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THE WHITE HOUSE

WASHINGTON

DATE Fri, Feb 24, 1984

FOR: _____RICHARD A. HAUSER

_____DAVID B. WALLER

_____PETER J. RUSTHOVEN

_____D. EDWARD WILSON, JR.

_____SHERRIE M. COOKSEY

_____H. LAWRENCE GARRETT, III

✓ _____JOHN G. ROBERTS, JR.

FROM: FRED F. FIELDING

The attached is for your information. ~~Please circulate and return to this office for filing~~.

Thank you.

/Attachment

Pls circulate

United States of America
Office of Government Ethics

Office of Personnel Management
Washington, D.C. 20415

FEB 16 1984

MEMORANDUM

SUBJECT: Digest of Selected Letters of OGE - 1983

FROM: David H. Martin
Director

TO: Designated Agency Ethics Officials and Other Interested Persons

Enclosed for your information is a copy of a digest of selected letters issued by the Office of Government Ethics during the calendar year 1983. This digest builds upon the one issued in January 1981 which covered the years 1979-1981 and the one issued in January for calendar year 1982. As you will note, the quick statutory index that is attached covers the total five year period.

Complete copies of these letters, with identifying information deleted, are maintained in OGE's library and are available to be reviewed there.* These are indexed by statute, regulation and subject. If you wish to obtain a copy of an individual letter opinion, please call the Office or stop by.

*Library Location:

1717 H Street, NW
Room 436
Washington, DC

Mailing Address:

1900 E Street, NW
Room 436H
Washington, DC 20415

Enclosure

DIGEST OF SELECTED OGE LETTERS

1983

Enc
Office of
one issue
January
attached

OFFICE OF GOVERNMENT ETHICS

Quick Index

Post Employment-18 USC 207

Generally- 79x5, 79x6, 80x3, 80x4, 80x6, 80x7, 80x9, 80x10, 81x1, 81x2, 81x4, 81x5, 81x7, 81x9, 81x10, 81x13, 81x14, 81x15, 81x20, 81x23, 81x25, 81x26, 81x28, 81x29, 81x30, 81x33, 81x35, 82x1, 82x5, 82x7, 82x8, 82x10, 82x11, 82x13, 83x5, 83x7, 83x8, 83x12, 83x14, 83x17

Section 207(a)- 79x5, 80x1, 80x2, 80x8, 80x9, 81x4, 81x5, 81x26, 82x1, 82x5, 82x7, 82x8, 82x13, 82x21, 83x7, 83x12, 83x14, 83x17

(b)(i)- 80x2, 80x9, 81x4, 81x5, 81x15, 82x7, 82x8, 83x13, 83x17

(b)(ii)- 81x4, 81x5, 81x9, 81x15, 81x35, 82x7

(c)- 80x6, 80x9, 81x1, 81x2, 81x4, 81x5, 81x7, 81x9, 81x10, 81x14, 81x20, 81x25, 81x28, 81x35, 82x7, 83x7, 83x12, 83x14

(d)- 80x6, 80x9, 81x7, 82x5

(e)- 81x7, 81x10, 81x14, 81x25

(f)- 80x9, 81x35

(g)- (See below)

(h)- 81x5, 81x33, 82x5, 83x5

(i)- 81x9, 81x20, 81x28

Prior to amendments

0, 82x2, 82x16 Section 207(a)- 80x4, 80x10, 82x2, 82x16

0, 81x23 Section 207(b)- 80x4, 80x10, 81x23

Financial Disclosure- Title II of the Ethics in Government Act.

Generally- 79x1, 79x2, 79x7, 80x5, 81x3, 81x22, 82x12, 82x14, 83x9

Outside earned income limitation- 81x6, 82x6, 82x9, 82x18, 83x4, 83x6

18 USC 202-209 - Criminal conflict of interest provisions (except those subsections of 207 above)

Section 202 (Definitions) -
81x8, 81x24, 81x30, 81x34, 82x22, 83x16

Section 203 (Compensation for Matters Affecting Government) -
81x10, 81x21, 81x24, 82x10, 82x20, 82x21, 83x2, 83x19

Section 205 (Claims against the Government) -
81x10, 81x12, 81x24, 82x11, 82x19, 82x20, 82x21, 83x1, 83x2, 83x19

Section 207(g) (Partners of Government Officers and Employees) -
79x3, 81x13, 81x19, 81x34

Section 208 (Official Actions Affecting Personal Financial Interests) -
79x4, 81x19, 81x27, 83x6, 83x18, 83x20

Section 209 (Dual Compensation for Official Duties) -
81x16, 81x17, 81x18, 81x31, 81x32, 82x15, 82x17, 82x18, 83x2, 83x3, 83x4, 83x6, 83x10, 83x11, 83x15

Office of Government Ethics- Title IV of the Ethics in Government Act
79x6

1983

83 X 1
01/27/83

OGE advised a United States Attorney that based on a prior interpretation by the Department of Justice, the exception in 18 U.S.C. 205 for "testimony under oath" would permit a present employee of the U.S. Government to serve as an expert witness for the plaintiff even though the United States was a defendant-in-chief. OGE further advised, however, that it was this Office's position that the standards of conduct, primarily those set forth at 5 C.F.R. 735.201, would prohibit such testimony. On the other hand, if the United States were dismissed as defendant-in-chief and plaintiff agreed not to enter any evidence against the United States, the employee's service as an expert might not be incompatible with the interests of the United States and his employing agency could make a determination under the applicable standards of conduct to allow the employee's participation.

83 X 2
01/31/83

OGE advised a Government attorney that he might accept payment of his expenses for personal legal counsel from his former law firm when those expenses were incurred by him in a matter arising out of his prior private service as counsel to a corporation now the subject of a federal grand jury investigation. Payment was not prohibited by 18 U.S.C. 203 or 205 because the attorney was required to give sworn testimony to a Congressional committee and was, under the facts presented, representing himself. Further, acceptance and payment of the expenses was not prohibited by 18 U.S.C. 209 because such payments would be made under his former law firm's policy of paying such expenses to the extent they related to services former partners and associates performed while they were in the firm. Such a written policy fell within the exception of Section 209(b) for allowing continued participation in a bona fide employee benefit plan maintained by a former employer. In order not to violate the overarching standards of conduct of Executive Order 11222, the employee was required to recuse himself in any matter involving the law firm until a significant period of time had passed after its last payment to him or on his behalf in relation to the matter involving his prior legal services to the corporation.

83 X 3
02/04/83

OGE advised a DAEO that the acceptance by an employee of the reimbursement from a private source for travel expenses of a spouse accompanying the employee on official travel would probably, except under very limited circumstances, violate 18 U.S.C. 209 and the standards of conduct governing gifts. If the agency had gift acceptance

83 X 6
04/13/83

OGE advised an ethics counselor that 18 U.S.C 208 and 209 and the outside earned income limitations of Section 210 of the Act would apply in the following manner to the payments made under a Covenant Not to Compete entered into by a recent appointee prior to his Government service. The payments did not appear to raise a question under 18 U.S.C. 209 because, from the facts presented, they were made pursuant to an agreement entered into before contemplation of Government service and for a normal business purpose; the appointee would retain a financial interest in the corporation until the final payment under the agreement was made and would be required by 18 U.S.C. 208 to refrain from taking any action affecting the corporation; and, the payments would not violate the limitations of Section 210 as they were imposed by policy on him by the White House, because no services were required to be performed and because the payments did not fall within the two basic purposes of the outside earned income limitation (i.e. to prevent individuals from "cashing in" on their Government positions and to ensure that outside activities do not detract unduly from an individual's attention to his job).

83 X 7
04/25/83

OGE advised a former senior employee who, while serving the Government, had assisted his former agency in drafting proposed legislation, that he would not be prohibited by 18 U.S.C. 207(c) from representing a private client to the legislative branch on that legislation. He would be prohibited from representing a client on that legislation or any other matter to his agency or employees of his former agency for a period of one year following his departure. This included instances where the agency employees were also present at House or Senate meetings or hearings. OGE further advised that while proposed legislation was generally not a particular matter involving a specific party or parties, if the proposed legislation on which he had worked as an agency employee was akin to a private relief bill and thus involved specific parties, he should make a further analysis of the restrictions of 18 U.S.C. 207(a) and (b).

83 X 8
04/25/83

OGE advised a Government attorney of the general restrictions of 18 U.S.C. 207 should he decide to join a private law firm as an associate. The attorney had posed questions which could not be answered with any specificity because the terms of the statute "particular matter involving a specific party or parties" and "personal and substantial participation" require some factual detail in order to be applied. OGE did refer the attorney to ABA Opinion 342 and Armstrong v. McAlpin 461 F. Supp. 622 (S.D.N.Y.), aff'd, 625 F. 2d 433 (2d Cir. 1980); vacated, 449 U.S. 1106 (1981) for his use in determining what restrictions might apply to any firm he might join.

83 X 13
09/21/83

OGE advised a former Government attorney that he may have violated 18 U.S.C. 207(b)(i) by representing an individual in negotiations with a U.S. Attorney's office during a grand jury investigation when that investigation had been pending in the former employee's office during his last year of Government service and had been handled by an attorney who was, at the time, under the direct supervision of the now former Government attorney. OGE stated to the former Government attorney that because his letter to our Office on its face indicated this possible violation, we were required by 28 U.S.C. 535(b) to refer this to the Department of Justice for possible prosecution. (The attorney had written to our Office asking if Section 207 would prohibit him from simply assisting the individual without contacting the Government since his former office had first told him they saw no problem in his representing the individual and later, after he had done so, questioned his representations.)

