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The Supreme Court's Indecent Proposal: Repealing the Honoraria Prohibition of the Ethics in Government Act of 1978

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NOTE

THE SUPREME COURT'S INDECENT PROPOSAL:
REPEALING THE HONORARIA PROHIBITION
OF THE ETHICS IN GOVERNMENT
ACT OF 1978

Heather M. Clark†

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[T]his disparity between the salaries of the judicial and legal professions cannot continue indefinitely without compromising the morale of the federal judiciary and eventually its quality.

—Chief Justice William H. Rehnquist¹

The disparity between the salaries of the judicial and legal profession cannot continue without compromising the morale of the federal judiciary and eventually its quality.

—Chief Justice William H. Rehnquist²

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¹ William H. Rehnquist, *The 1996 Year-End Report on the Federal Judiciary*, THIRD BRANCH (Admin. Office of the U.S. Courts Office of Pub. Affairs), Jan. 1997, at 1, 2 [hereinafter *1996 Report*].

² Jarrett Murphy, *Federal Judges Want Speaking Fees*, CBS News.com, at <http://www.cbsnews.com/stories/2000/09/22/national/main235734.html> (Sept. 22, 2000). Though three years had passed, Chief Justice Rehnquist's stated position on perceived

Of the inadequacy of judicial pay I have spoken again and again, without much result. . . . I can only refer back to what I have previously said on this subject.

—Chief Justice William H. Rehnquist³

INTRODUCTION

Allegations of judicial bribery or perceived judicial impropriety instantly attract public attention.⁴ As final arbiters of the law, our judges are entrusted by the Constitution and bound by centuries of tradition to ensure that every citizen receives a fair and impartial trial,⁵ regardless of the resources at her or his disposal. Unlike the lawyers who practice before them, judges are necessarily public servants, paid from the collective purse to serve a deep and common social good. It is no wonder, then, that there is a public outcry whenever judicial impropriety is exposed.

Responding to longstanding concerns that well-funded private interests had sought to exert improper influence over government officials, Congress enacted a law that broadly prohibited federal

salary inequities between the private and public sectors remained virtually unchanged. Chief Justice Rehnquist's letter of April 27, 2000, to Senator Mitch McConnell was purportedly private until September 2000, at which point Senator McConnell released the letter to the public. See Tony Mauro & Sam Loewenberg, *Who Really Wants to Lift Ban on Fees?*, LEGAL TIMES, Sept. 18, 2000, at 1. The Chief Justice's letter either suggested or offered support for a proposal to repeal the statutory ban on honoraria, discussed *infra*. See *id.*

³ William H. Rehnquist, *The 2001 Year-End Report on the Federal Judiciary*, THIRD BRANCH (Admin. Office of the U.S. Courts Office of Pub. Affairs), Jan. 2002, at 1, 2 [hereinafter *2001 Report*].

⁴ See *infra* note 43 and accompanying text; see also Russ Feingold, *Passing Judgment on Honoraria*, CHI. TRIB., Sept. 27, 2000, at 21 (arguing that the increase of money in politics has weakened ethical standards, and that prohibition on honoraria is necessary to protect the integrity of the federal judiciary); *Judges for Hire? Congress Should Not Repeal Ban on Outside Speaking Fees for Jurists*, POST-STANDARD (Syracuse, N.Y.), Sept. 21, 2000, at A14 (arguing that the mere appearance of impropriety is damaging to the justice system); Dan Morgan, *Bill Would End Ban on Honoraria for Judges*, WASH. POST, Sept. 14, 2000, at A1 (quoting senior vice president of Common Cause, Meredith McGehee, as saying that the proposed repeal of the 1989 ban on speaking fees for judges serving a lifetime appointment is "[t]otally unacceptable and outrageous"); *'Outside Jobs' Inappropriate for Judges, Including Scalia*, PANTAGRAPH BLOOMINGTON, Oct. 9, 2000, at A10 (asserting that judges should not be able to supplement their income at will and that "[t]he chances for actual or perceived conflicts of interest are glaringly obvious to Mr. and Mrs. Average American. They should be all the more obvious to experienced federal judges."). The purchase of influence is troubling to the public regardless of the branch of government involved. In discussing Maryland's Public Ethics Law, William Somerville recently wrote:

If a person on the street were asked to describe a problem in legislative ethics, the chances are strong that the first thought would be of an influential lobbyist bestowing valuable gifts on legislators to win votes. It seems that no other ethics issue resonates as clearly with constituents as the thought of influence bought with lavish meals, free trips, or cash honoraria for a brief speech.

William G. Somerville, *Ethics and the Citizen Legislature*, MD. B.J., Sept./Oct. 2000, at 22, 27.

⁵ See, e.g., U.S. CONST. amends. V–VI.

employees from accepting any form of non-governmental compensation (also known as honoraria) from private benefactors for delivering speeches, writing articles, or performing other non-work-related tasks.⁶ The Ethics Reform Act of 1989, a comprehensive amendment of the Ethics in Government Act of 1978,⁷ provided that “[a]n individual may not receive any honorarium while that individual is a Member, officer or employee” of the federal government.⁸ The Act applies to executive, legislative, and judicial officers and employees,⁹ including federal judges under the rubric of “judicial officers,”¹⁰ and their staffs within the definition of “judicial employees.”¹¹

However, recent events indicate that influential members of the Supreme Court would prefer to eliminate the ban as it applies to the judiciary. On September 18, 2000, Tony Mauro and Sam Loewenberg first reported on what Washington insiders had dubbed the “Keep Scalia on the Court” bill—previously confidential contacts between members of the Supreme Court and Senate Republican leaders that had culminated in congressional action to overturn the honoraria prohibition for federal judges.¹² Senate Republicans had surreptitiously inserted a provision into a massive 2001 appropriations bill that would quietly repeal the ban.¹³ Though the authors never alleged that Justice Scalia had personally contacted a member of Congress, they reported that “[f]or Scalia, the honoraria ban was one of several factors that caused him to muse aloud from time to time about leaving the Court. . . . Scalia’s frustration, as much as anything else, was the trigger for inclusion [of the] provision lifting the ban on honoraria for the judiciary.”¹⁴

⁶ See Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, 1760 (codified as amended at 5 U.S.C. app. § 501(b) (2000)).

⁷ See Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 5 U.S.C. app. §§ 101–505 (2000)).

⁸ 5 U.S.C. app. § 501(b). “The term ‘honorarium’ means a payment of money or any thing of value for an appearance, speech or article . . . by a Member, officer or employee” *Id.* app. § 505(3).

⁹ See *id.* app. § 101(f).

¹⁰ Under 5 U.S.C. app. § 109(10), “judicial officer” refers to “the Chief Justice of the United States, the Associate Justices of the Supreme Court, and the judges of the United States courts of appeals, United States district courts . . . [and other courts], the judges of which are entitled to hold office during good behavior.” *Id.* app. § 109(10).

¹¹ Under 5 U.S.C. app. § 109(8), “judicial employee” refers to:

[A]ny employee of the judicial branch of the Government, of the United States Sentencing Commission, of the Tax Court, of the Court of Federal Claims, of the Court of Appeals for Veterans Claims, or of the United States Court of Appeals for the Armed Forces, who is not a judicial officer and who is authorized to perform adjudicatory functions with respect to proceedings in the judicial branch

Id. app. § 109(8).

¹² See Mauro & Loewenberg, *supra* note 2.

¹³ See H.R. 4690, 106th Cong. § 305 (2000); Morgan, *supra* note 4.

¹⁴ Mauro & Loewenberg, *supra* note 2.

Mauro and Loewenberg also reported that Senator Mitch McConnell had received a private letter from Chief Justice Rehnquist in support of rescinding the ban, a letter which McConnell released to the public months later.¹⁵ The letter led some people to conclude that the Chief Justice was the impetus behind the repeal provision.¹⁶ Chief Justice Rehnquist responded to the accusation by explaining that "Senator McConnell's staff contacted my office regarding legislation the Senator planned to introduce to lift or ease the ban on honoraria for federal judges . . . [and] I responded to Senator McConnell's request by my letter of April 27."¹⁷ Though the sequence of contacts between Senator McConnell and Chief Justice Rehnquist is debatable, the Chief Justice's implicit support for such a provision was otherwise documented in his 2000 Year-End Report on the Federal Judiciary.¹⁸

According to reports, Senator McConnell directed the Senate Republicans' effort. McConnell asked Senator Judd Gregg to introduce the honoraria provision in the Senate Appropriations Subcommittee and then co-sponsored the provision.¹⁹ Passed by the Senate Appropriations Committee on July 18, 2000,²⁰ the provision was discovered and publicized by the *Washington Post* in September,²¹ immediately leading to a variety of scathing editorials in newspapers across the country.²² By October, the Senate Select Committee on Ethics had removed the provision before passing the 2001 appropriations bill.²³ The sudden, strong opposition from members of the Committee on Ethics appeared to have resulted from public disclosure of the concealed provision.²⁴

Though the immediate threat of repeal no longer looms ominously overhead, the provision to lift the honoraria ban received strong backing from leading Senate Republicans,²⁵ thereby increasing the likelihood that legislators might sneak a similar provision in through another back door. Indeed, there is at least one report that Senate Republicans are "continuing to insist that the repeal be retained in the final version of next year's appropriations bill for the

¹⁵ *Id.*

¹⁶ See Morgan, *supra* note 4. According to Morgan, Chief Justice Rehnquist requested in April 2000 that Congress repeal the honoraria prohibition. *Id.*

¹⁷ Mauro & Loewenberg, *supra* note 2.

¹⁸ See William H. Rehnquist, *The 2000 Year-End Report on the Federal Judiciary*, THIRD BRANCH (Admin. Office of the U.S. Courts Office of Pub. Affairs), Jan. 2001, at 1, 1-4 [hereinafter *2000 Report*].

¹⁹ See Mauro & Loewenberg, *supra* note 2.

²⁰ See H.R. 4690, 106th Cong. § 305 (2000).

²¹ See Morgan, *supra* note 4.

²² See, e.g., sources cited *supra* note 4.

²³ See Eric Pianin, *Ban on Honoraria for Judges Stays Intact*, WASH. POST, Oct. 4, 2000, at A4.

²⁴ *Id.*

²⁵ See Morgan, *supra* note 4.

Commerce, Justice and State Departments and the judiciary.”²⁶ Moreover, Chief Justice Rehnquist’s 2000 and 2001 Year-End Reports on the Judiciary have singled out salary concerns as the single most important problem facing the federal judiciary.²⁷ Thus, there remains a considerable threat that Congress will repeal or perhaps dramatically alter the honoraria prohibition in the near future, as a less costly alternative to raising the salaries of federal judges to correspond with rising private sector salaries and inflation. Moreover, if members of Congress attempt to repeal the honoraria prohibition yet again, they will not need to contact Supreme Court justices in order to ascertain their opinions on the matter.

