

Office of Government Ethics
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**Opinion Issued to a Department's
Designated Agency Ethics Official
dated February 12, 1982**

This Office has determined that your request for an advisory opinion concerning the breadth of the term "organization," as used in 18 U.S.C. § 208 and applied to state colleges, universities and higher education systems, presents a matter of first impression.¹ The following formal advisory opinion is issued in response to your request.

In your letter, you set forth the following:

Within this Department there are a large number of peer review committees in which special government employees, who are employees of colleges, universities and state and local governments, review grant applications and contract proposals submitted by colleges, universities and state and local governmental units.

In order to avoid conflicts of interest and potential conflicts it has been our policy and practice to require members of these peer review committees to excuse themselves from participation in review of applications or proposals submitted by or for their institutions. A recurring question has been the precise scope of the term "organization" as used in section 208 [18 U.S.C.]. For example, in a state with two or more college or university systems or multi-campus schools, does organization refer to the entire state executive structure, a separate university system or a separate campus.²

18 U.S.C. § 208(a) states in part that:

[W]hoever, being an officer or employee of the executive branch, . . . including a special Government employee, participates personally and substantially as a government officer or employee, through decision, approval, disapproval, recommendation, the rendering of

advice, investigation, or otherwise, in a . . .
particular matter in which, to his knowledge,
he, his spouse, minor child, partner, organization in
which he is serving as officer . . . or employee . . .
has a financial interest --

Shall be fined not more than \$10,000, or imprisoned
not more than two years, or both. (Emphasis supplied.)

The term "organization" is not defined in the statute. The legislative history offers little guidance. In the 1962 Senate Report accompanying H.R. 8140 the following statement was made concerning the deletion of the word "business" which had appeared before the word "organization" in section 208(a) as passed by the House of Representatives.

Subsection (a) [of § 208] at one point speaks in terms of an employee's disqualifying connection with a "business organization," thus leaving open the implication that he would remain eligible to act for the Government in a matter involving a nonprofit organization with which he is connected. A great number of universities, foundations, nonprofit research entities, and other similar organizations today are engaged in work for the Government. Conflicts of interest may arise in relation to them just as in the case of the ordinary business for profit. The committee therefore has deleted the word "business" from the subsection to make clear that improper dealing by a Government employee in connection with a nonprofit organization is also proscribed [sic].³

It is clear from this language that Congress intended that employees of universities and colleges be covered by the provisions of 18 U.S.C. § 208 when they serve the Federal Government. There is no evidence in the legislative record, however, that any consideration was given to the dual status of an employee of a state higher education institution or system who, as such, is also an employee of the state.

A number of states have established individual institutions of higher learning while others have established one or more higher education systems, each composed of a number of institutions. In most, if not all, of these states, the faculty and staff members are technically employees of and are paid by the

state government. If in these circumstances the state government itself were deemed to be the "organization" which employs these persons, section 208(a) would preclude each of them who is intermittently serving on a Federal peer review committee from involvement in any particular matter pending before the committee in which his or her state government had a financial interest. The prohibition would extend not only to an application for a grant or a bid for a contract submitted by such person's institution or system but also to one submitted by any other instrumentality of the state, including a non-educational agency.

Section 208 is, however, a penal statute and should not be extended to instances not clearly within its terms or to those exceptional to its spirit and purpose.⁴ Therefore, we believe that, where a member of a peer review committee is a faculty member or employee of a state higher education institution (whether the institution is established separately or, as in California, is part of a state system), he or she generally may be allowed to participate in a particular matter in which a Department or agency of his or her state other than an educational institution or system has a financial interest. Stated differently, we believe it reasonable and within the spirit of this statute to conclude that a state's higher education system and/or institutions need not invariably be joined with the rest of the state governmental structure into one "organization" for the purposes of section 208(a). The purpose, funding, and operations of a higher education system or individual institution are sufficiently dissimilar from those of most of the other agencies of a state that this rule should apply to most cases.⁵ Further, if a state has established and provides funds to individual institutions separately rather than through a system, these institutions may be deemed to be distinct from one another as well as from the rest of the state government.⁶

We cannot, however, make a general pronouncement about the status, for purposes of section 208, of separate educational systems within a state, or of individual institutions within a system.⁷ States that establish higher education facilities in either of those fashions do so by different statutory schemes. The diversity among the states makes it impossible to formulate a standard for the application of section 208(a) to a peer review committee member when he or she is confronted with an application or proposal originating in a system of his or her own state. Accordingly, we are of the view that your Department must

continue to resolve such situations on an individual basis. Whenever the system or the institution within the system that employs the peer review committee member has a discernible financial interest in an application or proposal, under section 208(a) your Department must find him or her disqualified to act on it. We believe, however, that in some of these cases your Department may utilize section 208(b) of Title 18, U.S.C., to grant the committee member a waiver because his or her employing institution's or system's financial interest in the matter before the committee is not so substantial as to affect the integrity of his or her services to your Department. These waivers are not to be given without careful analysis, however, and must take into account such factors as the state statutes establishing the system or systems, the manner in which grants or contracts are sought (by institution or by system), the entity being reimbursed for the indirect costs of a grant or contract, and the accountability for grant money once awarded.

