

THE WHITE HOUSE
WASHINGTON

MEMORANDUM TO THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

Preventing Conflicts of Interest on the Part of Advisers and Consultants to the Government

Over the past twenty or more years departments and agencies of the Government have made increasing use of part-time consultants and advisers and of advisory groups. The services of highly skilled persons on a part-time and intermittent basis is in the interest of the Government and provides the Government with an indispensable source of expert advice and knowledge. Since, however, such persons have their principal employment outside the Government, and frequently with business entities which are doing business with the Government or with universities which receive Government grants, a number of conflict of interest problems arise from time to time. It is important that departments and agencies of the Government oversee the activities of such consultants in order to insure that the public interest is protected from improper conduct and that consultants will not, through ignorance or inadvertance, embarrass the Government or themselves in their activities.

Many intermittent personnel serving the Government today are individuals with specialized scientific knowledge and skills who are regularly employed in industry, research institutes or education. Their employers in many cases have contracts with or research grants from the Government. The areas in which the skills and talents of these individuals are put to use by the Government on a part-time basis may be the same as the areas with which the contracts or grants received by their employers from the Government are concerned. An individual employed by a university may act as an intermittent consultant not only for the Government but for a private firm and either his university or the firm or both may be engaged in work for or supported by the Government. A consultant to the Government may have other financial connections with firms doing business with the Government in the general area of his expertise and, therefore, his consultancy. The many possible interrelationships between a consultant's service to the

Government and his own and his employer's financial interests demonstrate that conflicts problems may frequently arise.

Both the part-time adviser and the department or agency which makes use of his services must be alert to the possibility of conflicts. It is, of course, incumbent upon the consultant to familiarize himself with laws and regulations applicable to him. The responsibility of the agency is equally great. It must assist the consultant to understand those laws and regulations. It must obtain from him such information concerning his financial interests as is necessary to disclose possible conflicts. It must take measures to avoid the use of his services in any situation in which a violation of law or regulation is likely to occur. And it must take prompt and proper disciplinary or remedial action when a violation, whether intentional or innocent, is detected.

Most of the departments and agencies of the Government currently have regulations applicable to intermittent consultants and advisers. There is, however, considerable

diversity in their detail and, in some cases, their interpretation of applicable law. While the problems will undoubtedly vary from department to agency, and different rules and regulations may in some instances be appropriate, I believe it desirable to achieve the maximum uniformity possible in order to insure general standards of common application throughout the Government. This memorandum is designed to achieve that purpose.

Conflict-of-Interest Statutes

There are six basic conflict-of-interest laws which are pertinent to the subject matter of this memorandum. Four of the laws, sections 281, 283, 434 and 1914 of Title 18 of the United States Code, in general prohibit certain activities by a person who is in the employ of the Government. Two statutes, section 284 of Title 18 and section 99 of Title 5, prohibit a person who has left the employ of the Government from engaging in certain activities during a two-year period following the termination of his Government

service. The six statutes are set forth in full in the appendix to this memorandum. They contain restrictions which, with an exception discussed hereafter, are fully applicable to an individual who serves or has served the Government as an adviser or consultant, whether with or without compensation. The six statutes are discussed separately below.

18 U.S.C. 281. This statute prohibits an "officer or employee of the United States or any department or agency thereof" from receiving or agreeing to receive compensation for any services rendered in relation to any "proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, [or] officer. . . ." In general, the effect of this section is to preclude a Government employee from acting, in most of the important matters that

come before the Government departments and agencies, on behalf of a non-Government employer or other person from whom he receives compensation.

I have received an opinion from the Attorney General concluding that 18 U.S.C. 281 applies to all intermittent consultants and advisers on those days on which they are actually employed by the Government but that it applies only to certain consultants and advisers on the days during the period of their availability for Government service when they are not so employed. Those to whom section 281 applies on their days away from the Government service are: intermittent consultants and advisers whose Government employment during the period of their availability occupies a substantial portion of that period, or affords their principal means of livelihood.