83 X 14
09/26/83

OGE advised a department that a former senior employee subject to 18 U.S.C. 207(c) could not for a period of one year after leaving Government service represent a corporation to the department on any matter which was pending before the department or in which it had an interest. Further, because the former employee had been personally and substantially involved in developing a certain type of network for the department and at the same time the corporation had been been identified as a party or one of a number of parties capable of establishing the network, the former employee was permanently prohibited by 18 U.S.C. 207(a) from representing the corporation before the Government in matters involving the establishment of this department's network.

83 X 15
10/19/83

OGE advised a Government employee who served as director of an office that this Office must decline his request for our approval of a trust he proposed to establish for the benefit of the employees in his office. In reviewing the proposed trust the only eligible recipients for grants from the trust would be defined by their federal employment. Payments to individuals from this private trust based on those strict eligibility requirements would give rise to an inference that such payments were made as outside compensation for Government services, an action which is prohibited by 18 U.S.C. 209(a). Further the Office determined that a case-by-case examination for Section 209 purposes of each grant or loan from the trust would not be feasible under the circumstances, nor would such a review be likely to yield a favorable result in most cases.

83 X 19
12/23/83

OGE advised an employee completing his federal employment on sick leave status that he remains an employee subject to the criminal conflict of interest laws of 18 U.S.C. 202-209 and the standards of conduct of Executive Order 11222 until he is formally placed on the disability retired role. The employee wished to accept a consulting contract with a corporation while on sick leave and wished to know what restrictions were applicable to him. The opinion pointed out that 18 U.S.C. 205 would prohibit him from representing the corporation on any particular matter to the Government and that 18 U.S.C. 203 would prohibit him from receiving compensation based on anyone else's representations to the Government. Further, his agency standards of conduct required that he get approval from his agency for this outside employment. (His agency was preparing advice to him on the post-employment restrictions applicable to him once his sick leave was used and he officially retired.)

83 X 20
12/30/83

OGE advised an agency that an employee of the agency would be prohibited by 18 U.S.C. 208 from taking action on a contract when his wife was employed by the contractor as a consultant on the contract (as distinguished from an employee of the contractor.) This prohibition attached because the wife clearly had a financial interest in the matter of the contract. Further, the Office stated that while the agency could waive the prohibition of the criminal statute under Section 208(b), this waiver would not, in our estimation, overcome the appearance of impropriety if the employee participated in the contract.

THE WHITE HOUSE
WASHINGTON

Date 2.25.84

Suspense Date _____

MEMORANDUM FOR: Ann

FROM: **DIANNA G. HOLLAND**

ACTION

_____ Approved

_____ Please handle/review

_____ For your information

_____ For your recommendation

_____ For the files

_____ Please see me

_____ Please prepare response for _____ signature

_____ As we discussed

_____ Return to me for filing

COMMENT

She must mean FFF had in her material for weekend reading.

United States of America
Office of Government Ethics

Office of Personnel Management
Washington, D.C. 20415

FEB 3 1984

MEMORANDUM

207144cc

SUBJECT: Recent Conflict of Interest Prosecutions

FROM: David H. Martin
Director

TO: Designated Agency Ethics Officials

In recent months, OGE began what we expect to be a continuing effort to keep abreast of prosecutions brought under the conflict of interest statutes (18 U.S.C. §§ 202-209) in federal courts around the country. Attached is a summary of the more noteworthy cases of which we have been apprised. Most of the cases were resolved through unreported plea agreements, and some of the information we received is not part of the public record. In the interest of fairness, therefore, we have not included names or other specific identifying information. We thought you might be interested in the facts of actual cases; also, we offer the attached list in partial answer to those who suggest that it is unnecessary to be concerned with the conflict of interest statutes because they are never prosecuted.

If the facts of any of the cases on the list are particularly relevant to a matter of concern to you and you desire further information, please feel free to contact Joan Ehrenworth of my staff at 632-7642.

In addition to the summary of criminal cases, attached for your information is a copy of a recent decision of the Court of Appeals for the Federal Circuit in a civil conflict of interest case brought by a disappointed bidder against the Department of Justice.

Attachment

SUMMARY OF CRIMINAL CASES

1. In September, 1982, an Immigration and Naturalization Service detention officer was indicted by a federal grand jury on charges of compensation to an officer in a matter affecting the government; false statements; obtaining a visa by false statements; and causing the performance of an offense, in violation of 18 U.S.C. §§ 203(a)(2), 1001, 1546, and 2(b).

The officer had prepared an application for a visitor visa on behalf of an El Salvadoran National. In the application he falsely stated that the applicant was a student, living in Mexicali, Mexico, whereas in truth the applicant had illegally entered the United States and was working for a friend of the officer. A search of the officer's residence, pursuant to a warrant, revealed evidence that he was "moonlighting" as an immigration consultant and was representing himself as a former U.S. Immigration Officer. The evidence also showed that he had processed numerous other applications, some of which contained falsifications.

In November, 1982, the officer pleaded guilty to receiving compensation while an officer and employee in a matter affecting the government, in violation of 18 U.S.C. § 203(a)(2). The government agreed not to prosecute him regarding the balance of the false applications. In January, 1983, imposition of sentence was suspended and the defendant was placed on probation for a period of two years on the condition that he obey all laws, federal, state, and municipal, and that he contribute two hundred hours to community service as directed by the probation department.

2. An employee of the U.S. Department of Labor working for the Veterans Employment Service participated personally and substantially in the awarding of contract monies to various veteran publications. Unknown to his supervisors, the employee had a financial interest in several of these publications and in effect received back part of the monies he awarded under the government contracts.

The employee pleaded guilty to one count charging a violation of 18 U.S.C. § 208(a). He was sentenced to one year of unsupervised probation. A collateral consequence of the prosecution was that he was fired from his job as a Regional Commissioner for his office.

3. A physician was until recently the head of a department at Walter Reed Army Medical Center and the consultant to the Army Surgeon General on matters concerning the physician's specialty. In September, 1981, the United States Attorney's Office began a grand jury investigation into allegations that the physician had engaged in conduct which constituted a conflict of interest in violation of 18 U.S.C. § 208, and had improperly supplemented his income in violation of 18 U.S.C. § 209. Those allegations were based upon the physician's recommendation for use by the Army of products sold by a company in which he had a financial interest as a stockholder and a member of the board of directors and on the physician's receipt of payments by drug companies for drug studies carried out at Walter Reed during the regular course of his duties. Ultimately, the investigation expanded to include allegations that the physician had improperly influenced witnesses and obstructed the investigation in violation of 18 U.S.C. §§ 1503 and 1510.

In February, 1983, the defendant pleaded guilty to two counts of supplementation of income in return for promises that the United States Attorney's Office would not

1980, to October, 1980, the EDA loan officer became aware that the Ohio company had purchased the assets of the Pennsylvania company.

Also during this same period, the loan officer began to acquire a financial interest in the matter which would disqualify him from taking official action with respect to the loan. As part of a joint venture with another individual, the loan officer decided to try to purchase the steel mill that had been owned by the Pennsylvania company. After consulting with an attorney, the two put together a proposal outlining their anticipated operations which they submitted to a bank in Pittsburgh in November, 1980, in an effort to obtain a $1.15 million fixed asset loan and a $1.15 million working capital loan. The bank did not negotiate with the loan officer and his associate for a loan, so the loan officer discussed with an officer of the Ohio company the possibility of that company assisting in the financing of the project. The official proposed a form of financing in which the Ohio company would own half of the new operation and provide financing.

The loan officer and his associate did not accept the Ohio company's offer, because they did not want to be partners with the company in running the steel mill. Eventually, the loan officer lost interest in the effort to buy the steel mill and stopped contacting his associate in January, 1981.

In October, 1980, while the loan officer and his associate were attempting to purchase the steel mill which had been purchased with EDA loan proceeds and which was, at least technically, part of the collateral for the EDA loan, the employee took personal and substantial official action with regard to the loan. As an EDA loan officer, he helped the Ohio company prepare an application for a second disbursement of funds from the $10 million loan. He then prepared and sent forth an action memorandum to his superiors recommending that EDA disburse an additional $2.57 million to the company and characterizing the purchase of the Pennsylvania company's assets in a positive light, which concealed the true nature of the purchase and the fact that such a purchase was a significant incident of default by the Ohio company. In so doing the loan officer represented that the purchase of the other comany's assets was a transaction in furtherance of EDA's approved project.

The loan officer's recommendation was accepted by his superiors, and the additional funds were disbursed to the Ohio company. The effect of the loan officer's action was that the company was able to continue in operation with EDA funds and attention was not drawn to the questionable transaction, thereby permitting the loan officer to continue in his efforts to purchase the steel mill.

The loan officer pleaded guility to a charge of violating 18 U.S.C. §208(a). In September, 1983, he was sentenced to two years imprisonment, but execution of the sentence was suspended and he was placed on probation for five years subject to the following terms and conditions: He will reside in a halfway house for six months during his non-working hours; he will pay a $5,000 fine; and he will perform 250 hours of community service.

5. Between August, 1977, and February, 1978, an individual made regular payments to an employee of the United States Coast Guard to obtain favored treatment in connection with the processing of boat registrations. In February, 1979, she was charged by

payments the FDA doctor was suffering financial difficulties brought on by the protracted illness of his wife, who ultimately died because of it. The defense also offered evidence tending to show that the doctor was a man of extreme generosity who regularly made large, unsolicited gifts to friends and acquaintances in need. The trial lasted approximately two weeks and resulted in a hung jury.

