

Office of Government Ethics

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Letter to Two Private Attorneys dated February 23, 1981

This is in response to your letter of January 21, 1981, in which your firm, as counsel to [a special] Committee, requests our opinion as to whether the United States members of [the Committee] are special Government employees and, as such, subject to the prohibitions in the Federal laws on conflicts of interest.

The Memorandum of Understanding on Cooperation in the Field of Agriculture between the Government of the United States of America and the Government of the Federal Republic of Nigeria, dated July 23, 1980, expresses the intention of both governments to explore possible joint activities in the development of agriculture. One of its objectives is: "to foster private sector involvement in projects and activities consistent with the agricultural development policies and objectives of the two Governments." (Article II, 7.)

The [Committee] has been created pursuant to Article IV of the Memorandum for the purpose of providing: "a mechanism for support of private sector cooperation in agriculture. The U.S. Committee members would work with their Nigerian counterparts on the Committee toward expanding private sector cooperative projects in Nigeria."

We are informed that former Vice President Mondale asked [name deleted], a private businessman, to serve as chairman of [the Committee] and to select, in consultation with an official in the Department of Agriculture, nine additional businessmen for membership in the American Section of [the Committee]. [The businessman] did not restrict membership as suggested but enlarged it to include representatives from the private agricultural business sector with the financial and technical capacity to make investments in Nigeria as well as from private foundations. [The businessman] has assumed the title of "Chairman Designate." The principal delay in setting up the American Section, according to your letter, has been the uncertainty as to whether its members would be considered special Government employees by virtue of their participation in [the Committee].

To determine this question, we have solicited information as to

the nature of the appointment and the authority of the members of [the Committee] and related material facts about [the Committee] from officials of the Departments of Agriculture and State, the agencies mainly concerned with the implementation of the Memorandum of Understanding. We have learned that [Committee] members will not:

1. be sworn in or sign the customary oath of a Government employee;
2. receive any compensation or expenses from the Federal Government;
3. act as a spokesman for any Government agency;
4. have any office space in any Government agency;
5. be subject to the supervision of any Government agency; and
6. serve in any consulting or advisory capacity to the United States.

These are the criteria normally associated with the status of special Government employees. (See 18 U.S.C. § 202(a); Federal Personnel Manual, Chapter 735, Appendix C; and B. Manning, Federal Conflict of Interest Law 26-30 (1964).) The members meet none of these criteria.

A comparison of Articles III and IV of the Memorandum of Understanding highlights the private character of the functions performed by [the Committee]. Article III states that a [Working Group] will be formed by the United States and Nigeria to serve "as the coordinating body to plan and review activities and their implementation." This is a group composed of officials of both countries. The United States members are officials selected from the Departments of Agriculture and State. The Under Secretary of Agriculture for International Affairs and Commodity Programs is the head of the United States delegation. The [Committee] established under Article IV of the Memorandum, on the other hand, is a group selected from the private sector for "support of private sector

cooperation in agriculture" and "expanding private sector cooperative projects in Nigeria." It is not a Government agency.

On the information presently available to us, it is our conclusion that members of [the Committee] are not in the employ of the United States Government as special Government employees or otherwise and that they are not subject to the conflict of interest laws applicable to Federal employees. We caution, however, that any material change in the role performed by [the Committee] under the Memorandum could conceivably convert the status of the members of [the Committee] to that of special Government employees.

Sincerely,

J. Jackson Walter
Director