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United States v. National Treasury Employees Union and the Constitutionality of the Honoraria Ban: Protecting the First Amendment Rights of Public Employees

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CASENOTES

UNITED STATES V. NATIONAL TREASURY EMPLOYEES UNION AND THE CONSTITUTIONALITY OF THE HONORARIA BAN: PROTECTING THE FIRST AMENDMENT RIGHTS OF PUBLIC EMPLOYEES

"Congress shall make no law . . . [a]bridging the freedom of speech."¹

I. INTRODUCTION

During the 1980s, government ethics were brought into the spotlight as the public's confidence in the integrity of government officials eroded.² In an attempt to curb actual and per-

1. U.S. CONST. amend. I.

2. The focus of such ethical concerns was on the HUD scandal, the congressional speech honoraria, and the individual scandals of certain members of the House and Senate. Mark A. Adams et al., Project, *Eighth Survey of White Collar Crime Substantive Crime: Ethics in Government*, 30 AM. CRIM. L. REV. 617, 617-18 (1993). "According to a recent Washington Post-ABC poll, nearly 6 out of 10 people questioned believe the ethics of members of Congress were poor. . . ." Huang Yong, *Wright, Victim of Money-Hunting, Partisan Hostility*, Xinhua Gen. Overseas News Service, June 1, 1989.

"Reforms in rules governing honoraria also gained support as a result of revelations about honoraria abuses by former House Speaker Jim Wright." Thomas C. Joerg, Viewpoint, *Thoughts on the Thought Police*, NAT'L J. GOV'T EXECUTIVE, Feb. 1991. It was believed that Jim Wright had been violating ethics rules for at least ten years before his resignation. Allegations of Wright's ethical violations included the following: (1) failure to financially disclose \$145,000 worth of gifts received in the form of salary to his wife, and free or cut-rate use of apartments and a car; (2) surpassing the congressional limits on honoraria by selling bulk quantities of his book to groups to which he had delivered speeches; and (3) improperly receiving \$145,000 worth of gifts from one individual (George Mallick), thereby violating the house rules

ceived improprieties by government employees, and to reinforce the standards of integrity within the federal government, President Bush signed into law the Ethics Reform Act of 1989.³

Prior to the enactment of the Reform Act, the Quadrennial Commission had recommended to Congress both a thirty-five percent salary increase and a ban on honoraria received in all three branches of the government.⁴ The Quadrennial Commission, first appointed by Congress in 1967, functions to recommend appropriate salary levels for the top executive, legislative, and judicial positions.⁵ The Commission's 1989 report, which reinstated previous recommendations of significant salary increases, proved to be instrumental in channeling the enactment of the Reform Act of 1989.⁶ The President's Commission on Federal Ethics Law Reform endorsed the recommendation to ban the receipt of honoraria by all officials and employees in all three branches of government.⁷

limiting the receipt to gifts valued under \$100. Huang Yong, *U.S. House Speaker Accused of Violating Ethical Rules*, Xinhua Gen. Overseas News Service, April 17, 1989.

3. Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 [hereinafter Reform Act] (codified as amended at 5 U.S.C. app. §§ 101-505 (1994)) (amending the Ethics in Government Act of 1978). The Reform Act serves two principal purposes: "(1) to make necessary ethics reforms, including reforms of the outside income, gift, and travel rules, and (2) to institute a pay raise for officials and employees of all branches." June E. Edmondson, *And Gifts and Travel for All*, 37 FED. B. NEWS & J. 402, 402 (1990). Furthermore, the Reform Act expanded the existing restrictions upon off-the-payroll money-making activities of current federal employees in all three branches of the U.S. government. *National Treasury Employees Union v. United States*, 788 F. Supp. 4, 5 (D.D.C. 1992).

4. *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1009 (1995). The Reform Act adopted the Commission's recommendations; however, it only provided a twenty-five percent salary increase to employees at and above the GS-16 salary level. *Id.* The provisions governing this increase may be found in section 703 of the Reform Act.

5. *Id.* at 1008.

6. *Id.* at 1008-09.

7. *Id.* at 1009. The President's Commission stated:

Although we are aware of no special problems associated with receipt of honoraria within the judiciary, the Commission—in the interest of alleviating abuses in the legislative branch and in applying equitable limitations across the government—joins the Quadrennial Commission in recommending the enactment of legislation to ban the receipt of honoraria by all officials and employees in all three branches of government.

Id. at 1028. "In recommending this ban, we also recognize, as did the Quadrennial Commission, that the statutory definition of honoraria must be broad enough to 'close present and potential loopholes. . .'" *Id.* at 1009.

Just eleven years earlier, Congress had passed the Ethics in Government Act of 1978.⁸ This Act was passed in response to the public's growing concern with the integrity of the United States government that resulted largely from the Watergate scandal of the 1970s.⁹ The stated purpose of the 1978 Act was to "preserve and promote the accountability and integrity of public officials and of the institutions of the Federal Government" and to require investigations by the Attorney General in certain situations, particularly where the alleged wrongdoings involved the executive department.¹⁰ Upon signing the 1978 Act into law, President Carter described it as that which "will not only make [government officials] honest but [that which] will keep them honest" and that which will ensure that "the public has available to them an assessment of whether or not that candidate or that public official is honest."¹¹

The Reform Act amended the 1978 Act to impose a complete ban on the receipt of honoraria¹² by federal government employees.¹³ By implementing the salary increase, members of

8. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in scattered sections of 2 U.S.C., 5 U.S.C., 18 U.S.C., and 28 U.S.C. [hereinafter 1978 Act]).

9. The 1978 Act was "a direct outgrowth of the Watergate scandals" and "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 United States District Judge Harold H. Greene); see also Adams et al., *supra* note 2, at 617 (discussing the effect of the Watergate scandal).

10. S. REP. NO. 170, 95th Cong., 2d Sess. 1 (1978), reprinted in 1978 U.S.C.C.A.N. 4216, 4217.

11. Adams et al., *supra* note 2, at 617.

12. The provisions of the Reform Act governing honoraria are codified at 5 U.S.C. app. §§ 501-505 (1994), which reads:

The term "honorarium" means a payment of money or anything of value for an appearance, speech or article (including a series of appearances, speeches, or articles if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government) by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual (and one relative) to the extent that such expenses are paid or reimbursed by any other person, and the amount otherwise determined shall be reduced by the amount of any such expenses to the extent that such expenses are not paid or reimbursed.

5 U.S.C. app. § 505(3) (1994).

13. 5 U.S.C. app. § 501(b). On February 2, 1989, Congress passed the prohibition of honoraria "by Members, officers or employees of the Senate on or after the first

government would no longer find it necessary to accept honoraria in order to supplement their salaries.¹⁴ Government employee organizations such as the National Treasury Employees Union ("NTEU") denounced the amended regulations as bizarre and illegal.¹⁵ NTEU's president, Robert Tobias, characterized the amendment as "an absurd move that underscored our contention that the general ban on federal employee honoraria is ridiculous."¹⁶ The president of the American Federation of Government Employees, John N. Sturdivant, believed that "Congress made an inadvertent error by subjecting all federal workers to the restrictions, when its real purpose was 'to clean up its own house.'"¹⁷ Moreover, there still existed the ever-present level of dissatisfaction among federal employees who did not earn as high a salary as those in Congress.¹⁸

day that there takes effect any increase in the salaries of Members officers, or employees of the Senate as recommended by the Commission on Executive, Legislative, and Judicial Salaries. . . ." S. Res. 40, 101st Cong., 2d Sess. 135 CONG. REC. 1014 (1989) "The honoraria ban for all federal employees was a last-minute addition to the [Reform] [A]ct. . . . House members and senior executive branch employees got hefty pay raises . . . which also took effect Jan. 1, [and] are as high as 33% for some employees." Dana Priest, *Ethics Law's Deep Reach Into Bureaucracy; Honoraria Ban Curtails Employees' Outside Work; Court Challenge Cites First Amendment*, WASH. POST, Jan. 3, 1991, at A19. Because Congress regarded the acceptance of honoraria by its own members as a suspect activity, "as tending to corrupt," it sought to prohibit the receipt of honoraria not only by its own members, but also by virtually anyone employed by the federal government. *National Treasury Employees Union v. United States*, 788 F. Supp. 4, 5 (D.D.C. 1992).

14. "[The honoraria ban] was enacted based on recommendations of two government commissions, which tied salary increases for members of Congress and top executive branch officials to elimination of honoraria." 64 U.S.L.W. 3062, 3062 (U.S. Aug. 1, 1995).

15. *Executive Memo: Honoraria Debate Rages*, 1992 NAT'L J. GOV'T EXECUTIVE, Mar. 31, 1992.

16. *Id.* Office of Government Ethics ("OGE") director, Stephen Potts, agreed with Tobias, stating that "[w]hile Congress made a policy decision in enacting the honoraria ban now in effect, I continue to believe that a different policy would be more advantageous to government and less onerous to the many employees it now affects." *Id.* Earlier, Potts had called the Honoraria Ban "too restrictive" and "a mistake." Joerg, *supra* note 2.

17. Joerg, *supra* note 2. In 1991, the American Federation of Government Employees represented at least 700,000 federal workers. *Id.* Mr. Joerg contents that

By aiming at the freelancers and individualists in our society, Congress seems to give the federal worker the message that the government doesn't want any free-thinkers in its house, nor does it want to give people the opportunity to enhance their income by thinking. This inclusion of all federal employees . . . is particularly hypocritical. . . .