Following the trial, the FDA doctor undertook plea negotiations with the government. These negotiations resulted in his plea of guilty to a single count information charging him with unlawful supplementation of his government salary, in violation of 18 U.S.C. § 209. In December, 1982, he was sentenced to one year probation and 200 hours of community service. (He had already lost his job with the FDA.) The case against the Oregon doctor was dismissed after he made a public statement acknowledging the impropriety of making the payments in question.

10. In October of 1976, the cargo chief at John F. Kennedy International Airport made a secret investment in a bonded container station at the airport. He agreed with two other individuals to open this business to serve as a source of income upon the employee's forthcoming retirement. The two individuals were named as officers and owners of the business, and the employee remained a silent partner.

Before a container station can operate it must get a Customs license. Customs will inspect the proposed container station to determine that it meets their standards before issuing such license. Customs also conducts a background investigation of the proposed officers and employees of the business to insure their fitness. The cargo security report is conducted under the supervision of the cargo chief, who has the power to recommend that a station be granted a license and to assign customs inspectors to it after it is licensed.

In January, 1977, an application was submitted for a license for the container station in which an interest was held by the defendant employee. The application did not reveal that the defendant employee had an interest in that business. Two days later the inspection was completed and was approved by the inspector. The defendant employee then sent a memo recommending that a license be granted for the container station. As a result of the employee's memo, the license was granted 13 days later. This process usually takes about six months. In addition, Customs regulations require that the background investigation of officers be completed before any license is issued. In this situation, the background investigation had not even begun when the license was granted.

After three months of unsuccessful operation, the employee and his two partners decided to sell the business. Customs regulations require that a separate cargo security check and background investigation must be completed on the new owners of a previously licensed container station. However, the employee again used his position to recommend approval of the station for the buyer based on the prior inspection. He also used his position to push through the granting of the license pending the completion of the background check.

The employee was charged with violating 18 U.S.C. § 208 (counts 2 and 3) as well as conspiracy (count 1) and violations of 18 U.S.C. § 1001 (counts 4 and 5). He pleaded guilty to count 2 of the indictment in February, 1982. He was sentenced in January, 1983, to two years, 6 months to be served, 3 years probation, and a $10,000.00 fine.

received during the period from the United States government from a source other than the government of the United States, that is, from two private maintenance contracting companies.

In November, 1980, the defendant pleaded guilty to the misdemeanor information and in December, 1980, he was sentenced to a suspended sentence of eighteen months.

18. A U.S. Congressman was indicted for a violation of 18 U.S.C. § 203(a) as a result of his receipt of compensation from his law firm during the period of time that he was in Congress. The law firm was representing a hospital in the Congressman's home city in connection with its efforts to obtain federal funding for a new hospital building. In the course of these efforts, the law firm represented the hospital before the Community Services Administration, a federal agency, as well as the Executive Office of the President. The legal fees which the Congressman shared in from the law firm included compensation for services rendered before these federal agencies.

The Congressman pleaded guilty to the charge and was sentenced to 5 years probation, a $10,000 fine, and 6 hours per week of uncompensated community service during the period of probation.

19. The Army and Air Force Service (AAFES) is an agency and instrumentality of the United States, the purpose of which is to purchase merchandise and services for resale to active duty and retired United States military personnel and their dependents. In March of 1978, a military sales representative who represented vendors who were selling merchandise to AAFES gave to the chief of a branch of AAFES $2000 for his services as an officer and employee of the government.

The payor pleaded guilty to a violation of 18 U.S.C. §209 as a result of a plea agreement.

United States Court of Appeals for the Federal Circuit

CACI, INC. - FEDERAL, Appellee,	)	Appeal No. 83-742
v.	)	
THE UNITED STATES, Appellant.	)	

DECIDED: October 28, 1983

Before FRIEDMAN, RICH, and BENNETT, Circuit Judges.

FRIEDMAN, Circuit Judge.

This is an appeal by the United States from a judgment of the United States Claims Court that permanently enjoined the United States from awarding a contract to supply automated data processing and related services to the Antitrust Division of the United States Department of Justice. 1 Cl. Ct. 352 (1983). The award was enjoined on the ground that the relationship between officials in the Antitrust Division who participated in the process through which the contractor was selected and an officer of the firm to which it appeared the contract would be awarded violated ethical standards of conduct for government employees, created the appearance of impropriety, and resulted in prejudice in favor of that firm and against other firms seeking the contract. We reverse.

The proposal in this case involved a two-step competitive and negotiated bidding process, for a single contractor to supply many of the services that separate contractors previously had provided. First, prospective contractors were to submit an initial proposal. After government officials evaluated these bids and selected those deemed competitive, those bidders were invited to negotiation sessions which focused on improving their offers. Each of those firms then would submit its "best and final" offer, from which the government would select the offer it considered most advantageous.

Under the proposal, each bid was to contain two separate parts: a "technical proposal" and a "business management" proposal containing cost and price information. Each part was separately evaluated in both the initial and final phases of the bid process. The technical proposal was to be evaluated by a Technical Evaluation Committee, composed of Department officials, on the basis of a number of technical factors, including qualifications of technical personnel, prior corporate experience, and technical approach. In its evaluation of the initial submissions, the committee also would determine the areas where the bid could be made "more competitive" and improved through negotiations. The initial business proposal, i.e., the cost of the contract, was to be evaluated by the contracting officer.

The proposal provided that the contracting officer would award the contract on the basis of a weighted formula, under which 70 percent of the total was based upon the score of the

Stevens began in 1978. Shelton also worked under Stevens during the latter's tenure at the Group. Smith had a social relationship with Stevens.

The contracting officer for this procurement was Ronald L. Endicott, an employee of another division of the Department. As the trial judge stated, "[t]here is no evidence of any prior professional or social relationship between him and Stevens." Endicott was directly involved in all phases of the bid process, and "selected and named the Chair and members of the Technical Evaluation [Committee] . . . ."

In its consideration of the initial bids, the Technical Evaluation Committee evaluated the technical aspects of each proposed contract on a 100-point scoring system. It ranked CACI's bid first at 85.2 and Sterling's second at 79. In scoring the bids, the committee was not shown the cost estimate portion of the bids. After the committee reported these scores to the contracting officer, the latter then evaluated the costs of each bid with the assistance of Anderson, the chairman of the committee.

The contracting officer, Anderson, and Sweeney then met with representatives of each of the six bidders whose proposals were deemed to be in the "competitive range," i.e., that could be made competitive through negotiation. The contracting officer required the bidders to limit their discussions "as much as possible" to "the weaknesses of their [bids] and where the [bids] could be made more competitive."

The committee reported these scores to the contracting officer, who again, with Anderson's assistance, evaluated and graded the final cost proposals. Then, using the weighted formula described above, the contracting officer determined that Sterling's separate, unteamed bid had the highest overall score. Although Sterling's technical score was below CACI's, Sterling had a higher overall rating because its projected costs were significantly lower than CACI's.

Before any award was made, CACI filed a protest with the General Accounting Office alleging a conflict of interest by the four persons in the Group involved in the bid process who had prior associations with Stevens. It notified the contracting officer of the protest. On December 22, 1982, while the complaint was pending, Sweeney met with Stevens to formulate "transition plans" in connection with the anticipated award of the contract to Sterling.

After the Justice Department informed CACI that the Department would not defer the award pending the protest, CACI filed suit in the Claims Court on January 3, 1983. It sought a declaratory judgment that an award of the contract would be contrary to applicable law and to "the public interest in the integrity of the Federal procurement system," and injunctions (both preliminary and permanent) against the award.

B. Following an expedited trial at which 16 witnesses testified and a number of exhibits were introduced in evidence, the Claims Court (Judge Spector) permanently enjoined the award

The government also argues that CACI has not shown that "the challenged action has caused [it] injury in fact," 397 U.S. at 152, since it cannot demonstrate that if the conduct it challenges had not taken place it would have been awarded the contract. These arguments reflect a misconception of the basis of the Claims Court's jurisdiction and a misinterpretation of the legislative history of the statute that gave the Claims Court jurisdiction over suits seeking injunctive relief against the award of government contracts.

A. Prior to 1970, an unsuccessful bidder generally had no standing to challenge the award of the contract. See Perkins v. Lukens Steel Co., 310 U.S. 113 (1940); Edelman v. Federal Housing Administration, 382 F.2d 594, 597 (2d Cir. 1967). The theory of those decisions was that the various statutes and regulations governing the award of government contracts were not intended to protect bidders on those contracts but only to protect the government, and that violation of those provisions therefore did not violate any legally protected rights of unsuccessful bidders. Id.

In the seminal case of Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970), however, the court held that under Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1982), a disappointed bidder had standing to challenge the award of a government contract. The court stated that unsuccessful bidders "are the people who will really have the incentive to bring suit" to compel "agencies [to] follow

court and try and prove his cause of action." Id. at 1237. "[B]y the solicitation for bids, the Government impliedly promised that it would give honest and fair consideration to all bids received and would not reject any one of them arbitrarily or capriciously, but would award the contract to that bidder whose bid in its honest judgment was most advantageous to the Government." Heyer Products Co. v. United States, 177 F. Supp. 251, 252 (Ct. Cl. 1959); see also B. K. Instrument, Inc. v. United States, No. 83-6142 (2d Cir. Aug. 4, 1983); Heyer Products Co. v. United States, 140 F. Supp. 409, 412-13 (Ct. Cl. 1956).

