U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

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MEMORANDUM FOR AMY COMSTOCK
DIRECTOR
OFFICE OF GOVERNMENT ETHICS

From: Daniel L. Koffsky
Acting Assistant Attorney General

Re: Whether Section 501(c) of Ethics in Government Act Remains in Effect After Invalidation of Section 501(b)

Your office has requested our opinion whether section 501(c) of the Ethics in Government Act of 1978, 5 U.S.C. app. § 501(c) (1994), which authorizes government employees to make payments to charitable organizations in lieu of honoraria, remains in effect after the Supreme Court's decision in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) ("*NTEU*"). *See* Memorandum for Hon. Randolph Moss, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, from Stephen D. Potts, Director, Office of Government Ethics (Aug. 27, 1998) ("OGE Memo"). We conclude that § 501(c) does not remain in force.

BACKGROUND

Through the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, Congress enacted a number of amendments to the Ethics in Government Act of 1978 in an attempt to reinforce standards of integrity within the federal government. Section 501(b) of the Ethics in Government Act was amended to create a new "Honoraria Prohibition": "An individual may not receive any honorarium while that individual is a Member, officer, or employee." 5 U.S.C. app. § 501(b). "Officer or employee" was defined to include nearly all employees of the federal government. *Id.* at § 505(2). At the same time, Congress added a new provision to the Ethics in Government Act, § 501(c), permitting certain payments in lieu of honoraria to be made to qualifying charitable organizations on behalf of employees:

> Any honorarium which, except for subsection (b), might be paid to a Member, officer or employee, but which is paid instead on behalf of such Member, officer or employee to a charitable organization, shall be deemed not to be received by such Member, officer or employee. No such payment shall exceed $2,000 or be made to a charitable organization

from which such individual or a parent, sibling, spouse, child, or dependent relative of such individual derives any financial benefit.

Id. at § 501(c).

In 1995, the Supreme Court held that the honoraria ban of § 501(b) violated the First Amendment. *NTEU,* 513 U.S. at 477. Concluding that § 501(b) was a "crudely crafted burden on [government employees'] freedom to engage in expressive activities," the Court prohibited its enforcement against the class of employees represented by the *NTEU* plaintiffs, all executive branch employees below grade GS-16. *Id.* After the *NTEU* decision, this Office was asked what, if any, portion of § 501(b) survived. We concluded that, because the Supreme Court had invalidated § 501(b) "with respect to the vast majority of the statute's targeted audience," and because we could not speculate that "Congress would have enacted an honoraria ban as limited in scope as that portion of § 501(b) which the Supreme Court declined to strike down," no part of § 501(b) survived the Supreme Court's ruling. *See* Memorandum for the Attorney General from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Legality of Government Honoraria Ban Following U.S. v. National Treasury Employees Union* 1 (Feb. 26, 1996) (hereinafter "Honoraria Ban Memo").

With the ban on acceptance of honoraria thus invalidated, you have asked whether the provision on payments to charities in lieu of honoraria is still in effect, since the Office of Government Ethics would be responsible for issuing regulations to implement the provision.

DISCUSSION

In general, a determination that one provision of a statute is unconstitutional does not require invalidation of the entire statute. On the contrary, the presumption is that statutes remain intact to the extent possible. The judicial treatment of severability offers the model for our consideration. Because "a ruling of unconstitutionality frustrates the intent of the elected representatives of the people," courts generally "refrain from invalidating more of the statute than is necessary." *Regan v. Time, Inc.,* 468 U.S. 641, 652 (1984). Thus, "whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of [a] court to so declare, and to maintain the act in so far as it is valid." *Id.* (citing *El Paso & Northeastern R.R. Co. v. Gutierrez,* 215 U.S. 87, 96 (1909)). The question before us, then, is one of severability – can the invalid portion of the statute be severed from the otherwise valid ones?

The standard for determining whether an unconstitutional provision is severable from the remainder of the statute is well-established: "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley v. Valeo,* 424 U.S. 1, 108 (1976) (citing *Champlin Ref. Co. v. Corporation Comm'n,* 286 U.S. 210, 234 (1932)). Under this test, the severability inquiry is largely a question of legislative intent, informed by a presumption in favor of severance, *Regan*, 468 U.S. at 653, or as the Court put it in *Alaska Airlines v. Brock*, 480 U.S. 678, 685 (1987): "The final test . . . is the traditional one: the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted."