This Note argues, however, that although there is a lower direct cost to the public in permitting federal judges to receive honoraria to supplement their income, the indirect price—the integrity and independence of the judicial branch—will be unacceptably high. The insulation of the judicial branch from private influence plays an important legitimizing function in our representative democracy. Allowing private influence in the form of honoraria payments will compromise the independence of the judiciary by opening the door to political influence on judicial decisionmaking, or in the least will lead to the perception that such influence exists. Accordingly, this Note assesses the impact of a repeal of the honoraria prohibition of the Ethics Reform Act of 1989 (Reform Act) upon the judicial branch. Part I briefly explores the recent history of judicial impropriety in the form of bribery. Part II examines the germane history and provisions of the Reform Act as currently codified. Part III addresses pertinent case law regarding the repeal of the ban as it applies to other government employees and examines the conflicts that a Supreme Court-supported honoraria ban repeal has created with the *Code of Conduct for United States Judges*. Finally, Part IV argues that the ban should not be repealed as it applies to federal judges, and analyzes the implications of the repeal for the future legitimacy of the judicial branch.

I

JUDICIAL IMPROPRIETY—THE HONORARIA BAN’S LINK WITH THE PAST

It is generally agreed that offering, giving, receiving, or soliciting something of value for the purpose of influencing a public or legal

²⁶ Dan Morgan, *Opposition to Ending Honoraria Ban Grows*, WASH. POST, Sept. 25, 2000, at A19.

²⁷ See *2000 Report*, *supra* note 18, at 1–4; *2001 Report*, *supra* note 3, at 2–3.

official in the discharge of her duties is bribery²⁸ and is both unethical and illegal. It is far less clear, however, whether bribery has occurred when a judge receives payment in exchange for an activity such as speaking or writing. Nevertheless, the transaction retains a similar unethical taint; a judge is taking money from a person, or a relative of a person, who may have business before her court. Indeed, some might argue that permitting private, third parties to pay judges money in exchange for appearing, speaking, or writing at their behest is tantamount to bribery and is conveniently disguised by the euphemism "honorarium."

One of the primary reasons behind the enactment of the honoraria ban was the distasteful similarity between honoraria payments to judges and the crime of bribery.²⁹ Furthermore, high-profile cases of judicial bribery were under consideration when Congress drafted the law. In the mid-to-late 1980s, two high-profile trials of federal district court judges on bribery and perjury charges heightened public awareness of the potential for judicial impropriety. The subsequent House impeachments and Senate convictions of both judges further scarred the federal judiciary.

One of those notorious cases was *United States v. Nixon*.³⁰ After nearly eighteen years as a federal district court judge, and in the words of the Fifth Circuit Court of Appeals, "dissatisfied with his modest judicial salary," Walter Nixon sought to purchase an interest in three oil well properties from a successful investor, Wiley Fairchild, whose son was prosecuted for participation in a conspiracy to import marijuana.³¹ Judge Nixon was accused of arranging lenient treatment for Fairchild's son in the form of "passing his case to the file," a procedure that usually results in termination of a case.³² The high-profile prosecution of Judge Nixon on bribery and perjury charges wound its way through the courts for six years, as Nixon was accused of accepting a lucrative investment in exchange for "fixing the system" for a benefactor's son. In the end, Nixon was convicted on two counts of perjury, but acquitted on the bribery charge.³³ Despite the acquittal, however, the case left an indelible mark on the public. Moreover, Nixon subsequently was impeached by the U.S. House of Representa-

²⁸ See BLACK'S LAW DICTIONARY 191 (6th ed. 1990). For a theoretical discussion of the differences between judicial bribery and extortion, see Ian Ayres, *The Twin Faces of Judicial Corruption: Extortion and Bribery*, 74 DENV. U. L. REV. 1231 (1997).

²⁹ One Congressman even equated receipt of honoraria with "legalized bribery." 135 CONG. REC. 29,493 (1989) (statement of Rep. Smith).

³⁰ 816 F.2d 1022 (5th Cir. 1987).

³¹ *Id.* at 1023-24.

³² *Id.* at 1024-26.

³³ *Id.* at 1025.

tives in May 1989,³⁴ convicted, and thereby removed from the bench by the Senate in November 1989.³⁵ These highly visible proceedings, along with the simultaneous bribery, perjury, and impeachment proceedings against U.S. District Court Judge Alcee Hastings, helped sear the concept of federal judicial bribery into minds that never before had considered such turpitude possible in federal courts.

The case against Judge Hastings was equally serious. Indicted by a grand jury in 1981, Judge Hastings was accused of conspiring to secure a \$150,000 bribe in exchange for sentencing leniency for two Miami mobsters.³⁶ Acquitted by a jury in a criminal trial, Judge Hastings was later impeached by the U.S. House of Representatives for fabricating evidence to win his acquittal, perjuring himself during the trial, and for the original underlying bribery-conspiracy charge.³⁷ Although the Senate convicted Judge Hastings of perjury and conspiracy to accept a bribe, the bribery-conspiracy charge later was overturned by a district court.³⁸ The conviction was reinstated on remand, however, in light of *Nixon*, which held that the Impeachment Trial Clause rendered the Senate conviction nonjusticiable.³⁹ Unlike Nixon, whose name was forever tarnished by his trial and impeachment, Hastings improbably won election to the House of Representatives for his Florida congressional district while his impeachment proceedings were still underway.⁴⁰ Representative Hastings later became one of President Clinton's most passionate defenders during the 1998 presidential impeachment proceedings,⁴¹ an irony which drew much pub-

³⁴ 135 CONG. REC. H1811 (daily ed. May 10, 1989).

³⁵ 135 CONG. REC. 27,104 (1989).

³⁶ Kirk Semple, *Crime and Nourishment: In Miami Breaking Bread Has Become an Intricate Part of Breaking the Law*, MIAMI NEW TIMES, Apr. 11, 1996, <http://www.miaminewtimes.com/issues/1996-04-11/feature3.html/1/index.html>.

³⁷ 135 CONG. REC. 25,328-35 (1989).

³⁸ See *Hastings v. United States*, 802 F. Supp. 490, 505 (D.D.C. 1992).

³⁹ *Hastings v. United States*, 837 F. Supp. 3, 5 (D.D.C. 1993) (mem.); *Nixon v. United States*, 506 U.S. 224, 226 (1993).

⁴⁰ See Kenneth J. Cooper, *Hastings Joins His Former Accusers: Ousted Judge Takes House Seat Among Those Who Impeached Him*, WASH. POST, Jan. 6, 1993, at A10; African American Publications, *Alcee Hastings*, at <http://www.africanpubs.com/apps/bios/0014HastingsAlcee.asp> (last visited May 10, 2002).

⁴¹ See William E. Gibson, *For Alcee Hastings, History Comes Full Circle*, SUN-SENTINEL (Fort Lauderdale, Fla.), Dec. 18, 1998, at 20A, 1998 WL 23473674; William E. Gibson, *Ousted Judge to Make History: Alcee Hastings, Now a Lawmaker, Will Be the First Impeached Official to Vote on Impeaching a President*, ORLANDO SENTINEL, Dec. 18, 1998, at A17; Tim Nickens et al., *Florida on Clinton: Enough Already*, ST. PETERSBURG TIMES, Oct. 11, 1998, at 1A.

lic attention⁴² and further reinforced public concern over the corruption of government officials.⁴³

II

CHECKING THE EXCESSES OF GOVERNMENT OFFICIALS: THE ETHICS IN GOVERNMENT ACT OF 1978 AND THE ETHICS REFORM ACT OF 1989

A. The Ethics in Government Act of 1978

As an initial step in addressing public concerns over perceptions of governmental ethical impropriety, Congress passed the Ethics in Government Act (EIGA) in 1978 to codify a heightened level of ethics standards applicable to each of the three branches of the federal government.⁴⁴ Largely a reaction to the Watergate scandal,⁴⁵ the goal of

⁴² See, e.g., Bill Adair & Katherine Pflieger, *Like Committee, Florida's Delegates Split Down Party Lines*, ST. PETERSBURG TIMES, Dec. 12, 1998, at 7A; Greg McDonald, *Some Republicans Mull Impeachment: GOP Leadership Says It's Much Too Soon to Consider Seriously*, HOUSTON CHRON., Jan. 30, 1998, at A12; sources cited *supra* note 41.

⁴³ The *Hastings* and *Nixon* cases are not the only cases involving judges that have reached the public's awareness. In October 1996, two state superior court judges and an attorney were convicted of judicial corruption when the attorney, Patrick Frega, gave the judges "\$25,000 in gifts in exchange for favored treatment of his cases and special access to the judges." Alex Roth, *Judgment Day Looms in Judicial Bribe Case*, SAN DIEGO UNION-TRIB., June 11, 2000, at B1. The prosecutors, arguing that the original sentences should not be reduced, said, "At this stage of these proceedings, there can be no doubt that defendants Frega, Adams and Malkus violated the public trust and corrupted both themselves and the Superior Court of San Diego County." *Id.* By contrast, Malkus' attorney argued that "the evidence established only the appearance of impropriety." Valerie Alvord, *Ex-Judges, Lawyer Appeal in Gifts-for-Favors Case*, SAN DIEGO UNION-TRIB., Jan. 9, 1998, at B3. Frega's lawyer argued that although gifts were given and received, there was no expectation that a certain gift would affect a particular case's outcome. The lawyer further argued that "[a] gift (given with) generalized expectation of ultimate benefit is not a bribe, and a gift motivated out of friendship to promote good will or a matter unrelated to the official sphere is not a criminal act." *Id.* The ease with which lavish gifts, as in the above case, are explained away as innocent gifts is precisely why honoraria payments are damaging to the legitimacy of the judicial branch. The bribery scandal was described as "the worst in the history of the San Diego bench," and resulted in part from the plea bargained testimony of a third judge on similar bribery charges. See Alex Roth, *Ex-Judge, Lawyer Cut Prison Time*, SAN DIEGO UNION-TRIB., Nov. 29, 2001, at A1. The judges were tried with the attorney who allegedly bribed them, and were convicted on mail-fraud and RICO conspiracy charges; the conspiracy charges were recently reversed on appeal on grounds of instructional error. See *United States v. Frega*, 179 F.3d 793 (9th Cir. 1999) (upholding mail fraud and RICO charge against lawyer Frega and reversing RICO conspiracy charges against all three defendants).

⁴⁴ See Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 5 U.S.C. app. §§ 101-505 (2000)).

⁴⁵ The EIGA was "a direct outgrowth of the Watergate scandals' and of 'the failure of the then-Attorney General to prosecute those responsible for the "cover-up" of the initial burglary.'" Stuart Taylor, Jr., *U.S. Judge Orders a Special Inquiry into '80 Campaign*, N.Y. TIMES, May 15, 1984, at A1 (quoting U.S. District Judge Harold H. Greene); see also S. REP. NO. 95-170, at 21 (1978), reprinted in 1978 U.S.C.C.A.N. 4216, 4237 (citing as a reason for public financial disclosure that "public confidence in all three branches of the Federal government has been seriously eroded by the exposure, principally in the course of the Watergate investigation, of corruption on the part of few high-level government officials"

the seven-part EIGA was to “implement certain reforms in the operation of the Federal Government and to preserve and promote the integrity of public officials and institutions . . . of the Federal Government and to invigorate the Constitutional separation of powers between the three branches of Government.”⁴⁶

Three of the EIGA’s seven sections created independent checks on the potential for unethical behavior of government employees.⁴⁷ Titles I–III of the EIGA required public disclosure of the financial interests of certain employees in the three branches of the federal government.⁴⁸ Title IV established an Office of Government Ethics within the Office of Personnel Management.⁴⁹ Title V established restrictions on the post-employment activities of officers and employees of the executive branch of the federal government.⁵⁰ Title VI authorized the U.S. Court of Appeals for the District of Columbia to appoint, under certain circumstances, a special prosecutor, and Title VII established the Office of Senate Legal Counsel.⁵¹

As originally drafted, the EIGA did not prohibit employees of any branch of the federal government from receiving fees for speaking engagements, but it did require full disclosure of any honoraria received in the form of annual financial disclosure statements.⁵² Reports filed by members of the three branches of the federal government were to be made available to the public within fifteen days of their disclosure.⁵³ Specifically, the EIGA required the President, the Vice President, members of Congress, justices and judges of U.S. district courts, and other senior-level government employees to file financial disclosure statements.⁵⁴

Titles I–III of the EIGA additionally provided for the sanction of noncomplying federal government employees.⁵⁵ The EIGA established civil penalties for individuals who knowingly and willfully falsified or failed to file reports.⁵⁶ Additionally, the Act provided for the possibility that “systematic random audits be conducted of financial

and further stating that “[p]ublic financial disclosure was seen as an important step to take to help restore public confidence in the integrity . . . [of] the government as a whole.”); Thomas D. Morgan, *The Quest for Equality in Regulating the Behavior of Government Officials: The Case of Extrajudicial Compensation*, 58 GEO. WASH. L. REV. 488, 492 (1990) (arguing that the Watergate scandal created an environment conducive to ethics regulation).

