ORAL ARGUMENT NOT YET SCHEDULED

No. 06-5242

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL INSTITUTE OF MILITARY JUSTICE,

Appellant,

vs.

DEPARTMENT OF DEFENSE,

Appellee.

On Appeal from the United States District Court
for the District of Columbia

No. 04cv00312

The Honorable Reggie B. Walton

REPLY BRIEF OF APPELLANT NATIONAL INSTITUTE OF MILITARY JUSTICE

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GLOSSARY

DoD	Department of Defense
FOIA	Freedom of Information Act
NIMJ	National Institute of Military Justice

PERTINENT STATUTES AND REGULATIONS

Except for those attached as an Addendum to this brief, all applicable statutes, etc. are contained in the opening Brief of Appellant or the response Brief of Appellee.

SUMMARY OF ARGUMENT

Exemption 5 of the Freedom of Information Act (FOIA) provides that documents are protected from disclosure only if they are "inter-agency or intra-agency" communications. The government seeks here to invoke this exemption to shield communications from private citizens, including former government officials, all of whom at the time had no apparent relationship with the Department of Defense (DoD). The government's sweeping attempt to protect these communications as those of "consultants" would not only eviscerate the plain text of FOIA, but also would undermine the intent of Congress and the Supreme Court's decision in *Department of the Interior v. Klamath Water Users Protective Association*, 532 U.S. 1 (2001). Finally, the government's last ditch appeal to "national security" must be rejected.

ARGUMENT

I. The Government's Sweeping, Ad Hoc, and Ex Post Use of the "Consultant" Label to Preclude Disclosure Would Eviscerate the Plain Language of Exemption 5

This case is controlled by the clear, plain text of FOIA Exemption 5, which provides that documents must be "*inter-agency* or *intra-agency* memorandums or letters" to be protected from that statute's otherwise broad disclosure mandate. 5 U.S.C. § 552(b)(5) (emphasis added); *see also Klamath*, 532 U.S. at 9, 12 (recognizing the "apparent plainness of this text" and rejecting an interpretation that would convert it into "a purely conclusory term, just a label to be placed on any document the Government would find it valuable to keep confidential").

The government's attempt to clothe communications of select private citizens – whom the government itself has alternatively characterized as "outside," "unpaid," and, remarkably, even "*non-agency*" consultants, *see, e.g.,* Brief of Appellee at 14-15 (emphasis added) – as "inter-agency or intra-agency" communications would eviscerate the plain language of the FOIA statute. It would transform Exemption 5 into a means for shielding secret participation in

important matters of public policy by virtually any former official, academic, or other private citizen simply by applying the label "consultant" to that person.

First, despite the government's repeated use of terms including "attorney consultants" and "non-agency attorneys," *see, e.g.,* Brief of Appellee at ii, viii, 2, 3, 5, 6, 8, 9, 10, 13, 14, 15, 16, 17, 18, 21, 22, 23, the government long ago expressly abandoned any assertion of attorney-client privilege (which would have been inapplicable, in any event). The District Court relied solely on the government's claim of deliberative process privilege in holding the documents at issue protected by FOIA Exemption 5. JA0146-151. As NIMJ stated in its opening brief and the government did not contest in filing its response before this Court, attorney-client privilege is simply not at issue here. Brief of Appellant at 6 n.1. Whether the private citizens in question are, or were at one time, practicing attorneys is therefore irrelevant, and this Court should not be distracted by the government's references to "non-agency attorneys" or "attorney consultants," as opposed to simply "consultants."

Second, the government's sweeping position on appeal – that communications to or from any private citizen with relevant past experience or expertise may later be labeled as "consultant" communications and thereby qualify as "inter-agency or intra-agency memorandums or letters" protected from public disclosure under Exemption 5 – simply cannot withstand scrutiny. Indeed, even the declarations on which the government relies reveal the ad hoc nature of the "consultant" designation it has asserted in this litigation. Those declarations state, for example, that "the list of individuals consulted changed from time to time," Decl. of Paul W. Cobb, Jr. former Deputy General Counsel (Legal Counsel) of DoD, JA0072, and that this amorphous group operated with an "understanding" that they would consult "on a continuing basis on a variety of topics," Decl. of Karen Hecker, Associate Deputy General Counsel (Legal Counsel) of DoD, JA0115. *See*

Brief of Appellee at 6-7. In other words, the scope and duration of services – even the identities – of these "consultants" were never clearly defined, either formally or informally, yet the government now seeks to treat them for public disclosure purposes as the equivalent of agency personnel.

Acceptance of such a broad, standardless approach would allow Exemption 5 to become the exception that swallows the general rule of disclosure under FOIA. Government officials would have carte blanche to secretly and selectively receive input from private individuals on policy matters of the greatest public significance without even a pretense of transparency, simply by later designating those individuals as outside, unpaid, non-agency "consultants." Practically any former official could be characterized as having relevant experience to warrant such ex post designation; and, depending upon the policy area, presumably so too could any knowledgeable professional, industry representative, public interest group, political candidate, or even foreign government official. Select private individuals would thus be able to participate in key policy decisions without transparency or even a hint of public accountability as long as they were later called "consultants."