Applying this standard, we turn to the Ethics Reform Act. Before 1989, various federal laws limited the ability of Representatives, Senators, and other government employees to accept honoraria. One of these statutes, 2 U.S.C. § 31-1(b) (1988), *repealed by* Pub. L. No. 102-90, tit. I, § 6(c), 105 Stat. 451 (1991), prohibited any "Member" (defined to include Senators, Members of the House of Representatives, Delegates to the House of Representatives, and the Resident Commissioner of Puerto Rico, *see id.* at § 31-1(a)(3)) from "accept[ing]" honoraria that totaled more than 40 percent of that Member's salary in any calendar year.[1] In addition, section 323(a) of the Federal Election Campaign Act of 1971, 2 U.S.C. § 441i(a) (1988), *repealed by* Pub. L. No. 102-90, tit. I, § 6(d), 105 Stat. 451 (1991), limited to $2000 the amount that an "elected or appointed officer or employee of any branch of the Federal Government" could "accept" in any single honorarium. However, both of these statutes included exemptions for charitable contributions. *See id.* at § 31-1(c) ("Any honorarium, or any part thereof, paid by or on behalf of a Member to a charitable organization shall be deemed not to be accepted for the purposes of subsection (b) of this section."); § 441i(b) ("Any honorarium, or any part thereof, paid by or on behalf of an elected or appointed officer or employee of any branch of the Federal Government to a charitable organization shall be deemed not to be accepted for the purposes of this section."). Thus, Senators, Representatives, and other government employees could receive and keep honoraria in accordance with the limits established by §§ 31-1(b) and 441i(a). They could also donate to a charitable organization honoraria in excess of those limits.

When Congress undertook ethics reform in 1989, one of the problems it sought to address was the receipt of outside earned income by government officials. It was Congress' perception that "substantial outside earned income creates at least the appearance of impropriety and thereby undermines public confidence in the integrity of government officials." Report of Bipartisan Task Force on Ethics on H.R. 3660, Government Ethics Reform Act of 1989, *reprinted at* 135 Cong. Rec. 30740, 30744 (1989) ("Bipartisan Task Force Report"). With respect to the receipt of honoraria in particular, Congress expressed concern that "the practice of acceptance of honoraria by Members [of Congress], particularly from interest groups with important stakes in legislation, creates serious conflict of interest problems and threatens to undermine the institutional integrity of Congress." *Id.* at 30744. In response to this concern, Congress imposed the honoraria ban of § 501(b).

Congress was also aware that then-existing laws allowed government officials to donate excess honoraria to charitable organizations. The exemptions for charitable contributions under §§ 31-1(c) and 441i(b) had led to practices that Congress came to see as abusive. First, some

[1] In fact, an internal rule of the House of Representatives, House Rule XLVII, imposed even tighter restrictions, limiting the outside earned income of Members to 30 percent of their annual congressional salary.

Members of Congress who intended to donate some or all of their honoraria to charity chose not do so until the end of the year, in an effort to obtain interest on the fees throughout the year. Second, some Members used their honoraria income – both honoraria that they kept and those that they donated to charities – to increase tax sheltered contributions to a Keogh plan. They were able to do so under the Self-Employed Individuals Tax Retirement Act of 1962, Pub. L. No. 87-792, 76 Stat. 809, which permits self-employed individuals to contribute up to $30,000 or twenty-five percent of their earned income from self-employment (whichever is less) to a specific type of retirement plan known as a Keogh plan. *See* 26 U.S.C. §§ 415(c)(1), (3)(B), 401(c)(2), 1402(a) (1994); *see generally* 26 U.S.C. §§ 401-420 (1994). Contributions to a Keogh plan by a self-employed individual are tax-deductible up to a limit of fifteen percent of the individual's earned income from self-employment. 26 U.S.C. § 404(a)(3)(A), (a)(8)(D) (1994). Because honoraria were treated as earned income from self-employment, and because that income included even those honoraria that were donated to charities, *see id.* at § 1402(a), a Member of Congress could use honoraria to increase contributions to a Keogh plan, thereby increasing his or her tax deductions.

Troubled about these tax-related practices, *see* Bipartisan Task Force Report at 30744, Congress enacted § 501(c) to prevent them. As noted above, § 501(c) permits payments in lieu of honoraria to be made to qualifying charitable organizations on behalf of employees, but it states that such payments "shall be deemed not to be received" by the employee. At the same time, Congress amended § 7701 of the Internal Revenue Code, adding a new subsection (k) to bring the Code into conformity with new subsection 501(c):

> Treatment of Certain Amounts Paid to Charity. – In the case of any payment which, except for section 501(b) of the Ethics in Government Act of 1978, might be made to any officer or employee of the Federal Government but which is made instead on behalf of such officer or employee to an organization described in section 170(c) [defining "charitable contribution"] –
>
> > (1) such payment shall not be treated as received by such officer or employee for all purposes of this title and for all purposes of any tax law of a State or political subdivision thereof, and
> >
> > (2) no deduction shall be allowed under any provision of this title (or of any tax law of a State or political subdivision thereof) to such officer or employee by reason of having such payment made to such organization.
>
> For purposes of this subsection, a Senator, a Representative in, or a Delegate or Resident Commissioner to, the Congress shall be treated as an officer or employee of the Federal Government.

