

December 8, 1994

TO: Assassination Record Review Board Members

FROM: Sheryl Walter

RE: Government Ethics Regulations -- Effect of Special Employee Status  
on Applicability to Review Board Members of Certain Ethics Provisions

**1. Definition of "Special Government Employee "for Ethics Purposes**

A "special government employee" (SGE) in the executive branch is an officer or employee who is retained, designated, appointed, or employed to perform temporary duties, with or without compensation, for a period not to exceed 130 days during any 365-day consecutive period.<sup>1</sup> Because Review Board members were appointed by the President, confirmed by the Senate, and likely will devote less than 130 days annually to board business, Review Board members are SGEs. The effect of being classified as an SGE is that certain government ethics regulations with which full-time government employees must comply are wholly or partially inapplicable to SGEs. Some of these rules apply throughout the term of government appointment; others apply even after service as an SGE is completed. Summarized below are ethics rules that apply specially to SGEs.

**2. Financial Disclosure Requirements**

Special government employees are subject to the financial disclosure provisions of the Ethics in Government Act and implementing regulations.<sup>2</sup> Review Board members were required to file a Public Financial Disclosure Report (SF 278) upon appointment.. However, hereafter a Review Board member who performs 60 or less days or less of work for the board per year will only be required to file a Confidential Financial Disclosure Report (SF 450) annually. The filing deadline is the anniversary date of appointment to the Board.

**3. Criminal Conflict of Interest Statutes**

Under the applicable criminal conflict of interest statutes, SGEs:

a. Cannot seek, accept, or agree to receive anything of value in return for being influenced in the performance or nonperformance of an official act.<sup>3</sup>

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<sup>1</sup> 18 U.S.C. section 202(a); 5 C.F.R. section 2635.102(1).

<sup>2</sup> 5 C.F.R. Part 2634.

<sup>3</sup> 18 U.S.C. section 201.

b. Cannot seek or receive compensation from a non-Government source for any representational services, performed personally or by someone else, related to any matter in which the United States is a party or has a direct and substantial interest before any federal agency or other entity in which the SGE has participated personally and substantially as a government employee or, if the SGE served over 60 days during the preceding year, the matter is pending in the agency where the SGE serves.<sup>4</sup>

c. Cannot represent a non-Government party, with or without compensation, before any federal agency or other entity on any particular matter in which the United States is a party or has a direct and substantial interest in which (i) the SGE has participated personally and substantially as a government employee or (ii) if the SGE served over 60 days during the immediately preceding 365 days, the matter is pending in the agency in which the SGE is serving.<sup>5</sup>

d. Cannot represent another person to any federal agency or other entity on any matter involving a particular party in which the former SGE participate personally and substantially while serving in government. Besides this lifetime ban, SGEs are subject to a two year ban for matters merely pending under the SGE's official responsibility during the final year of government service.<sup>6</sup>

e. Cannot personally and substantially participate in any matter that will have a direct and predictable effect on an employee's own or imputed financial interests. A waiver can be obtained where the need of an individual's services outweighs a potential conflict of interest created by the financial interest involved.<sup>7</sup>

The focus of these rules is on appearances or communications made with the intent to influence official action. None of these restrictions applies to "behind the scenes" advice, *i.e.* where another individual who you briefed makes the representation. In addition, purely social contacts, requests for publicly available documents, or requests for purely factual information are all allowed. Post-employment appearance before or communications to Members of Congress and legislative staff are permitted as well.

#### 4. **Political Activities.**

Hatch Act<sup>8</sup> restrictions on the political activities of federal employees apply to SGEs only during the 24 hour period of any day in which they are actually performing government business.

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<sup>4</sup> 18 U.S.C. section 203.

<sup>5</sup> Id. section 205.

<sup>6</sup> Id. section 207.

<sup>7</sup> Id. section 208.

<sup>8</sup> 5 U.S.C. sections 7321-7328.

## 5. Executive Branch Standards of Ethical Conduct.

Government-wide Standards of Ethical Conduct<sup>9</sup> apply to regular and special government employees, and apply even though the SGE does not perform official duties on a given day. (A booklet containing the "Standards of Ethical Conduct for Employees of the Executive Branch" will be provided to the board during the ethics briefing scheduled during the December board meeting.) Ethics standards that differ for SGEs from those applicable to regular employees include the following:

a. An SGE cannot serve as an expert witness, with or without compensation, if he or she participated in the proceeding or in a particular matter that is the subject of the proceeding. If an SGE serves more than 60 days in a period of 365 consecutive days, that SGE cannot serve as an expert witness in any proceeding before a court or agency of the United States in which the SGE's employing agency is a party or has a direct and substantial interest unless the SGE's participation is authorized by the agency's designated ethics officer.<sup>10</sup>

b. An SGE cannot receive compensation for outside teaching, speaking, and writing that "relates to the employee's official duties."<sup>11</sup> The "relatedness test" is whether:

- (i) the SGE undertakes the activity as an official government duty;
- (ii) the circumstances indicate that the invitation to engage in the activity was extended primarily because of the SGE's official position rather than the SGE's own expertise on a particular subject;
- (iii) the invitation to engage in the activity or offer of compensation was extended to the SGE, directly or indirectly, by a person who has interests that may be affected substantially by the performance or non-performance of the employee's official duties;
- (iv) the information conveyed through the activity draws substantially on ideas or official data that are non-public information;
- (v) the subject of the activity deals in significant part with any matter the SGE is presently assigned or was assigned during the previous one-year period. Unless the SGE works more than 60 days in any 365-day consecutive period, the "relatedness" test here applies only on particular matters involving specific parties in which the SGE participated or is participating personally and substantially.

### Exceptions:

- (i) An SGE is not precluded from receiving compensation for teaching, speaking, or writing on a subject within the SGE's discipline or inherent area of expertise based on the SGE's educational background or experience, even though the activity deals generally with a subject within the agency's areas of responsibility.
- (ii) These restrictions also do not apply for teaching a course requiring

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<sup>9</sup> 5 C.F.R. Part 2635.

<sup>10</sup> Id. Part 2635.805.

<sup>11</sup> Id. Part 2635.807.

multiple presentations that is part of the regularly established curriculum of an institution of higher education, elementary or secondary school, or program of education or training sponsored and funded by the federal, state, or local government.

c. SGEs cannot accept gifts given directly or indirectly from "prohibited sources" (someone whose interests may be substantially affected by the SGE's performance or nonperformance of official duties) or given because of the SGE's federal position. Exceptions to this rule include:

(i) gifts resulting from the SGE's outside business or employment activities if it is clear that the gift was not offered because of the SGE's status with the federal government,<sup>12</sup>

(ii) non-cash gifts valued at \$20 or less with a maximum value of \$50 during a calendar year from any one source,

(iii) attending "widely-attended" gatherings (such as a professional association meeting), and gifts based on a pre-existing personal relationship, such as a family member or close friend.

The gift regulations also prohibit SGEs from accepting an honorary degree from an institution of higher learning that is a "prohibited source", such as a university with a contract with the agency, unless the agency ethics official determines in writing that accepting the degree would not cause a reasonable person to question the SGE's impartiality. The agency's ethics official must also approve acceptance of any award valued at more than \$200 for meritorious public service or achievement from a "prohibited source."

d. SGEs may engage in fundraising in a personal capacity so long as the SGE does not personally solicit funds or other support from anyone known to the SGE to be a person whose interests may be substantially affected by the performance or nonperformance of the SGE's federal duties.<sup>13</sup>

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<sup>12</sup> 5 C.F.R. Parts 2635.202, 2635.204.

<sup>13</sup> Id. Part 2635.808.