An illustration or two with reference to California, which has more than one system of higher education institutions, will be useful. The institutions within the University of California system (one of the three systems within the state)⁸ apply for grants separately, are individually responsible for initial accountability to the grantor, collect their indirect costs themselves rather than through a system-wide research foundation and maintain a distinct identity. Nevertheless, the institutions, as constituent parts of one higher education system, are ultimately responsible for carrying out the system's functions. Therefore, these institutions properly cannot be split off from that system one by one for the purposes of section 208(a). Therefore, the participation of a faculty member of one University of California institution in the proceedings of a peer review committee on a grant application from another University of California institution would contravene section 208(a), absent a waiver under subsection (b).

With respect to the constituent institutions of the three California systems, we have reviewed their respective operational responsibilities and have concluded that these systems are not the same "organization" as that term is used in section 208(a). The involvement of a faculty member of an institution in one system in the deliberations of a peer review committee considering an application or proposal from one of the other two systems or from an institution within one of the other two systems would not violate section 208(a).⁹ Where the

separation between systems is not complete, a waiver under section 208(b) would be necessary to permit the faculty member to participate in the committee's deliberations on that proposal.

We realize that the views we have expressed will require each Federal Department or agency to make a determination or determinations with regard to members of peer review committees who are employees of state institutions and who may be called upon to review matters submitted by some entity within their own state's higher education system. While this sometimes may not be an easily administered solution, it is the only appropriate one under the statute as it is drafted. Finally, we suggest that a Department or agency make appointments to its peer review committees so as to avoid, if possible, the need for the issuance of section 208(b) waivers to any of its members.

In accordance with the provisions of 5 C.F.R. 738.308 (a)(2), we have consulted with the Office of Legal Counsel of the Department of Justice prior to issuing this formal advisory opinion. We are authorized to state that the Office of Legal Counsel agrees with our analysis and conclusions.

Sincerely,

J. Jackson Walter
Director

1 The Office determined pursuant to 5 C.F.R. 738.305(a)(1) that this request presented a matter of first impression. Notice of request was also distributed to all agencies providing a time for any interested agency to comment. The Office received comments from four agencies. Staff members of this Office also met with officials of the agency making the request.

2 We want to avoid the confusion that may be inherent in your use of the term "multi-campus schools." For example, some schools may have elements that are geographically separate (e.g., a new medical school or law school in a major city and a main campus in the traditional university town) while other schools may consist of several separate and complete campuses. For purposes of this opinion, we use the word "institution" to refer to each of the several separate and complete campuses that together make up a higher education system. (Within the University of California

"institution" is also used to refer to those schools with one major campus and one or more geographically separate program elements.

3 S. Rep. No. 2213, 87th Cong., 2d Sess. 14, reprinted in 1962 U.S. Code Cong. & Ad. News 3852 3862-3.

4 U.S. v. Chemical Foundation Inc., 272 U.S. 1 (1926). This case, in part, involved the applicability of an earlier version of 18 U.S.C. § 208, then section 41 of the Criminal Code.

5 A land grant institution may be positioned outside the rule. For instance, it may have operational or other ties with the Department of Agriculture of its state. If so, it should be deemed to be a part of the state government, and, absent a waiver under 18 U.S.C. § 208(b), a member of its faculty or staff should be disqualified under section 208(a) from serving on a Federal peer review committee that is considering an application from that Department or any other state agency.

6 An example of two state institutions which may be treated separately because of their state statutes and funding procedures are the University of Colorado and Colorado State University.

7 This opinion does, however, provide as an example the three state higher education systems of California when dealing with faculty members only. See the discussion at page 4 *infra*.

8 The three systems of higher education in the State of California are the University of California, the California State Universities and Colleges, and the California Community Colleges.

9 When the peer review member is an officer of his or her institution, an additional consideration must be made *vis-a-vis* his or her duties to the entire state educational program by virtue of that position. For instance, a member of the Board of Regents of the University of California should not be given a waiver under section 208(b) for matters affecting an entity within the California State University and College system on the same basis as faculty members at a University of California institution.