Thus, CACI brought the present suit to enjoin the government's alleged breach of its implied contract to consider all bids fairly and honestly. As the Court of Claims explained in Heyer, "[t]his implied contract has been broken, and plaintiff may maintain an action . . . for its breach" where the "bids were not invited in good faith, but as a pretense to conceal the purpose to let the contract to some favorite bidder . . . and with the intent to willfully, capriciously, and arbitrarily disregard the obligation to let the contract to him whose bid was most advantageous to the Government." 140 F. Supp. at 413, 414; see also Keco, 428 F.2d at 1236.

In Section 133(a) of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, 39-40 (1982), Congress amended the Tucker Act to give the Claims Court the following additional authority:

contract the government violated statutory and procedural requirements. That is precisely the basis upon which CACI here challenges the proposed award to Sterling. To deny CACI standing to litigate this question before the Claims Court would vitiate the jurisdiction Congress gave that court over such suits in the Federal Courts Improvement Act.

B. 1. The government argues, however, that in Data Processing the Supreme Court modified the Scanwell doctrine by requiring as a condition of standing that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 153. It contends that under this standard CACI had no standing because the statutory provisions and regulations that CACI asserts the government violated were not intended to protect bidders but only to protect the government.

Data Processing was a suit by data processing companies directly challenging, as violating the governing statute, a ruling of the Comptroller of the Currency permitting national banks to provide data processing services. The question on the merits was whether the statute authorized the banks to provide such services. The plaintiffs asserted standing as competitors of the banks in providing the services. The injury about which the plaintiffs complained was the direct result of the Comptroller's alleged violation of the statute, and the standing issue turned upon whether the statute was intended to protect them against such injury.

not result in CACI receiving the award. See, e.g., Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38 (1976).

The Court of Claims has rejected a similar argument of the government that a disappointed bidder "must show that, but for the failure to consider its proposal, it would have received a contract." Morgan Business Associates v. United States, 619 F.2d 892, 895 (Ct. Cl. 1980). As the Court of Claims there indicated, "it would be virtually impossible for the plaintiff to make a 'but for' showing." 619 F.2d at 896. It held that the disappointed bidder need demonstrate only that if its bid had been fairly and honestly considered, "there was a substantial chance that [it] would receive an award--that it was within the zone of active consideration." Id. This "principle of liability" both "vindicates the bidder's interest and right in having his bid considered" and "at the same time forestall[s] a windfall recovery for a bidder who was not in reality damaged."

The flaw in the government's argument here is that it misconceives the nature of the injury that unsuccessful bidders seek to rectify in bid protest suits. Scanwell itself recognized that a disappointed bidder has "no right . . . to have the contract awarded to it in the event the . . . court finds illegality in the award of the contract . . . ." 424 F.2d at 864. The injury CACI here asserts is that the government's breach of its implied contract to deal fairly with all bidders

Court, however, CACI argues that there were violations of sections 207 and 208.

We conclude (A) that sections 207 and 208 were not violated; (B) that the record does not establish actual bias or favoritism toward Sterling by Sweeney, Anderson, Shelton, or Smith, or any impropriety in the award of the contract to Sterling because of their participation in the award process; and (C) that there was no appearance of or opportunity for impropriety that would warrant enjoining the award of the contract on the ground that the Department breached its implied contractual obligation to treat all bidders fairly and honestly.

A. 1. Section 207 of the Ethics in Government Act prohibits any government employee "after his employment has ceased" from

> knowingly act[ing] as agent . . . for, or otherwise represent[ing], any other person . . . in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person . . . to --
> (1) any department . . . of the United States . . . or any officer or employee thereof, and
> (2) in connection with any . . . application, . . . contract, claim, . . . or other particular matter involving a specific party or parties in which the United States . . . has a direct and substantial interest, and
> (3) in which he participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, while so employed . . . .

18 U.S.C. § 207 (Supp. V 1981).

CACI contends that Stevens' participation on behalf of Sterling in the preparation and presentation of Sterling's bid

> Mr. Stevens would be qualified to manage Sterling's proposal activities, represent Sterling with respect to the RFP [proposal] and manage Sterling's performance on any resulting contract for at least two reasons: (1) the program covered by the RFP did not involve any specific party or parties while Mr. Stevens was employed by the Division, and (2) the RFP to be issued does not involve the "same particular matter" as anything with which Mr. Stevens was involved as a Government employee. Specifically, the Antitrust Division's 1978 Litigation Support RFP and our new one will not be the "same particular matter" because of (a) time elapsed between them, and (b) fundamental differences in their scope and approach.

This ruling is entitled to weight. It would be most unusual to disqualify Sterling from bidding on the proposal because of Stevens' participation for Sterling after the Assistant Attorney General in charge of the Antitrust Division had advised Sterling that Stevens' handling of the proposal for Sterling would not be improper.

The record shows that the present proposal was not the "same particular matter" with which Stevens was involved while chief of the Group. Although Stevens "contemplated" competitive reprocurement of the services CACI and others were supplying under the sole-source contracts, he played no role "whatsoever" in either developing the baseline services concept or "in the formulation of the [proposal]" for bids on it. Sweeney, not Stevens, originated and developed both of these ideas, and did so after Stevens had left the Group in December 1980 and Sweeney had succeeded him as its head. Sweeney testified that he developed the idea for the baseline service contract, which he characterized as "basically my own," in approximately the spring and summer of 1981.

The Claims Court found that Anderson and Shelton received "employment offers conditioned in part on [Stevens'] success in receiving additional contracts." It stated that "Stevens had from a time prior to his departure from ISSG, to a time prior to the issuance of this [proposal], discussed with Anderson the possibility of their working together at Sterling," and that there was "some evidence of a lesser effort by Stevens to recruit Patricia Shelton . . . for work at Sterling."

Our review of the record leads us to conclude that there was no "arrangement concerning prospective employment" between either Anderson or Shelton and Sterling, and that these individuals were not "negotiating" with Sterling about prospective employment when they considered Sterling's bid.

Anderson testified that he had "discussions" with Stevens in April of 1981, after Stevens had left the Department. Stevens "talked about positions that might be available in the division that he was going to head within Sterling Systems." Anderson stated that Stevens "never made me any specific offer or any firm offer for employment at Sterling . . . ." No discussions of salary took place. In their last discussion, Anderson remembers believing that "there would be a further discussion" and that the matter was left "sort of hanging." He testified that Stevens told him "he had hoped to have positions available in the future, but right now he had nothing he could offer me, and I sort of anticipated some future contact from Mr. Stevens."

A CACI employee testified that Anderson mentioned to her that "Stevens had made him an offer from Sterling . . ." but that "the offer . . . had been withdrawn." Another CACI employee indicated that Anderson told him "that he might be leaving [the Group] and in fact he had talked to . . . Stevens and he was going to be going to work for Sterling in the next couple of months." These conversations occurred in either the spring or summer of 1981, with the witnesses unable to pinpoint specific dates.

Stevens had similar discussions about possible employment with Shelton. Shelton testified that in March or April of 1981, they had "some discussions about the possibility of my moving to Sterling Systems at some point." No specific position or salary was discussed. After that time, there were no additional discussions about employment.

Stevens testified that after he staffed a contract using personnel within the company, that "terminated any possibility of discussion with Pat [Shelton]." He also stated that although he had a specific job in mind for Shelton on another contract then under consideration, "the job did not materialize" because the contract was not awarded.

This evidence does not establish that either Anderson or Shelton had an "arrangement" concerning prospective employment with Sterling.

b. Anderson and Shelton were not "negotiating" with Stevens about prospective employment at Sterling. Their

discussions with some of the bidders about possible employment. Government officials often are approached about possible private employment. To bar them from participation months later in decisions involving a company that raised the possibility could cause serious problems for the effective functioning of the government. As the Senate Committee Report on the Ethics in Government Act explained: "Conflict of interest standards must be balanced with the government's objective in attracting experienced and qualified persons to public service. . . . There can be no doubt that overly stringent restrictions have a decidedly adverse impact on the government's ability to attract and retain able and experienced persons in federal office." S. Rep. No. 170, 95th Cong., 2d Sess. 32 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News 4216, 4248.

B. Our review of the record discloses no evidence that the Department officials who had prior professional and social contact with Stevens in fact were biased toward or did anything that improperly favored his company, Sterling.

1. Contrary to CACI's contention, the proposal was not structured to favor Sterling over its competitors. Indeed, it was CACI, and not Sterling, that received the highest evaluation of its final technical offer.

CACI complains that the cost-plus-fixed-fee type of contract used here prejudiced it because, unlike Sterling and other bidders who had not had prior data processing service contracts with the Department, CACI's estimated costs were required to reflect its prior actual costs and therefore it could

The record provides no valid basis for criticizing or rejecting the formula by which the Department weighted the bids. Sweeney testified that in this type of service contract, the most important factor is the caliber of the people who will do the work, and that this was the reason the technical aspects of the contract were given the most weight. He stated that the 70-30 allocation "struck a fair balance, as fair as we could possibly come up with in a competitive situation, between those two competing factors." The record indicates that the information in the bid showing how the contract will be performed (i.e., names and resumes of personnel who would do the work) enabled the government to make a meaningful evaluation of each bid's cost estimates.

