

FIRST AMENDMENT — FREE SPEECH CLAUSE — A PROHIBITION AGAINST FEDERAL EMPLOYEES ACCEPTING COMPENSATION FOR EXPRESSIVE ACTIVITIES REGARDLESS OF WHETHER SUCH ACTIVITIES ARE RELATED TO THE EMPLOYEE'S JOB VIOLATES THE FIRST AMENDMENT — *United States v. National Treasury Employees Union*, 63 U.S.L.W. 4133 (U.S. Feb. 22, 1995).

The United States Supreme Court recently held that a ban on all honorarium for government officers and employees was an unjustified burden on the First Amendment free speech rights of low-level Executive Branch employees. *United States v. National Treasury Employees Union*, 63 U.S.L.W. 4133, 4134 (U.S. Feb. 22, 1995). The Court explained that such a restriction could only be justified by the Government's interest, as an employer, in providing efficient public service. *Id.* at 4137 (citing *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)). In the case at bar, however, the Court found that any benefits resulting from the ban were too speculative and the burden imposed upon the federal employees' free speech rights was unjustified. *Id.* at 4140. Thus, the Court's holding provides greater protection to the expressive activities of government employees despite the Government's interests as an employer.

In 1989, upon the recommendation of the Quadrennial Commission on Executive, Legislative, and Judicial Salaries, as well as the President's Commission on Federal Ethics Law Reform, Congress adopted the Ethics Reform Act ("Act"). *Id.* at 4135 (citing 5 U.S.C. § 503(3) (Supp. V 1988)). The Act provided a 25% increase in salary for Members of Congress, the federal judiciary, and employees of the Executive Branch above the GS-15 salary level. *Id.* (citation omitted). The Act further provided that no "Member, officer[,] or employee" may accept any honorarium whether or not the compensated activity was related to the employee's governmental position. *Id.* (citation omitted). The Act defined Honorarium as money or value offered "for an appearance, speech[,] or article." *Id.* (quoting 5 U.S.C. § 505(3) (Supp. V. 1988)). Additionally, the Act's provisions were subject to the Office of Government Ethics's regulations, whose definition of an appearance, speech, and article permitted employees to receive compensation for performances in artistic or athletic events, acting in plays, delivering sermons, and writing fiction, poetry, or lyrics. *Id.* (citing 5 C.F.R. § 2636.201 *et seq.* (1994)).

Respondents, two employee unions and numerous career civil servants from various Executive Branch offices, challenged the constitutionality of the honoraria ban in the United States District Court for the District of Columbia. *Id.* Granting Respondents' motion for summary judgment, the district court held that the ban, as it applied to Executive Branch employees, was overinclusive because it restricted too much speech and underinclusive

because it singled out certain forms of speech while excluding others. *Id.* at 4135-36 (citing *United States v. National Treasury Employees Union*, 788 F. Supp. 4, 11, 13-14 (D.D.C. 1992)). The district court further held that the unconstitutional restrictions were severable from the rest of the Act. *Id.* at 4136.

The United States Court of Appeals for the District of Columbia Circuit affirmed the district court's ruling, noting that despite the absence of an explicit proscription of speech, the honoraria ban imposed a substantial burden upon Respondents' free speech rights. *Id.* (citing *United States v. National Treasury Employees Union*, 990 F.2d 1271 (D.C. Cir. 1993)). Recognizing the Government's strong interest in preventing any abuse of power or appearance of impropriety, the court of appeals nonetheless concluded that the Government failed to adequately justify placing such a burden upon Respondents' free speech. *Id.* (citing *National Treasury Employees Union*, 990 F.2d at 1277). The court of appeals also affirmed the district court's ruling that the ban was unconstitutional as applied to only Executive Branch employees and that such application was severable from the Act. *Id.* In fashioning a remedy, the court of appeals effectively rewrote the statute by limiting its scope to the Legislative and Judicial Branches. *Id.* (citing *National Treasury Employees Union*, 990 F.2d at 1279). The court of appeals later denied the Government's petition for rehearing *en banc*. *Id.* (citing *United States v. National Treasury Employees Union*, 3 F.3d 1555 (D.C. Cir 1993)).

The Supreme Court of the United States granted *certiorari* to decide whether the statutory honorarium ban violated the First Amendment Free Speech Clause. *Id.* at 4134. The Court affirmed the circuit court's holding that the honorarium ban violated the First Amendment but reversed the court's remedy because it prohibited application of the ban to all Executive Branch employees. *Id.* at 4141.

