

Office of Government Ethics

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**Statement by David R. Scott
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Concerning Proposed Book
by a White House Official dated March 25, 1983**

Inquiries from private citizens and the press have been received by the Office of Government Ethics ("OGE") concerning the legality and propriety, under applicable statutes and regulations, of the proposed publication of a diet book to be authored by [a White House official]. Some of the determinative events concerning this matter have not yet occurred. Nevertheless, because of the apparent confusion of some persons concerning the issues involved and standards to be applied, we believe that the release of a statement at this time will advance the public's understanding of the matter.

One set of inquiries has centered around the allegation that the proposal of a diet book is a disguise for additional compensation to [the official] for the performance of his official duties, permitting him to earn more as a Government employee than his Government position allows. The essence of this allegation is that there neither is nor will be any quid pro quo from [the official] in return for his receipt of advances against royalties from a publisher. In short, the charge is that [the official] will receive monies to write a diet book but does not intend to and will never write the book either during or after his Government service. This would make the receipt of such monies violative of a criminal conflict of interest statute, 18 U.S.C. § 209(a), which prohibits the receipt by a Government official of a supplement to his salary as such from an outside source as compensation for his services to the Government. However, that statute would not come into play if [the official] were to receive advances against royalties in a situation where an actual publication is contemplated. In other words, there can be no violation of 18 U.S.C. § 209(a) as a prohibited supplementation to [the official's] Government salary where any monies received by him would be explicitly in return for his efforts to produce a diet book having nothing to do with his official duties and responsibilities. OGE has ascertained that [the official] in fact entered into a contractual arrangement with [a publishing company] to produce a manuscript in 1983 for a

diet book to be published sometime in 1984.¹ Unless this contractual arrangement is dissolved or broken, [the official] is legally bound to deliver something of value (his manuscript on a subject unrelated to his official duties) to the publisher in return for receipt of two \$9,000 advances against royalties (one already received by [the official] in December 1982 and the second to be received in 1983 upon completion and delivery of the manuscript). If he fails to make delivery, he is liable for a complete refund. Under these circumstances there is no 18 U.S.C. § 209 violation.

A second set of inquiries questions the applicability of the 15% outside earned income limitation imposed by title II, section 210 of the Ethics in Government Act of 1978 to [the official's] compensation with respect to the proposed diet book. This section of the Act prohibits Presidential "advice and consent" appointees in the executive branch from earning outside income attributable to any calendar year in excess of 15% of their salary for that year. In essence, the allegation here is that [the official's] proposed book will bring sufficient advances against royalties before publication as well as royalties after publication to violate this provision of the law. Even though [the official] is not covered by this section 210 limitation because he does not occupy a position, appointment to which requires the advice and consent of the Senate, he (along with other Presidential appointees in the White House) is subject to an oral policy set by the White House Counsel's Office to abide by section 210's limitation. After having reviewed the written contract between [the official] and [the publishing company], we find that the contractual terms for the amounts and the contemplated schedule of payments do not contravene section 210.

The contract calls for two specified advances against royalties to be paid to [the official] by the publisher -- one of \$9,000 in 1982 upon [the official's] signing of the contract ([the official] signed the contract in December 1982 and received that same month the first \$9,000) and the second of \$9,000 to be paid in 1983 when a final manuscript is delivered to the publisher (as mentioned earlier, this has not yet occurred, but according to [the official] will occur in the near future). Nine thousand dollars in each of these years is less than 15% of [the official's] annual White House salary and is attributable to bona fide events called for in the contract. Two advances against royalties -- one on signing and one on completion of the manuscript -- is apparently within the normal practice of the

publishing industry for this type of proposed book. Even if [the official] were offered considerably more money than two \$9,000 advances against royalties in order to induce him to undertake the project, the terms of the contract contradict any allegation that the excess of what may have been originally offered over the \$18,000 ultimately agreed upon (the two \$9,000 advances) should be charged to [the official] as constructively received in 1982 or 1983. The contract explicitly states that there are to be no other inducements or advances against royalties to [the official] other than these two \$9,000 payments. The only other money he is entitled to under the contract will be royalties based strictly on the volume of sales of the book after publication. In essence, anything over \$18,000 to [the official] will be royalty income based on the post-publication sale of the book and will not be deferred income in any degree attributable to pre-publication advances against royalties. This is consistent with OGE's general guidelines on book royalties under section 210 of the Ethics Act of 1978 sent to the White House on December 3, 1982, wherein we distinguished between (1) those events creating "intellectual property" (here the book) such as the writing of a manuscript which gives rise to "earned income" subject to the attribution rules of section 210 of the Act, and (2) the subsequent retention of royalty interests after the book is published which are deemed to be "mere property right[s] in the residual income stream" -- that is, not within the concept of "outside earned income" under section 210 and therefore not within the attribution rules of that section.

