

OFFICE OF GOVERNMENT ETHICS

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**Memorandum dated March 15, 2001,
from Marilyn L. Glynn, General Counsel,
to Designated Agency Ethics Officials
Regarding Recent Office of Legal
Counsel Opinions**

PAYMENTS TO CHARITABLE ORGANIZATIONS IN LIEU OF HONORARIA

The Office of Legal Counsel (OLC) recently issued an opinion concerning 5 U.S.C. app. § 501(c), the provision that authorizes Government employees to make payments to charitable organizations in lieu of honoraria.

The Office of Government Ethics (OGE) had asked OLC whether section 501(c) remains in effect after the United States Supreme Court's decision that the general honoraria prohibition, 5 U.S.C. app. § 501(b), is unconstitutional. *See United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) (*NTEU*). OGE reasoned that because section 501(c) is basically an exception to the honoraria ban, the invalidation of section 501(b) should also nullify section 501(c).

In an opinion issued March 1, 2001, OLC concluded that section 501(c) is no longer in effect. Recognizing that the Court in *NTEU* effectively struck down the honoraria ban, OLC focused on the question of whether, in the absence of section 501(b), section 501(c) remains "fully operative as a law." According to OLC, "the statutory framework within which section 501(c) was originally enacted has since been so altered that section 501(c) no longer serves any of the purposes for which it was originally intended." OLC also stated that, since the language of section 501(c) makes explicit reference to section 501(b), the two provisions were intended to operate in tandem. Because there is no need for an exception to a provision that is no longer valid, section 501(c) is not in effect.

OGE is planning to revise 5 C.F.R. § 2636.303(b) in accordance with the OLC opinion.

COMMUNICATIONS UNDER 18 U.S.C. § 207(c)

On January 19, 2001, OLC issued an opinion in response to a question posed by OGE concerning the extent to which a former high-level Government official may make communications before his former department or agency under 18 U.S.C. § 207(c). The OLC opinion

concluded that the conduct of a former Government official would fall outside of permissible behind-the-scenes assistance if the former official intends that the information or views being conveyed to his former agency be attributed to him.

OGE had asked OLC if a former official could submit an unsigned report to his client--but in the name of the official's small consulting firm--knowing that the client would submit the report to the official's former Government agency and that the official would probably be recognized as the report's author. OLC reasoned that "a communication is the act of imparting or transmitting information with the intent that the information be attributed to the former official." In addition, OLC concluded that there is no requirement that the recipient of the information "actually recognize the former official as the source of the information."

The opinion notes that finding a former Government official criminally liable will depend on the facts and the "strength of the circumstantial evidence" of the former official's intent that the information or views conveyed to the agency be attributed to him.

Copies of both OLC opinions may be obtained from OGE's Website among the "Other Ethics Guidance" category in the "Laws and Regulations" section, at www.usoge.gov.