency.

Office of Government Ethics

84 x 4

Letter to a Private Attorney dated April 6, 1984

This letter refers to our meeting of April 6, 1984 and your subsequent correspondence of the same date.

Your letter, as well as our discussion, addressed the question whether your appointment as Independent Counsel pursuant to Title 28 U.S.C. § 593 might follow the form of an order entered by the United States Court of Appeals for the District of Columbia Circuit on February 12, 1982 at the request of Leon Silverman, Esq. You provided a copy of that order for our review.

Further, you sought our explanation of the supplementation of salary prohibition of Title 18 U.S.C. § 209. You also asked whether a special Government employee is forbidden to represent a client in a criminal case.

We have again reviewed the specimen order, and we reiterate that it is our position that the order would be proper to follow in obtaining special Government status pursuant to Title 18 U.S.C. § 202.

Under the Federal conflict of interest laws, the term "special Government employee" is defined as a person who is retained, designated, appointed, or employed, either with or without compensation, to perform temporary duties for not to exceed 130 days out of any period of 365 consecutive days. (Title 18 U.S.C. § 202(a)). A part of a day should be counted as a full day for the purposes of this estimate, and a Saturday, Sunday, or holiday on which duty is to be performed should be counted equally with a regular day. Even if it becomes apparent, prior to the end of the 365

days, that you have not been accurately classified, you will nevertheless continue to be considered a special Government employee for the remainder of that 365-day period. A new estimate should be made at the expiration of each 365 days thereafter. *Federal Personnel Manual*, 735-C-02.

Pursuant to Title 18 U.S.C. § 209(a), it is unlawful for a Federal officer or employee to receive any salary, or any contribution to or supplementation of salary, from a private source as compensation for his services to the Federal Government. However, this prohibition does not apply to a special Government employee who serves with or without compensation. (Title 18 U.S.C. § 209(c)). Therefore, as a special Government employee, you or a member of your staff appointed pursuant to 28 U.S.C. § 594(c) may continue to be compensated by your law firm even during the time that you are performing services for the Federal Government. However, as explained, there will be an independent restriction on your sharing in compensation received by the law firm in matters pending before the Department of Justice.

The restrictions on your outside activities in matters involving the United States are contained in Title 18 U.S.C. §§ 203 and 205. The former prohibits a person from receiving, agreeing to receive, or soliciting compensation for services rendered by himself or another before a Federal Department or agency at the time he is an officer or employee of the United States. Section 205 prohibits an officer or employee from acting as agent or attorney for anyone before a Federal agency or in court in a matter in which the United States is a party or has a direct and substantial interest and from receiving any gratuity or interest in a claim in consideration of his assistance in the prosecution of a claim against the United States. However, sections 203 and 205 both have a more limited application to special Government employees.

A special Government employee is subject to sections 203 and 205 only in relation to a particular matter involving a

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specific party or parties (1) in which he, at any time, participated personally and substantially while in Government or (2) which is pending in the Department in which he is serving. Moreover, the latter prohibition applies only to a special Government employee who has served in the Department for more than 60 of the preceding 365 days. You have not served in the Department of Justice during the last year. Therefore, the prohibition against your acting as agent or attorney in matters pending in the Department of Justice and receiving compensation for services rendered before a Federal Department in relation to such matters will not go into effect until you have actually performed services as Independent Counsel on all or part of 60 of the next 365 days. Until that time, you could personally represent clients in matters pending before the Justice Department, and you could share in your law firm's fees for its services performed in matters before the Department.

If you should perform duties as Independent Counsel on all or part of 60 days, however, you would be barred from personally representing a client in a matter "pending in" the Justice Department, and your firm would have to take measures to ensure that any compensation you might continue to receive from the firm was not attributable to services the firm performed in relation to matters pending in the Justice Department and was not compensation for any advice or assistance you might render to your partners or associates who were prosecuting claims pending in the Department.