In order to clarify the application of section 281 and promote its policies, each department and agency should take

steps to insure that at the time a consultant or adviser is appointed, an accurate estimate is made of the extent to which it will make use of his services. The following rules should be employed:

- (a) No appointment should extend beyond the end of the current fiscal year.
- (b) The period of appointment to be made for a part, or all, of the fiscal year, or of the remaining part of the fiscal year, should reflect the agency's best estimate of its employment of the individual.
- (c) Whether the estimate is that the consultant or adviser will be employed intermittently throughout the entire fiscal year or that part of the year which remains at the time of appointment, or throughout a shorter interval, the appointment should be made as follows:

- (1) If the agency estimates that the consultant or adviser will be employed 40% or more of the time within the period designated, the individual should be carried on the rolls as a Government employee for the entire period and should be informed that he is administratively regarded as subject to section 281 for the entire period.
- (2) If the agency estimates the consultant or adviser will be employed less than 40% of the period designated, the individual may be carried on the rolls as an intermittent consultant or adviser pursuant to an arrangement by which he would receive implementing appointments from time to time within the period, rather than an appointment for the entire period, and the individual should be

informed that he will be treated as a Government employee for purposes of section 281 only on the day or days within the pertinent period covered by implementing appointments.

- (3) If the consultant or adviser is serving more than one department or agency, he shall inform each of his arrangements with the others so that appropriate administrative measures may be effected by the departments or agencies involved.
- (4) For consultative or advisory boards, individual appointments should be made for the entire fiscal year, or such other period as may be prescribed by law, and the appointee informed that insofar as his board membership is concerned, he will be regarded as a

Government officer or employee only on
the days when the board meets.

To a considerable extent the prohibitions of section 281 are aimed at the sale of influence to gain special favors for private business and at the misuse of governmental position or information. In accordance with these aims, it is desirable that even a consultant or adviser who is subject to the section only on the days he serves the Government should make every effort to avoid any personal contact with respect to negotiations for contracts or grants with the department or agency which he is advising if the subject matter is related to the subject matter of his consultancy. I recognize that this will not always be possible to achieve since there are instances where the consultant or adviser may have an executive position and responsibility with his regular employer which will require him to participate personally in contract negotiations with the department or agency he is advising.

Whenever this is the case the consultant or adviser should participate in the negotiations for his employer only with the knowledge and approval of a responsible government official, who should note his approval in appropriate form. In other instances an occasional consultant or adviser may have technical knowledge which is indispensable to his regular employer in his efforts to formulate a research and development contract or a research grant and, for the same reason, it is in the governmental interest that he should take part in negotiations for his private employer. Again he should participate only with the knowledge and approval of a responsible government official, who should note his approval in appropriate form.

The aim of preventing the sale of influence and the misuse of governmental position or information that is reflected by section 281 should be furthered in yet another way with respect to a consultant or adviser who under the foregoing

rules is subject to section 281 only on the days he serves the Government. He should be barred, not only on those days but at all times during the designated period of his availability for service, from activities before a Government department or agency in relation to a matter in which the Government is interested if he is to receive compensation for such activities from a non-Governmental source in addition to or in lieu of a normal salary or fee arrangement.

It should be noted that the prohibition of section 281 against certain compensated activities "before" a department or agency may go beyond an individual's personal appearance at the department or agency. A consultant or adviser should not, at times when he is subject to the prohibition of the section, prepare or assist in preparing proposals for contracts or grants to be presented to a department or agency by or on behalf of a non-Governmental firm or organization from which he receives compensation.

18 U.S.C. 283, 18 U.S.C. 284 and 5 U.S.C. 99. Section 283 in general prohibits an officer or employee of the Government from acting as agent or attorney for prosecuting any other person's claim against the Government, or assisting in the prosecution of any such claim other than in the discharge of his official duties. This statute, which extends to both compensated and uncompensated activities, overlaps 18 U.S.C. 281 insofar as the latter section pertains to claims activities. Therefore a consultant or adviser who is not subject to section 281 at times when not actually employed by the Government may nevertheless be subject at those times to the interdiction of section 283. Even if not interdicted by that section, however, he would be subject to the two post-employment statutes, 18 U.S.C. 284 and 5 U.S.C. 99. The first of these prohibits a former Government employee, for a period of two years after his employment has closed, from prosecuting in a representative capacity any claim against the

United States involving any subject matter directly connected with which he was employed. 5 U.S.C. 99 prohibits a former officer or employee of an executive department, for a period of two years after his employment with the department has ceased, from prosecuting in a representative capacity, or aiding in the prosecution of, any claim pending in any department during his employment. It is apparent that a consultant or adviser would be subject to the prohibition of 18 U.S.C. 283 or one or both of 18 U.S.C. 284 and 5 U.S.C. 99 at all times until the termination of his last period of service to the Government. In addition he would be bound by the provisions of 18 U.S.C. 284 and 5 U.S.C. 99 for two years thereafter.

18 U.S.C. 434. This section sets forth a prohibition against certain actions on the part of a Government employee in his capacity as such. More particularly, the section, which applies to all consultants and advisers at all times during their span of service, prohibits a Government employee

who is interested in the profits of any business entity from acting for the Government in the transaction of business with such entity.