A third set of inquiries deals with an alleged prohibition that bars Presidential appointees, including [the official], from receiving compensation for the mere writing of any book while in the employ of the Government. However, there is no all-inclusive prohibition of that kind. The specifically applicable standards-of-conduct prohibitions in that context are tied to the receipt of compensation by a Presidential appointee for the publication of an article or book that deals with his or her official duties or the dissemination of governmental information. See, for example, section 202 of Executive Order No. 11222 (issued on May 8, 1965) and a regulation promulgated thereunder, 3 C.F.R. § 100.735-15(b).² There is no specific prohibition against a Presidential appointee's writing a book for compensation completely unrelated to his official duties and not containing any governmental information. However, the writing of such a book may run afoul of other standards of conduct, most notably the prohibition against using one's public office for

private gain (E.O. 11222, section 201(c)(1); 5 C.F.R. § 735.201a(a); 3 C.F.R. § 100.735-4(c)(1)), and the prohibition against an outside activity which is so time-consuming that it interferes with the proper discharge of one's official duties. See, e.g., 5 C.F.R. § 735.203(a) and 3 C.F.R. § 100.735-15(a).

There is no showing that the book venture is interfering with [the official's] discharge of his responsibilities in office. Thus, the final point for consideration is whether the proposed publication of a book authored by him involves the use of his position for private gain, or gives the appearance of such conduct. The Office of Legal Counsel, Department of Justice, has well summarized the pertinent test in an August 12, 1977 Memorandum Opinion for the Counsel to the President:

The legality and propriety of a Presidential appointee receiving compensation for a book or article is governed by somewhat different considerations when the subject matter has no relation to the individual's official duties and responsibilities. It is possible that in a given case the author might be relying on his visibility in office to generate interest in a book or article about his prior experiences or other matters -- or seem to be doing so -- and thereby create the appearance of using public office for private gain. This would depend, of course, on the particular facts in the specific case.

Volume 2, Opinions of the Office of Legal Counsel at p. 364 (1978) (emphasis added).

We believe the most critical "particular facts" that should be known in this matter in order to make a determination include: (1) whether the title of the book will specifically or inferentially refer to the White House or [the official's] position there, (2) what the jacket art and copy will display and state, (3) how the book will be advertised and promoted by the publisher, (4) whether the author will be in a Government position when the book is published, (5) whether he will himself actively promote the book while he is in public office (whether before or after publication), and (6) whether the advances against royalties are so large or of a nature to suggest that [the official] would not have received them except for his current position.

In order to attempt to answer these questions, members of the Office of Government Ethics have spoken with various parties connected with the proposed publication, reviewed the terms of the contract, and ascertained trade practices prevalent in the publication industry for this type of non-fiction book. While we have found some answers, there remain sufficient questions that only events to occur in the future can provide the facts necessary for a final ruling. For example, we have learned from [the official] that the exact title of the book has not been decided yet and that the title will not be "The White House Diet Book" or otherwise include the words "White House." We have learned that under the contract [the official] "has the right to approve the copy and layout of all advertising and promotional material, including the jacket art and copy, which is under the direct control of the Publisher." [The official] has made a commitment to exercise this contractual right only after consultation with and the clearance of the Designated Agency Ethics Official of the Executive Office of the President -- presently the Counsel to the President. We have learned that [the official] appropriately consulted that official before signing the book contract concerning the propriety of doing so, including the propriety of accepting the particular advances against royalties. We have been told by sources unconnected with the contract that the two advances of \$9,000 against royalties -- one upon the agreement to write the diet book and the second upon completion of the manuscript -- do not appear excessive and do not suggest either that [the official] did or did not receive them due to his governmental position.

Because, as pointed out above, some critical aspects of this matter are not now ascertainable by OGE, we must withhold any final judgments. Moreover, a determination under the pertinent regulations in any matter such as this is initially for the Designated Agency Ethics Official of the agency involved. As the book moves closer to publication, more of the facts for a final assessment will be known. Until that time, [the official's] efforts in the project will continue to receive close scrutiny by this Office to insure that the applicable standards of conduct are not contravened.

1 The contractual arrangement calls for [the publishing company] to publish the diet book no later than 18 months after [the official's] delivery of a satisfactory manuscript. We are informed at this time (the

end of March 1983) that the delivery of a completed manuscript to [the publishing company] appears at least a month away. The publisher has informed OGE that it contemplates that actual publication will occur approximately twelve months after receipt of a satisfactory manuscript.

23 C.F.R. § 100.735-15(b) applies specifically to White House personnel. It states:

[A]n employee who is a Presidential appointee covered by section 401(a) of Executive Order No. 11222...shall not receive compensation or anything of monetary value for any consultation, lecture, discussion, writing, or appearance the subject matter of which is devoted substantially to the responsibilities, programs or operations of his agency, or which draws substantially on official data or ideas which have not become part of the body of public information (emphasis added)