

COMMENT

DISHONORING THE HONORARIUM BAN: EXEMPTION FOR FEDERAL SCIENTISTS

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INTRODUCTION

Research scientists often receive compensation, typically honoraria, for giving speeches, writing books or articles, providing advice, and answering questions about their research.¹ Although these activities are generally extra-employment, a strong connection is customarily present between the subject matter of the expression and the scientist's area of professional expertise.² In some circumstances these activities can create financial conflicts of interest for scientists,³ but the receipt of modest honoraria from private sources has many beneficial effects and the practice is generally encouraged in academia and private industry.⁴

1. See *Proposed Regulations of the Office of Government Ethics for the Standards of Conduct of Executive Branch Employees: Hearing Before the Subcomm. on Human Resources of the House Comm. on Post Office and Civil Service*, 102d Cong., 1st Sess. 173 (1991) [hereinafter *Office of Government Ethics Hearing*] (statement of Robert J. Cousins, Ph.D., President, Fed'n of Am. Societies for Experimental Biology (FASEB)) ("Scientists in academia and industry are encouraged to engage in such activities as giving guest lectures at other institutions, consulting, writing textbooks and articles, or serving as editors of scientific journals . . . [and] they may receive compensation for these activities.").

2. *Id.* at 171.

3. See generally COMMITTEE ON GOVERNMENT OPERATIONS, ARE SCIENTIFIC MISCONDUCT AND CONFLICTS OF INTEREST HAZARDOUS TO OUR HEALTH?, H.R. REP. NO. 688, 101st Cong., 2d Sess. (1990) [hereinafter *SCIENTIFIC MISCONDUCT REPORT*] (describing cases of plagiarism, biased research findings, and purposeful misrepresentations by scientists linked to financial conflicts of interest); Michael D. Witt & Lawrence O. Gostin, *Conflict of Interest Dilemmas in Biomedical Research*, 271 JAMA 547, 547-48 (1994) (defining problem of conflict of interest in biomedical research and making recommendations for resolution).

4. See Robert C. Young, *Honoraria Ban for Federal Workers Will Dismantle Scientific Expertise: Inflexible Net of Rules May Drive Talent Away*, WASH. POST, Jan. 14, 1992, at H6 (noting that scientists gain credibility by participating in conferences and writing for peer-reviewed journals and other academic literature); cf. Witt & Gostin, *supra* note 3, at 550 (stating that most institutional guidelines encourage honoraria in return for finished work and that practice should

Many government agencies have scientific missions and either employ scientists directly or provide funding for scientists employed outside the government.⁵ The National Institutes of Health (NIH), for example, employs scientists with different biomedical research specialties in each of its sixteen institutes and provides research grants to scientists employed by academic institutions.⁶ Until recently, scientists employed by the government were subject to an honorarium ban, which prohibited them from participating in extra-employment activities for compensation. This ban is embodied in § 501(b) of the Ethics Reform Act of 1989.⁷

Section 501(b) precludes all federal employees, including scientists, from receiving honoraria from non-governmental sources for activities outside their official duties.⁸ The Ethics Reform Act defines honorarium as "a payment of money or any thing of value for an appearance, speech or article."⁹ Congress did not direct the honorarium ban toward federal scientists, instead § 501(b) was motivated by concerns about the appearance of influence-buying when legislators accepted compensation from special-interest groups.¹⁰ Nevertheless, the ban

be encouraged by "least stringent guidelines").

This Comment focuses on scientists in general, and biomedical research scientists in particular, because of the unique issues the honorarium ban poses for this group of federal government employees. The issue of whether members of a particular profession should accept honoraria from "interested" groups, however, has broader appeal. For example, a recent *Washington Post* article discussed the practice among high-profile journalists of accepting speaking fees of up to \$50,000 from corporations or special-interest groups. Howard Kurtz, *Money Talks*, WASH. POST, Jan. 21, 1996, (Magazine), at 11-15. Many of the journalists recognized the appearance of impropriety or influence-buying created by this practice but defended their ability to remain objective and impartial in reporting the news. *Id.* at 23.

5. See generally OFFICE OF THE FEDERAL REGISTER/NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, THE UNITED STATES GOVERNMENT MANUAL 1995/1996 (describing scientific purposes of government entities such as Public Health Service, Environmental Protection Service, Department of Energy, and National Science Foundation).

6. 42 U.S.C. § 241(a)(3) (1994) (authorizing Secretary of Health and Human Services to give grants to "universities, hospitals, laboratories, and other public and private institutions" for research projects); see also NATIONAL INSTITUTES OF HEALTH REVITALIZATION ACT OF 1993, H.R. REP. NO. 28, 103d Cong., 1st Sess. 54 (1993) [hereinafter NIH HOUSE REPORT]. Some of the more well known research institutes at NIH include the National Cancer Institute; the National Heart, Lung, and Blood Institute; the National Institute on Diabetes and Digestive and Kidney Disease; the National Institute on Aging; and the National Eye Institute. *National Institutes of Health Revitalization Act of 1993: Hearing on H.R. 4 Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 103d Cong., 1st Sess. 177 (1993) (statement of Rep. Dingell).

7. Ethics Reform Act of 1989, Pub. L. No. 101-194, § 601(a), 103 Stat. 1760 (codified at 5 U.S.C. app. § 501(b) (1994)).

8. 5 U.S.C. app. § 501(b) (1994).

9. *Id.* § 505(3).

10. See 135 CONG. REC. H8749 (daily ed. Nov. 16, 1989) (statement of Rep. Brown) (noting that decision to disallow honoraria was motivated by "appearance of impropriety" when members of Congress accepted payment from private sources); *id.* at H8751 (statement of Rep. Obey) (arguing that supplementing income from private sources creates conflict of interest); see also Joan Biskupic, *Court Allows Honoraria for Federal Rank and File*, WASH. POST, Feb. 23, 1995, at A1,

was not limited to members of the legislative branch.¹¹ Section 501(b) prohibits receipt of honoraria by members of the executive and judicial branches as well.¹² Thus, Congress stopped government scientists from accepting honoraria without evaluating the appropriateness of this practice for scientists or comparing the ban to regulations in place for scientists employed outside the government.

When enacted, the proscription against honoraria applied to all federal employees, regardless of rank.¹³ On February 22, 1995, however, the United States Supreme Court decided *United States v. National Treasury Employees Union (NTEU)*,¹⁴ which upheld a lower court finding that the honorarium ban violated the First Amendment rights of executive branch employees below the grade of GS-16.¹⁵ As a factor in finding that the honorarium ban contained in § 501(b) was not narrowly tailored, the Court cited failure of the ban to require a nexus between the government employee's job and the subject matter of the expressive activity.¹⁶ The Court declined the invitation to impose its own nexus requirement onto the statute and struck down the ban for career executive branch employees below a certain rank.¹⁷

Even before the *NTEU* decision, members of Congress were concerned that the ban was too broad because it prohibited receipt of honoraria for all expressive activity—related or unrelated to an employee's job. Since 1991, Congress has considered several bills that would restrict the ban to expressive activities that have a nexus to a government employee's job.¹⁸ For instance, legislation introduced in 1991, 1993, and 1995 would have prohibited receipt of honoraria only if the compensated activity related to the official duties of the

A9 (distinguishing acceptance of honoraria by legislators from acceptance by low-level executive branch employees).

11. See REPORT OF THE BIPARTISAN TASK FORCE ON ETHICS, 101ST CONG., 1ST SESS. (Comm. Print 1989), 135 CONG. REC. H9253-56 (daily ed. Nov. 21, 1989) [hereinafter BIPARTISAN TASK FORCE REPORT] (describing concerns stemming from acceptance of significant amount of honoraria by members of Congress).

12. 5 U.S.C. app. § 501(b).

13. *Id.*

14. 115 S. Ct. 1003 (1995).

15. *United States v. National Treasury Employees Union (NTEU)*, 115 S. Ct. 1003, 1015 (1995), *aff'g in part, rev'g in part* 990 F.2d 1271 (D.C. Cir. 1993).

16. *Id.* at 1016-17 (noting that speech unrelated to government employment should not be limited by government merely because of "administrative convenience" of banning all expressive activities).

17. *Id.* at 1019.

18. See, e.g., H.R. 1639, 104th Cong., 1st Sess. (1995); H.R. 1095, 103d Cong., 1st Sess. (1993); H.R. 109, 102d Cong., 1st Sess. (1991). Each of these bills attempted to limit the honorarium ban to expressive activities that relate to government employment. The bills are discussed in detail *infra* Part II.C.3.

government employee.¹⁹ While no bills of this nature successfully navigated their way through Congress, the *NTEU* decision is likely to rekindle the legislative effort to include a nexus requirement.²⁰

This Comment contends that prohibiting scientists from accepting honoraria for expressive activities, whether related or unrelated to their area of employment, does not further the interests of the researchers, the government, or the public. Within specified guidelines, scientists should be able to receive honoraria for sharing information with their peers and the public. Part I examines the importance of honoraria in the field of scientific research. This section includes an overview of laws encouraging collaboration of scientific research in government, academic, and private institutions. Part II provides background information about the passage and purposes of the Ethics Reform Act of 1989, which contains the honorarium ban. This section also discusses the Court's *NTEU* decision and criticizes the distinction between expressive activities that are related or unrelated to government employment. Part III analyzes existing and proposed legislation that would limit the honorarium prohibition to outside activities that have a nexus to employment. Part IV describes honorarium regulations governing scientists who are not employed by the government. This section concludes that the benefits flowing from receipt of honoraria for disclosure and dissemination of scientific information outweigh the costs. Government scientists should be subject to honoraria regulations similar to those governing their peers in academia and private industry because these regulations provide sufficient protection against misconduct, promote the free exchange of information, and encourage scientists to engage in public service.

I. ROLE OF HONORARIA IN SCIENTIFIC RESEARCH

To understand the impact of limits on expressive activity for scientists, such as the honorarium prohibition, it is first necessary to understand the importance of outside professional activities for these individuals. Receipt of honoraria does not itself cause a problem. As a recent article in a leading medical journal stated, the problem "arises when objectivity, truth telling, and disclosing results of

19. See, e.g., H.R. 1639, 104th Cong., 1st Sess. (1995); H.R. 1095, 103d Cong., 1st Sess. (1993); H.R. 109, 102d Cong., 1st Sess. (1991); see also *infra* Part III.C (discussing legislative proposals to modify honorarium ban).

20. Representative Barney Frank introduced a bill on May 15, 1995, to modify the honorarium prohibition. H.R. 1639, 104th Cong., 1st Sess. (1995); see also *infra* Part III.C (discussing series of unenacted bills designed to add nexus requirement to honorarium ban).

research, all essential to scientific rigor and integrity, are compromised by the desire for greater reward."²¹ As science has become increasingly commercialized over the past twenty-five years, the number and diversity of financial interests for scientists has increased.²² The challenge in assessing potential financial conflicts of interest for scientists is to distinguish interests that promote objectivity, truthfulness, or disclosure from interests that encourage bias, misrepresentation, or secrecy. In the absence of financial conflicts of interest that compromise research, scientists employed by both government and private institutions should be allowed to accept honoraria for disclosing and discussing their findings and theories.

A. Honoraria Is Important to All Scientists but Government Scientists Are Subject to the Ban

Many scientists who are not employed by the federal government nevertheless have their research paid for with federal funds.²³ Although these scientists conduct the same type of research performed by their government counterparts and are paid by the same source—the public—the regulations governing the two groups are different.

Unlike government scientists, scientists serving at academic institutions and in private industry are not only encouraged to give speeches and publish articles,²⁴ but are also allowed to accept compensation for engaging in these activities.²⁵ Researchers receive honoraria for publishing articles or books, giving lectures, and presenting research findings.²⁶ These activities promote the free exchange of information among scientists, which fosters improved

21. Witt & Gostin, *supra* note 3, at 550.

22. See *Is Science for Sale? Conflicts of Interest vs. the Public Interest: Hearing Before the Human Resources and Intergovernmental Relations Subcomm. of the House Comm. on Gov't Operations*, 101st Cong., 1st Sess. 179 (1989) [hereinafter *Is Science for Sale?*] (statement of Erich Bloch, Director, Nat'l Science Found.) (listing increased potential for misconduct by scientists due to financial interests).