It is in the best interests of the Government that the policy of this section be extended to consultants and advisers beyond its literal language. Accordingly, an adviser or consultant should be disqualified from the performance of duties involving the transaction of business with, or the rendering of advice which will have a direct and predictable effect upon the interests of, a business entity by which he is employed, or to which he renders consultant service, or in which he has a financial interest. In particular, he should be excluded from participation in the evaluation of contract or grant proposals which will directly affect the interests of such business entity. However, he need not be precluded from rendering general advice in situations where no preference or advantage might be gained therefrom by any

particular business entity. A non-profit organization or educational institution shall be deemed a "business entity" for the purposes of this paragraph.

18 U.S.C. 1914. Section 1914 forbids a Government employee to receive compensation "in connection with" his Government service from a source other than the Government or a State, county or municipality. The statute applies to an uncompensated as well as a compensated consultant or adviser. In cases where a consultant or adviser serves occasionally and for short periods, he may continue to receive his usual compensation from an outside private employer. And the continuation of the consultant or adviser's outside private compensation during a period of as much as 30 days a year of Government service would ordinarily be permissible on the assumption that it is not paid "in connection with" his Government services but rather as part of his normal salary arrangements with his private employer. However, if the length of

his service exceeds these limits, it will be necessary to determine specifically whether the continued outside compensation is related to the consultant or adviser's services to the Government, and thus improper, or whether it is permissible because made with respect to present, past, or future services for the outside employer. Cases of this nature should be referred to the chief legal officer of the department or agency for examination and recommendation as to the proper action to be taken.

Special Exemptions

Some consultants or advisers are appointed pursuant to a statute which exempts them from one or more of the conflict-of-interest laws. Nevertheless, a consultant or adviser so appointed should not participate in any matter where that participation, except for such exemption, would be within any of the statutes unless he receives permission to participate therein from the head of the department or agency

he serves. The latter shall not consent to the participation of such consultant or adviser in the matter unless he finds that such participation is, on the particular facts, consistent with the interests of the Government. Nothing in this paragraph shall be deemed to relieve any department or agency head, or appointee of such department or agency head, of the obligation to file a statement for publication in the Federal Register pursuant to the requirements of section 710(b) of the Defense Production Act of 1950 (50 U.S.C. App. 2160(b)) or of Executive Order No. 10647 of November 28, 1955 (20 F.R. 8769).

Ethical Standards of Conduct

Aside from the conflict-of-interest laws, there are elementary rules of ethics in the conduct of the public business by which all those who serve the Government are bound. That an individual may serve the Government only occasionally and for brief periods does not relieve him from the obligation

to abide by those rules. That he may be needed to bring rare or specialized talents and skills to the Government does not mean that he should be considered for a waiver. The people of the nation are entitled to ethical behavior of the highest order in the conduct of their Government's affairs from the sometime worker to no lesser degree than from the career worker.

Inside Information. The first principle of ethical behavior for the intermittent consultant or adviser is that he must refrain from any use of his public office which is motivated by, or gives the appearance of being motivated by, the desire for private gain for himself or persons with whom he has family, business or financial ties. The fact that the desired gain, if it materializes, will not take place at the expense of the Government makes his action no less improper.

An adviser or consultant must conduct himself in a manner devoid of the slightest suggestion of the extraction of private

advantage from his Government employment. Thus, a consultant or adviser must not, on the basis of any inside information, enter into speculation, or recommend speculation to members of his family or business associates, in the securities of any private company engaged in work for the Government in the field of his Government duties. He must obey this injunction even though those duties have no connection whatever with the financial and other arrangements between the Company and the Government. And he should be careful in his personal financial activities to avoid any appearance of acting on the basis of information obtained in the course of those duties.

It is important for consultants and advisers to have access to Government data pertinent to their duties and to maintain familiarity with the Government's plans and programs and the requirements thereof, within the area of their competence. Since it is frequently in the Government's interest that information of this nature be made generally available to an affected industry, there is generally no impropriety in

a consultant or adviser's utilizing such information in the course of his non-Government employment. However, a consultant or adviser may, in addition, acquire information which is not generally available to those outside the Government. In that event, he may not use such information for the special benefit of a business or other entity by which he is employed or retained or in which he has a financial interest.

In order to avoid any actual or potential abuse of information by a consultant or adviser, departments and agencies should, through information programs, make every effort to insure to the maximum extent possible that all firms within an industry have access to the same information that is available to a consultant or adviser who is employed by any of them. In addition, regular Government employees should avoid divulging confidential information to him unnecessary to the performance of his governmental responsibility, or information which directly involves the financial interests of his employer.

