

MEMORANDUM

January 16, 1998

To: Dean Kermit L. Hall
Review Board Member

From: Ronald G. Haron
Associate General Counsel &
Designated Agency Ethics Officer

Subject: Potential Book Project with
University Publications of America

This memorandum responds to your request for guidance, under the ethics regulations, in responding to the University Publications of America ("UPA") regarding a potential book opportunity that they have raised with you. See Jan. 8, 1998 K. Hall Letter to J. Gunn (attached hereto). As I understand it, the book project involves publishing a collection of (publicly open) documents on the Kennedy assassination.

I have (1) set forth a summary of my preliminary conclusions for your guidance on this matter and (2) explained in more detail my understanding of the relevant issues and my preliminary analysis, as follows:

A. Summary of Analysis

I recommend that you *not* engage in this book project for compensation during your tenure on the Review Board, nor should you presently negotiate a contract. However, it may be permissible for you to work on the project *without compensation*, but certain ethical constraints would still apply. However, there is no ethical prohibition on your negotiating a contract and working on this book project *after* you complete your tenure as a Review Board member.

Certain ethics regulations counsel against *present* participation in this project. They include a specific prohibition on outside writing projects where the opportunity was extended "primarily" because of the person's official position with the Government. In addition, there are more general prohibitions on the use of public office for private gain and holding financial interests that conflict with the "conscientious performance of duty." Finally, officials should avoid the appearance of violating these ethical regulations. Accepting compensation for this book project at this time could create an appearance that you have used your official position to obtain a private benefit (*i.e.*, a book

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contract). Any financial interest you acquire in a prospective book on recently released Kennedy documents could create the appearance of affecting your integrity or impartiality with respect to decisions made on releasing assassination documents. In obtaining a financial interest in a book on Kennedy assassination documents, you would essentially have created a financial interest, although arguably remote, in Review Board decisions regarding Kennedy documents.

Let me address the possibility of presently seeking or negotiating a contract where the terms of employment and compensation take effect after you complete your tenure at the Review Board. Again, to avoid any appearance of financial conflict, impropriety, partiality, or appearance of using his public office for private gain, I would advise you to err on the conservative side and not currently seek or negotiate an agreement to establish future compensation or terms of employment. I would counsel you to defer any such negotiations until after your tenure expires.

Let me also address the possibility that you presently engage in this book project *without compensation*. First, the work would have to be truly without compensation and there could be no arrangement for deferred compensation. Second, there is still a potential issue that your involvement could raise an issue as to the impartiality of your decisions on the Review Board. Third, assuming you were to work on the project without compensation, there would be certain restrictions to ensure that you are not conferring your official authority, or the Review Board's imprimatur, on this project.

Aside from the ethics regulations, a criminal statute prohibits an official from taking official action on matters in which an official has a financial interest; the criminal statute considers actual compensation, as well as a prospective employment contract, as creating a financial interest. As I understand the application of the statute, it precludes an official from working on a matter that would directly affect a particular company in which he has an interest. The Review Board would not be making any decisions regarding UPA specifically; thus, the nexus between the Review Board's decisions and UPA's financial interest (which could be imputed to you) would likely be too remote to be actionable under the criminal statute. However, this is my preliminary and informal analysis of the criminal statute and should not be considered a formal legal opinion. Nonetheless, I think it is important that you be cognizant of the statute and its possible application, although likely remote.

Finally, to the extent that you may want to pursue this book opportunity in some fashion, I would recommend that you advise the other Review Board members so that they will have an opportunity to consider what, if any, impact this may have on the Review Board as a whole.

B. Analysis

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To explain the basis for my preliminary advice (and organize a rather complex array of ethical regulations), I have broken down my analysis into five basic issues that should be considered. They are:

- (1) As a threshold matter, does your status as a Presidential appointee preclude your receipt of outside income? (No)
- (2) What are the prohibitions on your receipt of compensation for the book project while you continue to serve on the Review Board?
- (3) Could you currently negotiate a contract but defer the actual work and compensation until you complete your duties at the Review Board?
- (4) Could you currently work on the book project without receiving compensation?
- (5) Can you work on the book project for compensation after you complete your tenure at the Review Board?

Set forth is my analysis of these issues.