Writing for the majority, Justice Stevens first noted that federal employees make important and substantial contributions to the marketplace of ideas. *Id.* at 4134. The Justice opined that federal employees retain their First Amendment free speech rights when speaking on "matters of public concern" despite their status as government employees. *Id.* (quoting *Pickering*, 391 U.S. at 568). The majority then determined that Respondents' burdened speech had no relevant nexus to their employment status and any honorarium given for such speech constituted compensation for purely private conduct. *Id.* at 4136-37. In this context, Justice Stevens articulated the *Pickering* balancing test, which requires balancing the employee's free speech rights, as a citizen, to speak on matters of public concern with the government's interests, as an employer, to provide public services as efficiently and effectively as possible. *Id.* at 4137 (citing *Pickering*, 391 U.S. at 568). Further defining the *Pickering* test, Justice

Stevens distinguished between punishing an employee who speaks about individual employment status and prohibiting speech that addresses issues of truly public concern. *Id.* The Justice opined that Respondents' speech constituted speech regarding matters of public concern, thus, requiring the Government to sufficiently justify its burdensome employment policy. *Id.*

The majority then addressed the weight of the Government's burden, concluding that the broad, sweeping impact of the honoraria ban chilled potential speech substantially unrelated to the Government's asserted interests. *Id.* Accordingly, the Court concluded that the Government's burden was significantly greater than if the ban were to involve *post hoc* restrictions on a single employee's expressive activities. *Id.* In this regard, Justice Stevens posited that the Government's burden required a showing that the free speech rights of a large number of present and future government employees, as well as the interests of potential audiences, were outweighed by the Government's interests in providing efficient public service. *Id.* (citing *Pickering*, 391 U.S. at 571).

Before applying the *Pickering* test to the present case, the Court examined the ban's burden upon Respondents' free speech rights, noting that the honoraria ban removed a powerful incentive for Respondents to engage in expressive activity and encouraged Respondents to suppress their speech to maintain their employment status. *Id.* at 4137-38. The majority further noted that, because of their status, high-level government officials and Members of Congress would continue to receive invitations to engage in expressive activity, while lower-level government employees depend upon the commercial value of their ideas when seeking a forum in which to present those ideas. *Id.* Justice Stevens also opined that the honoraria ban's broad sweep substantially burdened the public's right to receive various messages and ideas communicated through the employees' expressive activities. *Id.*

The Court then applied the *Pickering* test, noting the Government's assertion that the ban was justified by the Congressional finding that compensation for expressive activity would negatively impact the Government's ability to provide efficient public service. *Id.* (citing *United Pub. Workers v. Mitchell*, 330 U.S. 75, 101 (1947)). Rejecting the Government's argument, the majority distinguished the Court's prior decision in *Mitchell*, upholding the Hatch Act, which prohibited government employee participation in partisan political activity. *Id.* In distinguishing *Mitchell*, Justice Stevens noted the Congressional concerns belying the Hatch Act, mainly protection of employee morale and the prevention of unfair employment practices based on an employee's political allegiance. *Id.* (citing *Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 566 (1973)). The majority concluded that the Hatch Act protected employee rights by addressing the proven ill effects created by allowing government employees to participate in partisan political activities. *Id.*

Noting the similarities between the Government's interests supporting the Hatch Act and the Government's interests asserted in the present case, the Court stated that the Government failed to provide any evidence of low-level employee misconduct related to the acceptance of honoraria. *Id.* Instead, the Court concluded, the Government attempted to justify its broad prohibition against honoraria with proof of misconduct on the part of legislators and high-level government officials. *Id.* at 4139. Justice Stevens declared both this justification, as well as the Government's assertion that the high administrative costs of monitoring low-level employees, were inadequate. *Id.* The Justice explained that Congress could not reasonably conclude that the potential abuses created by honoraria paid to high-level government officials were as likely as those found in the low-level employee context. *Id.* Justice Stevens reasoned that low-level employees had little, if any ability, to provide favors or preferred treatment to those who paid them honorarium. *Id.* Thus, the Court determined that Congress failed to address legitimate harms through reasonable legislation. *Id.*

Continuing to question the Government's asserted interests, the majority opined that the Act's failure to provide a general nexus requirement undermined Congress's finding that the honoraria ban was reasonably necessary. *Id.* The Justice noted that Congress provided such a nexus limitation when employees received honorarium for a series of speeches or articles, but created a total ban for individual speeches and articles. *Id.* The Court declared the Government's claim, that a prophylactic ban was justified by the administrative difficulty of enforcing such a nexus test, was unable to support the substantial burden placed upon Respondents' speech. *Id.*