Finally, relying on the Supreme Court's decision in *Klamath*, the government argues that communications of the individuals it has designated as "consultants" in this litigation qualify as "inter-agency or intra-agency" under Exemption 5 because the they had no "personal interests" to promote. Brief of Appellee at 18. The government further asserts that "[i]n the instant case, private or self-interests of the consultants are not at issue," and moreover that there has been "no suggestion" that "the non-agency attorneys had any personal interests whatsoever in the deliberative process for which their opinions and views were sought." *Id.* at 21.

Unlike *Klamath*, however, where the direct stake (water rights) of the private parties (the Klamath and other tribes) involved was not only clear, but clearly adverse to the interests of other parties (which the Court noted was "the dispositive point, " 532 U.S. at 14, thus finding it unnecessary to decide whether absence of discernible personal interest was sufficient to qualify as a "consultant"), how such an evaluation of "personal interest" should be made here, or in the context of FOIA litigation generally, is far from clear. During the time that these individuals, for example, provided input regarding military commission procedures, did any of them participate in litigation in which the military commission procedures were at issue (or were they part of law firms that may have represented detainees in such litigation or professional groups that may have advocated positions regarding the conduct of those commissions)? We simply do not know – nor has the government established, as would be its burden under even its own analysis, that any such conflicts check was ever made.[1]

More to the point, FOIA litigation should not be the forum for making ad hoc evaluations of individuals' interests. Rather, there are well-established means already in place for making this determination when private individuals are retained, regardless of compensation and even on a temporary basis, to consult for the government – such as conflict-of-interest and financial

[1] The government is correct that NIMJ has made no suggestion of personal interest in these proceedings, nor does it intend to impugn the integrity of the distinguished individuals at issue. However, in order to make the point that evaluating "personal interest" would be a complex endeavor in this case as it would in many others, it is worth at least noting that even cursory review of public record reveals that members of this distinguished group were appointed to the Military Commissions Review Panel, *see* Press Release, *Defense Department Picks Officials for Military Tribunal Posts, Appointing Authority, Legal Advisor, and Review Panel Members Named*, December 30, 2003, *available at* http://tinyurl.com/22qzf7, and served as counsel for *amici* in support of the military commissions in *Rasul v. Bush*, 542 U.S. 466 (2004), *see Brief Amicus Curiae of Law Professors, Former Legal Advisers of the Department of State and Ambassadors, Retired Judge Advocates General and Retired Military Commanders, and Other International Law Specialists in Support of Respondents*, 2004 WL 419453.

disclosure forms. Indeed, the various statutory and regulatory conflict-of-interest and disclosure requirements expressly apply to "special government employees," who are defined to include:

> an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, 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.

18 U.S.C. 202(a). *See also, e.g.,* 5 C.F.R. § 2635.102(h) and (l) (including special government employees for purpose of federal regulations concerning standards of ethical conduct for executive branch). Moreover, executive branch departments and agencies, including DoD, provide detailed ethics guidance for consultants who are designated special government employees. *See, e.g., An Ethics Guide for Consultants and Advisory Committee Members at the Department of Defense*, available at http://tinyurl.com/ypsa24. The government has made no suggestion that any of these standard procedures were followed here.

At the very least, *Klamath* and common sense must require that in order to be treated as the equivalent of agency personnel for purposes of public disclosure under FOIA, private citizens should comply with standard conflict-of-interest rules and ethics guidance relevant to all other temporary and even uncompensated government consultants and advisors, prior to participating in key public policy decisions. The government's failure to use this process or any other method for conferring governmental status on the private citizens whose communications with DoD are at issue is fatal to its claim under Exemption 5. Moreover, accepting the government's sweeping position regarding the ad hoc, ex post use of the "consultant" label in cases like this would be tantamount to not only eviscerating the express "inter-agency or intra-agency" plain language requirement of Exemption 5, but turning it on its head by making disclosure the exception rather than the rule.

II. The Government Ignores the Import of the Supreme Court's *Klamath* Decision and, Like the District Court, Relies on Non-Controlling, Unpersuasive Precedent

In attempting to make such sweeping use of the "consultant" designation, the government not only improperly relies on *Klamath* as setting the *ceiling*, rather than a *floor*, for the limits of the scope of Exemption 5, but in doing so ignores the true import of that decision. Moreover, the government makes virtually no effort to substantially rebut the myriad reasons why this Court's pre-*Klamath* decisions are distinguishable from the present circumstances, nor effectively argues why this Court should not revisit that precedent in view of *Klamath*.

As noted earlier, the Supreme Court in *Klamath* held that, *at a minimum*, Exemption 5 does not shield from disclosure as "inter-agency or intra-agency" communications those between a government agency and a private party when that private party has a direct stake in government proceedings that are adverse to the interests of others. *See* 532 U.S. at 12 n.4 ("the intra-agency condition [of Exemption 5] excludes, *at the least*, communications to or from an interested party seeking a Government benefit at the expense of other applicants" (emphasis added)). Even more significantly, the Court set forth two independent conditions to satisfy Exemption 5 – *first*, the communications at issue must be "inter-agency or intra-agency," and *second*, an applicable civil discovery privilege must apply – and then expressly reaffirmed the "independent vitality" of the first condition, stating that, despite earlier cases that may suggest otherwise, the first condition is "no less important" than the second. *Id.* at 9, 12.