Id.

18. Lt. Steven L. Hein of the U.S. Coast Guard wrote in a letter: "The restric-

The Honoraria Ban forbids federal employees from accepting compensation for making speeches or writing articles, and “applies even when neither the subject of the speech or the article nor the person or group paying for it has any connection with the employee’s official duties.”¹⁹ This provision of the Reform Act has been the subject of an ongoing constitutional battle between the United States government and its employees.²⁰ However, in February, the Supreme Court struck down the Honoraria Ban in *National Treasury* determining that it breaches the First Amendment rights of government employees.²¹ Already, the Court’s decision has provided authority to cases similarly involving government regulations which abridge public employees’ First Amendment rights.²²

This casenote reviews the Court’s decision in *National Treasury* and examines the interpretative scheme utilized in arriving at its conclusion. Part II of this casenote familiarizes the reader with the events and situations surrounding the *National Treasury* case and compares the definition of “honorarium” adopted by the Supreme Court in *National Treasury* with the definition initially proposed by Congress under the Ethics in Government Act of 1978. Part III examines how the majority in *National Treasury* dealt with the “nexus” requirement as it affects government impropriety. Part IV analyzes the manner in which the Supreme Court applied the test in *Pickering v. Board of Education* to address the constitutionality of the Honoraria Ban. A summary of *National Treasury*’s dissenting opinion appears in Part V. Finally, this casenote concludes that the

tions of this act are too broad and will not only adversely affect individuals and private organizations but the government as well. The issue here is not the money. . . . If we allow the provisions of this act to go unchallenged, we are quietly accepting what amounts to censorship.” *Honoraria Ban Offends*, 1991 NAT’L J. GOV’T EXECUTIVE, Apr. 15, 1991.

Harry F. Noyes, III, a Public Affairs Specialist for the U.S. Army Health Services Command had this to offer: “Everyone is missing the point, as regards to the honoraria ban. Congress’ vicious and stupid act of legislative tyranny is indeed unconstitutional. But we may not get far citing the First Amendment, since the law does not forbid us to publish.” *Id.*

19. *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1008 (1995).

20. *Id.*

21. *Id.*

22. *See Sanjour v. EPA*, 56 F.3d 85 (D.C. Cir. 1995) *rev’g* 984 F.2d 434 (D.C. Cir. 1993); *see also infra* part VI.

National Treasury decision projects authority and guidance to other courts in matters involving public concern and restraint of expression, demonstrates an evolution of the *Pickering* test, and preserves the First Amendment right of the freedom of expression.

II. REACTION TO THE HONORARIA BAN: THE *NATIONAL TREASURY* CASE

When the NTEU, the American Federation of Government Employees, and the American Civil Liberties Union filed suit in 1991 against the U.S. government, they gave a voice of protest to those federal employees who resented the Honoraria Ban.²³ The suit charged that the Honoraria Ban infringed upon the employees' First Amendment rights.²⁴ The district court declared that the Honoraria Ban was unconstitutional insofar as it applied to executive branch employees.²⁵ The D.C. Circuit Court of Appeals affirmed the district court's decision and concluded that the Honoraria Ban was not narrowly tailored to achieve its purpose.²⁶ The court reasoned that "[t]o create the sort of impropriety or appearance of impropriety at which the statute is evidently aimed, there would have to be some sort of nexus between the employee's job and either the subject matter of the expression or the character of the payor."²⁷ The D.C. Circuit found that the government had failed to identify such a nexus as to many of the plaintiffs.²⁸ Therefore, in order for there to be a ban on honoraria received, a nexus must exist

23. *National Treasury Employees Union v. United States*, 788 F. Supp. 4 (D.D.C. 1992).

24. *Id.* at 6.

25. *Id.* at 13.

26. *National Treasury Employees v. United States*, 990 F.2d 1271, 1277, 1279 (D.C. Cir. 1993). The D.C. Circuit court also agreed with the district court's holding that the Honoraria Ban was severable from the remainder of the Reform Act in its application to executive branch employees. *Id.* at 1277-79.

27. *Id.* at 1275. See *infra* part III for further discussion of the "nexus" requirement.

28. *Id.* The plaintiffs included a Nuclear Regulatory Commission lawyer who wrote on Russian history, a postal service mailhandler who wrote and gave speeches on the Quaker religion, a Department of Labor lawyer who lectured on Judaism, a Department of Health and Human Services employee who reviewed art, and musical and theater performances for local newspapers, and a civilian Navy electronics technician who wrote on Civil War ironclad vessel technology. *Id.* (citations omitted).

between the speech and the employee's job.

In 1995, the Supreme Court of the United States addressed the constitutionality of the Honoraria Ban in *United States v. National Treasury Employees Union*.²⁹ The Court held that the prohibition imposed a significant burden on expressive activity and that it was the kind of burden that abridges speech under the First Amendment.³⁰ The *National Treasury* case was a consolidation of several cases that challenged the ability of Congress to impose a ban abridging the constitutional right to free speech of government employees.³¹ The respondents included individual members of, and a union representing a class composed of all executive branch employees below grade GS-16 who, but for the Honoraria Ban, would be entitled to receive honoraria.³²

The Supreme Court in *National Treasury* adopted the definition of "honorarium" as amended by the 1992 Legislative Branch Appropriations Act³³ to include a payment of money or anything of value for an appearance, speech or article (including a "series of appearances, speeches, or articles if the subject matter is *directly related* to the individual's official duties or the payment is made because of the individual's status with the Government)."³⁴ In other words, the 1992 Appropriations Act

29. 115 S. Ct. 1003 (1995).

30. *Id.* at 1018. *Accord* *Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 502 U.S. 105 (1991) (holding that a statutory prohibition on compensation unquestionably imposes a significant burden on expressive activity, and is therefore inconsistent with the First Amendment). In *Simon & Schuster*, New York's "Son of Sam" law required accused or convicted criminals who received income from works describing their crimes to deposit the proceeds into an escrow account to be held and distributed to the victims of the crime and to creditors. *Id.* at 504-05.

31. *National Treasury*, 115 S. Ct. at 1010.

32. *Id.* The General Schedule ("GS") is the basic pay schedule for federal government employees. The schedule sets the annual rates of basic pay, consisting of 15 grades, designated "GS-1" through "GS-15", consecutively, with 10 rates of pay for each such grade. 5 U.S.C. § 5332(a)(1)-(2) (1994). The General Schedule for the pay period beginning January 1, 1995 indicates that the salary range for federal employees is between \$12,141 (GS-1, step 1) through \$88,326 (GS-15, step 10). Schedule 1, 5 U.S.C. § 5332 (1994).

33. Legislative Branch Appropriations Act of 1992, Pub. L. No. 102-90, tit. III, § 314, 105 Stat 447 (emphasis added).

34. *National Treasury*, 115 S. Ct. at 1009-10 (emphasis added). The 1992 Appropriations Act made the honoraria rules apply to the Senate and its employees, and also made minor changes to the gift and financial disclosure provisions of the Reform Act. *Adams et al. supra* note 2, at 620. The inapplicability of the Honoraria Ban to

amended "honorarium" to allow federal employees to receive money for making a series of appearances, giving a series of lectures or speeches, or writing a series of articles which are *not related* to the employee's official duties or status. While this exclusion provided a distinct and unique meaning to "honorarium" and gave it a narrower definition than that initially proposed in the Reform Act,³⁵ it is also important to recognize that the definition has several significant omissions:

"[A]pppearance" does not include "performances using an artistic, athletic or other such skill or talent or primarily for the purpose of demonstration or display; "speech" does not include "recitation of scripted material, as for a live or theatrical production," or the "conduct of worship services or religious ceremonies;" and "article" does not include "works of fiction, poetry, lyric, or script."³⁶

The Supreme Court found that the Honoraria Ban was too broad in its scope and that it should be less stringently applied to lower-level governmental employees. The Court determined that:

Congress reasonably could assume that payments of honoraria to judges or high-ranking officials in the Executive Branch might generate a similar appearance of improper influence. Congress could not, however, reasonably extend that assumption to all federal employees below Grade GS-

the Senate and its employees was perceived as a "major flaw" in the Reform Act. *Id.* at 636. The 1992 Appropriations Act subjected its officers and employees to the Honoraria Ban, and therefore corrected this "major flaw." *Id.* For a complete definition of "honorarium," see *supra* note 12.

35. The original definition set forth in the Reform Act read as follows:

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, excluding any actual and necessary travel expenses incurred by such individual (and one relative) to the extent that such expenses are paid or reimbursed by any other person, and the amount otherwise determined shall be reduced by the amount of any such expenses to the extent that such expenses are not paid or reimbursed.

National Treasury, 115 S. Ct. at 1009 n.4 (quoting 5 U.S.C. app. § 505(3) (Supp. I 1989)).

36. Robert S. Collins, *Ethics and the First Amendment: The Applicability of the Honorarium Ban of the Ethic Reform Act of 1989 to the Executive Branch*, 62 GEO. WASH. L. REV. 888, 892 (1994) (quoting *National Treasury Employees Union v. United States*, 788 F. Supp. 4, 6 n.3 (D.D.C. 1992)).