A case or other matter is not regarded as pending in the Department for purposes of these restrictions if it is within the jurisdiction of a court. Thus, if an information or indictment has been filed in a criminal case or a complaint has been filed in a civil case, the matter is no longer pending in the Justice Department. Even after expiration of the 60-day period mentioned above, then, you could personally represent a client in court or before the Department in such criminal cases, and your partnership

draw could include fees for these cases. The prohibitions mentioned above would only apply to a grand jury or other investigations or discussions with the Justice Department prior to the filing of an information or indictment in a criminal case and to administrative and civil matters pending in the Department prior to the filing of a law suit.

Please feel free to contact me if you wish to further discuss these matters.

Sincerely,

David H. Martin
Director

**Memorandum i
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from David H.
to Designated Age
General Counsels a
Regarding Summary of
of Travel Expense**

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Office of Government Ethics

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Letter to a Government Officer
dated July 23, 1981

You have asked this Office for an opinion on the impact of the Federal conflict of interest statutes upon a prospective course of action which you are interested in pursuing outside your Government employment. We have undertaken a review of this matter in light of the information which you have provided for our consideration, as well as additional information developed in conversations with representatives of the Office of General Counsel [of your agency].

You have provided the following information:

(1) You are currently serving a three year term as a member of [a Federal Board which governs an agency].

(2) You are a principal in a small consulting firm which handles matters totally unrelated to your responsibilities at [your agency].

(3) You desire personally to contact and represent your firm in negotiations on a contract matter before [a] Department [not related in any way to your agency] (hereinafter "the Department").

We will first review the three conflict statutes which bear on your situation. Chapter 11 of Title 18 of the United States Code contains criminal restraints which you as a Federal official must be aware of in your private business dealing in matters in which the United States Government has a direct and substantial interest. More specifically, 18 U.S.C. § 203 is essentially a prohibition against an officer

or employee of the executive branch receiving compensation from a private source for working on a particular matter in which the Government has an interest and which is pending before any Department or agency.[1]

18 U.S.C. § 205 is similar to section 203 and overlaps it in some respects. Section 205 prohibits an officer or employee of the executive branch from acting as agent or attorney for anyone with or without compensation before any Department or agency in any particular matter in which the United States is a party or has a direct and substantial interest.[2] Included in "particular matters" are applications

[1]18 U.S.C. § 203 states:

> (a) Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receives or agrees to receive, or asks, demands, solicits, or seeks, any compensation for any services rendered or to be rendered either by himself or another . . . in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court-martial, officer, or any civil, military, or naval commission . . . shall be fined not more than $10,000 or imprisoned for not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

[2]18 U.S.C. 205 states in part:

> Whoever, being an officer or employee of the United States in the executive . . . branch of the Government or in any agency of the United States . . . otherwise than in the proper discharge of his official duties--
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> . . . .
>
> (2) acts as agent or attorney for anyone before any department, agency, court, court-martial, officer, or any civil, military, or naval commission in connection with any proceeding, application, request

(continued...)

and contracts. Clearly, this part of the statute standing alone would constitute a bar to your personal involvement in any negotiations on behalf of a private firm before the Department. However, both sections 203 and 205 provide an exemption of limited application to the above mentioned restrictions in the case of special Government employees, an employment status which is defined in 18 U.S.C. § 202. In short, this exception precludes a special Government employee from representing private firms as an agent or attorney only in a matter involving a specific party or parties (i) in which he has participated personally and substantially in his Government capacity, or (ii) which is before his Department or agency if he has served therein more than 60 days in the past year.[3]

From the above, we determine that the critical issue in your case is whether or not you and the other members of

[2](...continued)

> for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest --
>
> Shall be fined not more than $10,000 or imprisoned for not more than two years or both.

