November 20, 2003

The Honorable John Conyers, Jr.
United States House of Representatives
Washington, DC 20515

Dear Representative Conyers:

I am writing in connection with certain comments in your recent press statement concerning the conflict of interest laws as they apply to special Government employees (SGE) who serve fewer than 60 days per year in an executive agency. Specifically, your Press Release of November 15, 2003 referred to the 60-day threshold for certain restrictions on representation as a "loophole" and suggested that the 60-day threshold was a mere legal technicality. I would like to take this opportunity to explain the history and purpose of the 60-day standard for special Government employees. Please understand that I am not opining on any individual matter. I do want to emphasize, however, my belief that the 60-day requirement is not a mere loophole but a well-thought-out measure designed to preserve the interest of Government in obtaining the expertise of a large number of scientists, policy analysts and other specialized advisors who serve the Government on a temporary basis.

Congress created the SGE category in 1962 in recognition of the need to apply appropriate conflict of interest restrictions to individuals who provide necessary, but limited, services to the Government. In 1961, the House Judiciary Committee observed that existing conflict of interest restrictions were "excessive" in that they "failed to take into account the role, primarily in the executive branch of Government, of the part-time or intermittent adviser whose counsel had become essential, but who cannot afford to be deprived of private benefits, or reasonably requested to deprive themselves, in the way now required." The Committee specifically noted that prior restrictions, such as the prohibition on representing private persons before the Government, created serious barriers to recruitment "when the Government seeks the assistance of a highly skilled technician, be he scientist, accountant, lawyer, or economist." Consequently, Congress enacted

a number of special provisions for SGEs, including the 60-day standard for certain representational activities, to which your recent comments refer.

With respect to the representational restrictions specifically, I would like to point out a couple of notable features. First, it is important that all SGEs, regardless of the number of days they serve, are subject to the same important prohibition on representing others in connection with any particular matter involving specific parties in which they have participated personally and substantially at any time for the Government.

Second, the 60-day standard serves simply as a threshold for an additional restriction, i.e., a much stricter prohibition on representation in connection with any particular matter involving specific parties that is pending in the agency that employs the SGE. The 60-day threshold was adopted in order to distinguish those SGEs who have more frequent occasions to acquire inside influence from those who have less frequent official dealings with Government staff and, presumably, less opportunity to abuse their access. Indeed, I find it significant that Congress rejected a proposal to use a shorter, 15-day threshold for this restriction: as the Senate Judiciary Committee reported in 1962, "a 15-day limit seems much too short and no doubt would often make unavailable to an agency the needed services of an individual with specialized knowledge or skills who must appear before that agency in other connections in his private capacity."

As a practical matter, it is not surprising that temporary experts in subject areas of concern to a particular agency should have other dealings with that same agency. These experts typically are in demand from the private sector for the same reasons that the Government requires their assistance. Based on our experience, we would find it unworkable, for example, to preclude temporary scientific advisors from having any other dealings with their employing agencies, as it is frequently the case that these individuals must represent their universities or other private employers in connection with various grant applications and other matters that may be unrelated to their official work as SGEs. The very premise of the laws governing SGEs is that the Government cannot obtain the expertise it needs if it requires experts to forego their private professional lives as a condition of temporary service.

In sum, I believe that the 60-day standard is not an accident or a mere legal technicality. Rather, current law reflects a considered Congressional judgment that accommodates both the Government's need for appropriate ethical controls and the Government's need for specialized services from outside experts.

If you would like to discuss this matter further, please call me, at 202-482-9292, or your staff may contact Richard Thomas, Associate General Counsel, at 202-482-9278.

Sincerely,

Amy L. Comstock
Director