16, an immense class of workers with negligible power to confer favors on those who might pay to hear them speak or to read their articles.³⁷

Ultimately, the Court declared the Honoraria Ban unconstitutional as it applied to those employees below the GS-16 level, that is, to those employees who did not receive the twenty-five percent salary increase when Congress passed the Reform Act.³⁸

Relying upon the narrowed definition of honorarium, the Court proceeded to analyze its application to the relation between the federal employee's official duties and the employee's expressive activity.³⁹ The Court recognized that the language of the Honoraria Ban did not clearly identify the terms of any nexus requirement⁴⁰ between expressive activity and government employment.⁴¹ The following statement issued by the Court discloses the uncertainty surrounding the issue of when the Honoraria Ban applies:

In other words, accepting pay for a *series* of articles is prohibited if and only if a nexus exists between the author's employment and either the subject matter of the expression or the identity of the payor. For an *individual* article or speech, in contrast, pay is taboo even if neither the subject matter nor the payor bears any relationship at all to the author's duties.⁴²

37. *National Treasury*, 115 S. Ct. at 1016.

38. *Id.* at 1018-19.

39. *Id.* at 1016-17.

40. Likewise, the D.C. Circuit, in *National Treasury Employees Union v. United States*, addressed the issue of the "nexus" requirement and concluded that the government's failure to identify some sort of nexus between the employee's job and either the expression's subject matter or the payor's character undercut its proffered concern about actual or apparent improprieties in the receipt of honoraria. 990 F.2d 1271,1275-77 (D.C. Cir. 1993). "To create the sort of impropriety or appearance of impropriety at which the statute is evidently aimed, there would have to be some sort of nexus between the employee's job and either subject matter of the expression or the character of the payor." *Id.* at 1275.

41. *National Treasury*, 115 S. Ct. at 1016-17.

42. *Id.* "Congress' decision to provide a total exemption for all unrelated series of speeches undermines application of the ban to individual speeches and articles with no nexus to Government employment." *Id.*

Thus, the Court reaffirmed the notion that without the expression of such a nexus, it is unlikely that the sort of government impropriety or appearance of impropriety at which the Honoraria Ban is aimed would emerge.⁴³

In addressing the constitutionality of the Honoraria Ban as an abridgment of First Amendment rights, the Supreme Court in *National Treasury* applied the balancing test set forth in *Pickering v. Board of Education*.⁴⁴ This deferential test balances "the interest of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public service it performs through its employees."⁴⁵ The Court justified the application of the *Pickering* test to the respondents in *National Treasury* because the expressive activities⁴⁶ subject to the Honoraria Ban fell "within the protected category of citizen comment on matters of public concern rather than employee comment on matters related to personal status in the workplace."⁴⁷ Thus, the government in *National Treasury* found itself bearing the heightened burden⁴⁸ of justification for

43. *Id.* at 1017; *see also* *National Treasury Employees Union v. United States*, 990 F.2d 1271, 1275-76 (D.C. Cir. 1993) ("[I]t is clear that the ban reaches a lot of compensation that has no nexus to government work that could give rise to the slightest concern."). A further discussion of the nexus requirement appears *infra* Part III.

44. 391 U.S. 563 (1968) (holding that although the state could not condition public employment upon a surrender of First Amendment rights enjoyed by citizens not employed by the government, the state did have a stronger interest in regulating the speech of its employees than it had in regulating the speech of citizens generally).

45. *Id.* at 568. The *Pickering* Court applied this test and ruled that the teacher could not be fired for having written a letter to the local newspaper criticizing the school board's allocation of funds. *Id.* at 574-75. *See infra* part IV for a more detailed discussion of the *Pickering* test.

46. The expressive activities refer to the speeches and articles for which respondents received compensation before enactment of the Reform Act.

47. *National Treasury*, 115 S. Ct. at 1013. In cases where disciplinary actions are taken in response to a government employee's speech, the Court has applied the *Pickering* test only when the employee has spoken "as a citizen upon matters of public concern" rather than "as an employee upon matters only of personal interest." *Connick v. Myers*, 461 U.S. 138, 147 (1983). There is a "longstanding recognition that the First Amendment's primary aim is the full protection of speech upon *issues of public concern*." *Id.* at 154 (emphasis added); *see also* *Waters v. Churchill*, 114 S. Ct. 1878 (1994); *Rankin v. McPherson*, 483 U.S. 378 (1987); *Sanjour v. EPA*, 56 F.3d 85 (D.C. Cir. 1995); *Baird v. Cutler*, 883 F. Supp. 591 (D. Utah 1995).

48. When speech involves a matter of public concern, the government bears the burden of justifying its adverse employment action. *Id.*; *Rankin*, 483 U.S. at 388; *cf.*

regulating the expressive activity of its employees because the "sweep" of the Honoraria Ban "*singles out* expressive activity for special regulation."⁴⁹ As the government failed to meet its burden,⁵⁰ the Court determined that the Honoraria Ban violated the First Amendment.⁵¹

III. GOVERNMENT IMPROPRIETIES AND THE "NEXUS" REQUIREMENTS

The enactment of both the 1978 Act and the Reform Act occurred largely in response to the public's perception of the government's integrity.⁵² Specifically, the Honoraria Ban reflected Congress' effort to protect and preserve the government's interest by assuring that federal employees did "not misuse or appear to misuse power" by accepting compensation for their expressive activities.⁵³ When the President's Commission of Federal Ethics Law Reform endorsed the views of the Quadrennial Commission,⁵⁴ it proposed that the definition of "honorar-

Connick, 461 U.S. at 148-49 (stating that private speech involving nothing more than a complaint about a change in the employee's own duties may give rise to discipline *without imposing any special burden* of justification of the government employer).

49. *National Treasury*, 115 S. Ct. at 1017 (emphasis added). Moreover, the Honoraria Ban is based only on speculation that the expressive activity might promote government impropriety and threaten the government's interests. The Court points out that "a 'reasonable' burden on expression requires a justification far stronger than mere speculation about serious harms." *Id.* at 1017. Part IV of this casenote includes a detailed analysis of the "heightened" burden requirement imposed on the United States government.

50. In order to meet its burden of justification for the restriction on expression created by the Honoraria Ban, the government was required to show that "the interests of both potential audiences and vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." *Id.* at 1014 (citing *Pickering*, 391 U.S. at 517).

51. *National Treasury*, 115 S. Ct. at 1018 ("[T]he speculative benefits the honoraria ban may provide the Government are not sufficient to justify this crudely crafted burden on respondents' freedom to engage in expressive activities.").

52. See *supra* note 2 and accompanying text.

53. *National Treasury*, 115 S. Ct. at 1015.

54. The Quadrennial Commission, first appointed by Congress in 1967, functions to recommend appropriate levels of Executive, Legislative, and Judicial salaries. In 1989, the Quadrennial Commission reinstated previous recommendations of significant salary increases; its report proved to be instrumental in channeling the enactment of the Reform Act of 1989. The Commission recommended a 35% salary increase as well as a ban on honoraria received. *Id.* at 1008-09. As we know now, the Reform Act

ia" had to be broad enough to "close present and potential loopholes . . . not reasonably necessary for the appearance involved; or any other benefit that is the substantial equivalent of an honorarium."⁵⁵ Clearly, Congress formulated a link between the actual and perceived improprieties by federal employees and their expressive activities and concluded that its interests would be best served by applying an across-the-board ban so that federal employees could not escape the statute through loopholes.

Part II of this casenote identified the definition of honorarium adopted by the Supreme Court in *National Treasury*.⁵⁶ On its face, the language provided by this definition applies the Honoraria Ban to nearly all federal employees.⁵⁷ However, the Court moved beyond this interpretation and determined that the language also provided an exemption for a series of speeches, appearances and articles unrelated to federal employment.⁵⁸ In other words, a series of expressive activities is not prohibited so long as it is not related to the federal employee's duty or status. This determination is consistent with the rationale that unrelated expressive activities do not fall within the link or "nexus" formulated by Congress.

The Court also recognized that an individual's speech is prohibited, even if the content of the speech is unrelated to the employee's government position.⁵⁹ This feature of the Honoraria Ban cast doubt on the government's argument 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.⁶⁰ The fact that the 1992 Appropriations Act amended the definition of "honorarium" to exclude a series of speeches belies the need for such a ban on speeches or arti-

provided a 25% increase to certain governmental employees. The provisions governing this increase may be found in Section 703 of the Reform Act. *Id.* at 1009 (citations omitted).

55. *Id.* at 1009 (quoting *To Serve with Honor: Report of the President's Commission on Federal Ethics Law Reform* 36 (Mar. 1989)).

56. *See supra* notes 33-35 and accompanying text.

57. *Baird v. Cutler*, 883 F. Supp. 591, 598 n.3 (D. Utah 1995).

58. *See National Treasury*, 115 S. Ct. at 1016. *See supra* part II.

59. 115 S. Ct. at 1016-17.

60. *Id.* at 1016-18.

cles with no "nexus" to an employee's duties.⁶¹ Without such a nexus, the appearance of impropriety is unlikely to appear.

Although each court reviewing the *National Treasury* case recognized that the Honoraria Ban lacked a proper nexus test, no attempt was ever made to remedy the defect. The constitutionality of the Honoraria Ban was first addressed by the District Court for the District of Columbia which applied the test in which, despite a compelling state interest, statutory provisions that are not "narrowly tailored"⁶² enough to avoid significant financial burdens on free speech rights are constitutionally suspect.⁶³ The district court found that the Honoraria Ban was not narrowly tailored by reason of its failure to require a nexus between prohibited speech and an employee's position in the government.⁶⁴ On appeal, the D.C. Circuit Court of Appeals again addressed the constitutionality issue and also concluded that the Honoraria Ban contained no identifiable nexus.⁶⁵ Absent such a nexus, the presumption of impropriety is unlikely to occur or raise concern.⁶⁶ Additionally, both the district and circuit courts concluded that the Honoraria Ban was severable from the remainder of the Reform Act insofar as it applied to executive branch employees.⁶⁷ The D.C. Circuit further ad-

61. *Id.* at 1016-17.

