

United States Senate
WASHINGTON, DC 20510

March 16, 2023

VIA ELECTRONIC TRANSMISSION

The Honorable Lloyd J. Austin III
Secretary
United States Department of Defense

Dear Secretary Austin:

For the past decade, I have conducted oversight of federal agencies regarding their use of Special Government Employees (SGEs).¹ SGEs are generally hired into temporary expert or advisory positions for the government, even though they are allowed to continue working at their private sector jobs. This private-sector expertise is why they are hired, which means their government service is often directly related to the industries in which they have a vested interest.² Because ethics rules are more relaxed for SGEs, this arrangement serves as a breeding ground for conflicts of interest and ethical red flags.³ It is therefore imperative that we gain a better understanding of how agencies are using these employees and managing the conflicts that arise in a way that ensures the public's trust.

At my request, the Government Accountability Office (GAO) in 2016 reviewed how SGEs are used within the Department of Justice, Department of Health and Human Services, National Science Foundation, Department of State, and the Nuclear Regulatory Commission.⁴ GAO conducted a study for employees in those agencies not serving on federal advisory or other committees, commissions, or boards.⁵ The report analyzed how agencies appointed, utilized, and tracked these SGEs.⁶ Despite the narrow scope of the inquiry, GAO made some useful findings. According to the report, most of the agencies surveyed had challenges reporting reliable data on SGEs, including trouble distinguishing between those employees who served on federal boards and those who did not.⁷ The report also noted "weak internal coordination and misunderstanding about the SGE designation," and it found that stronger data would better position agencies to

¹ State Department on "Special Government Employees" (July 25, 2013), <https://www.grassley.senate.gov/news/news-releases/state-department-special-government-employees>; 18 U.S.C. § 202(a) (definition of Special Government Employee).

² U.S. Off. of Gov't Ethics, Ethics Laws Applicable to Special Government Employees, <https://extapps2.oge.gov/Training/OGETraining.nsf/xsp/.ibmmodes/domino/OpenAttachment/training/ogetraining.nsf/D006291C1FEC02448525869C005BD4B8/Body/EthicsLawsApplicabletoSGEs.pdf>.

³ *Id.*

⁴ U.S. Gov't Accountability Off., GAO-16-548, Opportunities Exist to Improve Data on Selected Groups of Special Government Employees (2016), <https://www.gao.gov/assets/gao-16-548.pdf>.

⁵ *Id.* at 2.

⁶ *Id.*

⁷ *Id.* (abstract).

report on SGEs and provide required ethics training.⁸

In addition to these more general problems with agencies' management of the SGE designation, I have also raised objections to the executive branch's disregard for clear statutory language, which limits SGE service to a maximum of 130 days in a one-year period.⁹ The Office of Legal Counsel (OLC) has taken upon itself to effectively nullify this limit, and agencies have followed that lead. According to a longstanding OLC advisory opinion, agencies are to make a good-faith determination that SGEs are expected to serve no more than 130 days in a one-year period. As long as they do that, OLC opined, SGEs maintain their SGE status even after exceeding the legally-mandated time limit, though the agency must make a new assessment annually.¹⁰ At least one federal court, the U.S. Court of Appeals for the D.C. Circuit, has contradicted this loose interpretation and held, as the law clearly states, that SGEs are limited to a maximum of 130 days in a year.¹¹ This executive run around the law opens up the possibility that agencies may be allowing this exception to swallow the rule, violating the clear will of Congress.

Because of these outstanding questions, I am requesting a more detailed explanation from federal agencies as to their use of SGEs and how they have responded to the GAO report issued over half a decade ago. There has been plenty of time to consider areas of concern and develop better procedures for ensuring ethical norms are followed and that agencies are able to offer a full accounting for these employees.

So that Congress may conduct objective and independent oversight on this issue, please respond to this letter no later than March 30, 2023 with all materials in digital and searchable format, responsive to the following requests:

1. Please provide a complete list of special government employees who have served your agency for the past five years, including their names and titles; dates of service; whether or not the employees' SGE status was due to service on federal committees, commissions, or boards; a description of their duty assignment; and the specialty and expertise that led to their appointment or hire. In responding to this request, please include data for all currently-serving SGEs;
2. Please note individually whether each SGE received ethics training, and provide a copy of your training materials for these employees;

⁸ *Id.*

⁹ 18 U.S.C. § 202(a) (2014).

¹⁰ See *United States-Japan Consultative Group on Economic Relations*, 3 Op. O.L.C. 321, 322-23 (1979); see also U.S. Off. of Gov't Ethics, *Ethics Laws Applicable to Special Government Employees* at 4 (citing Op. O.L.C. 321, 323 (1979); 3 Op. Off. Legal Counsel 451, 454 (1970); OGE Informal Advisory Memorandum, 00 x 1, at 5 (Feb. 15, 2000) and OGE Informal Advisory Letter 05 x 7 (Nov. 1, 2005)); *Merit Systems Protection Board—Special Counsel—Employment of Temporary or Intermittent Attorneys and Investigators* (31 U.S.C. § 686), 3 Op. O.L.C. 451, 454 (1979).

¹¹ See *United States v. Baird*, 29 F.3d 647, 650 (D.C. Cir. 1994) (interpreting that an employee serving in excess of 130 days can no longer be considered an SGE).

3. Please list each employee for whom a conflict of interest or ethics problem was identified within the past five years, along with a detailed description of that conflict and how it was resolved or a note that the matter is still pending. In responding to this request, please include any financial disclosures, public or confidential, filed by the employee. For all SGEs who had concurrent employment, please identify the outside employer(s) and any other information collected by the agency as to that employment, including any contracts, business, or lobbying those employers have had before your agency;
4. For each SGE granted a waiver under 18 U.S.C. §§ 203 (e), 205 (f), 208 (b)(1), (b)(2), or (b)(3), or any other applicable law or regulation, please provide a detailed description of the conflict and the reason for the waiver, as well as the legal authority for granting it. In responding to this request, please also make note of the number of employees who requested waivers that were not granted;
5. If you have difficulty determining which employees qualify as SGEs, please describe why you have difficulty making this determination;
6. Please provide a copy of all agency-specific policies, procedures, or regulations related to SGEs, including those related to determining when your agency should hire SGEs, as well as your guidelines for assuring that hiring is only used when necessary to provide specialized talent not otherwise available within the agency. Include in your response to this request your agency's policies and procedures for identifying and resolving conflicts of interest encountered by SGEs, as well as a note of any changes you've made to these policies since July 2016;
7. For the past five years, please provide a detailed list of all SGEs who exceeded 130 days of employment within the relevant 365-day period and a description of why the employee exceeded the statutory limit. In responding to this request, please include the time periods these employees actually served and note whether your agency tracks SGEs' days of service or whether you allow the individual SGEs to track their own days.

Thank you for your cooperation with this ongoing congressional oversight. If you have any questions, please contact my designated staff member on the Budget Committee, James Layne, at (202) 224-0642.

Sincerely,



Charles E. Grassley
Ranking Member
Committee on the Budget