FEDERAL ELECTION COMMISSION
Washington, DC 20463

April 9, 1981

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1981-10

Mr. C. Normand Poirier
Acting General Counsel
International Communication Agency
Washington, D.C. 20547

Dear Mr. Poirier:

This refers to your letter of February 9, 1981, requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act").

Your letter states that an inter-agency working group has been established for the purpose of providing uniform guidance to those employees of the United States Government who were held hostage in Iran. You further indicate that the "demands for public appearances, speaking engagements and written articles by the former hostages is extremely great." This demand may result in the payment of honoraria for appearances and various articles which may result in exceeding the annual limitation ($25,000) on the amount of money an employee of the United States may accept in a calendar year.

You ask whether honoraria earned may be paid in installments in order to avoid exceeding the annual $25,000 limitation established by 2 U.S.C. 441i(a)(2). The request assumes that the $2,000 limitation on the amount which may be accepted per appearance cannot be avoided by using an installment plan.

Although the request seems to assume that the personnel involved are covered by 2 U.S.C. 441i, the Commission believes that threshold issue should be addressed. Specifically, the issue is whether the phrase appointed "officer or employee of any branch of the Federal Government" includes those former hostages who are officers or employees of the International Communication Agency, the Departments of State and Defense, or who are members of the foreign or military services. The Commission concludes that the quoted phrase includes these personnel, both civilian and military, and thus they are subject to the honoraria limits of 2 U.S.C. 441i.

The Congress in adopting the original honorarium provisions in 1974 (formerly 18 U.S.C. 616) did not define "officer or employee." The, legislative history from 1974 indicates clear Congressional intent and understanding that the term be generally inclusive:

> Mr. BRADEMAS. I would say to my colleague it is very clear what that language means, that means anybody working for the government of the United States who is appointed or elected in the Judicial, Executive or Legislative Branches. That is what it means.
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> CHAIRMAN HAYS. I think it is clear.

Transcript for the June 5, 1974, Markup Hearings on the Federal Election Campaign Act Amendments of 1974, (Committee on House Administration, 93rd Congress, 2d Session, 397-398, 1974).

Reflecting this history Commission regulations state:

> The term "honorarium" means a payment of money or anything of value received by an officer or employee of the Federal government, if it is accepted as consideration for an appearance, speech, or article. An honorarium does not include payment for or provision of actual travel and subsistence, including transportation, accommodations, and meals for the officer or employee and spouse or an aide, and does not include amounts paid or incurred for any agents' fees or commissions. (1) Officer or Employee. The term "officer or employee of the Federal government", or "officer or employee" means any person appointed or elected to a position of responsibility or authority in the United States government, regardless of whether the person is compensated for this position; and any other person receiving a salary, compensation, or reimbursement from the United States government, who accepts an honorarium for an appearance, speech, or article. Included within this class is the President; the Vice President; any Member of Congress; any judge of any court of the United States; any Cabinet officer; and any other elected or appointed officer or employee of any branch of the Federal government. 11 CFR 110.12(b)(1)

As Foreign Service officers and Foreign Service Information officers are appointed[1] to a position of responsibility or authority in the United States Government, their status under 441i is clear. The fact that these officers are appointed from "class to class" and generally on a "routine" basis with respect to Senate consideration is immaterial given their obvious relationship and functions with the Federal Government. Those former hostages who are employees of the Departments of State and Defense, or any of their component agencies, are likewise appointed to positions of responsibility or authority in the United States Government.

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[1] Foreign Service Officers are appointed under 22 U.S.C. 861 and Foreign Service Information Officers are appointed under 22 U.S.C. 1226.

Those former hostages who are members of the uniformed military services are also officers or employees of the Government and thus subject to the limits in 2 U.S.C. 441i. Commission regulations indicate that a person, other than one appointed or elected, may be covered if that person receives a salary or compensation from the United States Government. Members of the military are, by definition, either "appointed or enlisted in, or conscripted into, a uniformed service;" see 37 U.S.C. 101(23). They receive compensation based on their grade and status in the military service. It is well settled that their pay is given in consideration of and as compensation for their personal services while in the military service. Sherburne's Case, 16 Ct. Cls. 491. The pay levels for military personnel are established by Federal statute. See 37 U.S. 101, 201-205. Thus it is clear that they receive compensation from the Government.

The question presented by the request is application of the $25,000 annual ceiling to honoraria paid on an installment basis in a year (or years) following the year when the appearance occurred, or when the article was written.