The majority next reasoned that the breadth of the honoraria ban also was thwarted by Congress's decision to restrict only expressive activity. *Id.* The Court noted that the Quadrennial Commission and the President's Commission on Federal Ethics Law Reform deemed compensation for non-speech activities unrelated to the employee's employment status equally threatening. *Id.* Singling out expressive conduct, the Court opined, served to heighten the Government's burden. *Id.* Justice Stevens posited that this burden required a showing that the enumerated harms were real and that the restricting legislation directly and materially cured those harms. *Id.* (citation omitted). Finding that the Government failed to meet this burden, the Court noted that the Office of Government Ethics' regulations undermined the ban's broad scope. *Id.* at 4140. Those regulations, the Court noted, excluded numerous activities that had little or no nexus with the employee's job. *Id.* Thus, the Court determined that any benefits which the honoraria ban may provide were not sufficient to justify its enormous burden upon the free speech rights of Executive Branch employees below the GS-16 salary grade. *Id.*

Finally, the Court found that the circuit court's remedy was too broad. *Id.* Justice Stevens reasoned that the modified injunction enjoined the application of the honorarium ban to both senior officials who were not parties to the case and to expressive activities of lower-level employees, where a clear nexus between the employee's speech and job existed. *Id.* Accordingly, the majority limited the injunction originally granted by the district court to those Executive Branch officials before the Court. *Id.* Nonetheless, the majority refused to further modify the injunction by adding a nexus requirement to the honoraria ban. *Id.* The Court, therefore, affirmed the circuit court's holding regarding the constitutionality of the honoraria ban and reversed the lower court's remedy. *Id.* at 4141.

Concurring in part and dissenting in part, Justice O'Connor opined that while the majority correctly held that the honoraria ban was unconstitutional, the Court's remedy was too broad. *Id.* (O'Connor, J., concurring in part and dissenting in part). The Justice also expressed concern with the majority's application of the *Pickering* test in light of the Court's recent decision in *Waters v. Churchill*. *Id.* (citing *Waters*, 114 S. Ct. 1878 (1994)).

First, the Justice opined that the majority's distinction between *ex ante* rules and *ex post* punishments was relevant but should not constitute the basis of the Court's decision. *Id.* Justice O'Connor reasoned that there were many circumstances in which a codified *ex ante* rule prohibiting certain types of on-the-job expression would be justified. *Id.* Relying on such a distinction, the Justice concluded, would unnecessarily interfere with the Government's interests as an employer. *Id.* (citing *Waters*, 114 S. Ct. at 1887). Nonetheless, the Justice agreed with the majority that the honoraria ban was not sufficiently supported by the Government's interests in promoting efficient public service and avoiding the administrative burdens that would be created by enforcing a narrower ban. *Id.* Noting the Court's recent decision in *Waters*, which effectively broadened the Government's authority to regulate the speech of its employees, Justice O'Connor espoused that the Government failed to make a showing that the prohibited speech was likely to impact negatively the Government's interests as an employer. *Id.* at 4142 (O'Connor, J., concurring in part and dissenting in part).

Justice O'Connor then addressed the Court's remedy, asserting that even the majority's modification of the district court injunction was too broad. *Id.* Justice O'Connor agreed with the majority's decision to limit the remedy to the parties before the court, thus excluding high-level government officials. *Id.* The Justice, however, argued that the injunction should be restricted to the relief that Respondents requested (i.e., enjoining the ban regarding speech unrelated to the employee's job). *Id.* Discussing the Court's prior holdings severing unconstitutional statutes, Justice O'Connor opined that the Court should sever the Ethics Reform Act. *Id.* (citing *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987)). The Justice determined

that severing the ban's application would leave the ban untouched as it applied to high-level government officials and invalidate the ban as it applied to Respondents. *Id.* at 4143 (O'Connor, J., concurring in part and dissenting in part).

Dissenting, Chief Justice Rehnquist, joined by Justice Scalia and Justice Thomas, opined that the majority opinion overstated the negative impact that the ban would have on Respondents' free speech and found the Court's remedy too broad. *Id.* (Rehnquist, C.J., dissenting). The Chief Justice first noted that the ban did not prohibit any speech, nor did the ban discriminate on the basis of content or viewpoint. *Id.* at 4144 (Rehnquist, C.J., dissenting) (citations omitted). The Chief Justice reasoned that the honoraria ban was not an effort by the Government to control the marketplace of ideas, but was the act of an employer in the interest achieving its legitimate goals. *Id.* As such, Chief Justice Rehnquist concluded, the Court must grant significant weight to the Government's interests as an employer when balancing those interests with the individual rights of the employee. *Id.* (citing *Waters*, 114 S. Ct. at 1888).