Discussing the key pre-*Klamath* decisions on which the District Court primarily relied – *Ryan v. Dep't of Justice*, 617 F.2d 781 (D.C. Cir. 1980); *Public Citizen, Inc. v. Dep't of Justice*, 111 F.3d 168 (D.C. Cir. 1997); *Formaldehyde Institute v. Dep't of Health and Human Serv.*, 889 F.2d 1118 (D.C. Cir. 1989); and *Wu v. Nat'l Endowment for the Humanities*, 460 F.2d 1030 (5th Cir. 1972) – the government, like the District Court, ignores the Supreme Court's revitalization

of the "inter-agency or intra-agency" statutory requirement in *Klamath*. Moreover, although unnecessary to repeat the various reasons why these decisions are clearly distinguishable from the circumstances present here, and which are left largely unaddressed by the government, *see* Brief of Appellant at 13-19, it is worth reiterating that these decisions – at least the three that are prior precedent of this Court – must be revisited in view of *Klamath*.

Two of them, *Ryan* and *Public Citizen*, were expressly singled out by the Supreme Court itself as outlier decisions among the lower courts prior to *Klamath*, 532 U.S. at 12 n.4. The third, *Formaldehyde*, is a perfect example of what the Supreme Court admonished the government and the courts of appeals for doing prior to *Klamath* – "skip[ing] a necessary step" in Exemption 5 analysis by treating "inter-agency or intra-agency" as "a purely conclusory term, just a label to be placed on any document the Government would find it valuable to keep confidential." *Id.* at 12. While the government cites *Formaldehyde* for the proposition that it is "irrelevant" whether the source of material is "a regular agency employee or a temporary consultant" and there need not be any "formal relationship" with such an individual, Brief of Appellee at 13, 17, closer examination of the relevant passage shows that the *Formaldehyde* court in fact improperly treated Exemption 5 analysis as primarily, if not exclusively, about the government's deliberative process rather than the applicable statutory language, relegating "inter-agency or intra-agency" to a "purely conclusory term":

> As to the question regarding the nature of the relationship between the outside reviewers and CDC, *Ryan* established and [*CNA Financial Corp. v. Donovan*, 830 F.2d 1132 (D.C. Cir. 1987] recently reiterated that "inter-agency" and "intra-agency" are not rigidly exclusive terms, but rather embrace *any agency document that is part of the deliberative process*. Thus, both the Institute and the District Court err in focusing on the absence of any formal relationship between the Journal's reviewers and HHS. As noted above, whether the author is a regular agency employee or a temporary consultant is irrelevant; *the pertinent element is the role, if any, that the document plays in the process of agency deliberations. If the [material at issue] is deliberative in character, then it may come within the confines of Exemption 5 notwithstanding its creation by an outsider. The*

pertinent issue here is what harm, if any, the [material's] release would do to HHS' deliberative process.

889 F.2d at 1123-24 (internal quotation marks and citations omitted) (emphasis added). This analysis simply cannot be squared with the instruction of *Klamath*.

Finally, the government's reliance upon two post-*Klamath* appellate decisions – *Judicial Watch, Inc. v. Dep't of Energy*, 412 F.3d 125 (D.C. Cir. 2005) and *Tigue v. Dep't of Justice*, 312 F.3d 70 (2d Cir. 2002) – is no more availing. The government cites *Judicial Watch* for its reliance on *Ryan*, arguing that this case gives "continued vitality to *Ryan*." Brief of Appellant at 13, 20. However *Judicial Watch*, like *Ryan* and unlike this case, involved communications strictly among government employees or officials – records of the President's National Energy Policy Development Group (NEPDG). Indeed, dispositive for this Court was the fact that the documents at issue in *Judicial Watch* were created by "a body established by the President solely to advise him, and composed entirely of federal officials." 412 F.3d at 131.

Tigue, too, is easily distinguishable. That case, which is from another Circuit, concerned a memorandum authored by a government employee (an Assistant United States Attorney) and sent to a formal government task force "established by the [Internal Revenue Service] to gather information and make suggestions on how to reform its Criminal Investigation Division," known as the "Webster Commission." 312 F.3d at 73-74. The task force itself consisted of designated "federal law enforcement personnel with extensive experience in financial investigations." *Review of the Internal Revenue Service's Criminal Investigation Division*, Letter from William H. Webster to Charles O. Rossotti, Commissioner, Internal Revenue Service, April 9, 1999, *available at* http://tinyurl.com/3bzfrs; *see also id.*, Introduction at n.1 (recognizing that task force agents were seconded from various government agencies), *available at* http://tinyurl.com/2k9trf.

Thus, neither *Judicial Watch* nor *Tigue* concerned communications from non-government employees, let alone the communications of select private citizens acting without any formal, or even informal, public charge.[2]

III. The Government's Blanket Reliance on "National Security" Should Not Trump the Plain Statutory Text, Congressional Intent, and Policy Underlying FOIA

The government suggests that this Court set aside the well-settled legal principle that, in accordance with FOIA's general philosophy of full agency disclosure, statutory exemptions must be narrowly construed, *see, e.g., FBI v. Abramson*, 456 U.S. 615, 630 (1982); *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989), because this case involves matters of national security. Brief of Appellee at 24-25. This Court should not condone such a blanket appeal to national security as the shelter of last resort for protecting communications from disclosure as is required by both the letter and spirit of FOIA.