23. See Rebecca S. Eisenberg, *Propriety Rights and the Norms of Science in Biotechnology Research*, 97 YALE L.J. 177, 178 n.2 (1987) (noting that in 1984 federal funds of \$5,386,578,000 supported research at academic institutions).

24. *Office of Government Ethics Hearing*, *supra* note 1, at 173 (statement of Robert J. Cousins); see *id.* at 417 (statement of Dep't of Health & Human Servs.) (discussing traditional role of scientists to teach, deliver speeches, and write in effort to support exchange of scientific knowledge).

25. See *Office of Government Ethics Hearing*, *supra* note 1, at 430-31 (letter of Robert J. Cousins).

26. See Rick Weiss, *NIH: The Price of Neglect*, 251 SCIENCE 508, 510 (1991) (noting supplementary income benefit of honoraria).

understanding of health issues.²⁷ Honoraria payments provide incentives for scientists to share information with their peers and the public.²⁸

Subjecting government scientists to regulations that do not affect their counterparts in academia and private industry creates a negative disparity among scientists and a disincentive for scientists to work for the federal government.²⁹ The honoraria restriction deprives government employees, the public, and government institutions of the benefits that result from these activities. Extra-employment professional activities promote discovery and dissemination of scientific information,³⁰ enhance professional development for the scientist,³¹ and increase prestige for the employing institution.³² In the aggregate, denial of compensation for expressive activities, and their resultant benefits, may lead to recruitment and retention problems for federal scientific institutions.³³

27. See *Modifying the Honoraria Prohibition for Federal Employees: Hearing on H.R. 325 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 102d Cong., 1st Sess. 65 (1991) [hereinafter *Modifying the Honoraria Prohibition Hearing*] (statement of Ass'n of Am. Med. Colleges) ("[S]uch activities . . . involve the dissemination of knowledge linked to medical advances and improved understanding of human health and disease.").

28. See *United States v. NTEU*, 115 S. Ct. 1003, 1014 (1995) (acknowledging incentive to engage in expressive activity provided by promise of payment).

29. See *Office of Government Ethics Hearing*, *supra* note 1, at 347 (statement of Richard L. Crowell, Ph.D., President, Am. Soc'y for Microbiology (ASM)) (predicting that denial of compensation for government microbiologists would deny them opportunities enjoyed by peers employed in private sector).

30. See Eisenberg, *supra* note 23, at 181-84 (describing traditional scientific norms, which encourage prompt publication and disclosure of new observations); see also *NTEU*, 115 S. Ct. at 1012 (acknowledging that government employees contribute to "marketplace of ideas"); *Office of Government Ethics Hearing*, *supra* note 1, at 347 (statement of Richard L. Crowell) (stating that "scientific endeavors . . . are essential to the free exchange of scientific information"); *id.* at 361 (statement of Ass'n of Am. Med. Colleges) (maintaining that free exchange of information "speeds the process of scientific discovery and the translation of research results into medically-beneficial developments").

31. See *Office of Government Ethics Hearing*, *supra* note 1, at 173 (statement of Robert J. Cousins) ("The professional advancement of government scientists is unfairly and unreasonably disadvantaged by forbidding those activities."); *id.* at 176 (statement of Michael E. Lamm, M.D., President, Am. Ass'n of Pathologists (AAP)) (explaining that career advancement in science is accomplished by participating in professional activities such as oral presentations and article publications); *id.* at 424 (letter of Larry R. Faulkner, President, Electrochem. Soc'y) (stating that preventing government scientists from engaging in outside professional activities will reduce competence).

32. See *Office of Government Ethics Hearing*, *supra* note 1, at 170 (statement of Robert J. Cousins) (indicating that preventing government scientists at NIH, Centers for Disease Control, and other federal agencies from participating in professional activities harms reputation of those institutions).

33. See *Office of Government Ethics Hearing*, *supra* note 1, at 174 (statement of Robert J. Cousins) (stating that ban on outside professional activities, including teaching, speaking, and writing, would negatively affect government recruitment and retention of top researchers); *id.* at 176 (statement of Michael E. Lamm) (discussing salary structure and restrictive employment regulations as disincentive for federally employed scientists); *id.* at 356 (statement of Frank G. Standaert, M.D., President, Am. Soc'y for Pharmacology & Experimental Therapeutics)

Unfortunately, honoraria may also provide incentives for scientists to consciously or unconsciously bias their expressive output.³⁴ Although compensating a scientist can create a conflict of interest, universities and private employers recognize that regulation of receipt of financial compensation for speeches or articles is better than a flat ban.³⁵

B. *Specter of Scientific Misconduct*

Researchers who falsify or fabricate data for any reason are guilty of scientific misconduct,³⁶ which can have severe consequences for the public health.³⁷ From 1988 to 1990, a House Subcommittee held a series of hearings to investigate scientific misconduct and conflicts of interest among researchers receiving federal funds.³⁸ The ten cases profiled in that investigation revealed diverse forms and amounts of financial conflicts of interest.³⁹ One case involved researchers at a university who examined the effects of antibiotics on children's ear infections.⁴⁰ The study concluded that drug treatment was effective, thereby increasing prescriptions and sales of the antibiotics.⁴¹ When one of the researchers questioned the positive results of the study, an investigation revealed that the principal

(recognizing that private sector employment is more attractive due to limitations on government scientists); *id.* at 417 (statement of Dep't of Health & Human Servs.) (warning that restrictive standards will cause recruitment problems and encourage staff to seek private employment).

34. See SCIENTIFIC MISCONDUCT REPORT, *supra* note 3, at 6 (noting that "potential conflicts of interest may lead to misrepresentation of data").

35. Cf. SCIENTIFIC MISCONDUCT REPORT, *supra* note 3, at 71 (suggesting that scientists with financial conflicts may still be best qualified and that enforcing disclosure requirements may provide better alternative than prohibiting such persons from conducting research).

36. See SCIENTIFIC MISCONDUCT REPORT, *supra* note 3, at 10-50 (providing facts surrounding 10 cases of alleged misconduct, including instances of financial conflicts by individuals, institutions, and even investigators of allegations).

37. See SCIENTIFIC MISCONDUCT REPORT, *supra* note 3, at 65 (concluding that scientific misconduct may result in misrepresentations implicating safety and efficacy of drugs thereby endangering public).

38. The hearings are described in a House Report. See SCIENTIFIC MISCONDUCT REPORT, *supra* note 3.

39. SCIENTIFIC MISCONDUCT REPORT, *supra* note 3, at 10. One research study involved a series of clinical studies known as the Thrombolysis in Myocardial Infarction (TIMI) trials. *Id.* at 19. The TIMI trials were to compare the effectiveness of t-PA and streptokinase. *Id.* The Subcommittee hearings reported that "at least 13 of the researchers involved in the NIH-funded research owned stock [or stock options] in Genentech," the maker of t-PA. *Id.* at 21. Allegations that the researchers emphasized data favorable to t-PA and failed to report data favorable to streptokinase had not been resolved at the time of the hearings. *Id.*

40. SCIENTIFIC MISCONDUCT REPORT, *supra* note 3, at 28. Despite questions about their efficacy, annual expenditures for drug treatment of children's middle ear infections exceed \$400 million. *Id.* The principal investigator in the research on their effectiveness failed to disclose significant financial support and honoraria received from drug companies with an interest in the outcome of the federally funded studies. *Id.* at 29-31.

41. SCIENTIFIC MISCONDUCT REPORT, *supra* note 3, at 28.

researcher had received more than \$50,000 in honoraria from the three pharmaceutical companies producing the antibiotics.⁴² Regardless of what activities the researcher performed to justify payment of the honoraria, this transaction appears inappropriate because of the relationship between the payor and the researcher's work.

Despite suspicious relationships such as this one, elimination of situations in which a researcher has some sort of economic involvement with private industry is likely to be neither possible nor desirable.⁴³ The increased media attention given to cases of alleged scientific misconduct has helped the research community recognize the need for development of standards and regulations.⁴⁴ The NIH recently promulgated such regulations,⁴⁵ and many other institutions already have guidelines in place.⁴⁶ In general, these guidelines recognize the potential for compromise of research design, method, or reporting of results when potentially inconsistent financial interests

42. SCIENTIFIC MISCONDUCT REPORT, *supra* note 3, at 30.

43. See *Modifying the Honoraria Prohibition Hearing*, *supra* note 27, at 65 (statement of Ass'n of Am. Med. Colleges) (including sharing of information and improving knowledge of health and disease as benefits of lectures and articles by Veterans Administration physicians); Witt & Gostin, *supra* note 3, at 550 (declaring eradication of all conflicts impossible and acknowledging benefits to public health from collaboration by "knowledgeable, well-funded investigators").

44. See Sharon Begley & Mary Hager, *Open Season on Science*, NEWSWEEK, Dec. 16, 1991, at 65 (declaring that image of American science has been tarnished by allegations of fraud and misuse of taxpayer dollars). Scientists may recognize the need for regulation, but the task has not been easy. The NIH initially published proposed guidelines for conflicts of interest in the NIH Guide for Grants and Contracts on September 15, 1989, and requested comments. Notice of Proposed Rulemaking, 59 Fed. Reg. 33,242 (proposed June 28, 1994). Seven hundred and fifty-one responses were received from individuals associated with medical research, government, business, and law. *Id.* The majority of people who responded criticized the regulations for imposing an undue burden on individuals and institutions receiving federal funds. *Id.* The guidelines required disclosure of outside funding, consultant positions, and honoraria, and prohibited holding of equity or options in companies with an interest in the outcome of research. *Id.* These proposed guidelines were withdrawn due to enormous opposition and new regulations were not proposed again until June 28, 1994. *Id.* The new proposals reduce the scope of required financial disclosure, focus primarily on clinical rather than basic research, and leave discretion in the hands of individual institutions. *Id.* There were over 100 comments on the new proposals, most of which supported allowing institutions discretion to identify and resolve financial conflicts of interest. 60 Fed. Reg. 35,810 (1995). The new rules became effective on October 1, 1995 and will be codified at 42 C.F.R. § 50 and 45 C.F.R. § 94. *Id.*; see also Witt & Gostin, *supra* note 3, at 548 (describing criticism of original guidelines and summarizing character of subsequent proposal).

45. See 60 Fed. Reg. 35,810 (establishing standards and procedures regarding conflicts of interest for research institutions applying for Public Health Service funding).

46. See, e.g., *American Federation for Clinical Research Guidelines for Avoiding Conflicts of Interest*, 38 J. CLINICAL RES. 239, 239 (1990); Council on Scientific Affairs and Council on Ethical and Judicial Affairs, Am. Med. Ass'n, *Conflicts of Interest in Medical Center/Industry Research Relationships*, 263 JAMA 2790, 2790 (1990); Ass'n of Am. Med. Colleges Ad Hoc Comm. on Misconduct of Interest in Research, *Guidelines for Dealing with Faculty Conflicts of Commitment and Conflicts of Interest in Research*, 65 ACAD. MED. 487, 487 (1990).

are present, but do not recommend a flat prohibition against financial conflicts of interest.⁴⁷

Over the past twenty years, the types of financial interests available to research scientists have increased.⁴⁸ One of the problems associated with some forms of financial interests for scientists is increased secrecy and withholding of information.⁴⁹ In contrast, payment of honoraria for expressive activities provides incentives for scientists to share information. Along with expanding the types of financial conflicts, the commercialization of science has also altered the atmosphere at many research institutions and influenced the direction of research projects. At a time when many forms of financial arrangements inhibit disclosure of research data, compensation that promotes the free exchange of information should be encouraged.⁵⁰

C. Commercialization of Science

The commercialization of science gradually emerged in the 1980s, when the Supreme Court⁵¹ and Congress⁵² established proprietary rights in scientific discoveries. Allowance of ownership interests in scientific discoveries, combined with legislation encouraging joint

47. See Witt & Gostin, *supra* note 3, at 548-49 (summarizing and comparing current rules and guidelines established by American Medical Association, American Federation for Clinical Research, Association of Medical Colleges, and Harvard Medical School).