⁴⁶ S. REP. NO. 95-170, at 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4216, 4217.

⁴⁷ 5 U.S.C. app. §§ 401–406, 601–604, 701–716 (2000).

⁴⁸ *Id.* app. §§ 301–309.

⁴⁹ *Id.* app. §§ 401–406.

⁵⁰ *Id.* app. §§ 501–503.

⁵¹ *Id.* app. §§ 601–604, 701–716.

⁵² *Id.* app. §§ 101–103, 201–203, 301–303.

⁵³ *Id.* app. §§ 104(a), 205(b), 305(b).

⁵⁴ *Id.* app. §§ 101, 201, 301.

⁵⁵ *Id.* app. §§ 106, 204, 304.

⁵⁶ *Id.* app. §§ 106, 204(a), 304(a).

disclosure reports"⁵⁷ in order to ensure that the statute was "being carried out effectively and whether timely and accurate reports [were] being filed by individuals subject to this title."⁵⁸

B. The Ethics Reform Act of 1989

The Ethics Reform Act (Reform Act) made important changes to the existing Ethics in Government Act of 1978.⁵⁹ The stated purpose of the new legislation was "to amend the Rules of the House of Representatives and the Ethics in Government Act of 1978 to provide for Government-wide ethics reform, and for other purposes."⁶⁰ Perhaps most significantly, the Reform Act followed on the heels of enormous income increases that members of Congress received in the form of honoraria payments. According to one report, "[M]embers of Congress received \$9.1 million in honoraria fees in 1988."⁶¹ The most impressive outcome of the Reform Act was a limitation on receipt of gifts by federal employees while holding office.⁶² The Reform Act left the EIGA largely intact; Title II of the Reform Act, for example, closely parallels the first three titles of the EIGA.⁶³ Indeed, the reporting requirements are identical—every financial disclosure must include "the source, date, and amount of honoraria from any source."⁶⁴ While some commentators have criticized the addition of the gift limitation—the honoraria prohibition—for its over-inclusion of all federal

⁵⁷ *Id.* app. § 109(b).

⁵⁸ *Id.* app. § 109(a).

⁵⁹ Compare Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, with Ethics of Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824.

⁶⁰ 103 Stat. at 1716.

⁶¹ Michael H. Chang, *Protecting the Appearance of Propriety: The Policies Underlying the One-Year Ban on Post-Congressional Lobbying Employment*, KAN. J.L. & PUB. POL'Y, Winter 1996, at 121, 127 n.31. Chang argues that receipt of honoraria

contribute[s] to the appearance of impropriety in Congress. Special interests have legally given millions of dollars each year in honoraria fees and political action committee (PAC) contributions to obtain access and influence on the Hill. . . . Sixty Senators and eighty-one Representatives in the 1989 Congress have pocketed more than \$100,000 each during the period from 1983-88.

Id. (citing Press Release, Common Cause, Total House and Senate Honoraria (Aug. 1989)).

⁶² According to one scholar, "[R]egulations governing gifts are among the ethics code's most important provisions. They address a fundamental and abiding symbol of government gone astray. The use of public office for private gain undermines public confidence that official action fairly reflects the outcome of democratic processes." Seth D. Zinman, *Judging Gift Rules by Their Wrappings—Towards a Clearer Articulation of Federal Employee Gift-Acceptance Rules*, 44 CATH. U. L. REV. 141, 159 (1994). Zinman's article contains a broad discussion of gift regulations.

⁶³ Compare § 202, 103 Stat. at 1724-44, with §§ 101-109, 201-211, 301-309, 92 Stat. at 1824-61.

⁶⁴ Compare § 102(a)(1)(A), 103 Stat. at 1727, with §§ 102(a)(1)(A), 202(a)(1)(A), 302(a)(1)(A), 92 Stat. at 1825, 1837-38, 1851.

employees,⁶⁵ few have commented on the import of the prohibition for the federal judiciary.

The most significant difference between the Reform Act and the EIGA was the transformation of Title V of the EIGA, which originally dealt with restrictions on post-employment activities of executive branch employees. Title VI of the Reform Act, entitled "Limitations on Outside Employment and Elimination of Honoraria,"⁶⁶ modified Title V of the EIGA by adding several limitations on earned income applicable to the three branches of the federal government, including a prohibition on the receipt of honoraria by any member, officer, or employee of the federal government.⁶⁷ Although such persons cannot personally receive honoraria, the Reform Act allows a potential recipient to donate to charity any money—below a \$2,000 cap—that otherwise would have been paid to the employee.⁶⁸

Congress passed the Ethics Reform Act in 1989 after assessing the results of an extensive study by an intergovernmental task force.⁶⁹ In his capacity as a member of the House of Representatives, Vic Fazio served on the task force and recalled that at the time of enactment, the task force "couldn't justify the implication if not the reality that [honoraria] were influencing decisions."⁷⁰ Prior to the enactment of the Reform Act, judges and other government officials were receiving tens of thousands of dollars a year from special interest groups in exchange for appearances and speeches.⁷¹

⁶⁵ The majority of the academic debate has centered on the question of whether financial restrictions infringe upon free speech rights. See Ivy B. Cubell, Note, *Banning the Sale of Witness Testimony: A First Amendment Challenge to California Penal Code Section 132.5*, 75 B.U. L. REV. 1135, 1150 (1995) (arguing that a statute "is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers based upon the content of their speech"). Some have argued that, at least with respect to low- and mid-level prospective federal employees, surrendering First Amendment rights may be seen as a condition of employment because of the Reform Act's broad honoraria prohibition. See Robert S. Collins, *Ethics and the First Amendment: The Applicability of the Honorarium Ban of the Ethics Reform Act of 1989 to the Executive Branch*, 62 GEO. WASH. L. REV. 888, 919 (1994). The courts seem to be in agreement with this point, at least as it relates to the off-duty activities of lower-level federal employees. See *infra* Part III.B.

⁶⁶ See § 601, 103 Stat. at 1760–62.

⁶⁷ *Id.*

⁶⁸ Title VI of the Reform Act provides that

[a]ny 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

Id.

⁶⁹ See Morgan, *supra* note 26.

⁷⁰ *Id.*

⁷¹ *Id.*; see also Mauro & Loewenberg, *supra* note 2 (noting that Justice Scalia received \$37,000 in honoraria in 1989).

While many federal officials considered their salaries to be unnecessarily inadequate, the Reform Act largely evoked the third-party supplementation of salaries.⁷² Federal salaries, however, would continue to be examined and adjusted where appropriate. In 1967, Congress established a special working group, the Quadrennial Commission, to deal with executive, legislative, and judicial salaries.⁷³ The principal function of the Commission, which meets every four years, is to recommend appropriate compensation levels for the top positions in each branch of the federal government.⁷⁴ The Quadrennial Commission's 1989 report noted: "We have found that present salary levels stated in constant dollars are approximately 35% less than the salary levels fixed for the same positions in 1969. Thus, our top federal officials have seen their salaries severely eroded by inflation."⁷⁵ The report additionally found that "because their salaries are so inadequate, many members of Congress are supplementing their official compensation by accepting substantial amounts of 'honoraria' for meeting with interest groups who desire to influence their votes."⁷⁶ Justice Stevens stated that "[t]he Report of the 1989 Quadrennial Commission . . . was instrumental in leading to the enactment of the Ethics Reform Act of 1989."⁷⁷

During the first Bush Administration, the President's Commission on Federal Ethics Law Reform concurred with the Quadrennial Commission's findings that a salary increase was in order, and concluded that federal judges, members of Congress, and other senior government officials should be prohibited from making speeches or appearances paid for by interest groups.⁷⁸ It was later explained that "panel member and former Attorney Gen[eral] Griffin Bell summed up public concern about the source of the big honoraria checks being collected by judges and other federal officials: 'People wonder who's paying all these honoraria.'"⁷⁹ The public was becoming suspicious

⁷² See *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 457-58 (1995); FAIRNESS FOR OUR PUBLIC SERVANTS: REPORT OF THE 1989 COMMISSION ON EXECUTIVE, LEGISLATIVE AND JUDICIAL SALARIES 1-4 (1988) [hereinafter FAIRNESS FOR OUR PUBLIC SERVANTS]; David Broder, *Fiasco Leaves Wright Vulnerable to Coup*, ST. LOUIS POST-DISPATCH, Feb. 17, 1989, at 3B; Phil Gailey, *Bush Plan on Ethics Sidesteps Honoraria*, ST. PETERSBURG TIMES, Apr. 13, 1989, at 1A; Colman McCarthy, *The Pay Raise Doesn't Play*, WASH. POST, Jan. 8, 1989, at F2.

⁷³ Federal Salary Act of 1967, Pub. L. No. 90-206, § 225, 81 Stat. 613, 642 (codified at 2 U.S.C. §§ 351-364 (2000)).

⁷⁴ 2 U.S.C. § 356.

⁷⁵ FAIRNESS FOR OUR PUBLIC SERVANTS, *supra* note 72, at (v).

⁷⁶ *Id.* at (vi).

⁷⁷ *Nat'l Treasury Employees Union*, 513 U.S. at 457 (footnote omitted).

⁷⁸ See TO SERVE WITH HONOR: REPORT OF THE PRESIDENT'S COMMISSION ON FEDERAL ETHICS LAW REFORM 36 (1989); Feingold, *supra* note 4.