The $25,000 annual honoraria limit is set forth in 2 U.S.C. 441i(a)(2). For purposes of this limit "an honorarium shall be treated as accepted only in the year in which that honorarium is received." 2 U.S.C. 441i(d). This subsection was added as an amendment to 441i on December 20, 1977. When the amendment was offered on the Senate floor, Senator Dole (the principal sponsor) explained:

> The third part of my amendment would overturn another FEC interpretation [AO 1975-89][2] which says that an honorarium counts against the limit during the year in which the speech was actually given, rather than during the year in which the honorarium is received. The amendment changes that and says that it would count against the year in which the honorarium is actually received.
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> ... [T]he FEC insists in an advisory opinion, that it must count against the year in which the speech was given. Basically, what the FEC has done is put us on an accrual basis for reporting honorarium rather than a cash basis which would make more sense. Since most of us pay our taxes on a cash basis, it makes sense that we should account for honoraria on that basis as well.
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> ... This amendment takes care of a relatively narrow problem - it does not increase the amount of honoraria which an employee or official can earn and keep.
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> Cong. Rec. S 18,993 (daily ed. Nov. 4, 1977) (remarks of Sen. Dole).

Senator Dole's amendment was adopted by his colleagues and enacted. [3]

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[2] This opinion was relied on and followed in Advisory Opinion 1977-46, as well as in several other advisory opinions. The Commission held that as a result of the 1977 amendment AO 1977-46 was superceded. See Advisory Opinion 1978-73, copy enclosed.

[3] Pub. L. No. 95-216; 502, December 20, 1977. The amendments were made applicable for any honorarium received after December 31, 1976.

Thus, the Congressional intent underlying this part of the 1977 amendment was to modify the Commission's view of when honoraria are accepted and to favor the cash receipt approach. Commission regulations, as revised after the 1977 amendment, incorporate the general rule of acceptance in the year of receipt, 11 CFR 110.12(a)(3), but also retain a definition of "accepted" which means, in pertinent part:

> that there has been actual or constructive receipt of the honorarium and that the federal officeholder or employee exercises dominion or control over it and determines its subsequent use. 11 CFR 110.12(b)(5).

This definition indicates that the Commission views the 1977 amendment and its history as supporting the general proposition that acceptance of honoraria occurs when there is actual receipt. The regulation also recognizes that there may be circumstances where honoraria are constructively received. In this respect the regulation is similar to the Internal Revenue Service rule on constructive receipt of income [4] and accords with Senator Dole's view of the effect of the 1977 amendment. In explaining why his amendment was being offered on a social security financing bill, Senator Dole noted that the amendment would "bring[s] the treatment of honoraria for Federal election law purposes into conformity with the income tax treatment of honorarium payments." Id. S18, 993.

Accordingly, the Commission concludes that 2 U.S.C. 441i permits an agreement between a Federal employee and the payor of an honorarium which agreement defers an honorarium payment until a year (or years) after the honorarium event (speech, appearance or article). A payment pursuant to the agreement will be subject to the $25,000 limit for the year when the payment is received by the employee.

In reaching this conclusion the Commission points out that circumstances may arise where the receipt of the honorarium would occur in a year prior to the year of payment specified in the agreement. For example, an honorarium may be considered as received when the employee assigns rights under the agreement to a creditor who releases the employee from the debt in exchange for the assignment. Receipt may also occur where the employee uses the payment agreement as collateral or security for a loan which is obtained in a year before the honorarium is payable under the agreement. There may be other circumstances where the agreement is used to secure a present financial benefit with the result that the honorarium is considered as received under 441i when the benefit is obtained.

In summary, the Commission has concluded that receipt of an honorarium for purposes of

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[4] The general rule is set forth at 26 CFR 1.451-2(a) which provides in part:

> Income although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions.

2 U.S.C. 441i may be deferred by agreement to a year which follows the honorarium event; however, the use of such an agreement to obtain a financial benefit prior to the year of payment under the agreement may result in the receipt of the honorarium when the benefit is obtained.

The Commission notes that the $2,000 per honorarium limit applies to each honorarium transaction and may not be avoided or deferred in any circumstances. In particular fact situations there may be issues of whether a series of related appearances are actually a single appearance, or whether an article published in several installments is one or many articles. It is beyond the scope of this opinion to address those issues since under 2 U.S.C. 437f and 11 CFR 112.1 an advisory opinion request must present a specific transaction or activity that includes a complete description of all relevant facts.

The Commission expresses no opinion as to any tax ramifications in the situation presented since those issues are outside its jurisdiction. For the same reason the Commission may not state any views with respect to possible application of other Federal statutes or regulations. See, for example, 5 U.S.C. app. 210 and 18 U.S.C. 209.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely yours,

(signed)

John Warren McGarry
Chairman for the
Federal Election Commission

Enclosures (AO 1978-73, 1977-46 and 1975-89)