

Office of Government Ethics
93 x 9 -- 03/23/93

Letter to a Federal Employee dated March 23, 1993

This is in response to your letter of February 24, 1992, [in which] you state your disagreement with the opinion of the then General Counsel of [your] Department, regarding the application of the honoraria ban to compensation received by you relating to testimony you provided in a trial. The Office of Government Ethics (OGE) will normally not question the written advice of an agency ethics official on an issue raising the applicability of the honoraria ban as agencies have independent statutory and regulatory authority to administer the honoraria prohibition. As we are sympathetic to your position with respect to the application of the honoraria ban, we provide you with the following brief explanation of why we believe [the General Counsel's] analysis of the issue is correct.

As [the General Counsel] stated in his December 2, 1992, opinion, the Ethics Reform Act of 1989 prohibits Federal employees from receiving honoraria, which is broadly defined as a "payment of money or anything of value for an appearance, speech, or article." The honoraria restrictions imposed by the Ethics Reform Act of 1989 were opposed by the Office of Government Ethics and have been the subject of significant criticism by Federal employees. The regulations issued by the Office of Government Ethics implementing the honoraria prohibition as to executive branch employees sought to narrow the application of the prohibition by defining the terms "appearance", "speech" and "article." While the regulation limits the application of the ban by defining these terms, it does not carve out any exceptions to the prohibition against receiving compensation for appearances, speeches, or articles. If Congress had intended that compensation for appearing and speaking at a trial be excepted from the coverage of the statute, they should have included such an exception in the statute. We cannot change that which is statutorily mandated by writing regulations implementing our own view of how things should be.

While we are sympathetic to your sense that Federal employees should not be prevented from appearing, speaking and writing in matters totally unrelated to their official duties, our latitude in this area is restricted by the language of the statute. You should know that there is a possibility that, either by statute or court

action, the honoraria ban will be lifted. The possible lifting of the ban has no impact on your obligation to refund [to the payor] the honorarium that you received in accordance with the order of [the General Counsel]. However, if the statute or court ruling that lifts the honoraria ban retroactively negates the ban, you may be able to legally receive partial or full payment from [the payor] for your prior appearance on their behalf, if [the payor] is still willing to pay it. For example, if the courts find the honoraria ban to be unconstitutional, you would not be prohibited from receiving payment from [the payor] for the appearance you made on its behalf. You should seek to keep advised by your ethics official on the status of the honoraria prohibition and how it applies to your situation. In the meantime, you must comply with the order of [the General Counsel].

Sincerely,

Stephen D. Potts
Director