62. The Supreme Court, in *Ward v. Rock Against Racism*, defined "narrow tailoring" as being satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." 491 U.S. 781, 799 (1989) (quoting *United States v. Albertini*, 474 U.S. 675, 689 (1985)).

63. *National Treasury Employees Union v. United States*, 788 F. Supp. 4, 7 (D.D.C. 1992) (citing *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105 (1991)).

64. *Id.* at 10-11. The court stated that:

No official nexus or relationship between the officeholder and those for whom he would speak or write is contemplated by the statute. Payments for a "speech" or an "article" are proscribed to federal employees even when there is neither the possibility nor a perception that the office and the payment are interdependent.

Id. at 10.

65. *National Treasury Employees Union v. United States*, 990 F.2d 1271, 1274 (D.C. Cir. 1993) (discussing how as to many of the plaintiffs, there was no suggestion that their expressive activities are related to their employment).

66. *Id.* at 1275; see *supra* notes 27-28 and accompanying text.

67. *National Treasury Employees Union v. United States*, 990 F.2d 1271, 1277-79 (D.C. Cir. 1993); *National Treasury Employees Union v. United States*, 788 F. Supp. 4, 11-14 (D.D.C. 1992). Severance occurs when an unconstitutional provision of a statute is removed from the rest of the statute and involves a determination of whether the remainder of the statute is valid. As the district and circuit courts in

vanced its opinion by stating that the formulation of an appropriate nexus test was a legislative, not judicial, duty.⁶⁸ As a result of its reluctance to rewrite the Reform Act to include language indicating a nexus requirement, the D.C. Circuit chose to invalidate that section of the Honoraria Ban as it applied to executive officers by severing it from the Reform Act.⁶⁹

Likewise, the Supreme Court concluded that it was Congress' task to draft a narrower statute, but disagreed with the D.C. Circuit's severance of the Honoraria Ban from the Reform Act insofar as it provided a remedy to those not parties in the case.⁷⁰ The Court wisely rejected the Government's suggestion to modify the Honoraria Ban by crafting a nexus requirement. As Justice Stevens properly stated:

We cannot be sure that our attempt to redraft the statute to limit its coverage to cases involving an undesirable nexus between the speaker's official duties and either the subject matter of the speaker's expression or the identity of the payor would correctly identify the nexus Congress would have adopted in a more limited honoraria ban. We cannot know whether Congress accurately reflected its sense of an appropriate nexus in the terse, 33-word parenthetical statement with which it exempted series of speeches and articles from the definition. . . . The process of drawing a proper nexus, even more than the defense of the statute's application to senior employees, would likely raise independent constitutional concerns whose adjudication is unnecessary to decide this case.⁷¹

Ultimately, the Court torpedoed the government's argument that a prophylactic rule was needed because a nexus test would be too difficult to administer.⁷²

National Treasury proposed, the unconstitutional provision of the Honoraria Ban could be severed from the 1978 Act, thereby leaving the remainder of the 1978 Act in effect. Alternatively, courts may also hold that the unconstitutional provision is not severable and may choose to invalidate the statute in its entirety. For further discussion of severability see John C. Nagle, *Severability*, 72 N.C. L. REV. 203 (1993).

68. 990 F.2d at 1277 ("Articulation of some appropriate nexus test would seem a purely legislative act.")

69. *Id.* at 1277-79.

70. *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1018-19 (1995).

71. *Id.* at 1019 (citations omitted).

72. *Id.* at 1017. The Court stated that: "The Government's only argument against

It followed that the absence of a nexus requirement in the language of the Honoraria Ban placed the United States in a position to defend its interest under a heightened level of judicial scrutiny.

IV. THE PICKERING TEST

A. Pickering v. Board of Education⁷³

In 1961, Marvin L. Pickering was dismissed from his teaching position at a public school for writing a letter to the editor of a local newspaper criticizing a school board's handling of a tax bond issue.⁷⁴ As a result, Pickering took action against the school board, claiming that his letter was protected by the First and Fourteenth Amendments. The Illinois Supreme Court rejected Pickering's claim on the ground that, as a public school teacher, he had waived his right to make statements concerning the operations of the school "which in the absence of such position he would have an undoubted right to engage in."⁷⁵ The court concluded that Pickering could constitutionally be dismissed from his teaching position.⁷⁶

The Supreme Court of the United States did not attempt to clarify the Illinois court's position concerning the scope of protection entitled under the First Amendment.⁷⁷ Instead, the Court premised its opinion by stating "that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of

a general nexus limitation is that a wholesale prophylactic rule is easier to enforce. . . . A blanket burden on the speech of nearly 1.7 million federal employees requires a much stronger justification than the Government's dubious claim of administrative convenience." *Id.* (citations omitted).

73. 391 U.S. 563 (1968).

74. *Id.* at 564-66.

75. *Id.* at 567.

76. *Id.* at 568.

77. "It is not altogether clear whether the Illinois Supreme Court held that the First Amendment had no applicability to appellant's dismissal for writing the letter in question or whether it determined that the particular statements made in the letter were not entitled to First Amendment protection." *Id.* at 567.

the public schools in which they work . . . has been *unequivocally rejected*. . . .⁷⁸

The court's analysis focused on the interests of Pickering as a public citizen, distinguishing him from the public employee entity which had served as a basis for judgment in the lower courts. When balanced against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees,"⁷⁹ it does not appear that these interests outweigh those of a public citizen commenting on matters of public concern.⁸⁰ Given these circumstances, the Supreme Court subsequently found that the letter was constitutionally protected because it was related to a matter of public concern.

In balancing the interests of the state against the interests of its employees, the *Pickering* Court clearly formulated a standard of review relating to public employees' freedom of expression.

B. A Balancing Approach

The *Pickering* test is the classic balancing approach taken to evaluate First Amendment rights of public employees.⁸¹ To be protected, the speech must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employ-

78. *Id.* at 568 (emphasis added).

79. *Id.*

80. *Id.* at 570-74. "[T]he interest of the school administration in limiting teachers' opportunities to contribute to public debate is *not* significantly greater than its interest in limiting a similar contribution by any member of the general public." *Id.* at 573 (emphasis added).

Pickering's letter criticized the school board's allocation of funds between the athletic and educational programs, and the manner in which the board sought to solicit additional funds from the district's taxpayers to support its plan. *Id.* at 569. The Court deemed the content of this letter to be a matter of public concern. *Id.* at 569-70. *But see id.* at 570 n.3 (discussing situations that might warrant a different consideration of whether public comment is a matter of public concern).

81. *See Waters v. Churchill*, 114 S. Ct. 1878 (1994); *Rankin v. McPherson*, 483 U.S. 378 (1987); *Connick v. Myers*, 461 U.S. 138 (1983); *Sanjour v. EPA*, 984 F.2d 434 (D.C. Cir. 1993); *Baird v. Cutler*, 883 F. Supp. 591 (D. Utah 1995).

ees.”⁸² Therefore, in determining whether a public employee’s speech merits constitutional protection, a court is likely to employ the *Pickering* test to strike a balance between the competing interests. When the Supreme Court formulated the *Pickering* test, its main concern was to guard public employees from the fear of retaliatory dismissal after publicly commenting on matters of public concern.⁸³ However, *National Treasury* supports the proposition that a court may also rely on the *Pickering* test when it is required to determine the validity of a public employer’s restraint on job-related speech.⁸⁴

C. Application of the Pickering Test to the Honoraria Ban

The *National Treasury* Court applied the *Pickering* test to unprecedented facts regarding First Amendment rights of public employees and sought to strike a balance under the test to determine whether the restraints imposed by the Honoraria Ban warranted constitutional protection.

1. The “Public Concern” Element

Whether a public employee’s speech is a matter of public concern is the threshold issue in determining whether the employee’s activity is entitled to constitutional protection. The Supreme Court in *Connick v. Myers* provided that when an employee’s speech can “be fairly considered as relating to any matter of political, social, or other concern to the community,” the speech is a matter of public concern.⁸⁵ Relying on the *Connick* Court’s analysis of “public concern,” the *National Treasury* Court determined that the speech subject to the Honoraria

82. *Connick*, 461 U.S. at 142 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

83. *Pickering*, 391 U.S. at 572.

84. 115 S. Ct. at 1012.

85. 461 U.S. at 146. Alternatively, when a public employee speaks publicly on a matter of his or her *personal* interest, the “public concern” element usually is absent from the facts of a case, and therefore, the *Pickering* test is not applicable. In this type of situation, the Court may not be the appropriate forum to examine the consequences of an employer’s action. *Id.* at 147.