26 U.S.C. § 7701(k) (1994).

Together, §§ 501(c) and 7701(k) preserved the ability of government officials to donate honoraria to charity, while eliminating the tax shelter that had been available to them under §§ 31-1(c) and 441i(b). The Bipartisan Task Force Report explained that the purpose of these new provisions was to preclude government officers and employees from reaping any favorable tax consequences from their charitable donations:

> Donations of honoraria to charity would continue to be permitted after honoraria is abolished in 1991, but with certain restrictions and protections against potential abuse. Any honorarium that could have been received but for these provisions of law may be donated instead directly by the payor to a charitable organization (as defined in section 170c of the Internal Revenue Code of 1986), and no tax consequence or benefits to the Member or official may be derived from such payments to charity. The bill would amend the tax code to provide that a payment in lieu of honoraria made to charity would not be deemed to be income received by the Member or employee. **Thus, the amount of honoraria donations to charity could not be used to inflate the amount of tax-sheltered contributions made to a Keogh Plan or other pension fund.**

Bipartisan Task Force Report at 30744 (emphasis added).

Section 501(c) also placed a $2000 limit on each honorarium that a government official donated to charity. The apparent intent of this restriction was to limit the amount of interest that government officials, before donating the honoraria, might accrue and keep. *See* 135 Cong. Rec. at 1463 (statement of Sen. Mitchell) (describing provision in Senate Resolution 40 that was almost identical to section 501(c): "This resolution will still allow payment on a Member's behalf of honoraria to charitable organizations. Each such payment will be limited to a maximum of $2,000 and no pension or annuity benefit can accrue to a Member, based on these charitable donations.")

Keeping in mind the statutory background against which § 501(c) was enacted and the purposes that Congress intended it to serve, we now turn to the question whether, in the absence of § 501(b), § 501(c) remains "fully operative as a law." *Buckley*, 424 U.S. at 108. Your Office has concluded that, because § 501(c) is an "exception" to the general honoraria ban of § 501(b), the invalidation of 501(b) also nullifies 501(c), since "there would not appear to be any need for an exception, § 501(c), to a statute, § 501(b), that is no longer enforceable." OGE Memo at 3. Similarly, the Internal Revenue Service has determined that, because "[s]ection 7701(k) is premised on government employees not being permitted to receive honoraria," the invalidation of that prohibition makes § 7701(k) a "nullity." Memorandum for Ursula Werner, Attorney-Advisor, Office of Legal Counsel, U.S. Dept. of Justice, from Lewis J. Fernandez, Deputy Associate Chief Counsel, Income Tax and Accounting, Internal Revenue Service, *Re: Ethics in Government Act* at 2-3 (July 13, 2000).

We agree that § 501(c) is no longer effective. The statutory framework within which

§ 501(c) was originally enacted has since been so altered that § 501(c) no longer serves any of the purposes for which it was originally intended. Most evidently, § 501(b), to which § 501(c) is an exception, is no longer in effect. Before the nullification of § 501(b), § 501(c) was the sole avenue by which government officials could continue to direct to charities honoraria that they would be precluded from receiving. The very language of § 501(c) (emphasis added) – "[a]ny honorarium which, *except for subsection (b)*, might be paid to a Member . . ." – demonstrates the extent to which Congress intended the two provisions to operate in tandem. By its literal terms, the subsection applicable to honoraria that might be paid "except for subsection (b)" now refers to an empty set: there are no such honoraria. Thus, as your Office has recognized, *see* OGE Memo at 4, the invalidation of the honoraria ban means that there is no longer a need for any exception, limited or otherwise.

Furthermore, 2 U.S.C. §§ 31-1 and 441i, the statutes that preceded the Ethics Reform Act in setting limits upon government officials' receipt of honoraria but permitting the donation of honoraria to charities in excess of those limits, were repealed in 1991. *See* Pub. L. No. 102-90, tit. I, § 6(c)-(d), 105 Stat. 447, 451 (1991). To the extent that § 501(c) was enacted to correct the tax-related abuses that arose from the charitable contribution exceptions under §§ 31-1(c) and 441i(b), that purpose has disappeared because the statutes permitting those abuses are no longer in effect. Nor is § 501(c) necessary to preclude the resurrection of those abuses. In the absence of § 501(c), the outside earned income limitations of § 501(a) of the Ethics Reform Act, 5 U.S.C. app. § 501(a), under which honoraria count as income, would apply to all honoraria, including those donated to charities.[2]

A statutory provision that, by its terms, is tied to a provision now invalidated and that does not serve any of its original purposes cannot be considered "fully operative as a law." As the Court in *Alaska Airlines* explained, "Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently." *Alaska Airlines*, 480 U.S. at 684. Section 501(c) no longer has any independent function. We must therefore conclude that it is not in effect.

[2] We recognize that there is a regulation, 5 C.F.R. § 2636.303(b)(7) (2000), that excludes "[p]ayments to charitable organizations in lieu of honoraria" from the definition of "outside earned income." However, the statutory authority for that regulation is § 501(c). If, as we conclude, § 501(c) is no longer valid, that regulatory exception too must fail.