When the Department selected the 70-30 weighted formula, no one could have anticipated what the bids would be. It borders on the bizarre to suggest, as CACI apparently does, that the Department officials who allegedly favored Sterling anticipated that Sterling would be ranked second or lower on its technical proposal so that it could obtain the contract only if its costs, which for some unknown reason would be lower, were given substantial weight.

3. The fact that Anderson, the head of the Technical Evaluation Committee, assisted the contracting officer Endicott in evaluating the bids, and therefore saw the cost portions of the bids, did not taint the award process. The contracting officer testified that using a member of the Technical Evaluation

were. The record shows that Anderson saw the initial and final cost figures, and that he saw the initial cost figures after the Technical Evaluation Committee "had completed the technical evaluation of the initial proposals." There is no indication that the circumstances under which he saw the final cost figures were any different. Indeed, since the record shows that the contracting officer informed Anderson about the cost figures in connection with their analysis and evaluation of those figures after the Technical Evaluation Committee had evaluated the technical proposals, there is no factual basis for CACI's suggestion that Anderson communicated the cost figures to the Committee before the Committee rated the technical proposals.

Although Sweeney testified that Anderson had communicated to him the "relative scores" on the initial cost proposals, he further testified that this information did not enable Sweeney to predict the ultimate outcome of the bidding. As Sweeney stated: "I thought I knew who was going to win after best and final, and I was wrong." He had anticipated that "someone other than Sterling was going to be the lowest."

With respect to Stevens' submission of the two bids, the record shows that during the negotiating sessions after the first offers had been submitted, the contracting officer told Stevens that "the Infodata personnel . . . in our original submission were not up to the standards of the Sterling personnel and that we should seek an alternate personnel for two positions," and that the costs of the subcontract arrangement with

final cost figures when it rated the final technical proposals -- that Sterling appeared to be the successful bidder.

6. Finally, the Claims Court and CACI see something sinister in the fact that Sweeney met with Stevens to discuss implementing the contract even though CACI had filed with the Comptroller General a protest over the anticipated award to Sterling. At that time, however, Sterling had been preliminarily selected as the contractor. Since the Department was anxious for performance of the new contract to begin as soon as possible, it was not surprising or inappropriate for the Department to hold preliminary discussions with the apparently successful bidder. The contracting officer had authorized the meeting, which neither involved any impropriety nor reflected any bias toward Sterling.

A major thrust of the decision of the Claims Court was that there was both the opportunity for and the appearance of impropriety in that process. That was not an adequate or proper basis for enjoining the award of the contract to Sterling.

The Claims Court referred to an Office of Personnel Management regulation that states:

> An employee shall avoid any action, whether or not specifically prohibited by this subpart, which might result in or create the appearance of:
>
> . . .
>
> (b) Giving preferential treatment to any person;
>
> . . .
>
> (d) Losing complete independence or impartiality;
>
> . . . or
>
> (f) Affecting adversely the confidence of the public in the integrity of the Government.

5 C.F.R. § 735.201a (1982).

the government had cancelled. The government's primary defense was that "the contract was unenforceable due to an illegal conflict of interest on the part of" a government employee. 364 U.S. at 524. The Court held that the government could "disaffirm a contract which is infected by an illegal conflict of interest." 364 U.S. at 566.

That holding, however, rested solely on the Court's conclusion that the government employee had violated the conflict of interest statute. In the present case, in contrast, there has been no violation of the Ethics in Government Act. The broad language in Mississippi Valley cannot properly be applied to the significantly different situation in the present case.

We have carefully reviewed the record in this case. We conclude that the Claims Court ruling that the Department's award of the contract to Sterling would be "arbitrary, capricious, and an abuse of discretion" because of the possibility and appearance of impropriety is not supported by the record and therefore is not a proper basis for enjoining award of the contract. The Claims Court based its inferences of actual or potential wrongdoing by the Department on suspicion and innuendo, not on hard facts. The kind of inquiry and analysis the Claims Court made in this case, which without factual basis ascribed evil motives to four members of the Technical Evaluation Committee in their handling of bids, was clearly erroneous and did not justify an injunction against the government's award of the contract to Sterling.

THE WHITE HOUSE
WASHINGTON

Date 6/6/85

Suspense Date _____

MEMORANDUM FOR: JOHN

FROM: **DIANNA G. HOLLAND**

ACTION

_____ Approved

_____ Please handle/review

XX
_____ For your information

_____ For your recommendation

_____ For the files

_____ Please see me

_____ Please prepare response for
_____ signature

_____ As we discussed

_____ Return to me for filing

COMMENT

_____

_____

_____

_____

ethics file

United States Government
MEMORANDUM

Office of Government Ethics

Subject: Regional Ethics Training in New York

JUN 3 1985

From: David H. Martin David H. Martin DEC
Director

To: Designated Agency Ethics Officials
Inspectors General

This is to announce the next series of one-day ethics training courses to be held in New York, New York on August 22 and 23, 1985 at the Jacob K. Javits Building, 26 Federal Plaza, Room 1434, from 9 am to 3:30 pm.

The course will focus on the conflict of interest statutes, the standards of conduct, and review of financial disclosure statements, both public and confidential. The setting will be informal with discussion based on new case studies derived from typical agency ethics problems.

Please circulate this notice immediately among officials in bureaus, offices, and divisions of your agency or in military installations involved in any aspect of the ethics program. The first 90 registrants will be accepted.

As usual, there is no charge for the course. The attached registration forms may be copied and one should be submitted for each person planning to attend. Please return them by July 26, 1985 to:

Office of Government Ethics
P.O. Box 14108
Washington, D.C. 20044

If you have any questions, call Tricia Bryant at (FTS) 632-7642.

Attachment

Registration for New York Ethics Training

Name: _____

Title: _____

Agency: _____

Address: _____

_____

_____

Phone: FTS _____

Preferred Date: August 22 or 23 (circle choice).

Registration for New York Ethics Training

Name: _____

Title: _____

Agency: _____

Address: _____

_____

_____

Phone: FTS _____

Preferred Date: August 22 or 23 (circle choice).

THE WHITE HOUSE
WASHINGTON

8/5/85

TO: David Waller
Sherrie Cooksey
Larry Garrett
John Roberts ✓
Deborah Owen
Hugh Hewitt

FROM: *Richard A. Hauser*
Deputy Counsel to the President

FYI: X

COMMENT: _____

ACTION: _____

this file

AMERICAN LEGAL FOUNDATION
1705 N STREET, N. W.
SUITE 300
WASHINGTON, D. C. 20036
202-857-0400

July 29, 1985

Honorable Patricia Schroeder
2410 Rayburn House Office Building
U.S. House of Representatives
Washington, D. C. 20515

Dear Congresswoman Schroeder:

A copy of the May 21, 1985 edition of the Congressional Record has recently come to my attention. It contains a speech by you "placing in the record an addendum of 22 names to the Reagan Administration Ethics Dishonor Roll," which you characterize as a "very undistinguished list" of "individuals of . . . curious and questionable character."

As General Counsel to a public interest law firm which assists defamed public and private figures in vindicating their reputations, I am naturally concerned that Members of Congress do not abuse the Constitutional immunities afforded by the Speech or Debate Clause. As you are aware, this Clause exists in order to facilitate debate on matter of national policy (the proper business of Members of Congress). It was not intended, nor should it be used, for partisan, defamatory attacks on public and private citizens' reputations. To quote Thomas Jefferson:

> [The privilege] is restrained to things done in the House in a Parliamentary cause. . . . For [the Member] is not to have privilege contra morem parliamentarium, to exceed the bounds and limits of his place and duty.

Jefferson, A Manual of Parliamentary Practice 20 (1854), reprinted in The Complete Jefferson 704 (S. Padover ed. 1943) and quoted in Hutchinson v. Proxmire, 443 U.S. 111, 125 (1979).

The U.S. Supreme Court has further elucidated the proper use and scope of the Clause:

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

Gravel v. United States, 408 U.S. 606, 625 (1972)(my emphasis).

Your recent speech on the House floor viciously impugning the ethics of various men and women associated with the Reagan Administration is arguably covered by the Speech or Debate Clause. However, in light of that Clause's intended historical purpose, it strikes me as not only offensive but also improper to use this privilege to smear the reputations of individuals holding political views contrary to your own, while simultaneously depriving them of any legal recourse to vindicate their good names.

I would, consequently, invite you to make these same defamatory comments in some public forum outside Congress, where those you are accusing of "running afoul of ethical restrictions" would have an opportunity to dispute your allegations, if they so desired, in a court of law. Certainly, if you are confident of the truth of your statements, you will not hesitate to reassert them at a time when the immunities of the Speech or Debate Clause do not apply.

Sincerely,

Michael P. McDonald
General Counsel

MPM:db

Enclosure

GENERAL LEAVE

Mr. WOLPE. Mr. Chairman, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks on the bill just under consideration.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Michigan?

There was no objection.

REPORT ON RESOLUTION PROVIDING FOR CONSIDERATION OF HOUSE CONCURRENT RESOLUTION 152, FIRST CONGRESSIONAL BUDGET FOR THE U.S. GOVERNMENT FOR FISCAL YEARS 1986, 1987, AND 1988

Mr. PEPPER, from the Committee on Rules, submitted a privileged report (Rept. No. 99-141) on the resolution (H. Res. 177) providing for the consideration of the concurrent resolution (H. Con. Res. 152) revising the congressional budget for the U.S. Government for the fiscal year 1986 and setting forth the congressional budget for the U.S. Government for the fiscal years 1986, 1987, and 1988, which was referred to the House Calendar and ordered to be printed.