1. Does your status as a Presidential appointee to the Review Board preclude you from engaging in this book project for compensation *while you presently serve on the Review Board?*

Probably not. The ethics regulations generally prohibit Presidential appointees¹ from accepting any outside sources of income during the term of their appointment. See 5 C.F.R. § 2635.804(a) (“A Presidential appointee to a full-time noncareer position shall not receive any outside earned income for outside employment, or for any other outside activity, performed during that Presidential appointment.”); see also Executive Order 12674, §102. Even though certain high-level federal employees may, under certain circumstances, earn compensation from outside activities, presidential appointees are held to a higher standard. See 5 C.F. R. § 2636.302 (a) and note to § 2636.304 (a).

¹ A “Presidential appointee to a full-time noncareer position” is defined as “any employee who is appointed by the President . . . to a position that, by statute or as a matter of practice, is filled by Presidential appointment. 5 C.F.R. § 2635.804(c)(2). Thus, the definition literally covers Review Board members even though they do not work full time.

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However, it appears that you, as well as the other Review Board members, would be considered a "special Government employee" such that the restriction on outside income applicable to Presidential appointees would not apply (*see* 18 U.S.C. §209). Under 18 U.S.C. § 202(a), federal employees qualify as "special Government employees" if they are appointed to perform their duties for no more than 130 days out of the year. Although appointment of the Review Board members had no limitation as to the number of days they would serve, *see* 44 U.S.C. § 2107(7)(h), the Office of Government Ethics has stated that the agency's estimate, at the beginning of the year, of the number of days to be worked by the employee "determine[s] an employee's status as a special Government employee" *See* Office of Government Ethics Opinion 90 X 22. As a practical matter, the Review Board members have not worked more than 130 days per year, and indeed it was anticipated that they would continue to work in their respective regular jobs and receive income therefrom.

Therefore, the Review Board members would likely qualify as "special Government employees" such that the flat prohibition on outside income, applicable to Presidential appointees, would not apply to them. This was confirmed to me informally by the Office of Government Ethics ("OGE").

However, there are several restrictions that apply to all federal employees, including special Government employees. *See* § 2635.102(h). These restrictions relate to compensation from outside activities (§ 2635.801 *et seq.*) and restrictions having to do with seeking non-Federal employment (§ 2635.601 *et seq.*). I preliminarily consider these restrictions to be implicated if you were to presently engage in this Kennedy book project for compensation. For your consideration, an analysis of these restrictions follows.

2. What are the prohibitions on your accepting compensation for the book project *while you serve on the Review Board?*

There are several ethical prohibitions, and a criminal statute, that I believe counsel against your presently working on this book project:

- a. Restrictions on Outside Activities. The ethical prohibition on outside compensation for a writing project -- where the project relates to the federal employee's official duties -- appears applicable here. Federal employees are not to receive compensation for writing if the writing activity "relates to the employee's official duties." 5 C.F.R. § 2635(a). The requisite relationship between the outside writing project and the official's duties is established where "[t]he circumstances indicate that the invitation to engage in the activity was extended to the employee primarily because of his official position rather than his expertise on the particular subject matter." § 2635.807(a)(2)(B). This seems to be the case

here. You were apparently approached by UPA primarily due to your position on the Review Board, as you have acknowledged ("I feel strongly that UPA approached me because of my presence on the Board." See K. Hall Letter (attached)). Thus, I believe this regulation clearly precludes your accepting this opportunity for compensation in view of the fact that it was extended because of your official position.

In addition, the ethics regulations restrict writing opportunities where the entity extending the opportunity (UPA) "has interests that may be affected substantially by performance or non-performance of the employee's official duties." §2635.807 (a)(2)(C). Arguably, UPA has an interest in the Review Board's selection and release of documents on the Kennedy assassination.

b. Restrictions Relating to Seeking Other Employment. Section 208(a) of title 18 prohibits a federal employee from participating in a matter in which he has a financial interest, or in which an organization with whom he is employed, or with whom he even has "any arrangement concerning prospective employment," has a financial interest. This section, which has criminal penalties, potentially could be implicated if you enter into a book deal with UPA or seek employment with UPA. See also 5 C.F.R. § 2635.602, which states:

[a]n employee who is seeking employment or who has an arrangement concerning prospective employment shall comply with [certain disqualification requirements] . . . if the employee's official duties would affect the financial interests of a prospective employer or of a person with whom he has an arrangement concerning prospective employment.

Because the book project involves the publication of Kennedy assassination documents, including presumably documents released by the Review Board, both you and UPA arguably could have some financial interest in decisions of the Review Board if you sign a book contract or even if you currently seek employment with UPA.² (When I consulted informally with OGE, they identified this as a potential issue to consider.).