48. See *Moore v. Regents of Univ. of Cal.*, 793 P.2d 479, 483 (Cal. 1990) (expanding doctrine of informed consent to require physicians to "disclose personal interests unrelated to the patient's health, whether research or economic, that may affect the physician's professional judgment"). Original concerns about conflicts of interest dealt with researchers who put the interests of science ahead of the interests of patients or research subjects. See MARCA. RODWIN, *MEDICINE, MONEY, AND MORALS: PHYSICIANS' CONFLICT OF INTEREST* 46-48 (1993) (describing concern of reformers in 1960s who felt that researchers were more interested in advancement of science than patient welfare); Charles C. Mann, *Radiation: Balancing the Record*, 263 SCIENCE 470, 472 (1994) (detailing radiation experiments conducted before ethical standards were developed and noting that ethical flaws did not obviate scientific value of data).

49. See Eisenberg, *supra* note 23, at 206-07 (discussing interaction of patent law and traditional scientific incentives and noting that patent system of exclusive rights is in conflict with scientific community's goals of disclosure and dissemination); see also *Is Science for Sale?*, *supra* note 22, at 179 (statement of Erich Bloch) (listing withholding of information, biased interpretation, and inducement to commit fraud as potential consequences of industry-university research partnerships).

50. See *Office of Government Ethics Hearing*, *supra* note 1, at 173 (statement of Robert J. Cousins) (extolling information sharing benefits of scientists' expressive activities such as furthering exchange of scientific knowledge, advancing scientific careers, and enhancing reputation of employing institution).

51. See *Diamond v. Chakrabarty*, 447 U.S. 303, 310 (1980) (holding that live microorganism is patentable subject matter).

52. See Stevenson-Wydler Technology Innovation Act of 1980, Pub. L. No. 96-480, 94 Stat. 2311 (codified as amended at 15 U.S.C. §§ 3701-3714 (1994)); Bayh-Dole Act, Pub. L. No. 96-517, 94 Stat. 3015 (1980) (codified as amended at 35 U.S.C. §§ 200-211 (1994)); Federal Technology Transfer Act of 1986, Pub. L. No. 99-502, 100 Stat. 1785 (codified as amended at 15 U.S.C. §§ 3701-3714 (1994)). For a discussion of these acts, see *infra* Part I.C.2.

projects between researchers and profitmaking entities,⁵³ introduced complex economic incentives into the research arena. Some of these economic incentives have encouraged scientists to keep results secret until they can profit personally from their research.⁵⁴ The increased secrecy in scientific research that stems from commercialization may be countered in part by providing incentives for scientists to disclose and discuss research findings. Allowing scientists to receive honoraria for speaking and writing about their work provides such an incentive.

1. *Judicial incentive to collaborate*

The Supreme Court's 1980 decision in *Diamond v. Chakrabarty*⁵⁵ opened the door for the commercialization of scientific research.⁵⁶ In *Diamond*, the Court extended patent protection to a microbiologist's modification of a living organism.⁵⁷ The patentee in *Diamond* developed a new form of bacterium capable of breaking down crude oil.⁵⁸ He believed the bacterium would be valuable in the clean-up of oil spills and sought to patent the discovery.⁵⁹ The Patent Office, however, did not believe patents were intended to cover living microorganisms and, therefore, repeatedly denied his patent application.⁶⁰

The Supreme Court reversed the denial of the patent application.⁶¹ In doing so, the Court sought to fulfill the patent statute's goal of "promoting 'the Progress of Science and the useful Arts.'"⁶² This decision introduced proprietary interests into the world of biological research.⁶³ At about the same time, the desire to promote progress in science prompted Congress to pass a series of statutes that further eliminated impediments to the commercialization of science.⁶⁴

53. See Charles Weiner, *Universities, Professors, and Patents: A Continuing Controversy*, TECH. REV., Feb.-Mar. 1986, at 32, 42 (noting transformation of researchers from academicians and scientists to industry consultants and equity partners in corporations).

54. See Kathleen Day, *The Gene Therapy Gamble: 2 Md. Research Firms Bet Big in a Field Where Risks, Rewards Can Be Huge*, WASH. POST, Nov. 7, 1994, (Wash. Bus.), at 1 (discussing commercial interests of pharmaceutical companies and noting that companies have kept research results confidential until profit potential was protected).

55. 447 U.S. 303 (1980).

56. See Weiner, *supra* note 53, at 41-42 (crediting *Diamond* decision with "open[ing] the gates to commercializing the results of biological research," with researchers becoming financial partners with private industry).

57. *Diamond v. Chakrabarty*, 447 U.S. 303, 318 (1980).

58. *Id.* at 305.

59. *Id.* at 305-06.

60. *Id.* at 306.

61. *Id.* at 309.

62. *Id.* at 315 (quoting 35 U.S.C. § 101).

63. See *id.* at 310 (observing that patentee's discovery of new bacterium with new characteristics and potential for significant utility is patentable subject matter).

64. See *infra* Part I.C.2 (describing content and consequences of legislation).

2. *Legislative incentives to collaborate*

About fifteen years ago, Congress realized that discoveries made through federally funded research were not being translated into applied technologies that could benefit the public.⁶⁵ Legislators decided to increase interactions among government, academic institutions, and private industry.⁶⁶ In 1980, Congress passed both the Stevenson-Wydler Technology Innovation Act (Stevenson-Wydler Act)⁶⁷ and the Patent and Trademark Amendment Act of 1980, commonly known as the Bayh-Dole Act.⁶⁸ These Acts, referred to as technology-transfer statutes, describe the importance of continued innovation for the "economic, environmental, and social well-being"⁶⁹ of the United States. To promote innovation and utilization of technologies, these statutes encourage collaborative efforts through expansion of proprietary rights.

The Stevenson-Wydler Act promotes technology transfer by encouraging joint projects among developers, marketers, and users of technology.⁷⁰ With the Bayh-Dole Act, Congress amended the Patent and Trademark Act⁷¹ to encourage research collaborations among small businesses and non-profit entities.⁷² The Bayh-Dole Act allowed recipients of federal funds to apply for patents for products developed with government money.⁷³

Before passage of these statutes, the government retained proprietary rights to almost all technologies developed with federal money.⁷⁴ These statutes encouraged collaboration between academic institutions and private companies, with the goal of facilitating movement of products from research laboratories to practical

65. See Stevenson-Wydler Technology Innovation Act of 1980, Pub. L. No. 96-480, 94 Stat. 2311 (codified as amended at 15 U.S.C. § 3701(1) (1994)) (describing importance of industry-government interaction and cooperation to ensure that nation's health needs are addressed as rapidly as possible).

66. See *id.* § 3701(3) (noting that collaboration is desirable because most scientific discoveries occur in universities and federal laboratories but business is largely responsible for practical application).

67. Stevenson-Wydler Technology Innovation Act of 1980, Pub. L. No. 96-480, 94 Stat. 2311 (codified as amended at 15 U.S.C. §§ 3701-3714 (1994)).

68. Bayh-Dole Act, Pub. L. No. 96-517, 94 Stat. 3015 (1980) (codified as amended at 35 U.S.C. §§ 200-211 (1994)).

69. 15 U.S.C. § 3701(1) (1994).

70. 15 U.S.C. §§ 3701-3714.

71. 35 U.S.C. §§ 200-211 (1994).

72. See *id.*

73. *Id.* §§ 202-210.

74. See *id.* § 200 (ensuring that federal government obtains rights to inventions supported by federal funds).

application in the marketplace.⁷⁵ The Stevenson-Wydler and Bayh-Dole Acts successfully stimulated interaction between federally funded researchers and private companies. But federal employees still could not take advantage of expanded patent rights because these Acts applied only to recipients of federal funds.⁷⁶ Researchers employed directly by the government did not have the same rights as researchers receiving federal funds.

To address this problem, Congress passed the Federal Technology Transfer Act of 1986 (Technology Transfer Act).⁷⁷ The Technology Transfer Act extended patent and licensing rights to federal laboratories,⁷⁸ resulting in over 150 collaborative projects between federal scientists and individual companies.⁷⁹ The benefits for collaborators include additional funding for promising health research projects, increased scientific knowledge, and increased commercial productivity.⁸⁰ In addition to benefiting the participants themselves, increased interaction among government, universities, and industry benefits the public through improved health services,⁸¹ improved standards of living,⁸² and creation of new employment opportunities.⁸³

3. *Adverse consequences of research collaboration and commercialization*

Unfortunately, the commercialization of science has also had adverse consequences. The increased focus on proprietary rights and joint projects has altered the traditional atmosphere at academic and

75. See Witt & Gostin, *supra* note 3, at 547 (observing that federal legislation since 1980 has fostered collaborations between universities and private sector and moved products to marketplace quickly).

76. See generally Lawrence Rudolph, *Overview of Federal Technology Transfer*, 5 RISK: HEALTH SAFETY & ENV'T 133 (1994) (reviewing technology transfer statutes and noting that Stevenson-Wydler and Bayh-Dole Acts covered government-owned, contractor-operated labs (GoCos) while Federal Technology Transfer Act of 1986 covered government-owned, government-operated labs (GoGos)).

77. Federal Technology Transfer Act of 1986, Pub. L. No. 99-502, 100 Stat. 1785 (codified as amended at 15 U.S.C. §§ 3701-3714 (1994)) (recognizing discovery of potentially useful scientific and technological developments in federal laboratories).

78. 15 U.S.C. § 3710a(a)(2) (1994).

79. See John Carey, *NIH Is Not the Institution It Was*, BUS. WK., Nov. 5, 1990, at 145, 148 (discussing joint venture license agreement based upon collaboration between industry and NIH).

80. See David Blumenthal, *Academic-Industry Relationships in the Life Sciences: Extent, Consequences, and Management*, 268 JAMA 3344, 3345 (1992) (enumerating benefits and risks of collaborations such as increase in secrecy and damage to public opinion of scientific research in academic-industry collaborations).

81. 15 U.S.C. § 3701(9) (1994).

82. *Id.* § 3701(2).

83. See *id.* § 3701 (describing congressional finding that technology transfer promotes productivity, jobs, and U.S. competitiveness in international markets).

government research institutions.⁸⁴ Scientific researchers used to be rewarded for contributing to the communal body of scientific knowledge.⁸⁵ Traditional rewards, such as increased knowledge, recognition by colleagues, and career advancement are now frequently subordinate to a promise of financial gain.⁸⁶ Researchers are increasingly reluctant to share information and results.⁸⁷ The existence of a profit potential decreases the incentive for researchers to publish or present their findings promptly.⁸⁸ Researchers and their financial backers want to obtain patents and assure their own money-making capability before disclosing discoveries to potential competitors.⁸⁹ Ironically, the commercialization of scientific research, which was prompted by a desire to improve public health, has encouraged scientists to consider personal profit before public health.⁹⁰

Furthermore, introduction of proprietary interests into the research arena has influenced the types of research performed in the United States.⁹¹ Basic science research, also known as fundamental research,

84. See Claire Turcotte Maatz, Comment, *University Physician-Researcher Conflicts of Interest: The Inadequacy of Current Controls and Proposed Reform*, 7 HIGH TECH. L.J. 137, 143 & n.27 (1992) (describing traditional atmosphere at scientific institutions, which encouraged scientists to disclose research findings); cf. Witt & Gostin, *supra* note 3, at 548 (declaring that vigor and openness of science may be undermined by conflicts of interest).

85. See Eisenberg, *supra* note 23, at 197 (stating that intellectual property law alters traditional practice of "publication and dedication of research to the public"); Maatz, *supra* note 84, at 143-50 (describing how scientists used to publish research findings freely for reward of recognition, but now trend is to focus research efforts in areas that will attract private industry funding).

86. See Maatz, *supra* note 84, at 143-46 (describing evolution of rewards in field of medical research).

87. See Maatz, *supra* note 84, at 149 (describing today's scientists as "entrepreneurs, seeking to capitalize on their latest research findings before someone else reaps the profits"); Carey, *supra* note 79, at 148 (reporting that some researchers at NIH guard research findings because they are more interested in commercial values than in sharing results).