Consultants and advisers should be instructed that information not generally available to private industry must remain confidential in their hands, and must not be divulged to their private employers or clients. In cases of doubt they should be encouraged to confer with the chief legal officer or other designated agency official who can assist in the identification of information not generally available and in the resolution of any actual or potential conflict between duties to the Government and to private employers.

Occasionally an individual who becomes a Government consultant or adviser is, subsequent to his designation as such, requested by a private enterprise to act in a similar capacity. In some cases the request may give the appearance of being motivated by the desire of the private employer to secure inside information. Where the consultant or adviser has reason to believe that the request for his services is so motivated, he should make a choice between acceptance of the tendered private

employment and continuation of his Government consultancy. In such circumstances he may not engage in both. Furthermore, he should discuss any such offer of private employment with the chief legal officer of his Government agency whether or not he accepts it.

At times a private enterprise or other organization urges the appointment of one of its employees or members to a particular Government consultancy. The departments and agencies should discourage this practice. Any initiative in connection with the appointment of consultants, or in securing the names of qualified persons, should come from the Government.

Abuse of Office. An adviser or consultant shall not use his position in any way to coerce, or give the appearance of coercing, another person to provide any financial benefit to him or persons with whom he has family, business or financial ties.

Gifts. An adviser or consultant shall not receive or solicit anything of value as a gift, gratuity or favor for

himself or persons with whom he has family, business or financial ties if he has reason to believe that it would not be made but for his position with the Government, or if the acceptance thereof would result in, or give the appearance of resulting in, his loss of complete independence or impartiality in serving the Government.

Industry, Labor or Agricultural Representatives

It is occasionally necessary to distinguish consultants and advisers from persons speaking for a firm or an industry, or for labor or agriculture, or in some other representative capacity. A consultant or adviser is a person whose advice is obtained by a department or agency because of his particular qualifications and who serves as an employee in an individual and independent capacity. A representative of a firm or industry or organization who is invited to appear before a Government department or agency presents his views in a representative capacity and is not an employee. The representative is not, therefore, within the scope of the conflict-of-interest laws. Departments and agencies should

be careful to make and clarify the distinction noted here and should not compensate an industry or similar representative for his advice, though they may pay travel expenses and per diem allowances where appropriate.

Administrative Steps

All departments and agencies of the Government shall

(1) bring this memorandum to the attention of all consultants and advisers employed by them and of all regular employees dealing with such consultants and advisers;

(2) review their existing rules and regulations and where appropriate, revise them or issue new rules and regulations to promote the policies set forth in this memorandum; and

(3) take such other measures as may be appropriate to impress upon consultants and advisers and upon Government officials with whom they consult that they have a responsibility to avoid situations in which a potential conflict-of-interest may exist. These individuals should also be cautioned

to avoid situations in which the consultant or adviser might be thought to be influencing Governmental action in matters with regard to which he has a financial or other personal interest, or to be using inside information for private gain.

While it would be most advisable for a department or agency of the Government, in order to minimize the occurrence of conflicts of interest, to avoid appointing individuals to advisory positions who are employed or consulted by contractors or others having a substantial amount of business with that department or agency, I recognize that the Government has, of necessity, become increasingly concerned with highly technical areas of specialization, and that the number of individuals expert in those areas is frequently very small. Therefore, in many instances, it will not be possible for a department or agency to obtain the services of a competent adviser or consultant who is not in fact employed or consulted by such contractors. In addition, an advisory group

may of necessity be composed largely or wholly of persons of a common class or group whose employers may benefit from the advice given. An example would be a group of university scientists advising on research grants to universities. Only in such a group can the necessary expertise be found. In all these circumstances, particular care should be exercised to exclude his employer's or clients' contracts or other transactions with the Government from the range of the consultant's or adviser's duties.

Disclosure of Financial Interests

In order to carry out its responsibility to avoid the use of the services of consultants or advisers in situations in which violation of the conflict-of-interest laws or of these regulations may occur, each department or agency of the Government shall, at the time of employment of a consultant or adviser, require him to supply it with a statement of his private employment and financial interests. The statement should indicate the names of all the companies, firms, research organizations and educational institutions which he is serving as

employee, officer, member, director, or consultant, and the companies in which he has any other financial interest, such as the ownership of securities or other interests which have a significant financial value. He need not reveal precise amounts of investments. Each statement of financial interests should be forwarded to the chief legal officer of the department or agency concerned, for information and for advice as to possible conflict of interest. In addition, each statement should be reviewed by those persons responsible for the employment of consultants and advisers to assist them in applying the criteria for disqualification discussed in this memorandum as set forth above. Such statements should be kept current during the period the consultant is on the Government rolls.