Reviewing the Court's previous decisions dealing with the constitutionality of the Hatch Act, the Chief Justice concluded that if the congressional balancing of Government's interests against the interests of government employees were reasonable, no constitutional infirmity would exist. *Id.* at 4144-45 (Rehnquist, C.J., dissenting). Applying this principle, the Chief Justice posited that the congressional determination to ban all honorarium was reasonable and constitutionally sound. *Id.* (citing *Letter Carriers*, 413 U.S. at 564; *Pickering*, 391 U.S. at 568). Chief Justice Rehnquist reasoned that the majority did not afford enough weight to the Government's interest in preventing actual or perceived impropriety by government officials. *Id.* Pointing to the reports of the Quadrennial Commission and the President's Commission on Federal Ethics Law Reform, the Chief Justice argued that both Commissions, as well as Congress, realized the breadth of the ban but found it justified by the evils of honorarium. *Id.* at 4145-46 (Rehnquist, C.J., dissenting) (citations omitted). The Chief Justice further maintained that the majority's conclusion — that low-level government employees have little if any power to confer favors — plainly was wrong and justified the application of the ban to government employees below GS-16. *Id.* at 4146 (Rehnquist, C.J., dissenting).

Next, Chief Justice Rehnquist opined that the honoraria ban was also supported by the Government's interest in avoiding the administrative costs of enforcing a narrower ban on a case-by-case basis. *Id.* The Chief Justice concluded that Congress was sensitive to the employee's rights in limiting the scope of the ban by exempting series of speeches, articles, or appearances and creating other exemptions for travel and expenses related to expressive activities. *Id.* at 4146-47 (Rehnquist, C.J., dissenting). Such limitations, the

Chief Justice asserted, created only a limited burden on Respondents' free speech rights consistent with the First Amendment. *Id.* at 4147 (Rehnquist, C.J., dissenting).

Finally, the Chief Justice dissented from the Court's remedy, suggesting that the remedy was inconsistent with the majority's opinion. *Id.* Chief Justice Rehnquist posited that enjoining the application of the ban to all government employees below GS-16 was unnecessary and beyond the scope of the majority's opinion. *Id.* The Chief Justice concluded that finding the ban unconstitutional only required a remedy that enjoined the application of the ban to those employees below GS-16 who receive honoraria for expressive activity unrelated to their official duties. *Id.*

Analysis

Prior to *National Treasury Employees Union*, the Court's most recent applications of the *Pickering* test suggested that the rights of public employees were being substantially limited. *See id.* at 4141 (O'Connor, J., concurring) (citing *Waters*, 114 S. Ct. at 1878). The Court concluded that justifying restrictions on the expressive activities of government employees with the Government's interests as an employer is constitutional. *National Treasury Employees Union*, however, is a check on the trend toward restricting public employee rights. Allowing the Government's capacity as an employer to act as a conduit for manipulation of free expression is not in the interest of either the general welfare or individual rights. The Court's opinion in *National Treasury Employees Union* is overly broad and only serves to confuse the line between the Government's interests as an employer and the individual rights of its employees.

The Court only need note the unique status of the Government, as both an employer and a sovereign political entity, when justifying a check on the authority of the Government to manage its employees. The step from employer to a powerful political sovereign is a small one; one the Government ought not be allowed to make without substantial justification. Instead, the majority fashioned a remedy that enjoined the application of the ban to all Executive Branch employees irrespective of whether the restricted speech was related to the employee's job status. *Id.* at 4140-41. Justice O'Connor's concurrence and Justice Rehnquist's dissent both accurately identify the inconsistency between the majority's holding and remedy. *Id.* at 4142 (O'Connor, J., concurring), 4147 (Rehnquist, C.J., dissenting).

While the constitutional principles belying the Court's holding are sound, the remedy employed to carry out those principles is excessively broad. Providing a check to the recent trend toward restricting public employee rights is desirable and constitutionally compelled to the extent that it protects individual rights from government intrusion. Such a check,

however, must be derived from a proper balancing of the Government's legitimate interests as an employer and the individual rights of government employees. By failing to sever the Ethics Reform Act, consistent with prior precedent, the Court improperly ignored cases where the Government's legitimate interests may justify restrictions on government employee expressive activities that are substantially related to the employee's government job.

Richard J. Williams, Jr.