REAGAN ADMINISTRATION ETHICS DISHONOR ROLL ADDENDUM

(Mrs. SCHROEDER asked and was given permission to address the House for 1 minute and to revise and extend her remarks and include extraneous matter.)

Mrs. SCHROEDER. Mr. Speaker, today, I am placing in the record an addendum of 22 names to the Reagan Administration Ethics Dishonor Roll. This brings the total number of individuals cited on this list to a distressing 134.

The charges which earn an individual a position on this very undistinguished list include criminal wrongdoing, abuse of power and privilege, and improper behavior for a Government official. This roll is merely a compendium of newspaper accounts. Some of the individuals have been cleared by investigations. Others have resigned, maintaining their innocence, but aborting any further investigation.

I first started compiling this list 2 years ago when the House Post Office and Civil Service Committee was struggling to strengthen the Ethics in Government Act. The American public had been besieged with repeated newspaper accounts of top administration officials running afoul of ethical restrictions. Sad to say, the onslaught of ethical violations has continued unabated.

We must further strengthen our laws to help preclude such activity, but we must also hold accountable a President who appoints, supports, and defends individuals of such curious and questionable character.

REAGAN ADMINISTRATION ETHICS DISHONOR ROLL, ADDENDUM

(Compiled by the House Subcommittee on Civil Service, Representative Patricia Schroeder, Chairwoman, May 20, 1985)

112. Patrick C. Allison, Regional Director, Department of Health and Human Services, lobbied against the "Compassionate Pain Relief Bill" in apparent violation of prohibitions on use of Federal funds to lobby Congress.

113. Twenty-one non-career Ambassadors endorsed Senator Jesse Helms for re-election in apparent violation of established tradition followed by administrations of both parties which barred Ambassadors from participating in partisan politics while on active duty as official representatives of their country. Senator Helms is a member of the Foreign Relations Committee that confirms ambassadors.

114. Dixon Arnett, Deputy Undersecretary for intergovernmental Affairs, Department of Health and Human Services, told regional directors to contact state narcotics officials, governors, and mayors in their states "and ask them to contact their congressional delegation to ask for a 'no' vote" on the "Compassionate Pain Relief Bill" in apparent violation of prohibitions on use of Federal funds to lobby Congress.

115. Mark Evans Austad, Ambassador to Norway, allegedly tried to force his way into a Norwegian woman's home in the middle of the night. Mr. Austad "was apparently under the influence of alcohol" when he spent "half an hour knocking and kicking at her front door Wednesday in an attempt to get in."

116. Daniel K. Benjamin, Chief of Staff, Department of Labor, was accused of a conflict of interest allegedly involving the use of a lobbyist's boat. He also was allegedly involved in the award of a non-competitive contract to one of his former research assistants. Mr. Benjamin resigned.

117. Bruce Chapman, Deputy Assistant to the President in charge of the Office of Policy and Evaluation, White House, and former Director, Census Bureau, allegedly spent more than $10,000 on travel during a one year period including trips to his hometown, Seattle.

118. John Fedders, Director of the Division of Enforcement, Securities and Exchange Commission, reportedly beat his wife during their 18-year marriage. He was also reportedly involved in the alleged cover-up of a corporate bribe scheme by a former law client, the Southland Corporation. Mr. Fedders resigned.

119. Eileen Marie Gardner, head of the Office of Education, Philosophy and Practice, Department of Education, had criticized "misguided" efforts to help disabled people who had "selfishly drained resources from the normal school population." In addition, she indicated that the handicapped were responsible for their life situation. Ms. Gardner was told to resign.

120. Marianne Mele Hall, Chairwoman of the Copyright Royalty Tribunal, co-authored *Foundations in Sand: A Hard Look at the Soft Sciences.* This book contains such statements as American blacks "insist on preserving their jungle freedoms, their women, their avoidance of personal responsibility and their abhorrence of the work ethic." She also had no experience in copyright litigation and her experience as a teacher of law was allegedly gained at an unaccredited school that operated only on weekends. Ms. Hall resigned.

121. Donald T. Hallett, State Director of the Farmers Home Administration in California, Department of Agriculture, was found guilty of racial discrimination in his practices. Mr. Hallett received an official written reprimand.

122. Roger W. Jepsen, chosen by President Reagan to head the Commission to honor the Bicentennial of the U.S. Constitution, had once invoked the Constitution as a justification for driving his single-occupant vehicle down the car pool lane of a Virginia highway. During his campaign for re-election to the Senate, Mr. Jepsen said he had visited a Des Moines health club that had "nude encounters." Mr. Jepsen's name was withdrawn.

123. Patrick Korten, executive assistant director, Office of Personnel Management, allegedly participated in an illegal personnel transfer to benefit a former OPM political appointee and his wife. He authorized the Intergovernmental Personnel Act transfer for Carolyn Jeffress without expecting her to return to the federal government, as required by law.

124. James Meadows, Deputy Director of the Occupational Safety and Health Administration, Department of Labor, allegedly told high-ranking agency officials to "kick asses and take names" of employees who criticize agency policies.

125. Marjory E. Mecklenburg, Deputy Assistant Secretary, Department of Health and Human Services, was investigated by the Department Inspector General for possibly scheduling an HHS workshop in Denver so she could watch her son play in the Broncos-Vikings football game. HHS also looked into additional trips she took over a two-year period at a cost to the government of $12,938.67. Ms. Mecklenburg resigned.

126. Georgia Paras, Legal Services Corporation nominee, had allegedly attacked an Hispanic judge as "a professional Mexican," saying that there also were "professional blacks, professional Greeks, professional Dagos and professional Jews" who "put their ethnic orgin ahead of everything else." His appointment was withdrawn.

127. Russell A. Rourke, Assistant Secretary of Defense for Legislative Affairs, Department of Defense, wrote a memo which allegedly shows that he and other Pentagon officials are acting in a partisan political manner to deflect criticism of the DOD's spare parts program.

128. 128. Robert A. Rowland, head of the Occupational Safety and Health Administration, Department of Labor, allegedly owns up to $50,000 in stock in Tenneco, Inc., a conglomerate that could be affected directly by his decision not to adopt a federal standard requiring clean drinking water and toilet facilities for farm workers. The Office of Government Ethics is reviewing the case.

129. Thomas Tancredo, Secretary's Regional Representative, Department of Education, mailed out copies of a 12 page "statement," accompanied by his signed cover letter, lamenting the fact that we don't have an official state religion in this country.

130. Kathleen Troia, Principal Deputy Assistant Secretary for Public Affairs, Department of Defense, wrote a memo which allegedly developed a plan for possibly improper political involvement by DOD officials during the 1984 national election campaign.

131. Lawrence A. Uzzell, Special Assistant to the Undersecretary, Department of Education, advocated that every federal program for elementary and secondary education—including aid to the handicapped—should be abolished. Mr. Uzzell resigned.

132. R. Leonard Vance, Director of Health Standards, Occupational Health and Safety Administration, Department of Labor, accused his staff of using "communistic" language and having been "trained in Moscow."

He notified Congress that he could not turn over his logs because his "dog had barfed all over them."

133. John D. Ward, Acting Director, Office of Surface Mining, Department of Interior, was criticized by a Congressional Committee for failing to aggressively collect $150 million in outstanding strip mining fines and for allowing some chronic violators to receive new mining permits. Mr. Ward resigned.

134. Joseph R. Wright, Jr., Deputy Director, Office of Management and Budget, and head of the President's Council on Integrity and Efficiency, allegedly intervened, on behalf of his father's oil company, with the head of the Energy Department's Economic Regulatory Administration. The Energy Department then allegedly delayed a major enforcement case against the company.

A BILL FOR THE RELIEF OF MARY E. STOKES

(Mr. HUTTO asked and was given permission to extend his remarks at this point in the RECORD and to include extraneous matter.)

Mr. HUTTO. Mr. Speaker, today I rise in support of H.R. 1783, a bill for the relief of Mary E. Stokes, which passed earlier today.

This case is the result of an admitted mistake by the personnel office at the Naval Air Station in Pensacola, FL, which gave incorrect advice to Mrs. Stokes' husband before his death. Mrs. Stokes deceased husband, Mr. Bartley Stokes, served for 42 years—20 years in the Navy and 22 in the Civil Service at NAS Pensacola. Mr. Stokes was diagnosed as having cancer and was given only a few months to live. In an effort to provide for his wife's future, Mr. Stokes contacted the consolidated civilian personnel office at NAS for advice on combining his military and civil service annuities. He was advised by Mr. U.M. Buskey at the consolidated civilian personnel office of the best alternative to ensure that his wife, Mary, would receive all survivor benefits to which she is entitled. Mr. Stokes was promised that his wife would receive a monthly combined annuity check of $587. However, since his death, Mrs. Stokes' monthly check only amounts to $409 because his military and civil service were not combined.

The Office of Personnel Management made an inquiry into this case, and has ruled that it is clear from the record that Mr. Stokes fully intended that his service be combined and believed that it would be, and since such a combining of his service would have occurred under existing law had he not relied on the ill-considered agency advice that he exhaust his sick leave before accepting retirement, OPM supports the passage of H.R. 1783 to correct this mistake.