Ban passed the threshold afforded by the First Amendment to judicially review the Government's action.⁸⁶

The Court employed the *Pickering* test upon determining that the respondents' expressive activities in *National Treasury* fell within the protected category of "public concern" since their "speeches and articles for which they previously received compensation were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their government employment."⁸⁷ This conclusion, however, does not alone determine that the expressive activities are protected by the First Amendment.⁸⁸

2. The Government's Burden

The United States government found itself bearing the burden of justifying the Honoraria Ban on legitimate grounds.⁸⁹ When speech surpasses the threshold inquiry of "public concern,"⁹⁰ the government bears the burden to justify its adverse employment action.⁹¹

Up to this point, the Court's application of the *Pickering* test in *National Treasury* is consistent with that of *Pickering* and other cases evaluating the First Amendment rights of public employees. However, upon allocating the burden of justification for regulating the expressive activities of its employees to the government, the *National Treasury* Court also indicated that this burden was heavier than usual.⁹²

By augmenting the government's burden, the *National Treasury* Court advanced the application of the *Pickering* test to a different level. To understand the reasoning behind this, it is necessary to examine how the Supreme Court distinguished *National Treasury* from *Pickering* and its progeny.⁹³ Unlike

86. *National Treasury*, 115 S. Ct. at 1013.

87. *Id.*

88. *See infra* part IV.C.3.

89. *See, e.g.*, Rankin v. McPherson, 483 U.S. 378, 388 (1987).

90. *See supra* Part IV.C.1.

91. *National Treasury*, 115 S. Ct. at 1013; *see also* Connick v. Myers, 461 U.S. 138, 150 (1983).

92. *National Treasury* 115 S. Ct. at 1013-15.

93. *See id.* at 1012-13.

Pickering, *National Treasury* “does not involve a post hoc analysis of one employee’s speech and its impact on that employee’s public responsibilities,’ but rather the constitutionality of an ex ante rule, which is a ‘wholesale deterrent to a broad category of expression by a massive number of potential speakers.’”⁹⁴ In other words, the expressive activity subject to the Honoraria Ban does not serve as a basis for disciplining or discharging a federal employee like that in *Pickering* and its progeny because the expressions have not yet occurred. Furthermore, “[t]he widespread impact of the honoraria ban . . . gives rise to far more serious concerns than could any single supervisory decision.”⁹⁵ Finally, unlike the responsive adverse action taken in *Pickering*, the Honoraria Ban “chills potential speech before it happens.”⁹⁶ As the Court stated, “[t]he honoraria ban as applied to respondents burdens speech far more than our past applications of *Pickering* because the ban deters an enormous quantity of speech before it is uttered, based only on speculation that the speech might threaten the Government’s interests.”⁹⁷ For these articulated reasons, the Court required the government to bear

94. *Baird v. Cutler*, 883 F. Supp. 591, 598 n.3 (D. Utah 1995) (quoting *National Treasury*, 115 S. Ct. at 1013). *But see National Treasury*, 115 S. Ct. at 1020 (O’Connor, J., concurring in part and dissenting in part) (“[R]eliance on the *ex ante/ex post* distinction is not a substitute for the case-by-case application of *Pickering*.”).

Justice O’Connor agreed with the majority that the government bore a heavier burden of justification, however not by reason of the *ex ante/ex post* distinction of the regulation expressive activity, but by reason of the “magnitude of intrusion on employees’ interests.” *Id.* at 1020-021. O’Connor stated this view in response to the government’s argument that greater deference should be given to its predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large.” *Id.* at 1021 (quoting *Waters v. Churchill*, 114 S. Ct. 1878, 1887 (1994)).

Before *National Treasury*, the *Pickering* test was most recently applied in *Waters*. *Id.* at 1020. O’Connor perceived *National Treasury* as one of those situations in which “the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished.” *Id.* at 1021 (quoting *Waters*, 114 S. Ct. at 1887).

95. *National Treasury*, 115 S. Ct. at 1014.

96. *Id.*; *see also Baird*, 883 F. Supp. at 598 (“Post hoc analysis of an employee’s actual speech, as in this case, involves a less stringent balance and consideration of the impact on the employee’s responsibilities than ex ante analysis, which brings into play prior restraint on speech often involving a broad category of expression by numerous potential speakers.”).

97. *National Treasury*, 115 S. Ct. at 1013 n.11.

a heavier burden of justification with respect to the Honoraria Ban than with respect to an isolated disciplinary action.⁹⁸

3. Balancing the Interests

In addition to resolving the "public concern" issue,⁹⁹ the Court must strike a balance between the interests of the public employees and the interests of the government before determining whether the employees' expressive activities are protected by the First Amendment.¹⁰⁰

Although the Honoraria Ban is considered a content-neutral¹⁰¹ restriction on expression which does not prohibit speech per se, the Court determined that it imposed a significant burden on the respondents in *National Treasury*. By providing a disincentive to engage in expressive activity, the Honoraria Ban

98. 115 S. Ct. at 1014.

99. See *supra* part IV.C.i.

100. *Watters v. City of Philadelphia*, 55 F.3d 886, 895 (3d Cir. 1995). In *Watters*, the court held that a former police department employee's statements in a newspaper article expressing concern over the lack of formal policies for the EAP (employment assistance program) was speech on a matter of public concern, and that the statements were protected speech as the department's interests did not outweigh those of the employee. *Watters* may provide additional guidance for courts in cases where restraints imposed by a public employer on its employees' speech are constitutionally suspect. The Court in *Watters* introduced a three-step process for analyzing a public employee's claim of retaliation for engaging in protected activity: (1) the plaintiff must show that the activity in question is constitutionally protected; (2) the plaintiff must show that the protected activity was the substantial or motivating factor in the retaliatory act; and (3) the defendant may defeat the plaintiff's claim by demonstrating by a preponderance of the evidence that the same action would have been taken even in the absence of protected activity. *Id.* at 892.

101. "The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citation omitted). *Id.* In *Ward*, the Court determined that the municipal noise regulation designed to ensure that the musical performances at the public band shell did not disturb surrounding residents was a content-neutral regulation. *Id.* at 792-95; cf. *Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (holding that the Son of Sam law was inconsistent with the First Amendment since the law "singles out income derived from expressive activity for a [financial] burden the State places on no other income, and it is directed only at works with a specified content"); *Johnson v. Los Angeles Fire Dep't.*, 865 F. Supp. 1430 (C.D. Cal. 1994) (holding that the county fire department's prohibition of sexually oriented magazines in the workplace was unconstitutional and content-based, because it only banned magazines which were sexually oriented).

is constitutionally suspect.¹⁰² Thus, the Court adhered to its conclusion in *Simon & Schuster v. New York Crime Victims Board* “that the imposition of financial burdens may have a direct effect on incentives to speak” and is, therefore, inconsistent with the First Amendment.¹⁰³

The government cited *United Public Workers v. Mitchell*¹⁰⁴ in an attempt to meet its burden of justification by comparing the Honoraria Ban to the Hatch Act.¹⁰⁵ The government explained to the Court its two interests: (1) to promote the efficiency of public service and to avoid the appearance of impropriety resulting from honoraria-related speeches and articles;¹⁰⁶ and (2) to prevent the widespread “cumulative effect” of a practice which was perceived to interfere with government integrity.¹⁰⁷

a. The Hatch Act¹⁰⁸

The Hatch Act prohibits partisan political activity by *all* classified federal employees.¹⁰⁹ Congress’ fear of “the cumulative effect on employee morale of political activity by all employees who could be induced to participate actively” influenced the promulgation of the Hatch Act in 1940.¹¹⁰ Congress believed that the Act would combat the “demonstrated ill effects” of government employees’ partisan political activities.¹¹¹ In effect, the Hatch Act simultaneously serves to prevent the abuse of political patronage from contaminating the public service and to promote government neutrality and efficiency.¹¹²

102. *National Treasury*, 115 S. Ct. at 1020 (O’Connor, J., concurring in part and dissenting in part).

103. *Id.* (citing *Simon & Schuster*, 502 U.S. at 115).

104. 330 U.S. 75 (1947) (upholding the prohibition of the Hatch Act on partisan political activity by all classified federal employees).

105. 115 S. Ct. at 1015. For a further discussion of the Hatch Act, see *id.* at 1026-29 (Rehnquist, C.J., dissenting).

106. *Id.*

107. *Id.* at 1016.

108. Hatch (Political Activity) Act, ch. 410, 53 Stat. 1147 (1939) (codified in scattered sections of 5 U.S.C.).

109. *National Treasury*, 115 S. Ct. at 1015.

110. *Id.*; *United Public Workers v. Mitchell*, 330 U.S. 75, 101 (1947).

111. 115 S. Ct. at 1015.

112. Michael Bridges, Comment, *Release The Gags: The Hatch Act and Current*

For the purpose of later comparing the Hatch Act with the Honoraria Ban, this subpart identifies the pertinent provision of the Act, Section 9(a). Section 9(a) of the Hatch Act made it unlawful for an officer or employee in the executive branch of the Federal Government, with certain exceptions, to take "any part in political management or in political campaigns."¹¹³ More importantly, Section 9(a) served as a basis for the challenge to the constitutionality of the Hatch Act in *Mitchell* and in *United States Civil Service Commission v. National Ass'n of Letter Carriers*.¹¹⁴

b. *United Public Workers v. Mitchell*¹¹⁵

Mitchell embodied a constitutional challenge to the second sentence of section 9(a)¹¹⁶ of the Hatch Act. The appellants in *Mitchell* charged in their complaint that Section 9 was "repugnant to the Constitution of the United States as a deprivation of freedom of speech, of the press, and of assembly" and therefore, a violation of their First Amendment rights.¹¹⁷

Legislative Reform—Another Voice for Reform, 22 CAP. U. L. REV. 237, 239 (1993). For the historical background of the Hatch Act, see *id.* part I.A.