88. See Rebecca S. Eisenberg, *Academic Freedom and Academic Values in Sponsored Research*, 66 TEX. L. REV. 1363, 1375 (1988) (noting that requirement between researchers and sponsors that research results be kept secret to protect intellectual proprietary rights may conflict with traditional academic mores that promote dissemination of research findings).

89. See Kathleen Day, *Merck to Reveal Findings on Human Genetic Code: Move Stirs Debate over Research Secrecy*, WASH. POST, Sept. 29, 1994, at B11 (describing companies that have withheld research results pending efforts to turn profit).

90. See Blumenthal, *supra* note 80, at 3347 (including increased secrecy and damage to public support for biomedical research as risks of collaborations); cf. SCIENTIFIC MISCONDUCT REPORT, *supra* note 3, at 3-6 (noting that many possible reasons may account for scientific fraud and stating that most widely reported cases involved physicians conducting biomedical research).

91. See Boyce Rensberger, *Fundamental Research at Risk: Political Favor Shifting Toward Applied Science*, WASH. POST, Dec. 27, 1994, at A1 (identifying recent shift of political and industrial support for applied research over basic research projects); Witt & Gostin, *supra* note 3, at 548 (warning that research of public health and research having societal value may be rejected in favor of personal profit).

is aimed at discovering new information about the natural world.⁹² Fundamental research projects tend not to be profitable immediately, but instead form the basis for future technology that does prove financially lucrative.⁹³ Members of the scientific community are concerned that some researchers place too much emphasis on research leading directly to new technologies instead of on fundamental research.⁹⁴ Some observers look to the federal government rather than private entities to take the lead in supporting fundamental research projects.⁹⁵

Research motivated by profit or politics⁹⁶ may be designed differently and may have different goals than research motivated by concern about the public health.⁹⁷ Limited resources mean that not all research projects can be carried out.⁹⁸ Investors and physicians with personal financial interests in patents, products, or techniques may support projects that will be immediately profitable before projects that will advance science or produce the greatest public health benefit.⁹⁹ This trend alarms many scientists who feel that

92. See Rensberger, *supra* note 91, at A1 (explaining difference between basic research probing "the most intimate workings of the natural world" and applied research promising immediate results).

93. See Rensberger, *supra* note 91, at A1 (observing that basic science builds knowledge base, which benefits society in form of improved technologies and medicine). As a result of their indirect effects, basic science projects are described as the "most misunderstood by the public and by politicians." *Id.*

94. J. Michael Bishop et al., *Science and the New Administration*, 259 SCIENCE 444, 445 (1993). This article, co-authored by Harold Varmus, who is now Director of the National Institutes of Health, discusses the importance of fundamental research and warns that "[e]nactments of policies that favor practical applications over basic science . . . [are] likely to come at the expense of traditional, broadly conceived explorations of biology. . . . [T]his sacrifice would jeopardize the scientific progress required for social benefits and economic growth in the future." *Id.*; cf. Rensberger, *supra* note 91, at A12 (discussing Sen. Barbara Mikulski's comments emphasizing importance of focusing federal scientific investment around national economic goals, such as increasing manufacturing jobs).

95. See Bishop et al., *supra* note 94, at 444 (urging Clinton administration to reverse erosion of research in United States).

96. See NIH HOUSE REPORT, *supra* note 6, at 54 (stating that politicization of biomedical research results in inconsistent funding and imposition of "arbitrary" restrictions on controversial projects such as fetal-tissue research); see also Eisenberg, *supra* note 23, at 178 (discussing federal funding increase of 183% for defense related research compared to 38% for health-related research in 1980s).

97. See Blumenthal, *supra* note 80, at 3346 (discussing survey in which 30% of Harvard faculty receiving industry support said their research topics had been influenced by likelihood of commercial application); cf. Donald P. Francis & Donald Kennedy, *A Private-Sector AIDS Vaccine? Don't Hold Your Breath: Free-Market Incentives Are Minimal, Only Government Can Take the Lead*, WASH. POST, July 19, 1994, at A21 (letter to editor) (stating that economic disincentives prevent research sponsors from promoting AIDS vaccine despite desperate need).

98. See Boyce Rensberger, *Scientific Ranks Outpace Funds: Imbalance May Put Nation's Technological Primacy at Risk*, WASH. POST, Dec. 25, 1994, at A1, A20 (stating that increased competition for funding means that fewer basic science proposals are accepted).

99. Cf. Francis & Kennedy, *supra* note 97, at A21 (asserting that pharmaceutical companies lack financial incentive to develop AIDS vaccine because of low prices, uncertainty, and potential

progress in applied technologies cannot be achieved without continuing basic science research.¹⁰⁰

Scientists who work in federal institutions are employed by the American public. As such, government scientists have a greater obligation to conduct studies with the greatest potential for public benefit. This distinction is increasingly important as the proportion of total funding for research projects provided by private sources continues to rise.¹⁰¹ Increased private funding for medical research has raised the quality of research conducted by academic institutions and private entities and has increased the profit potential for individual scientists who are employed outside the government.¹⁰² Thus, the attractiveness of non-government employment for scientists has been greatly enhanced.

D. *Exodus from Government Service*

In contrast to the increased desirability of private employment, the attractiveness of government service for scientists has decreased, due in part to regulations such as the honorarium ban in § 501(b) of the Ethics Reform Act.¹⁰³ Researchers employed outside the government, even those who are supported by federal funds, are not subject to the ban. Biomedical researchers who choose government service generally receive much lower salaries than their peers in academia and private industry.¹⁰⁴ Scientists consider a variety of factors in deciding whether to conduct research for the government or for a private entity. Many researchers are willing to accept lower salaries in exchange for the opportunity to perform research at prestigious

liability).

100. See Rensberger, *supra* note 91, at A1 (highlighting concerns of scientists about increased role of politics in decisions about direction of scientific institutes).

101. See Maatz, *supra* note 84, at 139 n.7 (noting that while total funding for U.S. health research increased from \$7.94 billion in 1980 to \$20.57 billion in 1989, overall proportion of total funding from NIH dropped from 40% to 33%). The difference was attributable to increased contributions by private industry. *Id.*

102. See Rick Weiss, *NIH Cancer Chief Vents Frustration: Departing Broder Defends Government as Vital to Science*, WASH. POST, Dec. 24, 1994, at A1, A7 (describing enhanced efficiency of private research entity and increased salary of researcher who left government service).

103. See Weiss, *supra* note 26, at 508 (describing frustration of NIH investigators at not being able to earn same types of income as private workers).

104. See *Modifying the Honoraria Prohibition Hearing*, *supra* note 27, at 18 (statement of Rep. Morella) ("Many Federal employees accepted honoraria to supplement their income, which . . . is, on average, about 28 percent below salaries in the private sector."); see also NIH HOUSE REPORT, *supra* note 6, at 54 (concluding that federal salaries have not kept pace with private sector).

government entities, such as the NIH's National Cancer Institute (NCI).¹⁰⁵

Although funding for private research is on the rise, the resources available to scientists at the NIH remain unparalleled. Government researchers praise the number of beds for research subjects available at the NIH and the opportunity that the government entity provides to move quickly from laboratory findings to clinical studies, which may benefit patients sooner.¹⁰⁶ Researchers also note that there is more freedom and control over research for government employees.¹⁰⁷ As one government scientist stated, "When you work for a drug company, you work on their product'. . . . 'The goal is to get the drug approved [At the NIH] the goals are to find ways of treating cancer.'" ¹⁰⁸

In the last fifteen years, however, several top researchers have been lured away from government service.¹⁰⁹ For example, in December 1994, Samuel Broder, former director of the NCI, left government service after twenty-two years to become the chief scientific officer at a pharmaceutical company.¹¹⁰ Broder cited frustration with the politicization of science and slow bureaucratic action as factors in his decision to leave the NIH.¹¹¹ In making the move to the private sector, Broder doubled his government salary.¹¹² If the trend toward the private sector continues, there will be fewer of the best biomedical researchers performing the fundamental research projects that form the foundation for applied future projects.¹¹³ Progress in

105. See Susan Okie, *Scientists Return to NCI's Cutting Edge; Researchers, Citing Unique Opportunities, Rejoin Cancer Institute*, WASH. POST, July 27, 1990, at A25 (citing return of researchers to NIH because of "unparalleled opportunities" despite lower salaries).

106. *Id.*

107. See *id.* (citing difficulty getting approval for human studies and problems with insurance coverage as issues faced by researchers outside government).

108. *Id.* (quoting Bruce A. Chabner, Director of the Division of Cancer Treatment at the NCI).

109. See Robin Herman, *NIH Genes Researcher Is Leaving for His Own Lab*, WASH. POST, July 7, 1992, at H4 (describing departure of NIH researcher to start own lab with \$70 million venture capital grant); Weiss, *supra* note 102, at A1 (listing series of departures from NCI, most notably that of Director Samuel Broder).

110. Weiss, *supra* note 102, at A1, A7.

111. See Weiss, *supra* note 102, at A7 (noting Broder's prediction that research at private company will be more efficient and productive). The article quoted Broder as stating that "[t]his company can make decisions in five minutes that would take the government probably three to four years to make." *Id.*

112. See Weiss, *supra* note 102, at A7 (revealing that Broder's salary increased from \$120,000 to between \$225,000 and \$340,000).

113. See Rensberger, *supra* note 91, at A1, A12 (explaining dependence of applied research on underlying basic science principles and predicting long-term problems in future, such as finding cures for infectious diseases, if support for basic research is not provided).

science and technology will slow, as will the economic and health benefits associated with innovation in these areas.¹¹⁴

The federal government has become increasingly concerned about recruitment and retention of scientists.¹¹⁵ The increased politicization of medicine by Congress and special interest groups,¹¹⁶ combined with low salaries and stricter regulations,¹¹⁷ have diminished the attractiveness of government jobs. Moreover, scientists employed outside the government are subject to conflict of interest restrictions similar to those imposed by the Office of Government Ethics (OGE),¹¹⁸ but are not subject to the honorarium ban. The honorarium prohibition further decreases the attractiveness of government service for scientists.¹¹⁹ If the government continues to subject its researchers to unnecessary restrictions that do not affect their counterparts in private industry and academia, agencies with scientific missions, such as the NIH, will have increasing difficulty in attracting and retaining the most productive and efficient scientists.

II. ETHICS REFORM ACT OF 1989

Congress amended the Ethics in Government Act¹²⁰ in 1989 with the Ethics Reform Act.¹²¹ The amendments included imposition of a ban on receipt of honoraria by all federal employees.¹²² Although the honoraria prohibition contained in the Ethics Reform Act affects all federal employees, the ban was motivated by concern about widespread acceptance of honoraria by members of the legislative branch.¹²³

114. See 15 U.S.C. § 3701 (1994) (listing benefits of technological and industrial discoveries including better living standards, improved public services, increased productivity, new jobs, and better competitiveness for U.S. products).

115. See NIH HOUSE REPORT, *supra* note 6, at 54.

116. See Weiss, *supra* note 102, at A7 (describing difficult decision of NCI chief to leave NIH due to frustration with increased politicization of research, particularly in areas of AIDS and cancer).

117. See Weiss, *supra* note 26, at 508 (noting that honorarium ban prohibited government scientists from accepting "small but significant supplementary income" (quoting Stuart Aaronson, Chief, NCI, Laboratory of Cellular and Molecular Biology)).

118. Cf. National Science Foundation, 45 C.F.R. § 683.32(b) (1995) (allowing recipients of NSF funds who are not government employees to accept honoraria while not on official duty).

119. See *supra* Parts I A, I C (explaining importance of honoraria for scientists and recruitment problems for government institutes with scientific missions).

120. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at various sections of Titles 2, 5, 18, and 28 of the U.S.C. (1994)).

121. Ethics Reform Act of 1989, Pub. L. No. 101-94, 103 Stat. 1716 (codified in scattered sections of 5 U.S.C. (1994)).

122. 5 U.S.C. app. § 501(b) (1994).

123. *Modifying the Honoraria Prohibition Hearing*, *supra* note 27, at 20 (statement of Rep. Morella); see also BIPARTISAN TASK FORCE REPORT, *supra* note 11, at H9256 (noting that members of Congress earned almost \$10 million in honoraria before ban).

