

Office of Government Ethics

88 x 14 -- 10/21/88

**Letter to
a District of Columbia Agency General Counsel
dated October 21, 1988**

We received your request for guidance on the requirements of Federal ethics laws applicable to District of Columbia officials. In your letter, you state that you may soon be in a position of bringing a constitutional claim against various Federal officers who are charged with the duty to implement and enforce provisions of the Fiscal Year 1989 Appropriations Act for the District of Columbia. You serve as General Counsel to [a District of Columbia agency]. The [agency] may wish to pursue this claim in Federal court, and thus you need confirmation that your staff attorneys and you may lawfully represent your clients by virtue of the exception contained in 18 U.S.C. § 205.

The proscriptions found in 18 U.S.C. § 205 prohibit any officer or employee of the District of Columbia from acting as attorney for prosecuting any claim against the United States, otherwise than in the proper discharge of his official duties.¹ The exception contained in this statute suggests by the use of the term "official" that the focus of the provision is aimed at actions taken by employees in their private capacities. However, activities undertaken on behalf of a governmental unit can be "private" if they are not part of the employee's job.² The application of the exception, therefore revolves around the factual determination of whether this current suit falls within the scope of your official duties, and those of your staff attorneys.

Our Office has reviewed your request and enclosure, and has obtained the advice of the Office of Legal Counsel at the Department of Justice. It is our opinion, and the Office of Legal Counsel concurs, that you and your staff attorneys would qualify for the exemption so long as you are directed to do so by the [agency], and thus are acting in the proper discharge of your official duties.

Sincerely,

Donald E. Campbell

Deputy Director

1 18 U.S.C § 205 provides in part:

Whoever, being an officer or employees of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States, including the District of Columbia, otherwise than in the proper discharge of his official duties-

(1) acts as agent or attorney for prosecuting any claim against the United States...

* * *

Shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.

2 In the Memorandum Opinion for the General Counsel, Environmental Protection Agency by the Office of Legal Counsel, U.S. Department of Justice, the Acting Assistant Attorney General discusses the application of 18 U.S.C. §§ 203 and 205 to Federal employees detailed to state and local governments when their duties involve representation of those governments before their agency in an adversarial context in which the United States has an interest. While the facts of the case are not completely analogous, the Office of Legal Counsel does draw the conclusion that neither to these statutes applies if the employee is acting in the "proper discharge of his official duties." Memorandum Opinion for the General Counsel, Environmental Protection Agency, 4B Op. O.L.C. 498 (1980).