113. Hatch Act, ch. 410, § 9(a), 53 Stat. 1147 (1939) (current version at 5 U.S.C. § 7324(a) (1994)). Section 7324(a) states that:

(a) An employee may not engage in political activity—

- (1) while the employee is on duty;
- (2) in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof;
- (3) while wearing a uniform or official insignia identifying the office or position of the employee; or
- (4) using any vehicle owned or leased by the Government of the United States or any agency or instrumentality thereof.

5 U.S.C. § 7324(a) (1994).

114. 413 U.S. 548 (1973).

115. 330 U.S. 75 (1947).

116. When *Mitchell* was decided, the second sentence of section 9(a) read:

No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, except a part-time officer or part-time employee without compensation or with nominal compensation serving in connection with the existing war effort, other than in any capacity relating to the procurement or manufacture of war material shall take any active part in political management or in political campaigns.

Hatch (Political Activity) Act, ch. 410, § 9(a), 53 Stat. 1147 (1939) (codified in scattered sections of 5 U.S.C.) (emphasis added).

117. *Mitchell*, 330 U.S. at 83 n.12. The appellants also relied upon the Fifth, Ninth

Since none of the appellants, except for Appellant Poole, had yet engaged in the prohibited activity, the Court determined that the complaint failed to state a cause of action and dismissed the appeal.¹¹⁸ The Court determined, however, that Poole's appeal was appropriate for judicial review.¹¹⁹ Poole, a ward executive committeeman of a political party, was terminated from his employment by the Civil Service Commission upon being charged with taking an "active part in political management or in political campaigns."¹²⁰ Essentially, Poole urged the Court to resolve the issue of whether a breach of the Hatch Act could be made the basis for disciplinary action by the Commission without violating his First Amendment rights.¹²¹

The Court grounded its analysis by first professing Congress' authority under the Constitution to enact legislation to regulate the political conduct of its employees.¹²² In addition to constitutional authority, the Court cited to the authority of its case law and offered as an example, a case¹²³ in which it had upheld an act prohibiting certain types of political activity by office holders. In *Ex parte Curtis*, the Court deemed the con-

and Tenth Amendments to challenge the constitutionality of section 9(a); *see id.*

118. *Id.* at 84, 89. "For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions,' are requisite." *Id.* at 89 (citations omitted).

119. *Id.* at 91.

120. *Id.* at 94 (quoting section 9(a) of the Hatch Act). Poole had been politically active on election day as a worker at the polls and a paymaster for the services of other party workers. *Id.*

121. *Id.* In other words, the Court had to determine the constitutional validity of section 9(a) of the Hatch Act.

122. *See id.* at 96.

123. *Ex parte Curtis*, 106 U.S. 371 (1882). The Court upheld the right of Congress to punish the infraction of an act forbidding employees who were not appointed by the President and confirmed by the Senate from giving or receiving money for political purposes from or to other employees of the government. *Id.* at 375. More specifically, section 6 of the Act of Aug. 15, 1876, ch. 287, provided:

[T]hat all executive officers or employ[ees] of the United States not appointed by the President, with the advice and consent of the Senate, are prohibited from requesting, giving to, or receiving from, any other officer or employ[ee] of the government, any money or property or other thing of value for political purposes; and who shall offend against the provisions of this section, shall be at once discharged from the service of the United States; and he shall also be deemed guilty of a misdemeanor, and on conviction thereof shall be fined. . . .

Id. at 371.

stitutional authority of Congress to regulate the political conduct of its employees as the decisive principle to upholding the prohibitory act. The Court stated

The evident purpose of Congress in all this class of enactments has been to *promote efficiency and integrity* in the discharge of official duties, and to maintain proper discipline in the public service. Clearly, such a purpose is within the just scope of legislative power, and it is not easy to see why the act now under consideration does not come fairly within the legitimate means to such an end.¹²⁴

Therefore, the Court's analysis concluded that as long as an "end" is achieved by legitimately advancing the government's interest, Congress has the authority to enact legislation regulating the political activities of its employees.

The *Mitchell* Court extended its analysis to the substantive provision of section 9(a) of the Hatch Act and determined that the Act's purpose was similar to that of the statutes prohibiting political contributions of money.¹²⁵ The similarity bridges at the point where each prohibition directs itself to certain political contributions—these contributions being those traditionally frowned upon with great disapproval in the area of public service.¹²⁶ Whereas the Act in *Ex parte Curtis* prohibited contri-

124. *Id.* at 373 (emphasis added). It appears that the Court was advancing the Government's interests, and perhaps suggesting that some rational basis test applies to such legislation.

125. *Id.* at 98; *see supra* text accompanying note 19. The Court also cited *United States v. Wurzbach*, 280 U.S. 396 (1930) in its attempt to demonstrate the similarity between the Hatch Act and other statutes. *Mitchell*, 330 U.S. at 98. In *Wurzbach*, the Supreme Court upheld the validity of a statute which prohibited members of Congress from receiving contributions for whatever political purpose. 280 U.S. at 399. The pertinent section of the statute at issue, the Federal Corrupt Practices Act of 1925, read:

It is unlawful for any Senator or Representative in, or Delegate or Resident Commissioner to Congress, or any candidate for, or individual elected as, Senator, Representative . . . or any officer or employee of the United States . . . to directly or indirectly solicit, receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any other such officer, employee, or person.

Id. at 398 (quoting Federal Corrupt Practices Act, ch. 368, § 312, 43 Stat. 1053 (1925) (originally codified at 18 U.S.C. § 208) (repealed 1972)).

126. 330 U.S. at 99.

butions of money, the Hatch Act prohibited contributions of energy by government employees.¹²⁷

In the Court's view, if the means employed by Congress to adequately promote an efficient public service may be achieved by prohibiting partisan political activity, then the prohibition may withstand any rational basis test.¹²⁸ The Court also recognized that the Hatch Act did not restrict expressions involving matters of public concern; instead it restricted only "active participation in political management and political campaigns."¹²⁹ Upon concluding that Congress had reasonably achieved its goals through legitimate means by enacting the Hatch Act to minimize the cumulative effect on employee morale stemming from partisan political activity and to maximize the efficiency of public service, the Court upheld the constitutional validity of the Hatch Act.¹³⁰

c. *United States Civil Service Commission v. National Ass'n of Letter Carriers*¹³¹

More than twenty-five years after *Mitchell*, the Supreme Court again addressed the constitutionality of section 9(a) of the Hatch Act.¹³² As in *Mitchell*, the Court upheld the constitutional validity of section 9(a) and again concluded that "neither the First Amendment nor any other provision of the Con-

127. 330 U.S. at 98; see also *United States v. Wurzbach*, 280 U.S. 396 (1930) (upholding a statute which prohibited members of Congress from receiving contributions for whatever political purpose).

128. 330 U.S. at 99-104.

129. *Id.* at 100. "It is only partisan political activity that is interdicted. . . . Expressions, public or private, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted by law so long as the Government employee does not direct his activities toward party success." *Id.*

130. *Id.* at 101-04.

131. 413 U.S. 548 (1973).

132. *Id.* By 1973, the codification of section 9(a) of the Hatch Act could be found in 5 U.S.C. § 7324(a)(2). Section 7324(a) provided:

An employee in an Executive agency or an individual employed by the government of the District of Columbia may not—

(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or

(2) take an active part in political management or in political campaigns.

Id. at 550.

stitution invalidates" such a prohibition on partisan political activity.¹³³

The Court abandoned the rational basis test employed in *Mitchell*. Instead, the Court determined that the proper approach to evaluate the constitutional validity of the Hatch Act was to employ the *Pickering* balancing test.¹³⁴ Upon applying this balancing approach to section 7324(a)(2)'s sweeping limitation on partisan political activity, the Court decided that Congress had adequately struck a balance between its interests and that of its employees, so as to promote government efficiency and integrity.¹³⁵ The Court summarized its conclusion, stating that: "[a]lthough Congress is free to strike a different balance than it has, if it so chooses, we think the balance it has so far struck is sustainable by the obviously important interests sought to be served by the limitation on partisan political activities now contained in the Hatch Act."¹³⁶

Like its decision in *Mitchell*, the Court found congressional authority to regulate partisan political activity. However, in *Letter Carriers*, the Court chose to employ a new device—the *Pickering* balancing test—to examine the constitutional validity of Hatch Act. In doing so, the Court lowered the standard the government must meet in enacting legislation to secure its interests. Different as it may appear, the Court's hybrid approach still rendered the same decision, that section 7324(a)(2) of the Hatch Act is constitutional and does not impair, in any way, a public employee's First Amendment rights.¹³⁷

133. *Id.* at 556 ("We unhesitatingly reaffirm the *Mitchell* holding. . . . An Act of Congress going no farther would in our view unquestionably be valid.")

The challengers in *Letter Carriers* advanced their theory on the proposition that the language of section 7324(a)(2) was vague and ambiguous so as to abridge their First Amendment rights. *Id.* at 568. In reaffirming its decision in *Mitchell*, the Court concluded that the language of the Hatch Act was neither unconstitutionally broad nor fatally overbroad. *Id.* at 568, 580 *rev'g* 346 F. Supp. 578 (D.D.C. 1972).

134. 413 U.S. at 564. The *Mitchell* Court had not had the *Pickering* test upon which to rely.