[3]18 U.S.C. 205 states in part:

> A special Government employee shall be subject to the preceding paragraphs only in relation to a particular matter involving a specific party or parties (1) in which he has at any time participated personally and substantially as a Government employee or as a special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, or (2) which is pending in the department or agency of the Government in which he is serving: *Provided*, That clause (2) shall not apply in the case of a special Government employee who has served in such department or agency no more than sixty days during the immediately preceding period of three hundred and sixty-five consecutive days.

[your] Board are to be considered special Government employees under 18 U.S.C. § 202.

In two separate internal memoranda, the Office of General Counsel of [your agency] has concluded that it is "doubtful" whether or not the [members of this Board] are special Government employees. These memoranda seem to rely on the following factors as being dispositive of the issue:

(A) the definitional language of 18 U.S.C. § 202 does not exactly describe a member of [this] Board; and

(B) the payment of an annual salary to the [members of this] Board.[4]

[4]*See, e.g.*, the Office of General Counsel's ([of your agency]) memorandum to file of September 14, 1970:

> It might be argued from the $300-a-day salary authorized to each [Board member] (not to exceed 30 or 60 days)([citation omitted]), that a [Board member's] employment does not exceed "one hundred and thirty days" during the year. On the other hand, however, a [board member] is also authorized a salary of $10,000 *a year* (emphasis added). [citation omitted]. This suggests an annual salary, presumably pro-rated as such, notwithstanding the additional $300 per diem. In addition, the per diem allowance is not to be "construed to limit the number of days of meetings each year to 30 days." *Id.* Thus, the [Board members] are not precluded from meeting more than 130 days a year -- only their per diem allowance may not be paid for more than 30 or 60 days.

See also the memorandum of June 24, 1974 from Assistant General Counsel, Legal Affairs Office to General Counsel:

> A [Board member] simply does not fit within the language of 18 U.S.C. 202 as "an officer . . . of the executive branch . . . who is . . . appointed . . . to perform . . . temporary duties . . . ." nor within the sense of the statute in creating that category.

For the reasons set forth below, we are of the opinion that the [members of this] Board *are* special Government employees and therefore *do* fall within the exceptions enumerated under sections 203 and 205 of Title 18.[5]

18 U.S.C. § 202 defines a special Government employee as:

> an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States . . . who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis. . . .

Guidelines for obtaining and utilizing the services of special Government employees are found in the Federal Personnel Manual at Chapter 735, Appendix C.[6]

[5]By letters dated September 24, 1980 and January 28, 1981, this Office advised the General Counsel of [your agency] that officials such as the [members of this] Board who serve sixty days or less were not subject to the public financial reporting requirements of Title II of the Ethics in Government Act of 1978 (Pub. L. No. 95-521) but are instead subject to the confidential financial reporting requirements of Executive Order 11222.

[6]An Attorney General's Opinion of January 31, 1962 to the President set forth some mechanical rules for executive agencies to follow on the application of the conflict of interest laws to intermittent and part-time consultants and advisers, 42 Op. Att'y Gen. 6. After Public Law No. 87-849, 76 Stat. 1119, came into force in January 1963, the President rescinded his memorandum of February 9, 1962 and replaced it with a similar memorandum of May 2, 1963 entitled "Preventing Conflicts of Interest on the Part of Special Government Employees," 28 Fed. Reg. 4539. This second Presidential Memorandum was rescinded by Executive Order 11222, of May 8, 1965, 28 Fed. Reg. 6469, but its provisions were preserved as

(continued...)

The following rules are set forth to assist each agency in making the necessary determinations:

(a) At the time of the original appointment, the agency should make its best estimate of the number of days during the following 365 days on which it will require the services of the appointee. A part of a day should be counted as a full day for the purposes of this estimate.

(b) Unless otherwise provided by law, an appointment should not extend for more than 365 days. When an appointment extends beyond that period, an estimate as required by paragraph (a) should be made at the inception of the appointment and a new estimate at the expiration of each 365 days thereafter.