First, it is important to note that Congress expressly codified the need to protect certain materials from disclosure for national security reasons as the very first FOIA exemption, which was not, nor could have been, invoked in this case. 5 U.S.C. § 552(b)(1) (exempting matters "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" that "are in fact properly classified pursuant to such Executive order"). Indeed, the government points to nothing to suggest that disclosure of the communications here would pose any concrete harm to national security, other than making a

[2] The government also cites to a post-*Klamath* lower court decision as "reaffirm[ing] the role of outside consultants in the deliberative process as set forth in *Ryan*," *Physicians Committee for Responsible Medicine v. NIH*, 326 F. Supp. 2d 19 (D.D.C 2004). Brief of Appellee at 20 n.7. The district court in that case, however, actually distinguished *Ryan* and found that the material in question was *not* protected from disclosure because, "[p]ut simply, [the author] was not acting on behalf of the government when he received the grant and conducted his research." 326 F. Supp. 2d at 29.

purely conclusory assertion that such disclosure "would hinder the Executive's ability to make the best decisions regarding national security in the future." Brief of Appellee at 24.

Second, the case upon which the government primarily relies in making its appeal to national security, *Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003), is clearly inapposite. Not only did that decision involve an entirely distinct statutory exemption – FOIA Exemption 7, which applies to "records or information compiled for law enforcement purposes," 5 U.S.C. § 552(b)(7) – but it concerned release of investigative facts related to the *ongoing investigation into the terrorist attacks of September 11, 2001.* This Court there deferred to "the government's expectation that disclosure of the detainees' names would enable al Qaeda or other terrorist groups to map the course of the investigation and thus develop the means to impede it" as reasonable. 331 F.3d at 928. Notably, even the starkly distinguishable facts of that case did not dissuade a dissenting opinion of that divided panel from reminding us that "[n]either FOIA itself nor this circuit's interpretation of the statute authorizes the court to invoke the phrase 'national security' to relieve the government of its burden of justifying its refusal to release information under FOIA." *Id.* at 939 (Tatel, J., dissenting).

The Supreme Court itself has warned that even in a post-9/11 world the executive branch does not have a "blank check" when it comes to national security matters, including the detention and trial of suspected terrorists. *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2799 (2006) (Breyer, J., concurring) (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004)). Here, the plain language of FOIA as passed by Congress could not be any clearer – documents protected from disclosure must be "inter-agency or intra-agency." The Supreme Court, moreover, recently reaffirmed the importance and vitality of this plain statutory text in *Klamath*. The government seeks to expand this limited statutory exemption into a vast loophole to protect communications from select

private citizens with no public accountability. Because such an outcome would be contrary to the purpose and plain language of FOIA, it must be rejected and the decision of the District Court reversed.

Dated: August 23, 2007

Respectfully submitted,

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ADDENDUM

INDEX TO ADDENDUM

Westlaw.

18 U.S.C.A. § 202

C

Effective: July 07, 2004

United States Code Annotated Currentness
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 11. Bribery, Graft, and Conflicts of Interest (Refs & Annos)

→§ 202. Definitions

(a) For the purpose of sections 203, 205, 207, 208, and 209 of this title the term "special Government employee" shall mean an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, 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, a part-time United States commissioner, a part-time United States magistrate judge, or, regardless of the number of days of appointment, an independent counsel appointed under chapter 40 of title 28 and any person appointed by that independent counsel under section 594(c) of title 28. Notwithstanding the next preceding sentence, every person serving as a part-time local representative of a Member of Congress in the Member's home district or State shall be classified as a special Government employee. Notwithstanding section 29(c) and (d) of the Act of August 10, 1956 (70A Stat. 632; 5 U.S.C. 30r(c) and (d)), a Reserve officer of the Armed Forces, or an officer of the National Guard of the United States, unless otherwise an officer or employee of the United States, shall be classified as a special Government employee while on active duty solely for training. A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is voluntarily serving a period of extended active duty in excess of one hundred and thirty days shall be classified as an officer of the United States within the meaning of section 203 and sections 205 through 209 and 218. A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is serving involuntarily shall be classified as a special Government employee. The terms "officer or employee" and "special Government employee" as used in sections 203, 205, 207 through 209, and 218, shall not include enlisted members of the Armed Forces.

(b) For the purposes of sections 205 and 207 of this title, the term "official responsibility" means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action.

(c) Except as otherwise provided in such sections, the terms "officer" and "employee" in sections 203, 205, 207 through 209, and 218 of this title shall not include the President, the Vice President, a Member of Congress, or a Federal judge.

(d) The term "Member of Congress" in sections 204 and 207 means--

(1) a United States Senator; and

(2) a Representative in, or a Delegate or Resident Commissioner to, the House of Representatives.

(e) As used in this chapter, the term--

Westlaw.

5 C.F.R. § 2635.102

C

Effective: September 11, 2006

Code of Federal Regulations Currentness
Title 5. Administrative Personnel
Chapter XVI. Office of Government Ethics
Subchapter B. Government Ethics
Part 2635. Standards of Ethical Conduct for Employees of the Executive Branch (Refs & Annos)
Subpart A. General Provisions

→§ 2635.102 Definitions.

The definitions listed below are used throughout this part. Additional definitions appear in the subparts or sections of subparts to which they apply. For purposes of this part:

(a) Agency means an executive agency as defined in 5 U.S.C. 105 and the Postal Service and the Postal Rate Commission. It does not include the General Accounting Office or the Government of the District of Columbia.