⁷⁹ Feingold, *supra* note 4.

that those who paid honoraria might also influence judges in the execution of their judicial duties.⁸⁰

Although Congress did not adopt the Commission's recommendations in their original form, the recommendations did figure prominently in the Ethics Reform Act of 1989. Section 703 of the Reform Act provided a twenty-five percent sizeable one-time salary increase for members of Congress, federal judges, and for high-ranking executive branch employees above a certain salary grade.⁸¹ Section 601(a) of the Reform Act amended the Ethics in Government Act of 1978 by creating the "Honoraria Prohibition," which firmly states that "[a]n individual may not receive any honorarium while that individual is a Member, officer or employee."⁸² However, under the current law, federal judges may earn up to \$21,195 per year in outside income, which may come solely from teaching activities.⁸³

The honoraria prohibition was accompanied by a substantial salary increase for members of each branch, which increase resulted in a total compensation level equivalent to their old salaries and an amount they otherwise might have received in honoraria.⁸⁴ Furthermore, certain government employees were not prohibited from engaging in limited educational activities that could modestly supplement their salaries.⁸⁵ In effect, Congress attempted to substitute untainted income for that which judges and other high-ranking government officials had been receiving from interest groups;⁸⁶ however, the raise did not adequately compensate judges for what they were about to lose. Soon after the enactment of the Reform Act,

⁸⁰ See generally *id.* (discussing the public's suspicions regarding honoraria); Philip Shenon, *Ethics Unit Asks Ban on Fees for Speeches by U.S. Officials*, N.Y. TIMES, Feb. 23, 1989, at B6 (referring to critics who describe honoraria as "ill-disguised attempts to buy influence").

⁸¹ See Ethics Reform Act of 1989, Pub. L. No. 101-194, § 703, 103 Stat. 1716, 1768.

⁸² § 601, 103 Stat. at 1760.

The term "Member" means a Representative in, or a Delegate or Resident Commissioner to, the Congress. . . . The term "officer or employee" means any officer or employee of the Government except (A) any individual (other than the Vice President) whose compensation is disbursed by the Secretary of the Senate or (B) any special Government employee (as defined in section 202 of title 18, United States Code).

Id. at 1761-62.

⁸³ See Morgan, *supra* note 4. Notably, federal judges have found creative means to exercise the teaching exception. Recent advertisements in law student magazines have offered students opportunities to take summer sojourns with Chief Justice Rehnquist and Justices O'Connor and Kennedy in various exotic foreign countries. See Study Abroad Advertisements, *in* STUDENT LAW., Feb. 2001, at 5, 42, 43. The Reform Act creates an exception to the honoraria prohibition for all expenses related to traveling, including transportation, food, and lodging. See § 302, 103 Stat. at 1745-46 (codified as amended at 31 U.S.C. § 1353 (1994)).

⁸⁴ See 135 CONG. REC. 29,500 (1989) (statement of Rep. Stenholm).

⁸⁵ See § 601, 103 Stat. at 1761.

⁸⁶ See Collins, *supra* note 65, at 891.

lower-level employees of the executive and judicial branches brought suit to enjoin enforcement of the prohibition as it applied to them.⁸⁷

The scope of the Reform Act has drawn criticism from those outside the judiciary.⁸⁸ At least one commentator, Thomas Morgan, claims that comprehensive ethics legislation does more harm than good.⁸⁹ He argues that such legislation is harmful because the circumstances faced by each branch of government, as well as the circumstances of employees within each branch, differ significantly enough that a universal prohibition cannot possibly accommodate these differences.⁹⁰ For example, while almost \$10 million was collectively given to Congress in the form of honoraria in 1987, the money was not evenly distributed among its members.⁹¹ Legislators holding powerful offices within Congress were by far the largest recipients of honoraria.⁹² This argument implies that the prohibition of honoraria is more effective when applied to high-ranking government officials who have a greater ability to affect the outcome of legislation or trials.

⁸⁷ See *Williams v. United States*, 48 F. Supp. 2d 52 (D.D.C. 1999); *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995).

⁸⁸ See, e.g., Collins, *supra* note 65, at 914-15, 918 (recommending that judges imply a "nexus test" in interpreting the Reform Act when considering the receipt of honoraria by government employees, and suggesting that the broad ban's "burden on the speech of government employees" might be unconstitutional); Lisa Malloy Nardini, Comment, *Dishonoring the Honorarium Ban: Exemption for Federal Scientists*, 45 AM. U. L. REV. 885, 902-03, 909 (1996) (arguing that the coverage of lower-level government employees, such as government scientists, is unsuitably comprehensive).

⁸⁹ See Morgan, *supra* note 45. Morgan writes:

Seen as an imperfect attempt at regulation instead of as an implementation of imperishable morality, government ethics standards can be understood as capable of doing more harm than good. All regulation, however well intentioned, has side effects. It often discourages beneficial conduct as well as the behavior against which it was originally directed.

Id. at 491.

⁹⁰ *Id.* at 493. Indeed, the Supreme Court has acknowledged that the differences in the offices held by various government employees is a relevant consideration. See *Nat'l Treasury Employees Union*, 513 U.S. at 469.

⁹¹ See Morgan, *supra* note 45, at 493.

⁹² *Id.* ("Congressman Dan Rostenkowski, chairman of the House Ways and Means Committee . . . reportedly received \$245,000 in the year in which tax reform was high on Congress's agenda."). Other influential and high-ranking members of Congress receiving substantial funds in the form of honoraria include former House Speakers Jim Wright and Newt Gingrich. See Tom Kenworthy, *Wright: Raise Salaries and End Honoraria*, WASH. POST, Aug. 2, 1988, at A5 (reporting that Wright received "more than \$60,000 in royalties from sales of a book he wrote, 'Reflections of a Public Man,'" and that this payment "is one of the issues under investigation by the ethics committee"); see also Walter V. Robinson, *Flurry of Ethical Issues in Washington Prompts Hard Look at Business as Usual*, BOSTON GLOBE, Mar. 26, 1989, at 1 (noting that "Wright's principal accuser, Rep. Newt Gingrich of Georgia, now stands charged with putting together a questionable deal for his own book," and reporting that "Gingrich, a Republican, privately raised \$105,000 from conservative supporters, money that was used to pay the book's promotion costs and give the investors a tax break and his wife \$10,000 in income"). Receipt of gifts was also observed at the state level. See Jeffrey L. Rabin, *Shotgun, Cinnamon Buns and Trip to Rio Were Among Gifts to Lawmakers in 1988*, L.A. TIMES, Mar. 5, 1989, at 4, 1989 WL 2329615.

In addition to the argument that a comprehensive ethics regulation is of little utility, it can also be argued that Congress gave inadequate thought to the inclusion of the judiciary in the honoraria prohibition. It is evident from the congressional record that applying the ban to the judiciary was only a last minute consideration during the debate on the honoraria prohibition.⁹³ Congress's failure to consider the judiciary in the debate was a result of its concentration on the impropriety, or perceived impropriety, of members of Congress.⁹⁴ The shadow of Watergate undoubtedly motivated Congress to restore public confidence in executive branch officials as well.

III

SANCTIONING HONORARIA: ETHICAL AND LEGAL CHALLENGES

Judges in the United States are held to a high level of ethical scrutiny, in part because of their central roles in deciding the outcomes of trials that may affect many people and that may have a significant effect on legislative enactments. Viewed from this perspective, even the appearance of judicial impropriety may erode public confidence in the ability of the judicial branch to adjudicate in a fair and unbiased manner. Proven offenses such as judicial bribery, for example, instantly capture public attention and generate a tremendous amount of popular disdain.⁹⁵ There is a thin line between bribery and honoraria, and lawmakers tread that line cautiously. Both the legal and ethical challenges attending honoraria are discussed at length in Part III.

Section A examines the current ethical rules governing judges as embodied in the *Code of Conduct for United States Judges*. This body of law proscribes the commission of any action that creates the appearance of judicial impropriety. Next, Section B discusses the major cases that have dealt with the honoraria prohibition. Specifically, *United States v. National Treasury Employees Union*⁹⁶ addressed the federal law as it applied to government employees other than federal judges. Of particular significance to this section is the dissent by Justices Rehnquist and Scalia in *National Treasury Employees Union*, which repealed the ban as it applied to lower-level government officials.⁹⁷ Additionally, *Williams v. United States*⁹⁸ is a particularly germane case in which

⁹³ See, e.g., 135 CONG. REC. 29,703 (1989) (statement of Sen. Mitchell); 135 CONG. REC. H8746-47 (daily ed. Nov. 16, 1989) (statement of Rep. Fazio); see Collins, *supra* note 65, at 893.

⁹⁴ See sources cited *supra* note 92.

⁹⁵ See *supra* note 4 and accompanying text.

⁹⁶ 513 U.S. 454 (1995).

⁹⁷ *Id.* at 489-503.

⁹⁸ 48 F. Supp. 2d 52 (D.D.C. 1999), *rev'd*, 240 F.3d 1019 (Fed. Cir. 2001), *cert. denied*, 122 S. Ct. 1221 (2002). Although the Supreme Court denied certiorari, yet another jus-

federal judges attempted, although ultimately unsuccessfully, to get their salaries raised without the use of honoraria.

A. The Limitations of the *Code of Conduct for United States Judges*

In addition to the Reform Act, there are other sources of law that also could regulate judicial receipt of honoraria. Even if there were no federal law prohibiting honoraria, the *Code of Conduct for United States Judges*⁹⁹ would likely govern such financial activities of judges. Under its current language, however, it would not necessarily bar judicial receipt of honoraria.¹⁰⁰ Similar to the codes of professional conduct adopted for attorneys by various state bar associations, the *Code of Conduct for United States Judges* is not self-enforcing, and violation of its provisions is not necessarily illegal; rather, the judicial code is enforced by the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980,¹⁰¹ and violations may result in professional sanctions.¹⁰²

Based upon the 1972 *ABA Code of Judicial Conduct*, the *Code of Conduct for United States Judges* embodies the ethical standards for judicial conduct both on and off the bench.¹⁰³ Unlike the 1990 *Model Code of*

Conduct—Stephen Breyer, with a passionate dissent to the denial of certiorari—added weight to the vociferous requests from other Supreme Court justices for judicial salary increases. 122 S. Ct. 1226–28 (Breyer, J., dissenting).

⁹⁹ CODE OF CONDUCT FOR UNITED STATES JUDGES (Office of the Gen. Counsel, Admin. Office of the U.S. Courts 1997) [hereinafter CODE OF CONDUCT].

¹⁰⁰ The *Code of Conduct for United States Judges* adopted the *ABA Code of Judicial Conduct* of 1972, which does not follow the revised 1990 *Model Code of Judicial Conduct*, which created a much stricter standard than that provided by the *ABA Code of Judicial Conduct* of 1972. Canon 4 of the 1990 *Model Code of Judicial Conduct* is similar to the original Canons 4 and 5 created in 1972. The original Canons were essentially positive, with Canon 4 discussing permissible avocational activities and Canon 5 detailing permissible quasi-judicial activities. See CODE OF JUDICIAL CONDUCT CANONS 4–5 (1972). A judge was permitted to engage in such activities subject only to the limitations that those activities did not “detract from the dignity of his office or interfere with the performance of his judicial duties” or “cast doubt on his capacity to decide impartially any issue that may come before him.” *Id.* Canon 5. Thus, the Canons permitted a judge to “write, lecture, teach, and speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities” so long as he complied with the Code. *Id.* The revised 1990 *Model Code of Judicial Conduct*, by contrast, specifies the activities a judge may not engage in, thereby applying a narrower and stricter standard than the one applied by the current judicial code of conduct. Compare MODEL CODE OF JUDICIAL CONDUCT CANONS 4–5 (1990), with CODE OF JUDICIAL CONDUCT CANONS 4–5.

¹⁰¹ 28 U.S.C. §§ 332(d)(1), 372(c) (1994).

¹⁰² See *id.* § 372(c)(6).