² An arrangement for "prospective employment" includes employment subsequent to Federal service. See § 2635.603(a). Moreover, "seeking employment" means "discussion or communication [with the prospective employer] . . . mutually conducted with a view toward reaching an agreement regarding possible employment. . . ." § 2635.603(b)(1)(I). These discussions qualify as seeking employment even if they do not cover "specific terms and conditions of employment in a specific position." *Id.*

However, there are certain exemptions to this prohibition where the financial interest is considered too remote to affect the integrity of the official's decision making. *See* 18 U.S.C. § 208 (b)(1)-(3). Thus, the prohibition of § 208(a) does not apply if applicable ethical regulations indicate that the financial interest is "too remote or inconsequential to affect the integrity" of your duties. *See* § 208(b)(2). The critical issue is whether the decisions of the Review Board can be considered to have a "direct and predictable effect" on the financial interest of UPA. *See* § 2635.402. The standard for remoteness is set forth in § 2635.402(b)(1). An argument can be made that your decisions on the Review Board would not have a sufficiently direct impact on the financial interests of UPA or the book project.³

Therefore, as a technical matter, there is probably no "particular matter" being handled by the Review Board that would have a "direct and predictable effect on the financial interests" of UPA (imputed to you). Accordingly, you would probably not have a disqualifying financial interest, under the criminal statute, if you signed a book deal with UPA, but you should not rule out that possibility. (I again want to make clear that my preliminary analysis is based on a reading of the statute and the interpretative regulations, and it is not based on an analysis of federal case law interpreting the statute.)

³ Whether a financial interest is disqualifying under 18 U.S.C. § 208 is further informed by the ethics regulations. Under those regulations, participating in "a particular matter" of official Government business will have a "direct effect on a financial interest" if there is a "close causal link" between the official action and "any expected effect . . . on the financial interest." This standard *might* be met. For example, suppose (hypothetically) that the Review Board must consider whether to release, as assassination records, certain documents that are considered highly interesting and clearly worthy of publication. Release of such documents might enhance the marketability of the UPA book and thus create a conflicting financial interest.

Conversely, official action will not be considered to have "a direct effect" on the financial interest if "the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to," the official matter. The effect of the official action must be "real, as opposed to a speculative possibility" that the financial interest will be affected. *See* § 2635.402(b)(1)(I) & (ii). Finally, it would appear that the prohibition applies only with respect to official decision making affecting specific or identifiable persons and is not applicable to official actions, such as the Review Board's, that "extend to the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons." *See* § 2635.402(b)(3).

Assuming hypothetically, for the moment, that you had a financial interest in UPA, and that actions of the Review Board directly affected that interest, you would have to notify the Review Board of this interest and take steps to disqualify yourself from participation in the matter affecting UPA. *See* § 2635.604. However, there are procedures that you can take that would nonetheless allow you to participate in Review Board matters that might be considered to directly impact UPA's financial interest; you can seek to obtain a written determination by the agency that your financial interest will not affect "the integrity of [your] services" as a Review Board member. *See* 18 U.S.C. § 208(b)(1). This would require your "full disclosure of the financial interest" and then an advance "written determination" from an official of the agency (an "agency designee") that your "interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect" from you. *See id.* There are detailed regulations governing the procedures for such a "waiver." *See* §§ 2635.402(d), 2635.502(c)-(d), 2635.605. Thus, an "agency designee" may make a determination "that the employee's impartiality is not likely to be questioned" such that it would be "proper" to continue participating in the official matter.⁴ *See* § 2635.502(c)(2).

c. Other Restrictions. However, there are other general ethical prohibitions that are potentially implicated by your engaging in the book project with UPA:

i. Generally, Federal employees "shall not hold financial interests that conflict with the conscientious performance of duty." 5 C.F.R. § 2635.101(b)(2). Because you are in a position to determine what documents should be released under the JFK Act, there may be an appearance that your financial interest in a book publishing a collection of Kennedy assassination documents would affect the integrity and impartiality of your decisions regarding designation and release of assassination records under the JFK Act. Preserving your reputation as an impartial Board member, and avoiding the appearance of having any financial stake in the release of documents, is important not only from the perspective of the general public but from the perspective of the agencies with whom we deal. It is highly important that the agencies view the Review Board as totally impartial and as having no financial or other agenda, other than the public interest, in deciding on the release of classified Government documents.