(c) If an agency estimates, pursuant to paragraph (a) or (b), that an appointee will serve more than 130 days during the ensuing 365 days the appointee should not be carried on the rolls as a special Government employee and the agency should instruct him that he is regarded as subject to the prohibitions of sections 203 and 205 to the same extent as if he were to serve as a full-time employee. If it is estimated that he will serve no more than 130 days during the following 365 days, he should be carried on the rolls of the agency as a special Government employee.

[6](...continued)
follows: Those derived from ethical considerations were, in condensed form, included in Executive Order 11222 as Part III. The remaining portion was mandated by the Civil Service Commission (OPM) for continuing agency compliance governmentwide by inclusion in the Federal Personnel Manual at Chapter 735, Appendix C.

The members of [this] Board are appointed by the President by and with the advice and consent of the Senate.[7]

The enabling legislation, establishing the Board, is silent as to the actual status of the [members] and there is little in the legislative history surrounding the establishment of the [agency] which suggests that Congress focused on the status of the [members] in any determinative way.[8] However, there is some insight to be gained from looking at the effect that 18 U.S.C. § 202 has upon the Government officers or employees whose services are intermittent. The major purpose of this 1963 legislation was to remedy the failure of the existing conflict of interest statutes to deal with the special problems of intermittent officers and employees of the Government.[9] The formal act by which one is "retained, designated, appointed, or employed" is of crucial importance under section 202. The officer or employee's status as a regular or a special Government employee is determined by the terms of his appointment or retention. That is to say, section 202 defines special Government employee on the basis of whether the employee (officer) was appointed to serve no more than one hundred and thirty days out of any consecutive three hundred and sixty-five days. For purposes of this classification it is immaterial whether he is paid or not paid for his governmental work.

[7]The Board was established under the provisions of [citation omitted]. Each [member] receives a salary of $10,000 a year plus $300 a day for not more than 30 days of meetings each year and is reimbursed for travel and reasonable expenses incurred in attending meetings of the Board. There is no limit on the number of days on which meetings of the Board may be held.

[8]In floor debates, Congressman Udall did express the opinion that the [members of the Board] would be "special Government employees" who were "expressly permitted to engage in outside employment." [Citation omitted.]

[9]H.R. Rep. No. 748, 87th Cong., 1st Sess. 4, 13-15 (1961). S. Rep. No. 2213, 87th Cong., 2d Sess. 6-7 (1962).

The facts and form of the appointment are the critical elements.[10]

Under [the applicable provisions of the United States Code] the members of the Board are appointed by the President. The agency has advised us that the Board normally meets once a month on call of the Chairman. These meetings usually consist of an afternoon session on one day and a morning session on another day. Special meetings are held occasionally as policy matters dictate and separate committees of the Board meet on an intermittent basis. Since establishment of the Board, experience has shown that none of the [members] has served more than 130 days within a 365 calendar day period. More particularly, you have not served more than 130 days within the prior 365 day period, nor is it contemplated that you will serve more than 130 days during the current 365 day period.

For all of the foregoing reasons, we conclude that for purposes of the conflict statutes Board members are special Government employees.

Having concluded that you should be classified as a special Government employee, we are of the further opinion that you may enter into negotiations with the Department as a principal on behalf of your private consulting firm. You should be aware, however, that under [specific] provisions of [the regulations of this Department], the Department must make a further determination relative to contracting with a business concern which is substantially owned or controlled by a Government employee. We have no jurisdiction over that procurement issue.

[10] *See* Bayless Manning, *Federal Conflict of Interest Law* § 1A-3.2.2b (1964).

A copy of this advisory opinion will be made available both to [your agency] and the Department.