¹⁰³ Even the drafters of the *ABA Code of Judicial Conduct*, however, recognized that payment to judges by private parties creates illicit opportunities, and therefore they sought to provide ethical guidelines for such activities. One alarming aspect of the *Code of Conduct* is that it does not apply to the justices of the Supreme Court. The introduction of the Code states:

This Code applies to United States Circuit Judges, District Judges, Court of International Trade Judges, Court of Federal Claims Judges, Bankruptcy

Judicial Conduct, which, by its terms, prohibited specific forms of inappropriate conduct,¹⁰⁴ the standards in the *Code of Conduct for United States Judges* are comprised of seven Canons describing, permissively, what a judge may and should do.¹⁰⁵

The first two Canons of the *Code of Conduct for United States Judges* set the permissive stage for the rest, acting as general guidelines for any activity, judicial or otherwise, in which a judge might engage. The first sentence of Canon 1 forcefully declares that “[a]n independent and honorable judiciary is indispensable to justice in our society.”¹⁰⁶ Sections A and B of Canon 2 are also noteworthy. Section A admonishes that “[a] judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”¹⁰⁷ Section B states that “[a] judge should not lend the prestige of the judicial office to advance the private interests of others; nor convey or permit others to convey the impression that they are in a special position to influence the judge.”¹⁰⁸ In Canon 2, the drafters of the *Code of Conduct for United States Judges* emphasized the importance of the perception of the judicial branch as objective and impartial, and sought to circumscribe behavior that might undermine the legitimacy of the branch.¹⁰⁹ The

Judges, and Magistrate Judges. Certain provisions of this Code apply to special masters and commissioners as indicated in the “Compliance” section. In addition, the Tax Court, Court of Veterans Appeals, and Court of Appeals for the Armed Forces have adopted this Code.

CODE OF CONDUCT, *supra* note 99, at 1. Thus, without the current ban on honoraria, Supreme Court justices are essentially unrestricted in situations where a third party offers payment to one of them. Although Chief Justice Rehnquist would like to supplement cost-of-living increases with other means of compensation for federal judges, permitting the receipt of honoraria as a source of income supplementation is especially inappropriate when the result could be differential treatment among federal judges because Supreme Court justices are not bound by the same Code that applies to lower-level federal judges.

¹⁰⁴ See *supra* note I00.

¹⁰⁵ See CODE OF CONDUCT, *supra* note 99. The seven Canons, with the first, second, and fifth being most relevant here, are: “Canon 1: A Judge Should Uphold the Integrity and Independence of the Judiciary,” *id.* Canon 1; “Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities,” *id.* Canon 2; “Canon 3: A Judge Should Perform the Duties of the Office Impartially and Diligently,” *id.* Canon 3; “Canon 4: A Judge May Engage in Extra-Judicial Activities to Improve the Law, the Legal System, and the Administration of Justice,” *id.* Canon 4; “Canon 5: A Judge Should Regulate Extra-Judicial Activities to Minimize the Risk of Conflict with Judicial Duties,” *id.* Canon 5; “Canon 6: A Judge Should Regularly File Reports of Compensation Received for Law-Related and Extra-Judicial Activities,” *id.* Canon 6; “Canon 7: A Judge Should Refrain from Political Activity,” *id.* Canon 7.

¹⁰⁶ *Id.* Canon 1.

¹⁰⁷ *Id.* Canon 2(A).

¹⁰⁸ *Id.* Canon 2(B).

¹⁰⁹ See *id.* Canon 2. The commentary of Canon 1 is illuminating: “Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn upon their acting without fear or favor.” *Id.* Canon 1 cmt.

first two Canons establish the foundation for the entirety of the *Code of Conduct for United States Judges* and set a standard with which the other sections of the Code must comport.¹¹⁰

Canon 5 is comprised of eight sections, each describing the conduct expected of judges in various outside activities. This Canon addresses avocational activities and specifies, permissively, that “[a] judge may write, lecture, teach, and speak . . . if such avocational activities do not detract from the dignity of the judge’s office or interfere with the performance of the judge’s judicial duties.”¹¹¹ Although this section of the *Code of Conduct for United States Judges* is a direct grant of permission to engage in the enumerated activities, it is noteworthy that judges are warned at the beginning of this Canon of the additional limitations throughout the Canon to which they must adhere. The general prescription at the beginning of the Canon is one such limitation. Thus, if a judge’s teaching activities on the French Riviera, for example, somehow interfered with the performance of her judicial duties, she would violate the *Code of Conduct for United States Judges*.

Most relevantly, Canon 5 only indirectly addresses the collection of honoraria for speaking or writing.¹¹² For example, section C(4) merely states that “[a] judge should not solicit or accept anything of value from anyone seeking official action from or doing business with the court or other entity served by the judge, or from anyone whose interests may be substantially affected by the performance or nonperformance of official duties.”¹¹³ It is hard to imagine a situation in which a third party could make payments to a judge without creating even the appearance of impropriety.¹¹⁴ The passage of the Reform Act’s outright ban on judicial honoraria, enacted by the popularly-elected national legislature, may be the clearest evidence that a reasonable person would see impropriety in a judge’s receipt of such payments from a third party.

In contrast to the *ABA Code of Judicial Conduct* of 1972, the revised 1990 *Model Code of Judicial Conduct* took a harder line on specific forms

¹¹⁰ See *id.* Canons 1–2.

¹¹¹ *Id.* Canon 5(A).

¹¹² See *id.* Canon 5.

¹¹³ *Id.* Canon 5(C)(4). Regarding the issue of honoraria, the 1990 *Model Code of Judicial Conduct* is more clear: “A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge’s performance of judicial duties or otherwise give the appearance of impropriety.” MODEL CODE OF JUDICIAL CONDUCT Canon 4(H)(1) (1990). This part of Canon 4 of the *Model Code of Judicial Conduct* does not absolutely prohibit the receipt of honoraria. However, the standard set up by the *Model Code of Judicial Conduct* for receipt of honoraria is difficult to meet, and whether a complete congressional repeal of the prohibition would comply with the *Model Code of Judicial Conduct* is questionable.

¹¹⁴ It was apparently hard to imagine this at the time of the drafting of the Ethics in Government Act of 1978. See *supra* notes 4, 86 and accompanying text.

of potentially inappropriate behavior. Notably, though, the federal judiciary has not adopted the 1990 *Model Code of Judicial Conduct*.¹¹⁵ The 1990 *Model Code of Judicial Conduct* specifically addresses the issue of honoraria, as the commentary to Canon 4(H) explains:

The Code does not prohibit a judge from accepting honoraria or speaking fees provided that the compensation is reasonable and commensurate with the task performed. A judge should ensure, however, that no conflicts are created by the arrangement. A judge must not appear to trade on the judicial position for personal advantage. Nor should a judge spend significant time away from court duties to meet speaking or writing commitments for compensation. In addition, the source of the payment must not raise any question of undue influence or the judge's ability or willingness to be impartial.¹¹⁶

By directly addressing the issue of honoraria, the *Model Code of Judicial Conduct* provides specific guidelines that judges should follow when engaging in the activity. Although the Canons would—in the absence of the present honoraria ban—offer wiggle room for judges accused of honorarium impropriety, the *Model Code of Judicial Conduct* is distinct from the *Code of Conduct for United States Judges* by specifically detailing the behavior expected of judges in the event that they do accept honoraria. Neither the *Model Code* nor the *Code of Conduct* is optimal, however; under the *Model Code*, judges would be allowed to perform their own conflict checks, set their own rates of compensation limited only by the ambiguities of “reasonableness,” and spend time away from court duties subject only to the uncertain standard of “significance.”

In contrast to both of these codes, which represent the current federal ethical standards, the subsequently enacted federal law clearly and forcefully mandates that judges should not and may not accept honoraria. Read in its entirety, the *Code of Conduct* does not proscribe the receipt of honoraria; in this case federal law is more developed than current ethical standards. Although the *Code of Conduct* so circumscribes the receipt of honoraria as to make clear that judges cannot accept that which has an apparent taint of impropriety, a standard which effectively requires a judge to disgorge once an accusation of taint has been raised, the federal law affirmatively prevents the taint from even occurring in the first place.

Violations of the *Code of Conduct* are sanctioned by the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980

¹¹⁵ See Morgan, *supra* note 45, at 492 (noting that the life tenure of federal judges makes any remedy short of impeachment problematic from an enforcement standpoint).

¹¹⁶ MODEL CODE OF JUDICIAL CONDUCT Canon 4(H) cmt.

(Act),¹¹⁷ a controversial attempt by Congress to permit punishing federal judges for committing unethical acts without resorting to the constitutionally specified step of impeachment.¹¹⁸ Thus, when a judge fails to conform to the prescriptions mandated by the *Code of Conduct*, disciplinary action may first be sought under the Act. The Act details the process a federal judge who is accused of prejudicial conduct must undergo to answer the charges leveled against him. It provides that:

Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts . . . may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct.¹¹⁹

If the chief judge¹²⁰ of the circuit in which the accused judge sits finds the complaint meritorious, he may conduct additional investigations or "take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit."¹²¹ The Act then lists seven disciplinary actions the chief judge may take against the accused judge.¹²²

¹¹⁷ Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended at 28 U.S.C. §§ 331, 332, 372, 604 (1994)).

¹¹⁸ The debate over the constitutionality of the Judicial Council's Reform and Judicial Conduct and Disability Act of 1980 is, at this point, largely academic. Several scholars have questioned whether the Act, providing as it does for punishment outside of the constitutionally specified impeachment of judges, violates the Constitution's separation of powers doctrine. See, e.g., Drew E. Edwards, *Judicial Misconduct and Politics in the Federal System: A Proposal for Revising the Judicial Councils Act*, 75 CAL. L. REV. 1071, 1079 (1987) (criticizing the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 for the "wide discretion [given] to chief judges, judicial councils, and the Judicial Conference in disciplining federal judges," and stating that "[t]he reach of [the Act's] provisions poses the crucial question of whether it unconstitutionally infringes on either the limits placed on the causes for impeachment under [A]rticle II [or] the judge's right to tenure under [A]rticle III"); Steven W. Gold, *Temporary Criminal Immunity for Federal Judges: A Constitutional Requirement*, 53 BROOK. L. REV. 699, 699 (1987) (arguing that "prosecution of federal judges undermines the judiciary's independence by subjecting it to the very pressures that Article III was drafted to prevent," and that "impeachment is the only constitutional method for removing a federal judge, and that criminal prosecution, because it constitutes de facto removal, is unconstitutional if conducted prior to removal by impeachment"). However, at least four circuit courts have independently held that pre-impeachment criminal prosecutions of judges are entirely permissible. See *McBryde v. Comm. to Review Circuit Council Conduct*, 264 F.3d 52, 65-66 (D.C. Cir. 2001); *United States v. Claiborne*, 727 F.2d 842, 845 (9th Cir. 1984); *United States v. Hastings*, 681 F.2d 706, 710 (11th Cir. 1982); *United States v. Isaacs*, 493 F.2d 1124, 1142-44 (7th Cir. 1974).

¹¹⁹ 94 Stat. at 2036 (codified as amended at 28 U.S.C. § 372(c)(1) (1994)).

¹²⁰ If the accused is the chief judge himself, the clerk of the court shall give the complaint "to that circuit judge in regular active service next senior in date of commission." 28 U.S.C. § 372(c)(2).