(b) Agency designee refers to any employee who, by agency regulation, instruction, or other issuance, has been delegated authority to make any determination, give any approval, or take any other action required or permitted by this part with respect to another employee. An agency may delegate these authorities to any number of agency designees necessary to ensure that determinations are made, approvals are given, and other actions are taken in a timely and responsible manner. Any provision that requires a determination, approval, or other action by the agency designee shall, where the conduct in issue is that of the agency head, be deemed to require that such determination, approval or action be made or taken by the agency head in consultation with the designated agency ethics official.

(c) Agency ethics official refers to the designated agency ethics official or to the alternate designated agency ethics official, referred to in § 2638.202(b) of this chapter, and to any deputy ethics official, described in § 2638.204 of this chapter, who has been delegated authority to assist in carrying out the responsibilities of the designated agency ethics official.

(d) Agency programs or operations refers to any program or function carried out or performed by an agency, whether pursuant to statute, Executive order, or regulation.

(e) Corrective action includes any action necessary to remedy a past violation or prevent a continuing violation of this part, including but not limited to restitution, change of assignment, disqualification, divestiture, termination of an activity, waiver, the creation of a qualified diversified or blind trust, or counseling.

(f) Designated agency ethics official refers to the official designated under § 2638.201 of this chapter.

(g) Disciplinary action includes those disciplinary actions referred to in Office of Personnel Management regulations and instructions implementing provisions of title 5 of the United States Code or provided for in comparable provisions applicable to employees not subject to title 5, including but not limited to reprimand, suspension, demotion, and removal. In the case of a military officer, comparable provisions may include those in the Uniform Code of Military Justice.

(h) Employee means any officer or employee of an agency, including a special Government employee. It includes officers but not enlisted members of the uniformed services. It includes employees of a State or local government or other organization who are serving on detail to an agency, pursuant to 5 U.S.C. 3371, et seq. For purposes other than subparts B and C of this part, it does not include the President or Vice President. Status as an employee is unaffected by pay or leave status or, in the case of a special Government employee, by the fact that the individual does not perform official duties on a given day.

5 C.F.R. § 2635.102

(i) Head of an agency means, in the case of an agency headed by more than one person, the chair or comparable member of such agency.

(j) He, his, and him include she, hers and her.

(k) Person means an individual, corporation and subsidiaries it controls, company, association, firm, partnership, society, joint stock company, or any other organization or institution, including any officer, employee, or agent of such person or entity. For purposes of this part, a corporation will be deemed to control a subsidiary if it owns 50 percent or more of the subsidiary's voting securities. The term is all-inclusive and applies to commercial ventures and nonprofit organizations as well as to foreign, State, and local governments, including the Government of the District of Columbia. It does not include any agency or other entity of the Federal Government or any officer or employee thereof when acting in his official capacity on behalf of that agency or entity.

(l) Special Government employee means those executive branch officers or employees specified in 18 U.S.C. 202(a). A special Government employee is retained, designated, appointed, or employed to perform temporary duties either on a full-time or intermittent basis, with or without compensation, for a period not to exceed 130 days during any consecutive 365-day period.

(m) Supplemental agency regulation means a regulation issued pursuant to § 2635.105.

[71 FR 45736, Aug. 10, 2006]

SOURCE: 57 FR 35041, Aug. 7, 1992; 62 FR 48747, Sept. 17, 1997, unless otherwise noted.

AUTHORITY: 5 U.S.C. 7301, 7351, 7353; 5 U.S.C. App. (Ethics in Government Act of 1978); E.O. 12674, 54 FR 15159; 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547; 3 CFR, 1990 Comp., p. 306.

5 C. F. R. § 2635.102, **5 CFR § 2635.102**

Current through August 2, 2007; 72 FR 42626

END OF DOCUMENT

AN ETHICS GUIDE FOR CONSULTANTS AND ADVISORY COMMITTEE MEMBERS AT THE DEPARTMENT OF DEFENSE

At the Department of Defense (DoD), we are fortunate to have many experts and industry leaders from outside of the Government to provide advice to the Secretary as consultants or members of an advisory committee. Because many of you retain extensive links to Defense industries or other organizations related to national security, it is important that you understand potential conflicts of interest that may arise from your appointment to this Department. Recognizing your demanding schedules, this guidance only briefly summarizes those statutes and regulations most likely to affect you, and does not describe each element or exception.

1. Getting Advice

If you believe your situation may be affected by any of the guidance below, please contact the Standards of Conduct Office (SOCO) of the Office of the DoD General Counsel at (703) 695-3422, fax us at (703) 697-1640, or email us at SOCO@dodgc.osd.mil. We also have considerable guidance, including financial disclosure reporting, on our website at: http://www.defenselink.mil/dodgc/defense_ethics.

SOCO is available to provide advice on any ethics question you may have, many of which may be answered in a telephone call or by email. Good faith reliance on the ethics advice from an ethics official will, in most cases, protect you from adverse administrative action and deter criminal prosecution.

2. What Does It Mean to be a Special Government Employee?

In the Department, almost all consultants and all members of advisory committees are appointed as Special Government Employees (SGEs). This means that upon appointment, you assume the responsibilities, obligations, and restrictions that are part of public service. Because SGEs are not full-time employees, several of these restrictions apply to you only in limited circumstances.

