

Office of Government Ethics
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**Memorandum dated June 24, 1991,
from Stephen D. Potts, Director,
to Designated Agency Ethics Officials,
General Counsels and Inspectors General
Regarding Placing Honoraria into
Escrow Accounts**

The Office of Government Ethics has received a number of inquiries regarding the legality of employees arranging to have honoraria placed in escrow pending the outcome of litigation contesting the constitutionality of the honorarium prohibition added by Title VI of the Ethics Reform Act of 1989. The three cases pending in the District Court for the District of Columbia have been consolidated and set for hearing on July 16, 1991.

Inquiries regarding the possible use of an escrow arrangement were prompted by the following language contained in the decision by the Court of Appeals for the District of Columbia Circuit denying plaintiffs' request for a preliminary injunction:

. . . The appellants can put their compensation into escrow during the pendency of this litigation. If they succeed on their constitutional challenges, they can recover any honoraria paid into those accounts. Cf. *Hudson v. Chicago Teachers United, Local 1*, 708 F. Supp. 961, 963 (N.D. Ill. 1989) (holding that defendant's proposed escrow arrangement would 'adequately protect plaintiffs from the sort of irreparable harm that plaintiffs seek to avert'). If the Appellants fail, then they were never entitled to compensation in the first place.

National Treasury Employees Union v. United States, Nos. 90-5406 et al. (March 15, 1991).

Regulations implementing the statutory prohibition are contained in 5 C.F.R. Part 2636 (56 Fed. Reg. 1721-1730, Jan. 17, 1991). Section 2636.203(e) provides that, unless it is paid to a charitable organization, an honorarium is "received" by an employee if it "is paid to another person on the basis of designation, recommendation or other specification by the

employee."

It is our opinion that it would not violate the statute or the regulations for an employee to ask a person who has agreed to pay him an honorarium to establish an escrow account with provision for payment of the honorarium to the employee in the event of a final, non-appealable decision by a Federal court holding that the underlying statute is unconstitutional or in the event of legislation retroactively amending the statute to permit receipt of the escrowed honorarium. Where the payor rather than the employee places the honorarium into escrow with an agent selected by the payor, we would not view the escrowed honorarium as having been "received" by the employee until the conditions of the escrow are met and the honorarium is actually paid to the employee. Further, an agreement with the payor to pay an honorarium to the employee upon condition either that the court renders a final, nonappealable decision that the statute is unconstitutional or that the law is retroactively amended would not, in our opinion, violate the statute or regulations.