At the time that Congress passed the Ethics Reform Act, existing executive branch ethics regulations were much stricter than ethics regulations for the legislative and judicial branches.¹²⁴ In addition, a contemporaneous salary increase was granted for federal employees in all three branches who had been supplementing their government income with honoraria.¹²⁵ No pay increase was given to rank and file executive branch employees.¹²⁶

Thus, Congress seems to have imposed the honoraria prohibition on unappointed members of the executive branch as a means to achieve uniformity and to ease administrative burdens rather than as a directed effort to impose stricter regulations on these employees.¹²⁷ Unfortunately, government scientists became unintended casualties of this prohibition. Congress subjected government scientists to standards appropriate for legislators rather than treating federal scientists like their peers in academia and private industry.

A. *Honorarium Ban Intended for Members of Congress*

Members of Congress' practice of receiving honoraria provided the impetus for § 501(b) of the Ethics Reform Act.¹²⁸ Before passage of the 1989 Act, different ethics standards governed employees of each of the three branches.¹²⁹ Standards for the legislative branch were the least restrictive,¹³⁰ allowing members of Congress collectively to earn almost ten million dollars in fees for speaking engagements

124. See *infra* Part II.A.1 (describing executive branch regulations in effect when Ethics Reform Act passed).

125. 5 U.S.C. § 5318 (note) (1994).

126. See 2 U.S.C. § 31-1 (note) (1994) (making honorarium ban contingent on not repealing salary increase).

127. See Statement on Signing the Ethics Reform Act of 1989, PUB. PAPERS 1613 (stating that equitable application of ethics restrictions to three branches is desirable reform). But see Thomas D. Morgan, *The Quest for Equality in Regulating the Behavior of Government Officials: The Case of Extrajudicial Compensation*, 58 GEO. WASH. L. REV. 488, 488-89 (1990) (arguing that different ethical considerations arise from situations presented to members of different branches of government). Professor Morgan focuses on the costs of treating judges like members of Congress for the purpose of ethics regulations and concludes that judges and legal education suffer from this treatment, which does not produce a corresponding gain to the public. *Id.* at 489.

128. *United States v. NTEU*, 115 S. Ct. 1003, 1014 (1995) (noting that receipt of honoraria by lawmakers motivated ban); see also *Modifying the Honoraria Prohibition Hearing*, *supra* note 27, at 20 (statement of Rep. Morella) (differentiating acceptability of broad honorarium ban between members of Congress and rank and file federal employees).

129. See *infra* Part II.A.1 (describing pre-1989 differences in ethics standards).

130. See COMMISSION ON EXECUTIVE, LEGISLATIVE, AND JUDICIAL SALARIES, FAIRNESS FOR OUR PUBLIC SERVANTS 24 (1988) [hereinafter QUADRENNIAL COMMISSION REPORT] (reporting that less stringent standards of conduct for legislators allowed them to accept significant amounts of outside income).

and publications in 1987 alone.¹³¹ In passing the Act, Congress recognized the role of honoraria as salary supplements and made the honorarium ban contingent on a significant salary increase for top employees of each branch.¹³² The ban extended to career executive branch employees, although they did not receive offsetting salary increases.¹³³ Career executive branch employees were already subject to limits on outside earned income, and there were no reports of impropriety by these individuals.¹³⁴

1. *Regulations in effect prior to passage of the Ethics Reform Act*

Prior to the passage of the Ethics Reform Act, members of the executive branch were subject to more stringent restrictions on outside income than members of the legislative or judicial branches.¹³⁵ Existing legislation held employees of all three branches to a \$2000 limit per individual activity.¹³⁶ Executive branch employees at or above the GS-16 pay level, however, were also precluded from earning an aggregate amount of outside income, including honoraria, greater than fifteen percent of their federal salaries,¹³⁷ while members of the House of Representatives could earn as much as thirty percent of their salaries from outside income,¹³⁸ and Senators could receive up to forty percent of their salaries for outside activities.¹³⁹ Members of the judiciary had no maximum percentage of salary restrictions for outside income.¹⁴⁰ Additionally, only executive branch employees could face criminal liability for acceptance of

131. See BIPARTISAN TASK FORCE REPORT, *supra* note 11, at H9256-57 (stating that \$9.8 million was aggregate amount of honoraria received by members of Congress in 1987).

132. See discussion *infra* Part II.A.3 (explaining relationship of pay raise to honoraria prohibition).

133. See *infra* Part II.A.3 (discussing inconsistency between pay raise, which only applied to lawmakers and political appointees, and honorarium ban, which applied to all government employees).

134. See NTEU, 115 S. Ct. at 1009 (noting that honoraria ban was extended to career executive branch employees without evidence of problems caused by receipt of honoraria by them).

135. See QUADRENNIAL COMMISSION REPORT, *supra* note 130, at 346 (summarizing ethics regulations for each branch); *Modifying the Honoraria Prohibition Hearing*, *supra* note 27, at 71-73 (statement of Stephen D. Potts, Director, Office of Government Ethics) (describing regulations in place at passage of honoraria prohibition).

136. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 328, 90 Stat. 475, 494, *repealed by* Act of Aug. 14, 1991, Pub. L. No. 102-90, § 6(d), 105 Stat. 447, 451 (codified at 2 U.S.C. § 441(i) (1994)).

137. BIPARTISAN TASK FORCE REPORT, *supra* note 11, at H9256.

138. RULES OF THE HOUSE OF REPRESENTATIVES, RULE XLVII, H.R. DOC. NO. 279, 99th Cong., 2d Sess. 722 (1986).

139. BIPARTISAN TASK FORCE REPORT, *supra* note 11, at H9256.

140. CODE OF JUDICIAL CONDUCT Canon 6 (1972) (allowing judges to accept compensation for quasi-judicial and extra-judicial activities that do not give appearance of impropriety).

compensation from outside sources for services performed in the scope of their positions as government employees.¹⁴¹

Prior to passage of the Ethics Reform Act, the OGE applied a five-part test to determine whether a member of the executive branch could accept honoraria.¹⁴² The five-part test identified circumstances that might create a conflict of interest for the executive branch employee. The OGE test was as follows:

- (1) Is the honorarium offered for carrying out government duties for an activity that focuses specifically on the employing agency's responsibilities, policies and programs?
- (2) Is the honorarium offered to the government employee or family member because of the official position held by the employee?
- (3) Is the honorarium offered because of the government information that is being imparted?
- (4) Is the honorarium offered by someone who does business with or wishes to do business with the employee in his or her official capacity?
- (5) Were any government resources or time used by the employee to produce the materials for the article or speech or make the appearance?¹⁴³

If the employee answered these five questions in the negative, the employee could accept honorarium of \$2000 or less.¹⁴⁴

If a presentation or publication included information about a government agency's activities or disclosed information that had not yet been made public, the employee could not accept the honorarium.¹⁴⁵ The OGE also questioned the source of the compensation.¹⁴⁶ A potential conflict of interest arose when an entity or individual that was doing business or was likely to do business with the executive branch employee in his or her official capacity offered payment to the government employee.¹⁴⁷ Thus, executive branch employees were prohibited from accepting honoraria under circum-

141. 18 U.S.C. § 209(a) (1994).

142. *Modifying the Honoraria Prohibition Hearing*, *supra* note 27, at 72 (statement of Stephen D. Potts) (setting out test, which was valid until Jan. 1, 1991, for receipt of honoraria).

143. *Modifying the Honoraria Prohibition Hearing*, *supra* note 27, at 72 (statement of Stephen D. Potts); *see also* NTEU v. United States, 990 F.2d 1271, 1276-77 (D.C. Cir. 1993) (noting that application of this standard did not result in administrative difficulties), *aff'd in part, rev'd in part*, 115 S. Ct. 1003 (1995).

144. *Modifying the Honoraria Prohibition Hearing*, *supra* note 27, at 72.

145. *Modifying the Honoraria Prohibition Hearing*, *supra* note 27, at 72.

146. *Modifying the Honoraria Prohibition Hearing*, *supra* note 27, at 72.

147. *Modifying the Honoraria Prohibition Hearing*, *supra* note 27, at 72.

stances that could give rise to either actual or apparent conflicts of interest.¹⁴⁸

When the honorarium prohibition imposed by the Ethics Reform Act went into effect in 1991, it added an additional layer of regulation for executive branch employees.¹⁴⁹ In contrast to the extensive ethics regulations in place for members of the executive branch in 1989, members of the legislative branch enjoyed greater freedom.¹⁵⁰ Concern about the amount of honoraria accepted by members of Congress prompted creation of several Commissions to study the issue.

2. *Ethics commission findings and recommendations*

On February 2, 1989, congressional leaders appointed the Bipartisan Task Force on Ethics.¹⁵¹ This assemblage of Democratic and Republican members of Congress met weekly throughout much of the year and held four public hearings.¹⁵² The Task Force report provided the basis for the Ethics Reform Act of 1989, including the honorarium prohibition.¹⁵³ The Task Force relied on reports by the Commission on Executive, Legislative, and Judicial Salaries (Quadrennial Commission)¹⁵⁴ and the President's Commission on Federal Ethics Law Reform (Wilkey Commission).¹⁵⁵ Both the Quadrennial Commission and the Wilkey Commission reported that members of Congress were more likely than members of the other branches to

148. *Modifying the Honoraria Prohibition Hearing*, *supra* note 27, at 73.

149. *See* *Modifying the Honoraria Prohibition Hearing*, *supra* note 27, at 73 (statement of Stephen D. Potts) (describing additional ethics restrictions as "a layer that, in our judgment imposes too great a burden on the vast majority of government employees and is unnecessary to protect the government from unethical conduct").

150. *See* QUADRENNIAL COMMISSION REPORT, *supra* note 130, at 24, 36 (noting that legislation regulating outside income favored Congress over executive and judicial branches); *Modifying the Honoraria Prohibition Hearing*, *supra* note 27, at 71 (noting that executive branch employees were always subject to honoraria regulations whereas legislative and judicial branch employees were not).

151. *See* BIPARTISAN TASK FORCE REPORT, *supra* note 11, at H9253 (citing task force goal to restore public confidence and promote integrity of government officials).

152. BIPARTISAN TASK FORCE REPORT, *supra* note 11, at H9253.

153. *See* 5 U.S.C. app. § 501(b) (1994) (providing text of Ethics Reform Act's honorarium prohibition); *see also* BIPARTISAN TASK FORCE REPORT, *supra* note 11, at 14-16 (setting forth recommendations for honoraria and outside earned income).

154. *See generally* QUADRENNIAL COMMISSION REPORT, *supra* note 130 (reporting 1989 Quadrennial Commission's recommendations dealing with adjustments in governmental salaries and Congress' ban on honoraria for members of all three branches of government).

155. *See generally* PRESIDENT'S COMMISSION ON FEDERAL ETHICS LAW REFORM, TO SERVE WITH HONOR: REPORT OF THE PRESIDENT'S COMM'N ON FEDERAL ETHICS LAW REFORM (1989) [hereinafter WILKEY COMMISSION REPORT] (setting forth recommendations for ethics reform in all branches of government with emphasis on conflicts of interest and salary augmentation through gifts, honoraria, and outside employment).

supplement their government salaries with honoraria.¹⁵⁶ Despite their focus on acceptance of honoraria in Congress, however, both Commissions recommended banning receipt of honoraria in all three branches.¹⁵⁷

It is interesting to note that these Commissions employed a more limited definition of honoraria than that adopted by the Ethics Reform Act. Section 501(b) of the Ethics Reform Act states that "[a]n individual may not receive any honorarium while" employed by the government for an "appearance, speech, or article."¹⁵⁸ Both Commissions defined honoraria as "payments for public appearances to deliver a talk or engage in a colloquy at the invitation of some non-governmental group."¹⁵⁹ Thus, the Commissions' reports may have intended their recommendations to apply exclusively to oral activities.¹⁶⁰

The Wilkey Commission Report regarded compensation for writing scholarly articles, teaching academic courses, and publishing texts as outside earned income rather than honoraria.¹⁶¹ Neither Commission suggested that all outside earned income should be prohibited.¹⁶² In fact, the Wilkey Commission specifically recommended that the President be given authority to grant exemptions for extra-

156. QUADRENNIAL COMMISSION REPORT, *supra* note 130, at 23 (finding that members of Congress have unique job responsibilities which necessitate supplementing salaries with outside income); WILKEY COMMISSION REPORT, *supra* note 155, at 35 (describing lack of uniformity in regulations and desire to "alleviate[] abuses in the legislative branch").