PERMISSION FOR COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION TO SIT DURING 5-MINUTE RULE ON WEDNESDAY, MAY 22, 1985, AND PERMISSION FOR SUBCOMMITTEE ON SURFACE TRANSPORTATION OF COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION TO SIT DURING 5-MINUTE RULE ON THURSDAY, MAY 23, 1985

Mr. BOSCO. Mr. Speaker, I ask unanimous consent that the Committee on Public Works and Transportation be permitted to sit during the 5-minute rule in the House on Wednesday, May 22, 1985, and that the Subcommittee on Surface Transportation of the Committee on Public Works and Transportation be permitted to sit during the 5-minute rule in the House on Thursday, May 23, 1985.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from California?

There was no objection.

ORDER OF BUSINESS

Mr. SKELTON. Mr. Speaker, I ask unanimous consent to vacate my 60-minute special order and to replace it with a 5-minute special order this evening.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Missouri?

There was no objection.

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□ 2020

THE COMPETITTIVE SHIPPING AND SHIPBUILDING ACT OF 1985

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Virginia [Mr. BATEMAN] is recognized for 5 minutes.

Mr. BATEMAN. Mr. Speaker, today I am introducing, with the gentlelady from Louisiana [Mrs. BOGGS] and 15 other original cosponsors, the "Competitive Shipping and Shipbuilding Act of 1985."

Few would dispute the fact that our Nation's security depends on shipbuilding and maritime resources capable of responding to the demands of mobilization. Yet almost 15 years have gone by without meaningful congressional action while these resources have disappeared at a growing and alarming rate. Today our maritime industries are in a weakened state and growing weaker.

The United States, which generates about a fifth of the world's trade, carries only about 5 percent of that commerce in American vessels. The huge American merchant marine of the post-World War II era has dwindled to about 500 vessels, most of them antiques and few of them engaged in regular foreign commerce. Over the last 4 years 25 U.S. shipyards have closed, with a net loss of about 20,000 jobs (a few large yards have grown because of Navy contracts). Only five U.S.-flag ships are under construction today, all of them for the domestic trades.

Existing commercial policies and programs will not maintain the shipping and shipbuilding capacity needed for mobilization. American shipyards cannot compete with foreign yards that pay their workers $2 an hour, build ships with materials bought at subsidized prices and enjoy subsidized financing at depressed interest rates. American ship operators cannot compete with nations whose ships sail with new equipment and small, low-paid crews. Furthermore, more and more nations have restricted access to cargo from their ports to their own merchant ships.

Last year Congresswoman BOGGS and I, with several cosponsors, introduced a measure (H.R. 6222) to provide at least part of an answer to this dilemma. Focusing on the bulk and "neobulk" cargo sector of our commerce—chiefly grain, coal, ores, steel, and automobiles—title I of the bill required that in the 1st year after enactment, American importers and exporters ship at least 5 percent of bulk-neobulk cargo on U.S. vessels. The requirement would rise by 1 percent per year until it reached 20 percent.

In title II of the bill, we provided a tax credit for shippers to compensate for any additional expense imposed upon them by the higher cost of shipping in American vessels as opposed to foreign ships. This should eliminate the traditional opposition of shippers to cargo preference proposals.

Estimates indicate the measure would result in construction of 330 ships, readily convertible to military sealift uses, and create about 100,000 jobs in shipping, shipbuilding and allied industries. There should be little or no impact on the Federal deficit, since revenues expected from increased employment and corporate activity in shipping and shipbuilding would completely, or nearly completely, offset the revenue loss created by the tax credit.

Mr. Speaker, I am convinced that a bulk cargo fleet expansion program, with a tax credit for our shippers, is an important forward step in rebuilding the American merchant marine. I urge my colleagues to support prompt enactment of this important measure.

Mr. BATEMAN. Mr. Speaker, I yield to the gentlewoman from Louisiana [Mrs. BOGGS].

Mrs. BOGGS. Mr. Speaker, in recent years shipbuilding worldwide has been in a severe depression. The situation in the United States is even worse, if that seems possible. Currently there are only 13 merchant ships under construction in the United States, most of which are intended for domestic (or Jones Act) trade. Over the past 5 years the value of domestic shipbuilding and repair work in the United States has decreased significantly.

ethics file

United States Government
MEMORANDUM

Office of Government Ethics

OCT 28 1985

Subject: Participating in Privately-Sponsored Seminars or Conferences for Compensation

From: David H. Martin
Director

To: Designated Agency Ethics Officials, General Counsels, and Inspectors General

Private organizations frequently invite federal officials to be the principal speakers at conferences or seminars on subjects related to the activities of their employing agencies so that participants may learn details of the agency's policies or activities. Examples of these activities include private briefings given by government officials to investor groups, and seminars sponsored by organizations, such as law book publishers, at which the primary speakers are federal employees.

Public officials have a responsibility to increase public understanding of the programs for which they are responsible. However, an official should be wary of participating in a conference if his or her presence is desired primarily because it will contribute to the conference's financial success. Furthermore, problems arise when the subject matter of the discussion is devoted substantially to the responsibilities, programs, or operations of the agency, or draws substantially on official data or ideas which have not become part of the body of public information.

Title IV of the Ethics in Government Act gives the Office of Government Ethics responsibility for overall direction of executive branch policies related to preventing conflicts of interest. Because executive branch agencies differ significantly in their responses to their employees' requests to participate in conferences, seminars, or private briefings, we have prepared this memorandum to outline the factors to consider in determining whether the employee may receive compensation for his or her participation therein.

GENERAL PRINCIPLES

Because situations such as private briefings to investor groups and outside seminars and conferences are fraught with standards of conduct concerns, agencies must carefully evaluate such activities, using the analysis contained in this memorandum, before approving an employee's participation therein. This memorandum contains a brief summary of the ethical principles associated with such activities, followed by an in depth analysis of those principles.

1. Section 209 of 18 U.S.C. prohibits a government employee, with limited exceptions, from accepting an honorarium or other supplementation of salary from a private source for speeches given or articles written in the course of the employee's official duties.

2. Section 735.206 of 5 C.F.R. prohibits any government employee from receiving an honorarium or any other thing of monetary value for a lecture or article containing nonpublic government information.

3. Section 401(a) of Executive Order 11222 prohibits certain high-level officials from receiving compensation for a lecture or article, the subject matter of which relates in any way to the area in which their agencies work.

4. Lower-level employees are prohibited from receiving compensation for lectures or articles when the activity focuses specifically on the employing agency's responsibilities, policies, and programs, when the employee may be perceived as conveying the agency's policies, or when the activity interferes with his or her official duties.

5. Section 735.201a(a) of 5 C.F.R. prohibits an employee from receiving compensation for participating in a privately-sponsored seminar or conference when it appears that the entity requesting the employee's presence did so because of the individual's title and position in the agency in order to attract participants to the program.

6. Section 735.202 of 5 C.F.R. prohibits a federal employee from receiving anything of monetary value for a lecture or an article from an entity that has, or is seeking, a business relationship with the employee's agency.

7. Agencies should prohibit their employees from receiving anything of monetary value for lectures or articles when the acceptance thereof of would create appearance problems under section 735.201a(a), or would otherwise violate the standards of conduct or conflict of interest statutes.

DISCUSSION

Section 209 of 18 U.S.C. prohibits all government employees from receiving compensation from any source other than the federal government for their official duties. In the context of lecturing and writing, section 209 prohibits a government employee, with limited exceptions, from accepting an honorarium or other compensation from an outside source for speeches given or articles written in the course of the employee's official duties. In light of that provision, a government employee participating officially in a conference or seminar sponsored by a private entity may not receive an honorarium or other supplementation of salary from the sponsoring entity.

With respect to lecturing and writing as an outside activity, section 202 of Executive Order 11222 establishes the framework for executive branch policy in this area as follows:

> An employee shall not engage in any outside employment, including teaching, lecturing, or writing, which might result in a conflict, or an apparent conflict, between the private interests of the employee and his official government duties and responsibilities, although such teaching, lecturing, and writing by employees are generally to be encouraged so long as the laws, the provisions of this order, and Civil Service Commission and agency regulations covering conflict of interest and outside employment are observed.

Although the Executive Order encourages employees to engage in teaching, lecturing, and writing, it does so with limitations. The employee may not receive compensation when the activity might result in an actual or apparent conflict of interest, or when it runs afoul of another law, the Executive Order, or the agency's regulations. To determine the extent of this limitation, we must consider the following laws and regulations that have an impact in this area.

Certain High-Level Officials — 5 C.F.R. § 735.203

The most explicit reference to lecturing and writing by government employees outside their government employment appears in subsection (c) of 5 C.F.R. § 735.203. Subsection (c) reflects the language of the Executive Order, encouraging employees "to engage in teaching, lecturing, and writing that is not prohibited by law, the Executive Order, this part, or the agency regulations." However, the regulation imposes specific restrictions on Presidential appointees covered by section 401(a) of the Executive Order. This narrow category of individuals consists of heads of agencies, Presidential appointees in the Executive Office of the President who are not subordinate to the head of an agency in that office, and full-time members of committees, boards, or commissions appointed by the President.[1] The regulation addresses two situations in which these employees may not receive compensation for lecturing or writing outside their official duties where the subject matter of the activity is closely related to their government work. Those employees may not receive compensation for "any consultation, lecture, discussion, writing, or appearance the subject matter of which is devoted substantially to the responsibilities, programs, or operations of [their agencies], or which draws substantially on official data or ideas which have not become part of the body of public information."