Service as an SGE may be compensated or uncompensated, but it is always temporary. In fact, you should not serve for more than 130 days during any period of 365 consecutive days. This 130-day period is an aggregate of all your Federal service, not just your appointment at the Department of Defense. For example, it includes days you have served as an SGE in other Federal agencies or departments, and even days as a military reservist. If you have served in other Federal agencies or departments within the last year, please advise the appropriate committee manager, executive director, or Designated Federal Official (DFO), so that you do not exceed the 130-day period of appointment.

When computing days that you work as an SGE, count each day in which you perform services, even if it does not amount to an entire workday. Brief non-substantive interactions, such as emails or phone calls to set up a meeting, do not have to be counted as a day of duty.

3. Financial Disclosure

You are required to file either a public or confidential financial disclosure report (SF 278, OGE Form 450, or DoD Alternate Reporting Form) when you are first appointed, and annually thereafter if you are reappointed. As a member of an advisory committee, you may also be required to update the report before each meeting throughout your term of appointment. The purpose of financial disclosure is to protect you from inadvertently violating any of the criminal conflict of interest statutes, discussed below, and to ensure the public and this Department that your advice is free from any real or perceived conflict of interest. The supervisor or DFO, and a DoD ethics official review the reported information, which is not releasable to the public if it is a confidential financial disclosure report, except as authorized by the Privacy Act.

4. Criminal Conflict of Interest Statutes

You are required to comply with various criminal statutes while you are an SGE. These statutes are codified at 18 U.S.C. 201, 203, 205, 207, and 208, and are divided into the following subject areas: (1) financial conflicts of interest; (2) representational activities; and (3) limits on representation after you leave the Government.

Financial Conflicts of Interest

The main financial conflict of interest statute, **18 U.S.C. 208(a)**, prohibits you from participating personally and substantially in any particular matter that affects your financial interests, as well as the financial interests of your spouse, minor child, general partner, an organization in which you serve as an officer, director, trustee, general partner, or employee, or an organization with which you are negotiating or with which you have an arrangement for prospective employment. The primary reason you are required to disclose your financial interests is to alert the supervisor or DFO, and agency ethics official of any potential conflict of interest prior to your participation in a particular matter involving an entity in which you have a financial interest.

A financial interest might arise in various ways. For example, you could have a financial interest that could conflict with your participation in an advisory committee meeting that reviews whether a certain weapons program should be continued if:

- you own stock in the prime or subcontractor that supplies the weapon;
- your spouse owns stock in, or works for, the contractor(s);
- you are a consultant to, or employee of, the contractor(s);
- you are a member of the board of directors of the contractor(s), or
- you have a contract with the contractor(s) to provide supplies, parts, or services.

This statute does not apply to you unless you participate in a particular matter. Generally, DoD advisory committees address broad policy matters, not particular matters. This greatly reduces the potential for conflicts of interest. A particular matter is a matter that involves deliberation, decision or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. A deliberation that focuses on a discrete and identifiable class of persons as part of a broader policy deliberation, however, would not be a particular matter. For example, if an advisory committee deliberates on the topic of unmanned aerial vehicles (UAVs), which have a limited number of companies that manufacture them, then committee deliberations would be a particular matter. If, on the other hand, the topic is the future of aerial vehicles in general, then committee deliberations of UAVs as part of a broader policy deliberation would not be a particular matter. In the former example, any committee members who have a financial interest in a company that manufactures UAVs would have a conflict of interest if they participated in the advisory committee discussion.

If you become aware of such a financial conflict of interest, you must disqualify yourself from acting in a governmental capacity in the matter and notify the DFO, committee manager, or supervisor. You should also consult your ethics official, since there are several regulatory exemptions that may permit you to participate even when you have certain financial interests that cause a conflict of interest. For example, employees are permitted to participate in particular matters affecting companies that they own as part of a diversified mutual trust. Employees may also act in particular matters affecting companies in which the aggregate value of the employee's holdings does not exceed $15,000. Since there are other exemptions, you should contact your ethics official.

The statute and implementing Federal regulations provide for waivers that may also allow you to work on matters in which you have a financial conflict of interest. Such waivers must be obtained before you participate in the matter. Since waivers are complex, you should seek advice from your DoD ethics official.

You should also keep in mind that, even though the deliberations may not involve a particular matter under the criminal statute, having an interest in or being affiliated with any company that is the focus of a deliberation would require your recusal from discussions. A combination of DoD policy, and appearance and misuse of position concerns under the Standards of Conduct regulations, would prohibit your participation.

Another Federal statute, **18 U.S.C. 201**, commonly known as the bribery statute, prohibits Federal employees, including SGEs, from seeking, accepting, or agreeing to receive anything of value in return for being influenced in the performance of an official act.

Representational Activities

Two statutes, 18 U.S.C. 203 and 205, prohibit Federal employees, including SGEs, from acting as an agent or attorney for private entities before any agency or court of the Executive or Judicial Branches. For SGEs, section 203 prohibits the receipt of

compensation for representational services only in any particular matter involving a specific party: (1) in which the SGE has participated personally and substantially as a Government employee; or (2) which is pending in this Department and the SGE served for more than 60 days during the immediately preceding 365 days. Representational services include written or oral communications and appearances made on behalf of someone else with the intent to influence or persuade the Government. An inquiry into the status of a pending matter, such as an application for Federal funding, a progress report regarding a Cooperative Research and Development Agreement or clinical trial, or a pending investigation, is not necessarily a representation, but could give rise to an appearance of a prohibited representation. Section 205 parallels section 203, except that even uncompensated representations by employees are prohibited.