135. *Id.*

136. *Id.*

137. *Id.* at 581.

d. The Hatch Act and the Honoraria Ban: A Comparison

The government in *National Treasury* attempted to meet its burden of justification by comparing the Honoraria Ban to the Hatch Act.¹³⁸ The governmental interests advanced to the Court were: (1) to promote the efficiency of public service and to avoid the appearance of impropriety resulting from honoraria-related speeches and articles,¹³⁹ and (2) to prevent the widespread "cumulative effect" of a practice which was perceived to interfere with government integrity.¹⁴⁰ The government sought to classify the Honoraria Ban as a regulation of employees "reasonably deemed by Congress to interfere with the efficiency of the public service."¹⁴¹ So long as these governmental interests could be best obtained and achieved by prohibiting honoraria, the government argued that the Honoraria Ban was constitutionally valid.¹⁴²

The *National Treasury* Court attacked the government's argument by contrasting the effect of partisan political activity to that of receiving honoraria. The Court stated that "[u]nlike partisan political activity, however, honoraria hardly appear to threaten employees' morale or liberty."¹⁴³ Thus, the "demonstrated ill effects" which Congress had intended to combat were not the underlying concern of Congress when it enacted the Honoraria Ban. Instead, the government's concern stemmed from the "actual or apparent impropriety by legislators and high-level executives, together with the purported administrative costs of avoiding or detecting lower-level employees' violations of established policies."¹⁴⁴ The Court recognized that the government's interest was "undeniably powerful"; however, it was unsupported by evidence suggestive of honoraria-related

138. *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1015 (1995).

139. *Id.* at 1020 (O'Connor, J., concurring in part and dissenting in part).

140. *Id.* at 1016.

141. *Id.* at 1015 (citing *Mitchell* 330 U.S. at 101).

142. 115 S. Ct. at 1015-16; cf. *Mitchell*, 330 U.S. at 99 ("If in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection.").

143. 115 S. Ct. at 1015.

144. *Id.* at 1016.

improprieties by federal employees of *all* government branches.¹⁴⁵ The Court further stated that, although the Hatch Act also affected hundreds of thousands of federal employees, it actually protected the employees' rights in a manner which preserved their freedom of expression.¹⁴⁶ Quite different was the Honoraria Ban which aimed at restricting employees' rights to free expression.¹⁴⁷ The government offered as evidence incidents of impropriety by members of Congress and attempted to extend an assumption to all other branches of the government that such improprieties would also occur upon acceptance of honoraria for speeches and articles.¹⁴⁸ Absent evidence of these improprieties stemming from all government branches, the Court determined that the government failed to show how the Honoraria Ban served to protect its interests.¹⁴⁹ In other words, the Court found that neither the government's proffered reasons nor its asserted interests were sufficiently weighty to justify abridgement of the respondents' First Amendment rights. The *Pickering* test in this case struck a balance in favor of the public employees.

V. NATIONAL TREASURY'S DISSENT

The dissent vehemently disagreed with the Court's application of the *Pickering* test, and stated that a proper application

145. *Id.* at 1015-16.

146. *Id.* Protecting the employees' right to free expression eliminates the sense of threat or coercion in the workplace to participate in political activity one way or another. *Id.* at 1015.

147. *Id.* at 1016.

148. *Id.* at 1016 n.18.

149. *Id.* at 1015-16. The Court further elaborated:

Congress reasonably could assume that payments of honoraria to judges or high-ranking officials in the Executive Branch might generate a similar appearance of improper influence. Congress *could not*, however, reasonably extend that assumption to all federal employees below Grade GS-16, an immense class of workers with negligible power to confer favors on those who might pay to hear them speak or to read their articles. A federal employee, [such as Poole in *Mitchell*], might impair efficiency and morale by using political criteria to judge the performance of his or her staff. But one can envision *scant* harm, or appearance of harm, resulting from the same employee's accepting pay to lecture on the Quaker religion or to write dance reviews.

Id. at 1016 (emphasis added).

of the balancing test would conclude that the Honoraria Ban is consistent with the First Amendment.¹⁵⁰ Like Justice O'Connor, Chief Justice Rehnquist seemed to avoid the *ex ante/ex post* distinction altogether and focused his discussion on the principles established in *Pickering* and *Waters*.

First, the dissent points out that the government's interests as an employer in regulating expressive activity differs from those it possesses in regulating the expressive activity of the general public.¹⁵¹ Quoting *Waters v. Churchill*, the dissent proposed that the proper resolution in balancing the competing interests of the government and of its employees should be consistent with the following explanation:

The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.¹⁵²

The dissent, therefore, regards the majority's decision to understate the *Pickering* test because not enough weight is given to the government justifications for the Honoraria Ban.¹⁵³

Secondly, the dissent states that greater deference should be given to the government's "predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large."¹⁵⁴ In other words, the dissent feels that the majority overstepped its bounds in applying the unconstitutionality of the Honoraria Ban to all employees under the GS-16 level and therefore, im-

150. *Id.* at 1030 (Rehnquist, C.J., dissenting).

151. *Id.* at 1025; *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968).

152. *National Treasury*, 115 S. Ct. at 1025 (quoting *Waters v. Churchill*, 114 S. Ct. 1878, 1887 (1994) (plurality opinion)).

153. *Id.* at 1024 (Rehnquist, C.J., dissenting).

154. *Id.* at 1027 (Rehnquist, C.J., dissenting) (quoting *Waters*, 114 S. Ct. at 1886 (plurality opinion)).

posed an "unduly broad remedy."¹⁵⁵ According to the dissent, it was unnecessary to impose a heavier burden on the government for justification of the Honoraria Ban because of these two stated principles.

The dissent further elaborated on the content-neutrality characteristic of the Honoraria Ban and re-emphasized that there was no ban on speech, only on receipt of compensation.¹⁵⁶ Unlike the "Son of Sam" law in *Simon & Schuster*,¹⁵⁷ the Honoraria Ban did not "impose[] a financial disincentive only on speech of a particular content."¹⁵⁸ The content-based feature of the "Son of Sam" law necessitated the Court's imposition of a heightened burden of justification.¹⁵⁹ From this comparison emerges the conclusion that it was unnecessary for the majority to impose a heavier burden on the government to justify the Honoraria Ban. Additionally, the dissent pointed out that the Honoraria Ban exempted from its ban "travel and other expenses related to employee speech."¹⁶⁰ The dissent determined that the burden imposed on the respondents in *National Treasury* was only a *limited*, not *significant*, burden.¹⁶¹

According to the dissent, then, the proper application of the *Pickering* test would require the government to reasonably show that its "paramount interests in preventing impropriety and the appearance of impropriety" outweighed the *limited* burden imposed on the respondents, thereby justifying the Honoraria Ban.¹⁶² Substantial weight should have been given to the government's reasonable predictions of impropriety on the part of its employees.¹⁶³

Interestingly, the dissent pointed out a similarity between the Honoraria Ban and the Hatch Act which the majority had failed to do:

155. *Id.* 115 S. Ct. at 1024 (Rehnquist, C.J., dissenting).

156. *Id.* at 1024, 1029 (Rehnquist, C.J., dissenting)

157. *Simon & Shuster, Inc. v. New York State Crime Victims Bd.*, 502 U.S. 105 (1991).

158. 115 S. Ct. at 1025 (Rehnquist, C.J., dissenting) (citations omitted).

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

160. *Id.* at 1030 (Rehnquist, C.J., dissenting).

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

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

163. *Id.* at 1025 (Rehnquist, C.J., dissenting).

One of the purposes of the [Hatch] Act was assuredly to free employees who did not wish to become engaged in politics from requests by their superiors to contribute money or time, but to the extent the Act protected these employees it undoubtedly limited the First Amendment rights of those who did wish to take an active part in politics.¹⁶⁴

Upon disregarding the Hatch Act comparison, the majority struck an unreasonable balance to conclude that the government employees' interests outweighed that of the government.¹⁶⁵ The dissent claimed that the majority ignored the government's foremost interest in preventing impropriety and the appearance of impropriety of its employees, and in achieving its goals as effectively and efficiently as possible.¹⁶⁶ The dissent believed that Congress had reasonably struck a balance in favor of the government's interests, thus precluding any constitutional objection since, in Congress' judgment, "efficiency may be best obtained by prohibiting" honoraria.¹⁶⁷

The dissent also claimed that the majority misappropriated the burden on the government by focusing only on the burdens of the Honoraria Ban to the four respondents in *National Treasury*.¹⁶⁸ Although the respondents were all members of the class of sub-GS-16 workers, the dissent suggested that they too could generate impropriety or the appearance of impropriety.¹⁶⁹ Thus, the majority's theory "that federal employees below grade GS-16 have negligible power to confer favors" and to give rise to perceived improprieties is "*seriously flawed*."¹⁷⁰ This theory is inconsistent with the amount of deference usual-

164. *Id.* at 1029 (Rehnquist, C.J., dissenting). The majority dismissed the Hatch Act comparison presented by the government as irrelevant, because the Act aimed to protect employees' First Amendment right to free expression, rather than to restrict this right. *See supra* part IV.C.3.d.

165. *National Treasury*, 115 S. Ct. at 1026-27 (Rehnquist, C.J., dissenting).

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

167. *Id.* at 1026 (Rehnquist, C.J., dissenting).

168. *Id.* at 1027 (Rehnquist, C.J., dissenting).

169. *Id.* at 1028 (Rehnquist, C.J., dissenting) ("[The majority] conclud[ed] that Congress could not extend [the] presumption [of impropriety] to federal employees below grade GS-16.").