157. QUADRENNIAL COMMISSION REPORT, *supra* note 130, at 3, 24; WILKEY COMMISSION REPORT, *supra* note 155, at 35.

158. 5 U.S.C. app. § 503(3) (1994).

159. QUADRENNIAL COMMISSION REPORT, *supra* note 130, at 24; *see also* WILKEY COMMISSION REPORT, *supra* note 155, at 35 (adopting Quadrennial Commission definition).

160. *But see* WILKEY COMMISSION REPORT, *supra* note 155, at 36 (recognizing that ban should be broad enough to close "loopholes such as receipt of consulting, professional, or similar fees; . . . or any other benefit that is the substantial equivalent of an honorarium").

161. WILKEY COMMISSION REPORT, *supra* note 155, at 37. The Wilkey Commission Report recommended a maximum limit on outside earned income, but did not propose a flat prohibition on outside earnings for all government employees. *Id.* at 33. Commission members identified "categories of outside activity that neither interfere with the full performance of official duties nor pose significant ethical issues." *Id.* at 36. While the Wilkey Commission expressed concern that outside activities could "take time and energy away from official activities," it also acknowledged that activities such as writing scholarly articles could "benefit both the federal employees and society at large." *Id.* at 37.

162. *See* QUADRENNIAL COMMISSION REPORT, *supra* note 130, at 25 (recommending that restrictions be placed on all senior federal officials to prohibit outside income that conflicts or appears to conflict with official duties); WILKEY COMMISSION REPORT, *supra* note 155, at 36 (stating that limits on outside income should not be unnecessarily restrictive). Instead of endorsing a flat ban on extra-employment compensation, the Wilkey Commission recommended prohibiting outside earned income for activities or services that conflict or appear to conflict with the performance of official duties. WILKEY COMMISSION REPORT, *supra* note 155, at 35-36.

employment activities "that neither interfere with the full performance of official duties nor pose significant ethical issues."¹⁶³

Both the Quadrennial Commission and the Wilkey Commission further found that top officials in all three branches of the federal government were not adequately compensated.¹⁶⁴ Apparently, low government salaries were exacerbating recruitment and retention problems for federal agencies and institutions.¹⁶⁵ The Quadrennial Commission blamed inadequate government salaries for the practice of supplementing income through honoraria.¹⁶⁶ In conjunction with the recommendation to prohibit honoraria, the Quadrennial Commission recommended significant salary increases for senior members of the executive, legislative, and judicial branches.¹⁶⁷

3. *Contemporaneous salary increase*

Relying on the Quadrennial Commission report and in recognition of the value of honoraria payments as supplements to low government salaries, Congress offset the honorarium ban with substantial pay raises for members of Congress, judges, and politically appointed members of the executive branch.¹⁶⁸ Congress ensured that, if the provision granting these substantial pay raises were ever repealed, § 501(b) would cease to be effective.¹⁶⁹ The contingency of § 501(b) on significant salary increases for these discrete groups of government employees indicated recognition by Congress that these groups would be affected financially by the newly imposed honoraria prohibition.¹⁷⁰

163. WILKEY COMMISSION REPORT, *supra* note 155, at 36.

164. QUADRENNIAL COMMISSION REPORT, *supra* note 130, at 15 (noting that "top federal officials are paid substantially less than high officials in other public and private nonprofit organizations"); WILKEY COMMISSION REPORT, *supra* note 155, at 37-38 (suggesting that salaries should be adjusted to "offset the past erosion" in real wages caused by inflation).

165. See QUADRENNIAL COMMISSION REPORT, *supra* note 130, at 1, 27-28 (noting that federal judges increasingly resign from "lifetime" appointments and average tenure for top executive branch officials is 18 months).

166. QUADRENNIAL COMMISSION REPORT, *supra* note 130, at 24.

167. QUADRENNIAL COMMISSION REPORT, *supra* note 130, at 3, 24. The Quadrennial Commission recommended that the President design the 1990 budget request to reflect salary increases for senior members of all federal branches to approximate in constant dollars the relevant salaries from 1969. *Id.* at 3. The Commission believed that raising salaries to a level that would enable federal officials to meet "minimum family obligations" would undercut attempts to justify receipt of honoraria as needed income. *Id.* at 24.

168. Ethics Reform Act of 1989, Pub. L. No. 101-194, § 703, 103 Stat. 1716, 1763 (codified at 5 U.S.C. app. § 501 (1994)) (granting 25% pay raise).

169. *Id.*

170. See *NTEU v. United States*, 990 F.2d 1271, 1278 (D.C. Cir. 1993) (labeling "sharp" salary increases for members of Congress as one "key ingredient" in passage of honoraria prohibition), *aff'd in part, rev'd in part*, 115 S. Ct. 1003 (1995).

In the executive branch, only high-ranking, political appointees received these pay increases;¹⁷¹ other members of the executive branch were subject to the ban on receipt of honoraria without receiving supplemental salary increases.¹⁷² The non-competitive salary issues identified by the ethics Commissions' reports, however, were not restricted to top government officials.¹⁷³ Salaries for government scientists, for example, have not kept pace with those of scientists in the private sector.¹⁷⁴ For many scientists, therefore, the honoraria prohibition has contributed to the maintenance of inadequate salaries and excessive limits on outside earned income, making public service unattractive to distinguished scientists. Such a result does not serve the purpose of ethics legislation. Employees of all three branches of government are public servants and should be held to high ethical standards.¹⁷⁵ Nothing in this premise, however, requires the three branches of government, with their diverse functions and duties, to be controlled by identical regulations.¹⁷⁶

B. National Treasury Employees Union *Class Action*

In response to the honorarium ban, a class of executive branch employees below the rank of GS-16 filed suit seeking to enjoin enforcement of § 501(b) of the Ethics Reform Act as a violation of their First Amendment rights.¹⁷⁷ Most of the plaintiffs were executive branch employees who wrote or spoke about subjects unrelated to their positions with the government.¹⁷⁸ Plaintiffs included a

171. Pub. L. No. 101-194, § 703(a), 103 Stat. 1716, 1768 (codified at 5 U.S.C. § 5318 (note) (1994)).

172. See *id.* (stating that basic pay only for appointed positions in Executive Schedule shall be increased by 25% and rounded to nearest multiple of 100).

173. See *supra* notes 109-19 and accompanying text (explaining consequences of inadequate government salaries for scientists).

174. See NIH HOUSE REPORT, *supra* note 6, at 54 (citing non-competitive salaries as impediment to recruitment and retention of scientific personnel); QUADRENNIAL COMMISSION REPORT, *supra* note 130, at 20 (discussing problem of competitive salaries for NIH scientists).

175. See *Modifying the Honoraria Prohibition Hearing*, *supra* note 27, at 91 (statement of Fred Wertheimer, President, Common Cause) (asserting that public servants have duty to act in interests of general public).

176. Cf. *NTEU v. United States*, 990 F.2d 1271, 1278 (D.C. Cir. 1993) (asserting that private parties paying for speech or writing have greater expectation to influence Congress than to influence executive branch employees), *aff'd in part, rev'd in part*, 115 S. Ct. 1003 (1995); Morgan, *supra* note 127, at 488-89 (arguing that different ethical issues are presented for members of each branch who receive outside income).

177. *NTEU v. United States*, 788 F. Supp. 4, 6 (D.D.C. 1992), *aff'd*, 990 F.2d 1271 (D.C. Cir. 1993), *aff'd in part, rev'd in part*, 115 S. Ct. 1003 (1995).

178. *Id.* at 6 n.1. One plaintiff, Richard Deutsch, is a business analyst for the government who engages in outside activities that also involve business analysis. Joint Appendix at 42a-46a, *United States v. NTEU*, 115 S. Ct. 1003 (1995) (No. 93-1170) (declaration of Richard Deutsch). For further discussion of this plaintiff, see *infra* text accompanying notes 219-23.

Nuclear Regulatory Commission lawyer who authored articles about Russian history, a postal worker who spoke and wrote about the Quaker religion, and a Health and Human Services employee who wrote arts and theater reviews for newspapers.¹⁷⁹ Plaintiffs argued that the honorarium prohibition violated the First Amendment by denying them compensation for their extra-employment activities.¹⁸⁰

On February 22, 1995, the Supreme Court decided *United States v. National Treasury Employees Union (NTEU)*.¹⁸¹ Writing for the majority, Justice Stevens recognized that payment provides a "significant incentive" to engage in expressive activity.¹⁸² The Court noted that plaintiffs' status as government employees effectively denied them the right to this incentive.¹⁸³ Although the Court found the government's interest in integrity and efficiency to be "vital,"¹⁸⁴ it held that the honorarium ban was not sufficiently narrowly tailored to survive a First Amendment challenge by these plaintiffs.¹⁸⁵

Justice Stevens recognized the powerful government interest in preventing actual or apparent impropriety by federal employees.¹⁸⁶ Yet, he found that this interest was not strong enough to outweigh the interests of federal employees in exercising their First Amendment rights and the interests of potential audiences in hearing them.¹⁸⁷

1. *The Pickering balance*

In finding application of the honorarium ban to career executive branch employees unconstitutional, the Court in *NTEU* applied a balancing test that it had developed in *Pickering v. Board of Education*,¹⁸⁸ which also involved restrictions on the First Amendment rights of government employees. In *Pickering*, the Court balanced the individual's interest in speaking about matters of public concern against the government's interest in efficient performance of the

179. *NTEU*, 990 F.2d at 1275.

180. *NTEU*, 115 S. Ct. at 1010.

181. 115 S. Ct. 1003 (1995); see also Joan Biskupic, *Justices Question Honoraria Ban: Limits on Federal Workers' Speech Criticized in Oral Arguments*, WASH. POST, Nov. 9, 1994, at A4 (describing spirited oral arguments).

182. *United States v. NTEU*, 115 S. Ct. 1003, 1014 (1995).

183. *Id.* (stating that denial of honoraria induces individuals to "curtail their expression" in order to maintain employment with government).

184. *Id.* at 1016.

185. *Id.* at 1018.

186. See *id.* at 1015-16 ("The Government's concern is that federal officers not misuse or appear to misuse power by accepting compensation for their unofficial and nonpolitical writing and speaking activities. This interest is undeniably powerful . . .").

187. *Id.* at 1018 ("[T]he speculative benefits the honorarium ban may provide the Government are not sufficient to justify this crudely crafted burden on respondents' freedom to engage in expressive activities.").

188. 391 U.S. 563 (1968).

services entrusted to its employees.¹⁸⁹ Because *NTEU* involved a broad prophylactic ban rather than an after-the-fact disciplinary action, Justice Stevens modified this balancing equation to address the particular facts in *NTEU*.¹⁹⁰ Due to the honorarium ban's broad preemptive chilling of a vast amount of speech,¹⁹¹ the Court found that the government faced a greater burden than in *Pickering*.¹⁹² The broad scope of § 501(b) required that the government's interest overcome the interests of both executive branch employees and their potential audiences.¹⁹³

In assessing the weight of the executive branch employees' interests and those of their potential audiences, the Court began by noting that § 501(b) would have affected the work of several "literary giants."¹⁹⁴ Justice Stevens noted that Nathaniel Hawthorne,¹⁹⁵ Herman Melville,¹⁹⁶ and Walt Whitman¹⁹⁷ were all government employees. Each of these men contributed significantly to the "marketplace of ideas" through their expressive activities.¹⁹⁸ Justice Stevens factored into the *Pickering* balance the potential for the honorarium ban to stifle the next Hawthorne, Melville, or Whitman.¹⁹⁹ The risk of losing contributions from the next government-employed literary giant created a large burden for the government to overcome in justifying the ban on honoraria.²⁰⁰

The Court also noted that § 501(b) did not technically *prohibit* any expressive activity.²⁰¹ The ban applied only to *compensation* for such

189. *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). The *Pickering* balance test has been employed throughout the Supreme Court's jurisprudence. See *Waters v. Churchill*, 114 S. Ct. 1878, 1890 (1994) (holding that potential disruptiveness of fired employee's statements outweighed their First Amendment value); *Connick v. Myers*, 461 U.S. 138, 150-51 (1983) (applying *Pickering* balancing test to invalidate discharge of employee because First Amendment interests outweighed governmental interests of efficiency, integrity, and discipline).