¹²¹ *Id.* § 372(c)(6)(B).

¹²² See *id.* § 372(c)(6)(B)(i)-(vii).

The Act grants wide discretion to chief judges and judicial committee and council members in disciplining federal justices for improper conduct.¹²³ This poses a problem when the grant of power is viewed against the backdrop of the request made by the Chief Justice of the U.S. Supreme Court for the repeal of the honoraria ban.¹²⁴ It strains credulity to think that, in the face of the Chief Justice's request for repeal of the ban, circuit court judges will voluntarily discipline judges for accepting payment from third parties, even though the *Code of Conduct for United States Judges* prohibits any activity that "cast[s] reasonable doubt on the capacity to decide impartially any issue that may come before the judge."¹²⁵ It seems logical that lower-level judges will view the Chief Justice's request as a statement that honoraria do not pose ethical problems for judges.

Furthermore, the current federal law prohibition might be most useful precisely because it brings within its coverage all federal judges, including the otherwise self-governing justices of the Supreme Court. As previously stated, the *Code of Conduct for United States Judges* does not apply to Supreme Court justices. Thus, in the absence of the current honoraria ban, Supreme Court justices would be virtually unlimited in accepting payment from private third parties for appearing, speaking, or writing on their behalf. This lack of limitation is especially significant in light of the rather vociferous complaints of the Chief Justice and others currently on the bench. It is likely that these justices will indulge in accepting honoraria, if given the chance.

However, there may be reason to believe the justices will act with some restraint. In asking, "Who Judges the Supreme Court Justices," Professor Victor Williams notes:

[A]lthough the Supreme Court is not bound by the Judicial Conference's Code of Conduct for United States Judges, the Commission "has been informed that the Court and the Justices use it for guidance on applicable ethical standards. . . ." Additionally, the Commission was informed that the Chief Justice is said to exercise "supervisory authority over the Court's adherence" to the standards of the Ethics Reform Act of 1989, and further, that the Justices had agreed to "comply with the substance of Judicial Conference regula-

¹²³ If the chief judge does not either dismiss a complaint lodged against another judge or find that appropriate corrective measures have already been taken, the Act requires the chief judge to appoint a "special committee to investigate the facts and allegations contained in the complaint" for further investigation and to determine appropriate disciplinary action. *Id.* § 372(c)(4)-(6).

¹²⁴ See Mauro & Loewenberg, *supra* note 2.

¹²⁵ CODE OF CONDUCT, *supra* note 99, Canon 4.

tions concerning outside earned income, honoraria, and outside employment."¹²⁶

Although the Supreme Court is not legally bound by the *Code of Conduct for United States Judges*, there is reason to believe that it offers at least a modicum of guidance for the justices. One question remains, however: Who exercises supervisory authority over the Chief Justice's ethical conduct? The *Code of Conduct for United States Judges* is not to be taken lightly, nor is there reason to suspect that judges take it lightly. However, the explicit and stricter standard of the current law is preferred to the weaker, and easily traversed, standard of the ethical code.

B. The Court Speaks: Federal Employees, Inadequate Pay, and Honoraria

The Ethics Reform Act of 1989's universally applicable prohibition on federal employees' receipt of honoraria was ephemeral. In *United States v. National Treasury Employees Union*,¹²⁷ two unions and several career civil servants employed by the executive branch and classified below grade GS-16¹²⁸ brought an action challenging the constitutionality of a section of the Ethics Reform Act of 1989 that prohibited receipt of honoraria by government employees.¹²⁹ The petitioners alleged that they had lawfully received compensation for speaking or writing before the passage of the Reform Act, which banned receipt of honoraria.¹³⁰ The District Court held that because Congress had been concerned about the appearance of impropriety among its own members, the honoraria prohibition as applied to executive branch employees was severable from the ban upon the specific parties seeking relief.¹³¹

The Court of Appeals affirmed, noting that the denial of compensation placed a heavy burden on the government employees.¹³² Ultimately, the Supreme Court weighed in, holding for the plaintiffs and emphasizing that the employees sought compensation "for their expressive activities in their capacity as citizens, not as Government employees."¹³³

¹²⁶ Victor Williams, *Third Branch Independence and Integrity Threatened by Political Branch Irresponsibility: Reviewing the Report of the National Commission on Judicial Discipline and Removal*, 5 SETON HALL CONST. L.J. 851, 903 (1995) (footnotes omitted).

¹²⁷ 513 U.S. 454 (1995).

¹²⁸ "The General Schedule, abbreviated 'GS,' is the basic pay schedule for employees of the Federal Government." *Id.* at 459 n.2.

¹²⁹ *Id.* at 461.

¹³⁰ *Id.*

¹³¹ *Id.* at 462.

¹³² *Id.*

¹³³ *Id.* at 465.

The plaintiffs submitted affidavits describing activities for which they had received compensation prior to the enactment of the honoraria ban. For example, the affidavits described that “[a] mail handler employed by the Postal Service . . . had given lectures on the Quaker religion for which he received small payments. . . . [and a] microbiologist at the Food and Drug Administration had earned almost \$3,000 per year writing articles and making radio and television appearances reviewing dance performances.”¹³⁴ The Court held that the ban imposed a significant burden on expressive activity by chilling potential speech before it occurred, thus increasing the government’s burden to prove that its interest outweighed the employees’ speech interests.¹³⁵ The Court further held that while “operational efficiency is undoubtedly a vital governmental interest . . . several features of the honoraria ban’s text cast serious doubt on the Government’s submission that Congress perceived honoraria as so threatening to the efficiency of the entire federal service as to render the ban a reasonable response to the threat.”¹³⁶

The Court recognized that the employees who contested the prohibition were low-level executive-branch employees who did not engage in work-related activities, and that Congress did not intend the prohibition to sweep so broadly.¹³⁷ Given that this judicially crafted exception does not appear within or necessarily follow from the text of the statute, whether the same logic would ultimately apply to the avocational activities of high-ranking government officials or federal judges is unclear.¹³⁸ In this case, however, the government’s interest was insufficient to satisfy the heightened burden created by singling out expressive activity for special regulation.¹³⁹

The Court declared that a total ban on the paid speech of these executive branch employees was unconstitutional, and that therefore these employees could continue to receive honoraria for public speaking engagements.¹⁴⁰ Still, the Court specifically declined either to overturn the law or to preclude the application of its ban on honoraria for higher-level officials and members of the other branches of the U.S. government.¹⁴¹ Pertinently, the Court enunciated that its “policy

¹³⁴ *Id.* at 461.

¹³⁵ *See id.* at 468.

¹³⁶ *Id.* at 473.

¹³⁷ *See id.* at 472–73 (acknowledging that the government does not have a sufficiently strong interest in limiting the speech of rank-and-file employees).

¹³⁸ *See id.* at 473 (“Congress reasonably could assume that payments of honoraria to judges or high-ranking officials in the Executive branch might generate [an] . . . appearance of improper influence.”).

¹³⁹ *Id.* at 475–76 (citations omitted).

¹⁴⁰ *Id.* at 477–78.

¹⁴¹ *Id.*

of avoiding unnecessary adjudication of constitutional issues"¹⁴² prevented it from deciding whether 5 U.S.C. app. § 501(b) applies to executive-branch employees above grade GS-16¹⁴³ or to members of the judicial branch.¹⁴⁴ It is from this precedential context that Chief Justice Rehnquist recently asked Congress to pass legislation that will directly increase judicial salaries.¹⁴⁵

Surprisingly, Chief Justice Rehnquist did not concur with the majority that partially overturned the honoraria ban in *National Treasury Employees Union*. In fact, he dissented and voted to uphold the ban across the board.¹⁴⁶ In his dissent, Chief Justice Rehnquist acknowledged that public employees do not relinquish their First Amendment rights by virtue of their employment with the government.¹⁴⁷ He emphasized, however, that "the State's interests as an employer in regulating the speech of its employees differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."¹⁴⁸ Moreover, the Chief Justice rejected the majority's conclusion that the ban chilled potential speech, declaring: "The ban neither prohibits anyone from speaking or writing, nor does it penalize anyone who speaks or writes; the only stricture effected by the statute is a denial of compensation."¹⁴⁹

What is most interesting about the Chief Justice's dissent, however, was not his rejection of the Court's reasoning in lifting the prohibition as applied to low-level executive-branch employees, but his support of the congressional rationale in adopting the prohibition.¹⁵⁰ Chief Justice Rehnquist fervently agreed with the Congress as he opined that "[t]he Court largely ignores the Government's foremost interest—prevention of impropriety and the appearance of impropriety—by focusing solely on the burdens of the statute as applied to several carefully selected Executive Branch employees."¹⁵¹ Thus, a mere five years before his plea to Senator McConnell to repeal the honoraria prohibition, Chief Justice Rehnquist steadfastly supported its uniform application to all officials and employees in the govern-

¹⁴² *Id.* at 478 (citation omitted).

¹⁴³ *Id.* (citations omitted).

¹⁴⁴ *Id.*

¹⁴⁵ See Charles Lane, *Rehnquist Raises the Flag: Pay Judges More*, WASH. POST, Jan. 8, 2001, at A17.

¹⁴⁶ See *Nat'l Treasury Employees Union*, 513 U.S. at 489 (Rehnquist, C.J., dissenting).

¹⁴⁷ *Id.* at 491 (Rehnquist, C.J., dissenting).

¹⁴⁸ *Id.* (Rehnquist, C.J., dissenting) (quoting *Connick v. Myers*, 461 U.S. 138, 140 (1983) (quotation omitted)).

¹⁴⁹ *Id.* at 490 (Rehnquist, C.J., dissenting).

¹⁵⁰ *Id.* at 494 (Rehnquist, C.J., dissenting).

¹⁵¹ *Id.* (Rehnquist, C.J., dissenting).

ment, and his reasoning applied as much to executive officers as to judicial officers.¹⁵²

The sting of a repeatedly unadjusted salary in prosperous economic times may have changed Chief Justice Rehnquist's mind,¹⁵³ and other federal judges were clearly becoming increasingly concerned over their own incomes as well. In the 1999 case *Williams v. United States*,¹⁵⁴ twenty U.S. district court judges sought a declaratory judgment that they were entitled to employment cost index (ECI) adjustments under the Ethics Reform Act of 1989.¹⁵⁵ In an attempt to provide for the automatic increase of judicial salaries, the Reform Act amended the Executive Salary Cost-of-Living Adjustment Act¹⁵⁶ to require that Congress annually adjust the salary of federal judges pursuant to an index set forth in the Reform Act.¹⁵⁷ In *Williams*, the Reform Act imposed one condition: whenever a pay-rate adjustment was made for judges, there must be a commensurate adjustment in the rates of pay of positions of most federal employees in order to reflect increases in the cost of living and salary increases in the private sector.¹⁵⁸ The district court observed that in keeping with this new formula, Congress had adjusted the salaries of federal judges on the first days of January 1991, 1992, and 1993.¹⁵⁹ The district court further observed that in 1994, however, the scheme broke down: Congress had not made an adjustment to the salaries of General Schedule employees, and consequently it made no adjustment for the judges.¹⁶⁰ Furthermore, from 1995 through 1997 General Schedule employees

¹⁵² One plausible interpretation of Chief Justice Rehnquist's dissent in *National Treasury Employees Union* is his reluctance to encroach on Congress's policymaking authority. The Chief Justice begins his dissent by stating that "the Court's opinion is seriously flawed . . . its application of the First Amendment understates the weight that should be accorded to the governmental justifications for the honoraria ban and overstates the amount of speech that actually will be deterred." *Id.* at 489 (Rehnquist, C.J., dissenting).