Legal Interpretation

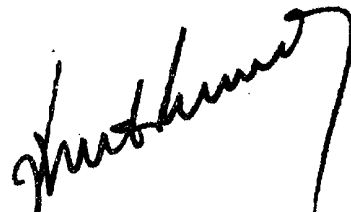
Whenever the chief legal officer of a department or agency believes that a substantial legal question is raised by the

employment of a particular consultant or adviser he should advise the Department of Justice, through the Office of Legal Counsel, in order to insure a consistent and authoritative interpretation of the law.

This memorandum shall be published in the Federal Register.

THE WHITE HOUSE

February 9, 1962

A handwritten signature in black ink, appearing to read "H. R. H. H.", is written over the typed text of the memorandum.

Shall be fined not more than \$1,000 or imprisoned not more than six months, or both.

18 U.S.C. 284

Whoever, having been employed in any agency of the United States, including commissioned officers assigned to duty in such agency, within two years after the time when such employment or service has ceased, prosecutes or acts as counsel, attorney or agent for prosecuting, any claims against the United States involving any subject matter directly connected with which such person was so employed or performed duty, shall be fined not more than \$10,000 or imprisoned not more than one year, or both.

5 U.S.C. 99

It shall not be lawful for any person appointed as an officer, clerk, or employee in any of the departments, to act as counsel, attorney, or agent for prosecuting any claim against the United States which was pending in either of said departments while he was such officer, clerk, or employee, nor in any manner, nor by any means, to aid in the prosecution of any such claim, within two years next after he shall have ceased to be such officer, clerk, or employee.

Appendix

18 U.S.C. 281

Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than \$10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

Retired officers of the armed forces of the United States, while not on active duty, shall not by reason of their status as such be subject to the provisions of this section. Nothing herein shall be construed to allow any retired officer to represent any person in the sale of anything to the Government through the department in whose service he holds a retired status.

This section shall not apply to any person because of his membership in the National Guard of the District of Columbia nor to any person specially excepted by Act of Congress.

18 U.S.C. 283

Whoever, being an officer or employee of the United States or any department or agency thereof, or of the Senate or House of Representatives, acts as an agent or attorney for prosecuting any claim against the United States, or aids or assists in the prosecution or support of any such claim otherwise than in the proper discharge of his official duties, or receives any gratuity, or any share of or interest in any such claim in consideration of assistance in the prosecution of such claim, shall be fined not more than \$10,000 or imprisoned not more than one year, or both.

Retired officers of the armed forces of the United States, while not on active duty, shall not by reason of their status as such be subject to the provisions of this section. Nothing herein shall be construed to allow any such retired officer within two years next after his retirement to act as agent or attorney for prosecuting or assisting in the prosecution of any claim against the United States involving the department in whose service he holds a retired status, or to allow any such retired officer to act as agent or attorney for prosecuting or assisting in the prosecution of any claim against the United States involving any subject matter with which he was directly connected while he was in an active-duty status.

This section shall not apply to any person because of his membership in the National Guard of the District of Columbia nor to any person specially excepted by enactment of Congress.

18 U.S.C. 434

Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than \$2,000 or imprisoned not more than two years, or both.

18 U.S.C. 1914

Whoever, being a Government official or employee, receives any salary in connection with his services as such an official or employee from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or

Whoever, whether a person, association, or corporation, makes any contribution to, or in any way supplements the salary of, any Government official or employee for the services performed by him for the Government of the United States --

Shall be fined not more than \$1,000 or imprisoned not more than six months, or both.

18 U.S.C. 284

Whoever, having been employed in any agency of the United States, including commissioned officers assigned to duty in such agency, within two years after the time when such employment or service has ceased, prosecutes or acts as counsel, attorney or agent for prosecuting, any claims against the United States involving any subject matter directly connected with which such person was so employed or performed duty, shall be fined not more than \$10,000 or imprisoned not more than one year, or both.

5 U.S.C. 99

It shall not be lawful for any person appointed as an officer, clerk, or employee in any of the departments, to act as counsel, attorney, or agent for prosecuting any claim against the United States which was pending in either of said departments while he was such officer, clerk, or employee, nor in any manner, nor by any means, to aid in the prosecution of any such claim, within two years next after he shall have ceased to be such officer, clerk, or employee.