190. See *NTEU*, 115 S. Ct. at 1014 ("The widespread impact of the Honoraria ban . . . gives rise to far more serious concerns than could any single supervisory decision.")

191. See *id.* at 1013 (describing honorarium ban as "Congress' wholesale deterrent to a broad category of expression by a massive number of potential speakers").

192. *Id.* at 1014 (finding that broad speech restrictions is more onerous than isolated disciplinary actions).

193. *Id.* (finding that application of ban to low level executive branch employees did not further ban's goal of reducing undue influence).

194. *Id.* at 1012.

195. *Id.* (noting Hawthorne's employment with Customs Service).

196. *Id.* (adding that Melville also worked for Customs Service).

197. *Id.* (listing Whitman as employee of both Departments of Justice and Interior).

198. *Id.*

199. *Id.* at 1015 ("[W]e cannot ignore the risk that [the ban] might deprive us of the work of a future Melville or Hawthorne.")

200. See *id.* at 1014-15 (finding that ban imposes immeasurable costs with regard to right of public to hear and read words of governmental employees, thereby violating First Amendment).

201. *Id.* at 1014 (conceding that § 501(b) does not prohibit speech or discriminate among speakers based on content or viewpoint of messages); see also *id.* at 1029 (Rehnquist, C.J.,

expressive activities; therefore, despite the ban, government employees remained free to engage in expressive activities as long as they did not receive compensation.²⁰² In addressing this distinction, the Court cited *Simon & Schuster v. New York State Crime Victims Board*.²⁰³ In that case, the Supreme Court invalidated a state's "Son of Sam" law, which restricted the ability of criminals to receive compensation for expression regarding their crimes.²⁰⁴

In *Simon & Schuster*, the Court found that a financial burden alone was enough to create a First Amendment violation.²⁰⁵ Accordingly, the Court in *NTEU* held that the honorarium ban infringed on the First Amendment rights of low and mid-level executive branch employees by deterring expressive activity.²⁰⁶

In *Pickering*, the Court had distinguished between the interests of the government when acting as an employer and its interests as a sovereign.²⁰⁷ The government's interest in regulating the activities of its employees is stronger than its interest in regulating the activities of the general public.²⁰⁸ In administering § 501(b), the government functions as an employer because only government employees are prohibited from accepting honoraria.²⁰⁹

In *NTEU*, the Court recognized the government's vital interest in efficiently regulating the ethical conduct of its employees.²¹⁰ The Court noted the concern that "federal officers not misuse or appear to misuse power by accepting compensation for their unofficial"

dissenting) ("[U]nlike our prototypical application of *Pickering* which normally involves a response to the content of employee speech, the honoraria ban prohibits no speech and is unrelated to the message or the viewpoint expressed by a government employee.")

202. See *id.* at 1024 (Rehnquist, C.J., dissenting) (accusing Court of overstating burden to particularly sympathetic plaintiffs in order to set stage for broader than necessary remedy).

203. 502 U.S. 105 (1991), cited in *NTEU*, 115 S. Ct. at 1014.

204. *Simon & Schuster v. New York State Crime Victims Bd.*, 502 U.S. 105, 109 (1991).

205. *Id.* at 115 (restating "engrained" principle that statute is presumptively violative of First Amendment if it imposes financial burden on speakers based on speech's content).

206. *NTEU*, 115 S. Ct. at 1014; cf. *id.* at 1014 n.14 ("No man but a blockhead ever wrote, except for money." (quoting J. BOSWELL, *LIFE OF SAMUEL JOHNSON* L.L.D 302 (R. Hutchins ed., 1952))).

207. *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) ("[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."). Subsequent Supreme Court case law clarifies this distinction. In 1994, the Court declared that the government's interest in efficient achievement of its goals "is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Waters v. Churchill*, 114 S. Ct. 1878, 1888 (1994).

208. See *NTEU*, 115 S. Ct. at 1012 (describing increased ability of Congress to restrain speech of individuals employed in government service).

209. *Id.*

210. See *id.* at 1016 (describing government reliance on avoidance of administrative costs of detecting violations by lower-level employees as justification for flat ban).

speeches and writing.²¹¹ In furtherance of this interest, however, Congress sought to restrict the behavior of all government employees, even executive branch employees for whom there had been no evidence of impropriety.²¹² The Court noted the influence of the Quadrennial Commission and Wilkey Commission reports on Congress' passage of the honorarium prohibition.²¹³ These reports recommended an across-the-board ban on honoraria, but cited no instances of "misconduct related to honoraria" among rank and file executive branch employees.²¹⁴

The Court also discussed the absence of a requirement that government employees' expressive activities relate to their jobs.²¹⁵ Without this nexus requirement, § 501(b) banned speech that would not create even the appearance of impropriety by government employees.²¹⁶ Thus, the Court held that Congress did not narrowly tailor the honorarium ban to meet the government's needs.²¹⁷ In holding that the ban was unconstitutional as written, the majority of the Court chose not to impose its own nexus requirement or to limit the decision to executive branch employees who engage in activities unrelated to their jobs.²¹⁸

2. *Expressive activities that relate to government employment*

In *NTEU*, the Supreme Court did not decide whether the honorarium ban may constitutionally be applied to individuals whose expressive activities bear a relationship to their government employment. One of the plaintiffs in the *NTEU* case, Richard Deutsch, acknowledged a nexus between his position as a business editor for the Voice of America and his freelance business writing.²¹⁹ In the

211. *Id.* at 1015.

212. *See id.* (concluding that Congress could not reasonably extend presumption of impropriety by members of Congress to all federal employees).

213. *See id.* at 1009 (detailing Commissions' findings of potential impropriety in acceptance of honoraria by legislators).

214. *Id.* at 1016.

215. *See id.* at 1015 (finding that government could not claim workplace disruption because speech did not relate to employment duties).

216. *Id.* at 1017.

217. *Id.* at 1019.

218. *See id.* (discussing desire to avoid "judicial legislation" and uncertainty about how to craft nexus requirement). *But see id.* at 1022 (O'Connor, J., concurring in part and dissenting in part) (recommending expansion of nexus requirement for series of activities to prohibit even single expression if related to government employment).

219. *NTEU v. United States*, 990 F.2d 1271, 1283 n.3 (D.C. Cir. 1993), *aff'd in part, rev'd in part*, 115 S. Ct. 1003 (1995). Deutsch states that he was hired by Voice of America, in part, because of the "expertise demonstrated by articles [he] had written." Joint Appendix at 43a, *United States v. NTEU*, 115 S. Ct. 1003 (1995) (No. 93-1170) (declaration of Richard Deutsch). Voice of America also assured him that he could continue to publish articles while he worked for the government and "in fact, encouraged [him] to publish because this might add prestige

opinion of the United States Court of Appeals for the District of Columbia Circuit, Judge Williams noted Deutsch's assertion that the prohibition against compensation for writing and speaking will reduce the likelihood that "hard-working, intelligent, creative persons"²²⁰ will choose government service.²²¹ But Judge Williams did not factor Deutsch's assertions into the *Pickering* balance.

Although Judge Williams assumed *arguendo* that § 501(b) could be applied to Deutsch without violating the Constitution,²²² the Supreme Court left this question open. The majority did not decide whether the statute would be constitutional if a nexus existed between the employee's job and the activity for which the employee received honoraria.²²³ In *Sanjour v. E.P.A.*,²²⁴ decided three months after *NTEU*, the D.C. Circuit came closer to addressing the nexus issue.

In *Sanjour*, the D.C. Circuit invalidated ethics regulations prohibiting government employees from being reimbursed by private parties for travel expenses incurred for unofficial speaking engagements.²²⁵ The regulation at issue in *Sanjour* imposed a greater burden on employees than the honorarium ban in § 501(b) because § 501(b) allows employees to recover necessary travel expenses.²²⁶ Moreover, the distinction made by the regulation in *Sanjour* was between "official" and "unofficial" speaking engagements.²²⁷ The subject matter of the speech and its relationship to the government employees job was not directly at issue in *Sanjour*.

Nevertheless, the government's assertions and the court's analysis in *Sanjour* are relevant to the distinction between speeches or articles that relate to government employment and those that are unrelated. The government initially asserted two interests in support of the regulations. First, the regulations protect against the "appearance of impropriety" that could result from a government employee accepting reimbursement from a private party to whom the employee might

to the agency." *Id.*

220. *NTEU*, 990 F.2d at 1276.

221. After hearing the plaintiff's argument that prohibiting private compensation would decrease the attractiveness of government service, Judge Williams stated, "Surely this is so." *Id.*

222. *Id.*

223. See *NTEU*, 115 S. Ct. at 1019 (stating that addition of nexus requirement to ban "would likely raise independent constitutional concerns whose adjudication is unnecessary to decide this case").

224. 56 F.3d 85 (D.C. Cir. 1995).

225. *Sanjour v. E.P.A.*, 56 F.3d 85, 87-88 (D.C. Cir. 1995).

226. *Id.* at 93-94; see also 5 U.S.C. app. § 505(3) (1994) (allowing receipt of "actual and necessary travel expenses").

227. *Sanjour*, 56 F.3d at 90. Under the E.P.A. ethics regulation, government employees could receive "travel and accommodation reimbursement for 'official' or 'authorized' speaking, writing, or teaching engagements, but not for activities the agency does not pre-approve." *Id.*

then "appear beholden" and "prone to provide illicit regulatory 'favors' in return."²²⁸ The D.C. Circuit noted that the government wisely abandoned this assertion because the "appearance of impropriety" bore no relation to the distinction between official and unofficial speech made by the regulation.²²⁹

Second, the government asserted that reimbursement to government employees from private entities would make it appear that the employees were "selling" their labor twice.²³⁰ The government argued that this practice might cause the public to question "the single minded dedication of government employees to the public interest."²³¹ The court found that the scope of the regulations did not fit the government's asserted interests.²³²

Of primary importance to the court in *Sanjour* was the fact that the distinction between official and unofficial speech made the government regulation underinclusive.²³³ The regulation was underinclusive because recovery of expenses from a private party for official speech raised the same concerns that the government identified for unofficial speech.²³⁴ The court noted that the regulation was also overinclusive because the public could not construe receipt of minimal expenses, such as a bus ticket, as "using public office for private 'gain.'"²³⁵ Yet, recovery of minimal expenses would be barred by the regulation along with receipt of extravagant expenses.²³⁶

Similarly, limiting the honorarium ban to expressive activities that have a nexus to government employment and allowing honoraria for those that do not, would make § 501(b) both underinclusive and overinclusive. If a scientist conducts research on the efficacy of a particular drug, there is little difference between the manufacturer of the drug paying the scientist to speak about the research or about a wholly unrelated topic. It is natural for manufacturers to want to provide an incentive to a scientist who will speak favorably about their products. The concern is that the scientist will be induced to fabricate positive results in return for payment from the manufacturer.

228. *Id.* at 94.

229. *Id.*

230. *Id.*

231. *Id.* at 95.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at 97-98.

236. *Id.* at 98.

But the concern about impropriety is not related to the subject of a particular speech or article. If this were true, drug manufacturers could easily subvert the regulation by paying honorarium to a scientist *only* for a speech about an unrelated topic, and *not* paying for a glowing article about the payor's product by the same scientist. Like travel expenses, concern about payment of honoraria hinges on either the payor's interest in the government employee's work or fear that scientists will be distracted from dedication to the public interest. Neither of these concerns is addressed by imposing a nexus requirement into the honorarium ban in § 501(b). As stated in *Sanjour*, the dangers "derive[d] from the private source's interest in the future actions of the employee's agency"²³⁷ rather than the distinctions between either official and unofficial or related and unrelated speech. Despite the assertion that a nexus requirement is unnecessary and unhelpful, it continues to appeal to members of the Supreme Court and Congress.