¹⁵³ See Robert S. Bennett, *Pay Scales of Justice*, WASH. POST, Feb. 19, 2001, at A33.

¹⁵⁴ 48 F. Supp. 2d 52 (D.D.C. 1999), *rev'd*, 240 F.3d 1019 (Fed. Cir. 2001), *cert. denied*, 122 S. Ct. 1221 (2002).

¹⁵⁵ See *id.* at 53.

¹⁵⁶ Pub. L. No. 94-82, 89 Stat. 419 (1975) (codified as amended at 5 U.S.C. § 5318 (2000)).

¹⁵⁷ See Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, 1769 (codified as amended at 5 U.S.C. § 5318 (2000)). The district court explained:

[B]eginning in 1991 and in each subsequent year, the salary of a federal judge shall be adjusted based upon a specific schedule and index. Under the Act, in any year in which salaries of General Schedule employees are adjusted under the Comparability Act, federal judges' salaries are to be adjusted by an amount equal to one-half of one percent less than the percentage change in the ECI for the period ended December of the previous year.

48 F. Supp. 2d. at 54.

¹⁵⁸ See *id.* at 53.

¹⁵⁹ See *id.* at 54.

¹⁶⁰ See *id.*

received ECI adjustments, but Congress again made no adjustment for the federal judges.¹⁶¹

Noting the importance of the issue of judicial compensation, the *Williams* court looked to the Founding Fathers,

who were very aware of the importance of an independent judiciary. In Federalist No. 79, Hamilton stated that “[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support.” He noted that “[i]n the general course of human nature, a power over a man’s subsistence amounts to a power over his will.”¹⁶²

Through reference to the writings of the Founding Fathers, the *Williams* court posited a historic basis for an understanding of the strong influence of compensation on the judiciary and the imperative that it come from a legitimate source. The court easily concluded that the Reform Act granted federal judges an ECI adjustment effective at the time of the enactment of the Reform Act in 1989, and declared that federal judges were entitled to receive that which was promised by the statute.¹⁶³

Notably, however, the district court’s judgment was reversed on appeal, setting the stage for an even more interesting proceeding when the judges appealed the reversal to the Supreme Court.¹⁶⁴ Unexpectedly, the Supreme Court not only denied certiorari, but three justices took the “unusual” step of issuing a sharply worded dissent on that denial.¹⁶⁵ Justice Breyer’s dissenting opinion in support of the petition, which was joined by Justices Scalia and Kennedy, went to great lengths to illustrate the disparities between judicial and other professional salaries.¹⁶⁶ Intriguingly, no opinion was rendered by Justice Rehnquist, whose fourth vote to grant certiorari would have made the difference between hearing and rejecting the case. It remains unclear as to whether the Chief Justice simply felt more comfortable than his colleagues with the court of appeals’ disposition of the case, or rather was unwilling to cast the fourth vote for certiorari because of his own previous comments and actions on the subject.

¹⁶¹ *See id.*

¹⁶² *Id.* at 55.

¹⁶³ *See id.* at 60.

¹⁶⁴ *Williams v. United States*, 240 F.3d 1019 (Fed. Cir. 2001), *cert. denied*, 122 S. Ct. 1221 (2002).

¹⁶⁵ *Williams v. United States*, 122 S. Ct. 1221 (2002) (mem.) (Breyer, J., dissenting).

¹⁶⁶ *See id.* (Breyer, J., dissenting).

IV
THE CURRENT DEBATE

This Note argues that, for the numerous reasons discussed above, Congress should not repeal the Ethics Reform Act of 1989 as it pertains to federal judges. Repealing the Act will simply enhance the potential for bribery or improper influence on the judiciary, thereby creating a serious threat to the political independence and legitimacy of federal court judges. Moreover, the Chief Justice's unusual request to Congress poses an apparent and perhaps significant conflict for the judicial and legislative branches. By examining the motivations of the Chief Justice in requesting the repeal, the other remedies that are available to address the problem perceived by certain members of the Court, and the probable consequences of repealing the prohibition, it becomes clear that the repeal remedy is not only completely unnecessary, but also poses a moral hazard to the judicial branch.

After the decision in *Williams* and subsequent congressional action, Chief Justice Rehnquist published the 1999 Year-End Report on the Federal Judiciary.¹⁶⁷ In this report, Chief Justice Rehnquist acknowledged that federal judges had received their mandated 3.4% ECI adjustment in accordance with the Reform Act. However, the Chief Justice was not satisfied with the ECI adjustment provided for in the Reform Act and demanded by *Williams*. He stated explicitly that “[t]he Judiciary is appreciative of the adjustment, but it should not be confused with a raise in salary. We must continue to work for more appropriate compensation for federal judges to maintain the quality and morale of the federal Judiciary.”¹⁶⁸

In the 2000 Year-End Report on the Federal Judiciary, the Chief Justice again commented about the inadequacy of the current federal judicial salary.¹⁶⁹ Indeed, Chief Justice Rehnquist declares in the overview to the report that he will focus “on what [he] consider[s] to be the most pressing issue facing the Judiciary: the need to increase judicial salaries.”¹⁷⁰ In contrast to his 1999 report, the Chief Justice's 2000 report specifically addressed the recent attempt to remove the ban created by the Reform Act.¹⁷¹ His comment is illuminating: “This move was met with an outcry against what some feared would create the appearance of impropriety, even though any honoraria would be governed by the strict standards of the Code of Conduct for United

¹⁶⁷ William H. Rehnquist, *The 1999 Year-End Report on the Federal Judiciary*, THIRD BRANCH (Admin. Office of the U.S. Courts Office of Public Affairs), Jan. 2000, at 1 [hereinafter *1999 Report*].

¹⁶⁸ *Id.* at 2.

¹⁶⁹ See *2000 Report*, *supra* note 18, at 1.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 3; see also *supra* text accompanying notes 6–8 (describing the contours of the Ethics Reform Act of 1989).

States Judges, just as they had been before 1989.”¹⁷² Apparently the Chief Justice continues to deem lifting the prohibition a viable solution to the perceived financial burden on the judiciary, despite public concern.

In his letter to Republican Senator McConnell, Chief Justice Rehnquist explicitly requested that Congress lift the prohibition on honoraria for speaking fees, at least as it applies to federal judges serving a lifetime appointment.¹⁷³ According to one report, the language that Senator McConnell inserted into the appropriations bill, reported out-of-committee on September 8, 2000, stated that the previously announced ban “shall not apply to any individual while that individual is a justice or judge of the United States.”¹⁷⁴ Under the proposal prevailing at that time, although Congress would have lifted the ban, it would have subjected honoraria to the approval and scrutiny of an existing judicial commission, the Federal Judicial Conference.¹⁷⁵ The Conference, which serves as the judiciary’s own policymaking body, apparently would have generated new guidelines by which federal judges could earn money for public appearances, speeches, and writings.¹⁷⁶

According to one report, Chief Justice Rehnquist asked for the ban’s repeal because it is “sorely needed to ease the growing disparity between the pay of judges and of members of the private legal profession, in which first-year salaries at blue-ribbon New York law firms are now reaching upwards of \$140,000.”¹⁷⁷ By comparison, the Chief Justice’s government salary is currently \$186,300,¹⁷⁸ independent of any amounts that might be earned through outside legal endeavors. The prospect of increasing the amount earned from such endeavors has dangled before judges’ eyes for years. In 1995, the Supreme Court overturned the honoraria prohibition as it applied to lower-level executive-branch employees, but purposely did not extend the holding to senior executives in that branch, or to members of the federal judiciary.¹⁷⁹ Subsequently, the U.S. District Court for the District of Columbia was asked to decide a case that would automatically increase the

¹⁷² 2000 Report, *supra* note 18, at 3.

¹⁷³ See Morgan, *supra* note 4.

¹⁷⁴ S. REP. NO. 106-404, at 188 (2000); see Murphy, *supra* note 2.

¹⁷⁵ See Morgan, *supra* note 4.

¹⁷⁶ See *id.*

¹⁷⁷ *Id.*; see also 135 CONG. REC. 29,496 (1989) (statement of Rep. Lloyd) (arguing that an ECI adjustment for the judiciary is “particularly important to the Federal judiciary who has lost large numbers of experienced, dedicated judges in recent years who can no longer afford to stay in Government service”).

¹⁷⁸ See U.S. Dept. of Labor, Bureau of Labor Statistics, Judges, Magistrates, and Other Judicial Workers, available at <http://www.bls.gov/oco/ocos272.htm>.

¹⁷⁹ See *United States v. Nat’l Treasury Employees Union*, 513 U.S. 454 (1995).

salaries of federal judges under a cost-of-living formula contained in the Reform Act.¹⁸⁰

Other justices have also reportedly pined for salary supplementation. The lead article by Mauro and Loewenberg detailing Chief Justice Rehnquist's request¹⁸¹ became the subject of an unexpected and rare public reproach by Justice Antonin Scalia, who called the front-page article a "mean-spirited attack upon my personal integrity"¹⁸² and denied several statements attributed to him within. In a letter to the editor of the *Legal Times*, Justice Scalia countered the attributed statements by stating that

the honorarium ban makes no difference to me. For many years, all of my outside earned income has come from teaching, which is not covered by that ban, and that is the only compensable extrajudicial activity I am interested in pursuing. . . . What limits my earnings from teaching is not the honorarium ban, but the \$21,195 limit on all outside income earned by judges. I have indeed been critical of that arbitrary limitation¹⁸³

Justice Scalia similarly denied that he would leave the bench because of the prohibition on speaking fees, claiming that he is not affected financially by that specific prohibition.¹⁸⁴ Mauro and Loewenberg reported, however, that Justice Scalia had earned \$37,000 from speaking fees in 1989, the year before the ban went into effect.¹⁸⁵ Notably, Justice Scalia did not address his previous receipt of honoraria in his response to the article.¹⁸⁶

In January 2002, Chief Justice Rehnquist released the 2001 Year-End Report on the Federal Judiciary,¹⁸⁷ in which he again lamented the current salary paid to federal judges. At the top of his agenda was a request that judicial vacancies be filled. Chief Justice Rehnquist stated that "the relatively low pay that federal judges receive, compared to the amount that a successful, experienced practicing lawyer can make" is one cause of the current vacancies.¹⁸⁸ Although recognizing that judges had received a cost-of-living adjustment (COLA) in 2001, he went on to note that "a COLA only keeps judges from falling further behind the median income of the profession."¹⁸⁹ Chief Jus-

¹⁸⁰ See *Williams v. United States*, 48 F. Supp. 2d 52 (D.D.C. 1999), *rev'd*, 240 F.3d (Fed. Cir. 2001), *cert. denied*, 122 S. Ct. 1221 (2002).

¹⁸¹ Mauro & Loewenberg, *supra* note 2.

¹⁸² Antonin Scalia, *Scalia: Article Off Base*, LEGAL TIMES, Oct. 2, 2000, at 85 (noting, in a letter to the editor, that the author rarely responds to erroneous reports in the media).