Limits on Representations After You Leave the Government

The final statute, 18 U.S.C. 207, prohibits former employees, including SGEs, from representing another person or entity to this Department or to another Federal agency or court in any particular matter involving a specific party in which the former SGE participated personally and substantially while with the Government. This bar lasts for the lifetime of the particular matter.

Additionally, if you were paid for your services as an SGE, and your basic rate of pay was $142,898/year or over (in 2006), and you served 60 days or more as an SGE during the 1-year period before terminating service, you are also subject to the same 1-year cooling-off period that is applicable to former senior officials. For 1 year after terminating your appointment, you would be prohibited from making a communication or appearance on behalf of any other person, with the intent to influence, before any employee of the agency in which you served, in connection with any matter on which such a person seeks official action. Please note that this bar is not limited to particular matters, but includes policy matters as well, and that it does not apply to the entire Department of Defense, but only to the component in which you were appointed.

SGEs who qualify for the above restriction are also prohibited, for 1 year after their appointment terminates, from representing a foreign entity before any Federal agency, or aiding or advising a foreign entity, with the intent to influence a decision by that agency.

5. Standards of Ethical Conduct

The following paragraphs highlight some of the administrative Standards of Ethical Conduct regulations (5 C.F.R. Part 2635) that pertain to DoD SGEs.

Teaching, Speaking, and Writing in a Personal Capacity

Generally, during your term of appointment, you may continue to receive fees, honoraria, and other compensation for teaching, speaking, and writing undertaken in your personal or non-Government capacity, but there are several limitations.

You are prohibited from receiving compensation for teaching, speaking, or writing ("activity") that "relates to the employee's official duties." 5 C.F.R. 2635.807. For you, the "relatedness" test is met if:

- the activity is undertaken as an official Governmental duty;
- the invitation was extended to you primarily because of your position in the Government rather than your expertise on the particular subject matter; the invitation was extended to you, directly or indirectly, by a person who has interests that may be affected substantially by the performance or nonperformance of your official duties;
- the information conveyed through the activity draws substantially on ideas or official data that are confidential or not publicly available; or
- during a 1-year period of your current appointment,
  1) if you serve for more than 60 days and the subject of the activity deals in significant part with any matter to which you are presently assigned or were assigned during the previous 1-year period, or
  2) if you serve 60 days or less and the subject deals in significant part with a particular matter involving specific parties in which you participated or are participating personally and substantially.

Notwithstanding the above limitations, you may receive compensation for teaching, speaking, or writing on a subject within your discipline or inherent area of expertise based on your educational background or experience. In addition, these restrictions do not apply to teaching a course requiring multiple presentations that is part of the regularly established curriculum of an institution of higher education, an elementary or secondary school, or a program of education or training sponsored and funded by the Federal, state, or local governments.

If you use or permit the use of your military rank or your DoD title or position as one of several biographical details given to identify yourself in connection with your personal teaching, speaking, or writing, whether or not compensated, and if the subject of the teaching, speaking, or writing deals in significant part with any ongoing or announced policy, program, or operation of the Department of Defense, you should make a disclaimer that the views presented are your views and do not necessarily represent the views of this Department or its components.

Acceptance of Gifts from Outside Sources

Any gift given to you from a DoD prohibited source or because of your service on the advisory committee or as a consultant to this Department will raise concerns and may be prohibited. 5 C.F.R. 2635.202. You may accept gifts given to you because of your personal, outside business, or employment relationships. There are other exceptions, but since they are often fact-specific, you should consult your agency ethics official.

Providing Expert Testimony

If you participated while a Federal employee in a particular United States judicial or administrative proceeding or in a particular matter that is the subject of the proceeding, you may not serve, except on behalf of the United States, as an expert witness, with or without compensation, in that proceeding if the United States is a party or has a direct and substantial interest. 5 C.F.R. 2635.805. However, such testimony may be authorized by the DoD General Counsel.

In addition, if you are appointed by the President, serve on a commission established by statute, or have served or are expected to serve for more than 60 days in a period of 365 consecutive days, you may not serve, except on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a United States court or agency in which the Department of Defense is a party or has a direct and substantial interest, unless authorized by the DoD General Counsel.

Impartiality

Although you are prohibited by 18 U.S.C. 208(a) from participating in matters in which you have a financial interest, there may be other circumstances in which your participation in a particular matter involving specific parties would raise a question regarding your impartiality in the matter. For example, you may be asked to review a grant application submitted by your mentor or someone with whom you have a close personal or professional relationship. Or your advisory committee may consider a weapons program operated by your former employer or former client. This may raise a concern about your impartiality in the review.

While the impartiality rule is quite complex and very broad in scope, there are several triggers that are helpful. 5 C.F.R. 2635.502.

1. Your official duties must involve a particular matter involving specific parties [As discussed above, DoD advisory committees usually focus on policy-level issues and do not consider particular matters involving specific parties],

2. The circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality, and

3. a) The matter is likely to have a direct and predictable effect on the financial interests of a member of your household, or
b) someone with whom you have a relationship (such as a relative, a business or financial entity, a former employer, an employer or client of your spouse, or an organization in which you are an active participant) is, or represents, a party to the matter.