170. *Id.* (Rehnquist, C.J., dissenting) (emphasis added).

ly given to "government predictions of harm used to justify restriction of employee speech."¹⁷¹

Finally, the dissent commented on the majority's treatment of the "nexus" requirement and stated that the majority's application of the "nexus" to all employees under GS-16 was too broad.¹⁷² Because many express activities of these employees are unrelated to their federal duties, the Honoraria Ban would not apply.¹⁷³ Alternatively, the Honoraria Ban would apply to "an unknown number of these individuals [who] would receive honoraria where there is a nexus between their speech and their Government employment."¹⁷⁴ The dissent further interpreted the statute's exemption for a "series of appearances, speeches, or articles" as a demonstration of Congress's sensitivity to inhibiting as little speech as possible.¹⁷⁵ The majority overlooked this dimension of the Honoraria Ban upon determining that the lack of a "nexus" requirement coupled with the express exemption for a "series" of expressive activities undermined the across-the-board ban on honoraria. According to the dissent, then, the majority should have formulated some type of "nexus" requirement for those employees below the GS-16 level so as to avoid the broad remedy the majority granted to the whole class of employees.¹⁷⁶

The dissent relied upon established principles found in *Pickering* and *Waters* to oppose the imposition of a heavier burden of justification, and defended the Honoraria Ban of its content neutrality. In contrast, the majority simultaneously

171. *Id.* at 1027 (Rehnquist, C.J., dissenting).

172. *See generally id.* at 1027-28 (Rehnquist, C. J., dissenting) (arguing that the majority focuses on employees who are members of the class in question but by no means breadth of the class as defined in 5 U.S.C. app. 505(3)).

173. *See id.* at 1027. (Rehnquist, C.J., dissenting).

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

175. *Id.* at 1029 (Rehnquist, C.J., dissenting) (emphasis added). Congress' rationale was interpreted by the dissent as follows:

One is far less likely to undertake a "series" of speeches or articles without being paid than he is to make a single speech or write a single article without being paid. Congress reasonably could have concluded that the number of cases where an employee wished to deliver a "series" of speeches would be much smaller than the number of requests to give individual speeches or write individual articles.

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

176. *See id.* at 1029-31 (Rehnquist, C.J., dissenting).

drew an unprecedented distinction of an *ex ante/ex post* restriction to evolve the classic *Pickering* test, and safe-guarded the long established and guaranteed First Amendment right of freedom of expression. The arguments presented by the dissent are strong, and perhaps suggestive of a level of uncertainty as to how to scrutinize congressional acts which allegedly interfere with a public employee's First Amendment rights. The dissent's arguments are of the recurring kind which will undoubtedly appear in future courts' opinions of cases similar to *National Treasury*.

VI. ANALYSIS OF THE DECISION

National Treasury illustrates an evolutionary scheme crafted by the Supreme Court to appropriately apply the *Pickering* test to unprecedented facts regarding the First Amendment rights of public employees. The decision serves to guide courts to properly allocate to the government employer the burden of justification of restricting expression. Not only does *National Treasury* require that there be a heavier burden of justification on the part of the government employer where there is an *ex ante* restriction on expression, it also reaffirms the principle established in *Simon & Schuster* which regards a financial burden on expression as an abridgment of First Amendment rights.

In May of 1995, three months after the *National Treasury* decision, the United States Court of Appeals for the District of Columbia Circuit held that regulations¹⁷⁷ prohibiting government employees from receiving compensation or reimbursement for unofficial speaking or writing activities relating to their official duties, while permitting such compensations for officially authorized activities on the same issues, were unconstitutional.¹⁷⁸ The D.C. Court relied on the principles established in

177. 5 C.F.R. § 2636.202(b) (1992) [hereinafter OGE/EPA regulation] ("An employee is prohibited by the standards of conduct from receiving compensation, including travel expenses, for speaking or writing on subject matter that focuses specifically on his official duties or on the responsibilities, policies and programs of his employing agency."). This regulation was adopted by the Office of Government Ethics ("OGE") in January 1991 and distributed by the EPA to its employees. See *Sanjour v. EPA*, 984 F.2d 434, 436-37 (D.C. Cir. 1993).

178. *Sanjour v. EPA*, 56 F.3d 85 (D.C. Cir. 1995), *rev'g* 984 F.2d 434 (1993).

the *National Treasury* decision to arrive at its conclusion in *Sanjour v. EPA*.¹⁷⁹ The court followed the analysis of the *National Treasury* Court and applied the balancing test to the competing government and employee interests.¹⁸⁰

Interestingly, the D.C. Circuit court's approach to *Sanjour* was different before *National Treasury* was decided, thus rendering a different conclusion to the case. Upon addressing the constitutionality of the OGE/EPA regulation in 1993, the court did not find the regulation to impose a severe burden on the employees' First Amendment rights.¹⁸¹ However, the 1993 *Sanjour* court based its decision on the distinction between the meaning of "official" and "unofficial" speech,¹⁸² whereas the *National Treasury* Court made its basis on the definition of honorarium. Although the OGE/EPA regulation in *Sanjour* does not define "honorarium," it was adopted to interpret existing ethics law on honoraria and finds its authority in the 1978 Act.¹⁸³

This brief comparison of the two holdings in *Sanjour* displays two different approaches that the D.C. Circuit Court took to interpret the regulation on expressive activity before and after the *National Treasury* decision was made. The holding in the 1995 *Sanjour* case clearly supports the contention that *National Treasury* serves to guide courts to properly allocate to the government employer the burden of justification of restricting expression. This holding may also forecast a shift in judicial favoritism from the government's interest in preventing improprieties caused by accepting outside income to the public

179. *Id.* at 91 "Fortunately, the Supreme Court's recent decision in [*National Treasury*] offers useful guidance on how to apply *Pickering* in such a case." *Id.*

180. *Id.* at 90-99.

181. 984 F.2d at 441.

182. 984 F.2d at 442. The court found the definition promulgated by the EPA to be helpful:

Writing, speaking, or editing is normally "official" if it results from a request to EPA to furnish a speaker, author or editor. If an invitation is addressed to an employee, the invitation is "official" if it is tendered because of the employee's EPA position rather than the employee's individual knowledge or accomplishments. The fact that an activity is prepared for or performed outside normal duty hours is not controlling. Otherwise, such activities are "outside" activities for purposes of § 3.500.

40 C.F.R. § 3.503 (1991).

183. *See* 5 C.F.R. § 2636.202 (1992).

employee's interest in protecting his individual right to free speech.

The legislative history of the Ethics Reform Act of 1989 suggests that both the Quadrennial Commission and the President's Commission on Federal Ethics Law Reform were concerned mainly with imposing the Honoraria Ban on higher-level employees within the federal government.¹⁸⁴ If this is indeed true, then the Court's holding in *National Treasury* is justified. There is no reason that the Court should have limited the holding as well as the remedy to only those parties to the case. Upon determining that the application of the Honoraria Ban abridged the First Amendment rights of the federal employees below GS-16, the Court, naturally, extended the remedy to the entire class of employees below that level.

VII. CONCLUSION

It is important to recognize that the Court's holding in *National Treasury* neither serves to take away from the government employer its right to restrict the expressive activities of its employees nor ignores the interests that the government serves to advance and preserve in regulating such activity. Rather, *National Treasury* suggests that as long as the government employer is able to justify its restraints on expression in a sufficient manner, and also demonstrate that its interests clearly outweigh any burden imposed on its employees, then its restraint will pass judicial scrutiny.

The manner in which the Court arrived at its decision in *National Treasury* does not depart from the established principles of *Pickering* and its progeny. In fact, the Court consistently adhered to principles established in cases involving First Amendment rights of public employees, only modifying their application as consistent with the facts in *National Treasury*. The advancement or evolution of the *Pickering* test was the judicial mechanism by which the Court adjudicated a unique, yet recurrent, constitutional issue. Until the Court is able to

184. 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, 893 (1994).

understand Congress' intent expressed by the wording of the Honoraria Ban, it will have to evaluate the First Amendment rights of public employees on a case-by-case basis.

The aftermath of *National Treasury* will test Congress. Perhaps attempts such as those made in 1991 to loosen the prohibition on honoraria may now succeed.¹⁸⁵ Perhaps Congress will clarify its intent and rewrite the Honoraria Ban so that its purpose can be served efficiently. It may be possible that Congress will "sever" certain words and phrases from the Honoraria Ban so as to strengthen its constitutional validity. *National Treasury* clearly suggests that these are areas in which Congress will need to focus. After all, these areas fall within the legislative, not judicial, jurisdiction of the federal government.

Judy M. Lin

185. In 1991, the Senate and the House of Representatives were unable to agree on which workers should be exempted from the honoraria ban. Susan B. Glasser, *Congress Set to Ban Senate Staff Honoraria; At the Same Time, a Bill to Relax a Ban for All Government Workers Appears Stalled*, ROLL CALL, July 25, 1991. Representative Barney Frank (D-Mass) sponsored a bill to exclude those at or below the GS-16 level. *Id.* House Judiciary Committee Chairman Jack Brooks (D-Texas), however, objected to the below GS-16 exclusion. Dana Priest, *Ethics Law's Deep Reach Into Bureaucracy; Honoraria Ban Curtails Employees' Outside Work; Court Challenge Cites First Amendment*, WASH. POST, Jan. 3, 1991, at A19. Brooks suggested that an exclusion be made for all those federal employees who made outside appearances *unrelated* to their official work; that is, any federal employee should be allowed to accept honoraria so long as the speech, appearance, lecture, etc. is not related to their government duties.