¹⁸³ *Id.*

¹⁸⁴ See *id.*

¹⁸⁵ See Mauro & Loewenberg, *supra* note 2.

¹⁸⁶ See Scalia, *supra* note 182.

¹⁸⁷ See *2001 Report*, *supra* note 3.

¹⁸⁸ *Id.* at 2.

¹⁸⁹ *Id.*

tice Rehnquist continues to be dissatisfied with the salary of federal judges despite the COLA increases that have been allocated, thus increasing the likelihood that he may again attempt to influence the existence of the honoraria ban.

The Supreme Court justices are not without legitimate justification in calling for pay increases; it is the means rather than the end that is problematic. One arguable justification for an increase in salary is the lack of qualified candidates willing to fill judicial vacancies. Recent news reports indicate that there are currently approximately 101 unfilled federal judicial positions.¹⁹⁰ In his 1999 Year-End Report on the Federal Judiciary, Chief Justice Rehnquist lamented that in 1999 only thirty-three new judges had been confirmed compared to sixty-five the previous year.¹⁹¹ Some, including Chief Justice Rehnquist,¹⁹² argue that the diminutive salary offered to federal judges may explain this drought. Whether the judicial positions remain unfilled because of the salary size is arguable.¹⁹³ Cost-of-living increases, however, have not been enough to placate the federal judiciary; Chief Justice Rehnquist at first publicly stated that these were no substitute for true salary increases,¹⁹⁴ and then privately suggested the alternative to Senator McConnell.

Another justification for raising salaries is the current increasing trend in judicial caseloads.¹⁹⁵ According to the Chief Justice's 1999 Year-End Report on the Federal Judiciary, the caseloads that federal

¹⁹⁰ See Darryl Fears, *Nominee's Past Opens Old Wounds: Appeals Court Pick Raises Tempers, Divides Black*, WASH. POST, Mar. 3, 2002, at A5; Kevin Galvin, *Senators Balk at Judge Nomination*, SEATTLE TIMES, Jan. 24, 2002, at B1.

¹⁹¹ See 1999 Report, *supra* note 167, at 1, 5.

¹⁹² See Mauro & Loewenberg, *supra* note 2. In his letter to Senator McConnell, Chief Justice Rehnquist wrote: "Such disparity harms the ability of the judiciary to retain and recruit the most capable lawyers from all socioeconomic classes and geographical areas, particularly in high cost-of-living urban areas . . ." *Id.* Mauro and Loewenberg go on to note that "[f]orty-two judges, an unusually high number, have left the federal bench since 1993, although money may not be the reason for all of them." *Id.*

¹⁹³ The reason may be political; much has been made of Senate Republican long-term, concerted efforts to prevent former President Clinton from appointing his choice of federal judges. On the other hand, the reason may be practical. In his overview of the 1999 Year-End Report on the Federal Judiciary, Chief Justice Rehnquist warned that "federal judges . . . continue to dispense justice despite an increasing workload and a relatively decreasing salary." 1999 Report, *supra* note 167, at 2.

¹⁹⁴ See 1996 Report, *supra* note 1, at 2.

¹⁹⁵ One Congressman spoke out on the issue:

Since I ascended the bench in 1965, the caseload per appellate judge has more than tripled. That for a trial judge has more than doubled and the complexity has gone out of sight. . . . In addition, judges find themselves confronted with a steady flow of new causes of action, often in complex areas, created by a Congress that oftentimes fails to take into account what impact they will have on the judiciary. It is clear that if we are serious about attracting qualified and dedicated individuals to the Federal bench we must provide a system of adequate compensation.

135 CONG. REC. H8760 (daily ed. Nov. 16, 1989) (statement of Rep. Moorhead).

judges must balance have risen disproportionately to their salaries.¹⁹⁶ Total filings in the Supreme Court increased slightly more than 4.8% from 1998 to 1999.¹⁹⁷ For the same time period, there was a two percent increase in total filings in the courts of appeals and a four percent increase in criminal case filings in the district courts.¹⁹⁸ In 2000, though the economy experienced modest inflation and the real value of salaries therefore decreased, filings in the courts of appeal, district courts, and in the Supreme Court remained virtually static.¹⁹⁹

This Note does not challenge, based on this statistical evidence, the fact that federal judges are working harder for less pay than their private-sector counterparts. This Note only addresses the question of whether judges should be compensated by the private sector in exchange for speaking engagements.

Alternatives to the Chief Justice's extreme proposal do exist. In his own report, Chief Justice Rehnquist delineates three ways that the 107th Congress could ease the financial strain on the judiciary: first, by increasing judicial salaries by 9.6% in accordance with the foregone ECI; second, by ending the tie of judicial increases to that of non-career public servants; or third, by automating salary increases in accordance with the Reform Act.²⁰⁰

There are additional options that the Chief Justice failed to address. Although the current ban does not allow federal judges to make money from public speaking engagements, the regulations do permit judges to earn money from other endeavors, such as teaching courses at accredited institutions.²⁰¹ There is currently a cap on teaching income,²⁰² but Justice Scalia's alternative to Chief Justice Rehnquist's current proposal would include raising the maximum amount. One other alternative entails setting up an annual fund similar to that of the Quadrennial Commission, empowered to review inflation rates, private sector salary changes and other conditions, and then to match salary increases against these factors.²⁰³

Perhaps the most dramatic alternative would be to take Chief Justice Rehnquist's requests with a grain of salt. Many have accepted without argument the comparison between private-sector associate employment and public-sector judicial employment, when in fact the two occupations are different in many ways. First, and perhaps most significantly in times of recession, is the almost complete employment

¹⁹⁶ See *1999 Report*, *supra* note 167, at 4–5.

¹⁹⁷ *Id.* at 5.

¹⁹⁸ *Id.* at 4.

¹⁹⁹ See *2000 Report*, *supra* note 18, at 5.

²⁰⁰ *Id.* at 3.

²⁰¹ See, e.g., Scalia, *supra* note 182 (discussing the justice's earnings from teaching).

²⁰² See *supra* note 83 and accompanying text.

²⁰³ See *supra* notes 73–74 and accompanying text.

security enjoyed by federal judges. Unlike associates at large firms, judges are insulated from economic slowdown and cannot be laid off. Second, judges are given staffs in order to do most of their legal research, particularly at the federal level. Judges operate at a high level of abstraction; associates, on the other hand, must do their own research and writing, not to mention work past government business hours and late into the night. One last major difference that should not be overlooked is the intangible benefit that comes with the position of a judge. Judicial positions bring with them the prestige and power of a job that is relatively rare, highly sought after, and accords a fair amount of independence.

Let us also not forget that the lifetime position pays quite well at \$186,300 for the Chief Justice, \$178,300 per year for the eight associate justices, and federal appellate court judges and district judges are paid \$150,000 and \$141,300, respectively, in addition to the outside perks they receive because they are federal judges.²⁰⁴ This may not seem like a lot for lawyers, but it is a significantly greater salary than that of other professionals. Although justices may not be paid for speaking engagements, at a minimum their traveling and accommodation expenses can be paid for by whomever invites them to speak.²⁰⁵ Additionally, the federal judiciary began its protests during a period of unprecedented change in attorney salaries, buoyed at least in part by the threat of attorney flight from private firms into well-financed emerging-growth companies. Now, in the midst of an economic recession, and commensurate layoffs of highly paid attorneys from both the emerging-growth companies and competing law firms, first-year associate salaries may well fall, and jobs will certainly disappear. Federal judges, by contrast, will never see their salaries decreased, and need never leave their judicial posts.²⁰⁶

The 1989 honoraria ban was intended to rid the judiciary of allegations that corporations and interest groups were using speaking engagement payments to lobby or influence federal officials. In the absence of the prohibition, federal courts most likely will face new allegations of impropriety and impartiality. Indeed, one organization is already predicting that “[c]ompanies will be lining up to cut the judges’ checks.”²⁰⁷ Such public perception can do nothing less than undermine the legitimacy of the judicial branch.

²⁰⁴ See *supra* note 178; Morgan, *supra* note 4.

²⁰⁵ See *supra* note 83.

²⁰⁶ See U.S. CONST. art. III, § 1 (stating that judges “shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office”).

²⁰⁷ Morgan, *supra* note 4 (quoting Mike Casey, vice president of the Environmental Working Group).

The current state of the legislation that would lift the ban on receipt of honoraria is uncertain. The Senate approved the repeal of the ban as a part of a recent spending bill, but the House did not.²⁰⁸ Thus, the provision that would have ended the prohibition on receipt of honoraria has, for the moment, been dropped from formal consideration by Congress.²⁰⁹ The issue is now under consideration by a House-Senate conference committee for inclusion in a future appropriations bill.²¹⁰

CONCLUSION

Though this Note has focused on the writings of two prominent Supreme Court justices, their views on the receipt of honoraria are not necessarily representative of the views of the entire Court. Justice Stephen Breyer, for example, has written forcefully in support of congressional regulation of outside judicial income, including honoraria:

A judge must insulate himself or herself from financial bias To help in this process of self-reflection and recusal, as well as to provide some basis for oversight of the decisions judges make, Congress has imposed rules that regulate . . . any outside employment, earned income, activities, gifts, and honoraria that judges may receive. These requirements facilitate both awareness and accountability of judges with respect to the possibility of prejudice or conflicts of interest. These rules of recusal, and the degree to which judges conscientiously follow them to avoid conflicts of interest and prejudice, are central to assuring the independence of judging from the circumstances of the judge, as well as to assuring the perception of the integrity of the judiciary in the eyes of the public over whom these judges hold so much power for so long a tenure.²¹¹

Other federal judges have voiced similar support for the current ban. Senior Judge Jack Weinstein of the U.S. District Court for the Eastern District of New York wrote in 1994 that “[t]he present statute and regulations on earnings by judges seem like a useful compromise between unrestricted rights to earn extra income by lecturing and a complete prohibition.”²¹²

The drafting and passage of the Ethics in Government Act of 1978 and the Ethics Reform Act of 1989 were hardly accidental; the modifications made by the latter act were perceived as necessary when passed, and have been upheld by a Supreme Court that easily could

²⁰⁸ David G. Savage, *Wrath of Scalia on Honorarium Story*, L.A. TIMES, Oct. 3, 2000, at A5.

²⁰⁹ See *id.*

²¹⁰ See *id.*

²¹¹ Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989, 994 (1996).

²¹² Jack B. Weinstein, *Limits on Judges Learning, Speaking and Acting—Part I—Tentative First Thoughts: How May Judges Learn?*, 36 ARIZ. L. REV. 539, 551 & n.70 (1994).

have found grounds to address the law's universal applicability. Today, after twelve years of experience with the Reform Act, and despite many other criticisms of the U.S. justice system, the federal judiciary has not been accused of widespread corruption. The honoraria ban is an integral part of preserving the perceived independence of the judiciary and therefore should not be repealed as it pertains to federal judges. Any potential for bribery or improper influence upon the judiciary is a serious threat to the political independence and legitimacy of federal court judges. Moreover, the Chief Justice's unusual request to Congress in itself poses a significant conflict for the judicial and legislative branches; for Congress to follow the judiciary's request for outside supplementation of income would, at the very least, itself carry the appearance of impropriety. Although one can hardly claim that federal judges are not entitled to a salary increase, allowing an exception to the prohibition on honoraria for federal judges is not an appropriate means to properly compensate our judges.