Considering the breadth of this prohibition and how much it depends upon the perception of the beholder, if you believe your participation in advisory committee discussions could subject you to criticism, please contact your supervisor, DFO, or agency ethics official to determine whether you should be disqualified from participation in the matter, or authorized to participate in the matter.

Serving Two Masters

As indicated in the above regulation on impartiality, you cannot represent two entities and retain impartiality. For example, you may be an employee of a corporation or nonprofit organization which intends to submit its views to Government officials regarding the same subject matter that the advisory committee is studying. In such a situation, you must recuse yourself from participation in either the corporation or nonprofit organization's recommendation, or, recuse yourself from participation in the advisory committee's recommendation. If you find yourself in this situation, consult your DFO or ethics counselor.

Endorsement of Non-Federal Entities

Many DoD SGEs hold senior and influential positions in their private lives. However, please remember that you may not use, or permit the use of, your official title, position, organization name, or authority associated with your Government position to imply a DoD or Government endorsement of a non-Federal entity, event, product, service, or enterprise. 5 C.F.R. 2635.702. Provided that you act exclusively outside the scope of your official position and abide by the restrictions discussed above, you may participate and support the activities of non-Federal entities in your personal capacity.

Misuse of Position

Primarily because of the stature and visibility of many of our consultants and members of advisory committees, actions that may be perceived as the misuse of their public office tend to receive uncommon public scrutiny. The prohibition, which applies to all Federal employees, bars the use of public office for private gain. 5 C.F.R. 2635.702. This broad prohibition generally is triggered by the following:

1. Using your title, position, or authority for your own private gain, or the private gain of friends, relatives, clients, or anyone with whom you are affiliated in a non-Governmental capacity (including nonprofit organizations in which you serve as an officer, member, employee, or persons with whom you have or seek an employment or business relationship);

2. Using your title, position, or authority to coerce or induce another person to provide any benefit to yourself or any person identified above;

3. Using non-public information in a financial transaction to further your private interests or those of another, or disclosing confidential or non-public information without authorization; or

4. Using Government property and time for unauthorized purposes.

A good example is when a private entity issues a press release announcing that one of its employees will serve on a DoD Advisory Committee. To many, selection to serve on a DoD Advisory Committee confirms the SGE's expertise and wisdom, and therefore tends to lend similar credence to the private entity. It also suggests Department of Defense endorsement of the private organization. Thus we discourage private companies from issuing such press releases.

Lobbying Activities

While the time you spend performing official duties as an SGE is usually brief, please remember that during those periods, you are prohibited from engaging in any activity that directly or indirectly encourages or directs any person or organization to lobby one or more members of Congress. (18 U.S.C. 1913) This statute does not bar you, in your official capacity, from appearing before any individual or group for the purpose of informing or educating the public about a particular policy or legislative proposal, or from communicating to members of Congress at their request. Communications to members of Congress initiated by you, in your official capacity as a member of an advisory committee or as a consultant, must be coordinated through the Office of Legislative Affairs.

As a private citizen, you may express your personal views (but not the views of the advisory committee as a whole or the opinions of this Department) to anyone. In doing so, you may state your affiliations with the advisory committee, may factually state the committee's official position on the matter (to the extent that non-public information is not used), but may not represent your positions or views as the committee's or the Department's position on the matter. Moreover, in expressing your private views, as with all other personal (non-Government) activities, you are not permitted to use Government computers, copiers, telephones, letterhead, staff resources, or other appropriated funds.

Emoluments Clause

The Constitution prohibits Federal employees, including SGEs, from accepting any compensation from, or employment with, a foreign government or the political subdivision of a foreign government, including a public university, a commercial enterprise owned or operated by a foreign government, or an international organization controlled by a foreign government. The ban does not apply to a foreign privately-owned corporation. U.S. Constitution, Art. I § 9, cl. 8. If you have a contract with, or are consulting for, a foreign government, please promptly contact SOCO.

Foreign Gifts and Decorations Act

During the period of your appointment as an SGE, you may not accept a gift above a minimum value ($305 in 2006) from a foreign government or an international organization. You may be surprised to learn that this prohibition applies to gifts offered to you by foreign governments even if such gifts have no nexus to your Government appointment. The restriction extends to your spouse and dependents, but does not apply to travel and related expenses from a foreign government incurred as part of your official duties. 5 U.S.C. § 7342.

Foreign Agents

You may not act as an agent or lobbyist of a foreign principal required to register under the Foreign Agents Registration Act or the Lobbying Disclosure Act of 1995 unless the head of the agency certifies that your employment is in the national interest. 18 U.S.C. § 219. If you have registered under either of these statutes, please contact SOCO.

Hatch Act

The Hatch Act, which limits the political activities of Federal civilian employees, applies to you only while you are conducting Government business. 5 U.S.C. §§ 7321-7326.

Disclosure of Information

You may not disclose classified or proprietary information that you receive in the course of your official duties. Before disclosing information that is proprietary, not releasable under the Freedom of Information Act, protected by the Privacy Act, or otherwise restricted, please confirm that it may be released. 18 U.S.C. § 1905.

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Certificate of Service

I hereby certify that two copies of the final Reply Brief of Appellant, National Institute of Military Justice, with references to the parties' deferred joint appendix inserted, has been served on this 23rd day of August, 2007, via overnight delivery to:

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