Sincerely,

J. Jackson Walter
Director

Appendix C. Conflicts of Interest Statutes and Their Effects on Special Government Employees (Including Guidelines for Obtaining and Utilizing the Services of Special Government Employees)

Public Law 87-849 repealed the six existing basic conflict of interest laws and replaced them with six new sections of title 18 numbered 202, 203, 205, 207, 208, and 209. Sections 203 and 205 contain prohibitions affecting the activities of Government employees in their private capacities. The prohibitions applicable to special Government employees are less stringent than those which affect regular employees-- i.e., those who are appointed to serve more than 130 days a year. Section 207 contains prohibitions affecting the activities of persons who leave the service of the Government. It applies with the same force to former special Government employees as it does to former regular employees. Section 208 puts a restriction on the activities of a Government employee in performing his functions as such. This section also applies with the same force to both categories of employees. Section 209, which prohibits a regular employee's receipt of pay from private sources in certain circumstances, specifically excludes special Government employees from its coverage.

It will be noted that all but 18 U.S.C. 202, which is devoted to the definition of terms, carry criminal penalties. The restraints imposed by the four criminal sections which are applicable to temporary and intermittent advisers or consultants, and to other persons falling within the definition of a special Government employee, are onsidered below.

18 U.S.C. 203 and 205. These two sections in general operate to preclude a regular Government employee, except in the discharge of his official duties, from representing another person before an agency or court, whether with or without pay in a matter in which the United States is a party or has a direct and substantial interest. The two sections, however, impose only the following major restrictions upon a special Government employee:

1. He may not, except in the discharge of his official duties, represent anyone else before a court or Government agency in a matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest and in which he has at any time participated personally and substantially in the course of his Government employment.

2. He may not, except in the discharge of his official duties, represent anyone else in a matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest and which is pending before the agency he serves. This restraint, however, is not applicable if he has served the agency no more than 60 days during the past 365 days. He is bound by the restraint, if applicable, regardless of whether the matter is one in which he has ever participated personally and substantially.

These restrictions prohibit both paid and unpaid representation and apply to a special Government employee on the days when he does not serve the Government as well as on the days when he does.

Each agency should observe the following rules in obtaining and utilizing the services of a consultant, adviser, or other temporary or intermittent employee:

(a) At the time of his original appointment and the time of each appointment thereafter,

the agency should make its best estimate of the number of days during the following 365 days on which it will require the services of the appointee. A part of a day should be counted as a full day for the purposes of this estimate, and a Saturday, Sunday, or holiday on which duty is to be performed should be counted equally with a regular work day.

(b) Unless otherwise provided by law, an appointment should not extend for more than 365 days. When an appointment extends beyond that period, an estimate as required by paragraph (a) should be made at the inception of the appointment and a new estimate at the expiration of each 365 days thereafter.

(c) If an agency estimates, pursuant to paragraph (a) or (b), that an appointee will serve more than 130 days during the ensuing 365 days, the appointee should not be carried on the rolls as a special Government employee and the agency should instruct him that he is regarded as subject to the prohibitions of sections 203 and 205 to the same extent as if he were to serve as a full-time employee. If it is estimated that he will serve no more than 130 days during the following 365 days, he should be carried on the rolls of the agency as a special Government employee and instructed that he is regarded as subject only to the restrictions of sections 203 and 205 described in paragraphs 1 and 2 above. Even if it becomes apparent, prior to the end of a period of 365 days for which an agency has made an estimate on an appointee, that he has not been accurately classified, he should nevertheless continue to be considered a special Government employee or not, as the case may be, for the remainder of that 365-day period.

(d) An employee who serves two agencies shall inform each of his arrangements with the other. If both his appoinments are made on the same date, the aggregate of the estimates made by the agencies under paragraph (a) or (b) shall be considered determinative of his classification by each. Notwithstanding anything to the contrary in paragraphs (a), (b), or (c), if after being employed by one agency, a special Government employee is appointed by a second to serve it in the same capacity, each agency should make an estimate of the amount of his service to it for the remaining portion of the 365-day period covered by the original estimate of the first. The sum of the two estimates and of the actual number of days of his service to the first agency during the prior portion of such 365-day period shall be considered determinative of the classification of the appointee by each during the remaining portion. If an employee serves more than two agencies, they shall classify him in a manner similar to that prescribed in this paragraph for two agencies. Each agency which employs special Government employees who serve other agencies shall designate an officer to coordinate the classification of these employees with such other agencies.