⁴ It is not entirely clear to me which agency official would make this determination. *See* Definition of Agency Designee at § 2635.102(b).

ii. A federal employee "shall not . . . solicit or accept . . . [an] item of monetary value from any person or entity seeking official action from . . . or whose interests may be substantially affected by the performance or nonperformance of the employee's duties." 5 C.F.R. § 2635.101(b)(4). It could be argued that UPA, which wants to publish released documents on the Kennedy assassination, has interests that would be affected by the Review Board and, as such, you should avoid receiving anything of monetary value from UPA including a book contract.

iii. "An employee shall not use his public office for his own private gain." 5 C.F.R. § 2635.702. An appearance that your official position on the Review Board is being used for private gain is more likely where, as here, the business opportunity appears to have arisen as a result of your position.

iv. "Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards . . ." 5 C.F.R. § 2635.101(b)(14). Thus, while the integrity or impartiality of your decisions may not be affected in the least by a contract with UPA, there may be a sufficient appearance of conflict requiring that you not participate in the book project. Whether there is an appearance of conflict is determined by a reasonableness standard. *See id.*

3. May you currently negotiate a contract for compensation on the book project where the business relationship and compensation will commence after you leave the Review Board?

No. I raise this issue to the extent you may have considered negotiating a contract now, while serving on the Review Board, but have the terms of employment and compensation commence after leaving Federal service. While this would technically avoid an ethical issue under § 2635.807 (prohibiting outside compensation while a Government employee), I believe there still remain ethical and perhaps criminal constraints against currently negotiating a contract.

Section 208 of title 18 and 5 C.F.R. § 2635.601 *et seq.* prohibit an employee from participating in a matter that would affect the financial interest of "any person or organization with whom he is negotiating or has any arrangement concerning prospective employment." 18 U.S.C. § 208(a). As explained previously (*see* § 2.b, "Restrictions Relating to Seeking Other Employment," of this memorandum), this provision carries criminal penalties, although it appears that the connection between your official duties and any financial interest through UPA would be too remote to trigger these provisions. But I believe the possibility of financial conflict, although remote, is still there.

Furthermore, I would counsel against entering into a contract, even where the terms and compensation are prospective, because it may create the appearance of comprising the integrity of your role as an impartial Review Board member for the very same reasons that direct compensation could appear to be compromising (*see* § 2.c, "Other Restrictions," of this memorandum).

4. May you presently engage in the book project without compensation?

Yes, but with limitations. There appears to be no bar to engaging in this project so long as you are *not* compensated, including no deferred compensation. In addition, certain ethics regulations would impose some constraints on your involvement with the book project. For example:

i. You would have to make certain that your involvement in the book project would not conflict with your official government duties and responsibilities, *see* §2635.101(10), and that this involvement could not be construed to reasonably question your impartiality in carrying out the work of the Review Board (*see* §2635.101(8)).

ii. You could not state or imply that the Review Board sanctions or endorses your activities in connection with the book project. *See* § 2635.701 (b).

iii. You could not use your official position, or "any authority associated with [your] public office," to promote or endorse the book project. *See* § 2635.702 (c).

iv. You could not use any non-public information to advance the book project. *See* § 2635.703 (a).

v. You could not use Government property for the book project; in addition, you could not work on the book project during official work hours nor use Review Board staff to assist on the book project during their official hours. *See* § 2635.704 & 705.

vi. When identifying your credentials for the book, you may refer to your position with the Review Board as one of several biographical details, but it could not appear more prominently than other significant biographical details. *See* § 2635.807(b)(1).

vii. You should also include with any published book a disclaimer stating that any views expressed in the book do not necessarily represent the views of the Review Board or the Federal Government. *See* § 2635.807(b)(2).

5. May you work on the book project for compensation *after* you complete your tenure on the Review Board?

Yes. There is no bar to entering into negotiations, and engaging in this work for compensation, after you complete your tenure at the Review Board. High Government officials have written books after leaving office. *See, e.g.*, Reich, Robert B. (Former Secretary of Labor), *Locked in the Cabinet* (1997); Hubbell, Webb (Former Associate Attorney General), *Friends in High Places: Our Journey from Little Rock to Washington, D.C.* (1997); Cheney, Lynn V. (former Chair of the National Endowment for the Humanities) *Telling the Truth: Why Our Culture and Our Country Have Stopped Making Sense* (1995).⁵

Please let me know if you have any questions or wish to discuss any of these matters further.

⁵ There are restrictions on activities subsequent to Federal service, but these relate to lobbying, or representing private interests, before the Government. *See generally* 5 C.F.R. § 2637 & § 2641.

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