If nonpublic information is involved in the employee's lecture, employees covered by this provision and all other federal employees, as discussed below, may not receive compensation from the sponsoring organization. When the employee's lecture or article does not contain nonpublic information, the scope of the prohibition in section 735.203(c) on this category of top-level employees depends upon the meaning of the

[1] Although Executive Order 11222 limits the category of officials to which 5 C.F.R. § 735.203(c) applies, OGE would encourage agencies to include in this prohibition all high-level officials who are authorized to state their agency's position on key policy issues.

phrase "devoted substantially to the responsibilities, programs, or operations of his agency." In an opinion about government officials writing articles and books, the Office of Legal Counsel explains that the Department of Justice has given the phrase a broad reading as it applies to top-level employees. It encompasses "the general subject matter or sector of the economy or society with which the individual's agency is concerned, even though the writing does not specifically relate to the functions of the agency."[2] The Office of Legal Counsel rejected a narrower interpretation of the phrase with respect to these employees, which would have barred the receipt of compensation only where the article or book related to existing statutory responsibilities and programs of the agency.[3] Although the Office of Legal Counsel was interpreting the Department of Justice's own regulations, we agree with this broad interpretation as it relates to the activities of the senior officials listed in section 401(a) of the Executive Order. For example, an FTC commissioner would not be permitted to accept anything of monetary value for a speech or an article on the procedure for instituting an action before the FTC, or for a speech or article on the more general topic of federal trade law. That would be impermissible because the general subject matter is that with which the individual's agency is concerned. As a result, the employees encompassed by this prohibition may not receive compensation or anything of monetary value for teaching or lecturing at seminars, conferences, or private briefings where the subject matter relates to the area in which their agencies work.

All Other Employees — Guidelines

Since the restriction of subsection (c) of 5 C.F.R. § 735.203 only addresses a narrow group of senior officials, agencies have had little guidance on how to handle situations in which lower-level employees seek to engage in lecturing and writing on subjects related to their work. This memorandum will discuss the factors agencies should consider in evaluating their employees' requests to participate in these conferences or seminars for compensation.[4]

Section 201(c)(1) of Executive Order 11222 prohibits an employee from taking any action, whether or not otherwise specifically prohibited, which might result in, or create the appearance of using public office for private gain. In light of that provision, which is mirrored in the model regulations at 5 C.F.R. § 735.201a(a), the employee must be concerned with appearances even where the employee's speaking or writing is not prohibited by a more specific regulation. In cases in which an employee not specifically covered by subsection (c) is engaged in writing or speaking on matters substantially related to the activities of his or her agency, the interest in avoiding the appearance of using public office for private gain may preclude the employee from receiving outside compensation for the activity.

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[2] 2 Op. Off. Legal Counsel 361,363 (1977).

[3] Id.

[4] Several agencies have extended the prohibition of the Executive Order and 5 C.F.R. § 735.203(c) by regulation to all of their employees. As a result, the factors stated in the body of the memorandum are the factors that an agency should consider unless it has a more restrictive regulation or policy.

Section 735.206 of 5 C.F.R., prohibits an employee from directly or indirectly using, or allowing the use of, official nonpublic information to further a private interest. This regulation, applicable to all federal employees, prohibits an employee from receiving an honorarium or any other thing of monetary value for a lecture which contains government information not previously disclosed to the public. Although there are circumstances under which an employee could appropriately release previously nonpublic information in an official speech or paper, he or she should not do so in a private forum where the primary purpose is to benefit a private interest rather than to release agency views in an acceptable forum.

While section 735.206 addresses the situation in which the employee's own private interest is satisfied by some form of compensation, the private interest covered by the regulation need not be restricted to that of the employee. An opinion from the Office of Legal Counsel has interpreted the Justice Department's regulation in this area to apply "even where the private gain will be realized by a person or organization other than the Government official."[5] This Office believes that comparable regulations of other agencies should be construed in the same manner.

When the seminar, conference, or briefing in which the employee wishes to participate does not involve nonpublic information, but the subject matter thereof relates to the programs or operations of the employee's agency, the permissibility of the activity depends upon how closely the subject matter relates to the agency's responsibilities. Generally, an employee not covered by subsection (c) of 5 C.F.R. § 735.203 may lecture on a subject within the employee's inherent expertise based on his or her educational background or experience, even though the subject matter is related to the activities of the employing agency. The employee will be prohibited from receiving compensation only when the activity focuses specifically on the agency's responsibilities, policies, and programs, when the employee may be perceived as conveying the agency's policies, or when the activity interferes with his or her official duties. This formulation reflects the approach taken by the Office of Legal Counsel in an opinion on the outside employment of government employees.[6]

The purpose of this distinction is to permit employees who wish to engage in these outside activities to do so in those instances in which the likelihood that official information or position will be misused is minimal. In situations in which the potential for abuse is greatest, as in discussions of an agency's policies or programs, we would prohibit the receipt of compensation or anything of value. The Office of Legal Counsel has supported this treatment for the Department of Justice's lower-level employees, permitting them to teach in the area of law for which they have responsibility. In so doing, the Office of Legal Counsel suggests that a more liberal policy for lower-level personnel is warranted because they are not usually sought in order to ascertain the Department's official position on key policy issues. Furthermore, they are not authorized to state that position, so they are not likely to

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[5] 2 Op. Off. Legal Counsel 361, 365 (1977).

[6] 2 Op. Off. Legal Counsel 231 (1978).

be attractive to an audience because of their affiliation with the Department.[7] We adopt this formulation because it comports with the spirit of section 735.206, which prohibits the use of official information to further a private interest, and the spirit of the Executive Order, which encourages teaching, lecturing, and writing.

Based on the concern expressed in subsection 201a(a) of 5 C.F.R. § 735 about the appearance of using public office for private gain, employees should avoid situations in which it appears that they are trading on their government positions. Neither the organization sponsoring the conference or seminar nor the employee may use the employee's government title when the employee is appearing in his or her personal role. On the other hand, if the agency deems it appropriate for the employee to participate officially, the agency may send the employee to the program on the government's behalf. Although the employee's presence may incidentally benefit the conference sponsor, the employee is not precluded from using his or her official title where his or her participation is a matter of official business. However, the employee would be doing his or her government job and could not receive anything of monetary value from the organization arranging the program.

Another limitation on outside compensation for lecturing or writing is based on 5 C.F.R. § 735.202. That restriction focuses on the source of the compensation rather than on the subject matter discussed in the lecture or article. Section 735.202 prohibits an employee from accepting, directly or indirectly, any gift, gratuity, or other thing of monetary value from any of the following sources:

(1) a person who has, or is seeking to obtain, business relations with the employee's agency;

(2) a person who conducts activities that are regulated by the employee's agency; or

(3) a person who has interests that may be substantially affected by the performance of the employee's official duty.

If a person or entity in one of those three categories requests the employee to speak at a program or to write an article, on any subject, the employee is prohibited from accepting an honorarium or any other thing of monetary value from the person or entity in return.

It is not always clear whether the employee has received compensation or anything of monetary value. Sometimes the organization offering the honorarium gives the money to a charitable organization on the employee's behalf. In the context of the outside earned income limitation of section 210 of the Ethics in Government Act, this Office has rendered its opinion that an honorarium paid to a charitable organization on a government employee's behalf must be counted as outside earned income.[8] Similarly, an employee who is prohibited from receiving compensation or anything of monetary value for an appearance or article cannot get around the prohibition by having it paid to a charitable organization on his or her behalf.

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[7] 2 Op. Off. Legal Counsel 361, 363 (1977).

[8] OGE Informal Opinion 82x9.

In cases in which the employee is permitted to accept something of monetary value for lecturing or writing, the amount of the honorarium is limited by 2 U.S.C. § 441i(a). That provision prohibits an elected or appointed officer or employee of the federal government from accepting an honorarium of more than $2000 for any appearance or article. Subsection (b) of 2 U.S.C. § 441i explains that, for the purposes of this provision, any honorarium paid by or on behalf of the employee to a charitable organization is not considered accepted by the employee for purposes of the $2,000 limitation. This charitable exception only applies in situations covered by section 441i. It does not apply when the issue is whether the individual has accepted an honorarium or any other thing of value in violation of the standards of conduct.

As this Office has stated previously, a federal employee may receive an honorarium for a lecture or article on a subject unrelated to his or her official position if the source of the honorarium or item of value is not otherwise prohibited. However, in doing so, the individual may not use government time or resources, nor may the employee use his or her government title.

The ethical considerations are somewhat different when a government employee is asked to lecture or write in an area related to his or her agency's official responsibilities or programs in cases in which he or she will not receive compensation. Because the problems with supplementation of salary and use of office for private gain are not usually present in these situations, the agency has more discretion in allowing activities of this type.

In these instances, the employee should request prior agency approval. Before granting approval, the agency should carefully evaluate the situation to make sure that no private interest is profiting from the information inappropriately and that there are no other conflicts of interest. Even if the employee does not receive compensation directly, there are situations in which the employee may be prohibited from engaging in the activity under 5 C.F.R. § 735.206 where some other person or entity is profiting from the activity. Likewise, if a person or an entity contributes to a charity on the employee's behalf, this could constitute impermissible compensation. However, if these problems are not present, the employee may engage in the activity as long as the employee does not use government time or resources to do so. In other cases, the employing agency may determine that the employee should engage in the activity onlyin his or her official capacity. In those instances, the agency should direct the employee to conduct the activity on behalf of the agency, with the agency paying the associated expenses.