(e) When a person is serving as a member of an advisory committee, board, or other group, and is by virtue of his membership thereon an officer or employee of the United States, the requirements of paragraphs (a), (b), (c), and (d) should be carried out to the same extent as if he were serving the sponsoring agency separately and individually.

(f) The 60-day standard affecting a special Government employee's private activities before his agency is a standard of actual past service, as contrasted with the 130-day standard of estimated future service discussed above. As in paragraph 2 above, a special Government employee is barred from representing another person before his agency at times when he has served it for an aggregate of more than 60 days during the past 365 days. Thus, although once having been in effect, the statutory bar may be lifted later by reason of an intervening period of nonservice. In other words, as a matter of law the bar may fluctuate in its effect during the course of a special Government employee's relationship with his agency.

Office of Government Ethics

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Letter to a Private Attorney dated April 6, 1984

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Further, you sought our explanation of the supplementation of salary prohibition of Title 18 U.S.C. § 209. You also asked whether a special Government employee is forbidden to represent a client in a criminal case.

We have again reviewed the specimen order, and we reiterate that it is our position that the order would be proper to follow in obtaining special Government status pursuant to Title 18 U.S.C. § 202.

Under the Federal conflict of interest laws, the term "special Government employee" is defined as a person who is retained, designated, appointed, or employed, either with or without compensation, to perform temporary duties for not to exceed 130 days out of any period of 365 consecutive days. (Title 18 U.S.C. § 202(a)). A part of a day should be counted as a full day for the purposes of this estimate, and a Saturday, Sunday, or holiday on which duty is to be performed should be counted equally with a regular day. Even if it becomes apparent, prior to the end of the 365

days, that you have not been accurately classified, you will nevertheless continue to be considered a special Government employee for the remainder of that 365-day period. A new estimate should be made at the expiration of each 365 days thereafter. *Federal Personnel Manual*, 735-C-02.

Pursuant to Title 18 U.S.C. § 209(a), it is unlawful for a Federal officer or employee to receive any salary, or any contribution to or supplementation of salary, from a private source as compensation for his services to the Federal Government. However, this prohibition does not apply to a special Government employee who serves with or without compensation. (Title 18 U.S.C. § 209(c)). Therefore, as a special Government employee, you or a member of your staff appointed pursuant to 28 U.S.C. § 594(c) may continue to be compensated by your law firm even during the time that you are performing services for the Federal Government. However, as explained, there will be an independent restriction on your sharing in compensation received by the law firm in matters pending before the Department of Justice.

The restrictions on your outside activities in matters involving the United States are contained in Title 18 U.S.C. §§ 203 and 205. The former prohibits a person from receiving, agreeing to receive, or soliciting compensation for services rendered by himself or another before a Federal Department or agency at the time he is an officer or employee of the United States. Section 205 prohibits an officer or employee from acting as agent or attorney for anyone before a Federal agency or in court in a matter in which the United States is a party or has a direct and substantial interest and from receiving any gratuity or interest in a claim in consideration of his assistance in the prosecution of a claim against the United States. However, sections 203 and 205 both have a more limited application to special Government employees.

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Appendix C. Conflicts of Interest Statutes and Their Effects on Special Government Employees (Including Guidelines for Obtaining and Utilizing the Services of Special Government Employees)

Public Law 87-849 repealed the six existing basic conflict of interest laws and replaced them with six new sections of title 18 numbered 202, 203, 205, 207, 208, and 209. Sections 203 and 205 contain prohibitions affecting the activities of Government employees in their private capacities. The prohibitions applicable to special Government employees are less stringent than those which affect regular employees-- i.e., those who are appointed to serve more than 130 days a year. Section 207 contains prohibitions affecting the activities of persons who leave the service of the Government. It applies with the same force to former special Government employees as it does to former regular employees. Section 208 puts a restriction on the activities of a Government employee in performing his functions as such. This section also applies with the same force to both categories of employees. Section 209, which prohibits a regular employee's receipt of pay from private sources in certain circumstances, specifically excludes special Government employees from its coverage.

It will be noted that all but 18 U.S.C. 202, which is devoted to the definition of terms, carry criminal penalties. The restraints imposed by the four criminal sections which are applicable to temporary and intermittent advisers or consultants, and to other persons falling within the definition of a special Government employee, are onsidered below.

18 U.S.C. 203 and 205. These two sections in general operate to preclude a regular Government employee, except in the discharge of his official duties, from representing another person before an agency or court, whether with or without pay in a matter in which the United States is a party or has a direct and substantial interest. The two sections, however, impose only the following major restrictions upon a special Government employee:

1. He may not, except in the discharge of his official duties, represent anyone else before a court or Government agency in a matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest and in which he has at any time participated personally and substantially in the course of his Government employment.

2. He may not, except in the discharge of his official duties, represent anyone else in a matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest and which is pending before the agency he serves. This restraint, however, is not applicable if he has served the agency no more than 60 days during the past 365 days. He is bound by the restraint, if applicable, regardless of whether the matter is one in which he has ever participated personally and substantially.

These restrictions prohibit both paid and unpaid representation and apply to a special Government employee on the days when he does not serve the Government as well as on the days when he does.

Each agency should observe the following rules in obtaining and utilizing the services of a consultant, adviser, or other temporary or intermittent employee:

(a) At the time of his original appointment and the time of each appointment thereafter,

the agency should make its best estimate of the number of days during the following 365 days on which it will require the services of the appointee. A part of a day should be counted as a full day for the purposes of this estimate, and a Saturday, Sunday, or holiday on which duty is to be performed should be counted equally with a regular work day.

(b) Unless otherwise provided by law, an appointment should not extend for more than 365 days. When an appointment extends beyond that period, an estimate as required by paragraph (a) should be made at the inception of the appointment and a new estimate at the expiration of each 365 days thereafter.

(c) If an agency estimates, pursuant to paragraph (a) or (b), that an appointee will serve more than 130 days during the ensuing 365 days, the appointee should not be carried on the rolls as a special Government employee and the agency should instruct him that he is regarded as subject to the prohibitions of sections 203 and 205 to the same extent as if he were to serve as a full-time employee. If it is estimated that he will serve no more than 130 days during the following 365 days, he should be carried on the rolls of the agency as a special Government employee and instructed that he is regarded as subject only to the restrictions of sections 203 and 205 described in paragraphs 1 and 2 above. Even if it becomes apparent, prior to the end of a period of 365 days for which an agency has made an estimate on an appointee, that he has not been accurately classified, he should nevertheless continue to be considered a special Government employee or not, as the case may be, for the remainder of that 365-day period.

(d) An employee who serves two agencies shall inform each of his arrangements with the other. If both his appointments are made on the same date, the aggregate of the estimates made by the agencies under paragraph (a) or (b) shall be considered determinative of his classification by each. Notwithstanding anything to the contrary in paragraphs (a), (b), or (c), if after being employed by one agency, a special Government employee is appointed by a second to serve it in the same capacity, each agency should make an estimate of the amount of his service to it for the remaining portion of the 365-day period covered by the original estimate of the first. The sum of the two estimates and of the actual number of days of his service to the first agency during the prior portion of such 365-day period shall be considered determinative of the classification of the appointee by each during the remaining portion. If an employee serves more than two agencies, they shall classify him in a manner similar to that prescribed in this paragraph for two agencies. Each agency which employs special Government employees who serve other agencies shall designate an officer to coordinate the classification of these employees with such other agencies.

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