III. MODIFYING THE HONORARIUM BAN TO INCLUDE A NEXUS REQUIREMENT

Since passage of the Ethics Reform Act, Congress has successfully added two nexus requirements, one for a series of expressions,²³⁸ and one for Department of Defense employees.²³⁹ In addition, several other nexus requirements have been proposed but not enacted.²⁴⁰ Although the decision in *NTEU* enjoined application of the honorarium ban to government scientists below GS-16,²⁴¹ the ban still applies to many scientists, and by adding a new nexus requirement to the Act, Congress could presumably cure the constitutional deficiency with respect to all government scientists.²⁴² A nexus requirement that does not expressly exempt scientists or take their special needs into account would again place government scientists at a disadvantage relative to their peers in non-government positions.²⁴³

237. *Id.* at 94.

238. 5 U.S.C. app. § 505(3) (1994).

239. 10 U.S.C. § 2161 (1994).

240. *See infra* Part III.C (describing 1991 and 1993 legislation).

241. *NTEU*, 115 S. Ct. at 1018-19 (granting relief to all executive branch employees below GS-16 pay scale).

242. *See NTEU v. United States*, 990 F.2d 1271, 1276-77 (D.C. Cir. 1993) (assuming ban could be constitutionally applied if nexus was present), *aff'd in part, rev'd in part*, 115 S. Ct. 1003 (1995).

243. *See supra* Part I.C (discussing problems created by honorarium ban for government scientists).

A. *Nexus Requirement for a Series of Expressive Activities*

In 1992, Congress amended § 505(3) of the Ethics Reform Act.²⁴⁴ Congress expanded the definition of honorarium by including a nexus requirement for a series of expressive activities. The new definition of honorarium is

a payment of money or any thing 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.²⁴⁵

The parenthetical clause excepts a series of writings or speeches from the flat prohibition against honoraria.²⁴⁶ Government employees may accept honoraria for a series of expressive activities if the subject matter is unrelated to the individual's official duties.²⁴⁷

It is not clear why relaxation of the flat ban was warranted for a series of expressive activities but not for a single incident.²⁴⁸ No explanation for the differential treatment is provided in either the original statute, the amendment, or in debates during passage of these laws.²⁴⁹ The clause itself provides little guidance on how ethics officials or federal employees should interpret the nexus requirement.

Honoraria may not be accepted if the subject of a series of expressive activities "directly relate[s]" to official duties or is paid

244. Legislative Branch Appropriations Act, 1992, Pub. L. No. 102-90, § 314(b), 105 Stat. 447, 469 (codified at 5 U.S.C. app. § 505(3) (1994)).

245. 5 U.S.C. app. § 505(3) (1994).

246. *Id.* Prior to the 1992 Amendment, the term "honorarium" meant the following:

[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.

Id.

247. The inconsistent treatment given to a series of expressions as opposed to a single event was highlighted by several of the Justices during oral argument for *United States v. NTEU*. See *Federal Employees: Justices Debate Whether Ban on Honoraria Violates Federal Workers' Free Speech*, Daily Rep. for Execs. (BNA) at A-215 (Nov. 9, 1994). The nexus analysis required for a series undercuts the government's argument that a nexus requirement would be too burdensome. *Id.*

248. See *United States v. NTEU*, 115 S. Ct. 1003, 1016 (1995) (calling series exception "rather strange parenthetical").

249. Cf. Eric J. Murdock, *Finally, Government Ethics as if People Mattered: Some Thoughts on the Ethics Reform Act of 1989*, 58 GEO. WASH. L. REV. 503, 503 (1990) (noting that Act went through Congress very quickly and "no committee or conference reports were prepared").

because of the employee's "status with the government."²⁵⁰ In her concurring opinion in *NTEU*, Justice O'Connor recommended expanding the application of this language to single instances of expressive activity.²⁵¹ If this brief clause were extended to single acts, all government scientists could again be discouraged from engaging in the usual and customary extra-employment activities that private scientists are encouraged to engage in for compensation.²⁵²

B. Department of Defense Exception

Later in 1992, Congress enacted a more detailed nexus passage, lifting the prohibition against receipt of honoraria for employees and students at United States military academies.²⁵³ Employees at Department of Defense schools may receive honoraria for "an appearance, a speech, or an article published in a bona fide publication if such [activity] is customary for scholarly or academic activities normally associated with institutions of higher learning."²⁵⁴

Receipt of honoraria under the Department of Defense modification remains contingent on several conditions. The subject matter of the activity must not "relate primarily to the responsibilities, policies, or programs of the school at which the individual is a faculty member."²⁵⁵ In addition, the activity cannot involve government resources,²⁵⁶ must not be offered by a person who will be affected by performance of the faculty members duties,²⁵⁷ and is limited to a maximum of \$2000.²⁵⁸

Within these restrictions, faculty members at Department of Defense schools may receive honoraria. Furthermore, the statute allows certain government employees to receive honoraria for expressive activities "within [their] academic or military specialty."²⁵⁹ The subject matter will not be deemed to relate primarily to the

250. 5 U.S.C. app. § 505(3) (1994).

251. See *NTEU*, 115 S. Ct. at 1021-22 (O'Connor, J., concurring in part and dissenting in part) (asserting that exclusion of single event without nexus to employee's official duties would be more consistent with congressional intent behind honorarium ban).

252. See *supra* Part I.A (describing typical activities engaged in by scientists for information exchange and professional development).

253. See National Defense Authorization Act, Pub. L. No. 102-484, § 542, 106 Stat. 2315, 2413-14 (1992) (codified at 10 U.S.C. § 2161 (note) (1994)) (authorizing personnel at military schools to accept honoraria under limited circumstances and creating exception to honorarium ban for faculty members and students at qualified Department of Defense schools).

254. *Id.*

255. *Id.* § 542(a)(1).

256. *Id.* § 542(a)(2).

257. *Id.* § 542(a)(4).

258. *Id.* § 542(f).

259. *Id.* § 542(b).

school at which the individual is employed "if the preparation and presentation of the particular appearance, speech, or article is clearly outside of the individual's duties."²⁶⁰ This exception resembles the ethics regulations governing executive branch employees before passage of the honorarium ban because it permits compensation for expressive activities within a government employee's particular area of expertise as long as the focus is not on the employee's job or employing institution.²⁶¹ Passage of this exception also indicates congressional recognition that receipt of honoraria is an accepted practice in certain scholarly and academic fields and that parity in ethical standards for all government workers is not essential.²⁶²

C. *Legislative Attempts at Modifying the Honorarium Ban*

Congress began consideration of proposals to add a nexus requirement for executive branch employees as early as January 3, 1991, just two days after the honorarium restriction went into effect.²⁶³ In 1991, four separate bills sought to modify the honorarium restriction for executive branch employees.²⁶⁴ All four of these proposals would have lifted the honorarium ban for career executive branch employees who engage in income-producing activities unrelated to their official duties if the payor of the compensation had no direct interest in the employees official position.²⁶⁵ In addition, two of the proposals required disclosure of any honorarium received

260. *Id.*

261. See *supra* text accompanying note 143 (laying out pre-1991 Office of Government Ethics (OGE) test for acceptance of honoraria).

262. See *id.* (specifically allowing acceptance of honoraria for "customary" scholarly and academic activities). The President's Commission on Federal Ethics Law Reform (the Wilkey Commission) expressed a similar opinion. Although the Wilkey Commission recognized that "honoraria paid to officials can be a camouflage for efforts by individuals or entities to gain the officials' favor," it also recognized the value of "scholarly articles," which "can benefit both the federal employees and society at large." WILKEY COMMISSION REPORT, *supra* note 155, at 35-37.

263. See *Modifying the Honoraria Prohibition Hearing*, *supra* note 27, at 204 (reporting that several members of Congress initiated steps to amend Ethics Reform Act of 1989 in order to eliminate unintended federal employees from honoraria prohibition); see generally H.R. 109, 102d Cong., 1st Sess. (1991); H.R. 325, 102d Cong., 1st Sess. (1991); H.R. 414, 102d Cong., 1st Sess. (1991); H.R. 474, 102d Cong., 1st Sess. (1991).

264. See *Modifying the Honoraria Prohibition Hearing*, *supra* note 27, at 2-11 (providing text of four bills).

265. See *Modifying the Honoraria Prohibition Hearing*, *supra* note 27, at 2-11 (recognizing need to prohibit honoraria on individual basis determined by nature of employee's unofficial supplemental income). For example, H.R. 325, presented by Representative Barney Frank, would have lifted the honorarium ban if "the subject of the appearance, speech, or article and the reason for which the honorarium is paid is unrelated to that individual's official duties or status" and "the party offering the honorarium has no interests that may be substantially affected by the performance or nonperformance of that individual's official duties." H.R. 325, 102d Cong., 1st Sess. 2 (1991).

and specified that the honorarium must be within "usual and customary" limits, under a maximum dollar amount of \$2000.²⁶⁶

Representative Barney Frank proposed a bill to modify the honoraria prohibition in 1993, which ultimately did not pass.²⁶⁷ Two years later Representative Frank proposed an almost identical bill.²⁶⁸ This bill, which is currently in committee, would allow honorarium for "an appearance, a speech, or an article in a bona fide publication" if three criteria were met.²⁶⁹ First, the subject of the activity could not relate primarily to the government agencies' "responsibilities, policies, or programs"²⁷⁰ and should not involve government resources or nonpublic information.²⁷¹ Second, the honorarium could not be paid because of the government employee's official duties or status.²⁷² Third, the party providing the honorarium could not have interests that would be substantially affected by either the performance or nonperformance of the employee's duties.²⁷³

These three criteria replicate elements of the nexus analyses presented by the Department of Defense exception²⁷⁴ and the OGE outside income restrictions.²⁷⁵ Despite a general consensus about the excessive reach of § 501(b), the 1991 proposal, which passed in the House, did not pass the Senate, falling short by a single vote.²⁷⁶ Moreover, Congress never enacted the 1993 bill²⁷⁷ and the legislation introduced in 1995 has not reached a vote in either house.²⁷⁸

266. *Modifying the Honoraria Prohibition Hearing*, *supra* note 27, at 4, 8-9 (containing maximum limits included in H.R. 325 and H.R. 414).

267. See H.R. 1095, 103d Cong., 1st Sess. (1993) (proposing that honorarium would be permitted when activity met specified criteria).

268. H.R. 1639, 104th Cong., 1st Sess. (1995).

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. Cf. National Defense Authorization Act, Pub. L. No. 102-484, § 542, 106 Stat. 2315, 2413-14 (1992) (codified at 10 U.S.C. § 2161 note (1994)) (authorizing honorarium when activity does not relate to school activities, or involve government resources, or is not related to individual's performance as member of armed forces or government employee); see *supra* Part III.B (evaluating Department of Defense exception).

275. See Standards of Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635.807(a)(2)(i)(B)-(D) (1995) (addressing limitations on receipt of compensation related to teaching, speaking, and writing); *supra* text accompanying note 143 (listing Office of Government Ethics criteria for receipt of honoraria).

276. See *NTEU v. United States*, 788 F. Supp. 4, 14 n.15 (D.D.C. 1992) (stating that proposal to eliminate honorarium ban for activities unrelated to employment "was prevented of consideration by the Senate by the objection of a single U.S. Senator"), *aff'd*, 990 F.2d 1271 (D.C. Cir. 1993), *aff'd in part, rev'd in part*, 115 S. Ct. 1003 (1995).

277. H.R. 1095, 103d Cong., 1st Sess. (1993).

278. H.R. 1639, 104th Cong., 1st Sess. (1995).

The decision in *NTEU* is likely to lead to a renewed effort in Congress to add a nexus requirement to the honorarium ban.²⁷⁹ Although a nexus requirement burdens less speech than a total ban, the government's interests in protecting against the appearance of impropriety and in maintaining the focus of public servants are not addressed by a nexus requirement. Moreover, a nexus requirement would keep government scientists from accepting moderate amounts of honoraria for customary activities. The enormous scope of government agencies with scientific missions, such as the NIH, could preclude employees from speaking about any scientific subject.²⁸⁰

IV. GOVERNMENT SCIENTISTS SHOULD BE ENCOURAGED TO ACCEPT HONORARIA

In *NTEU*, Justice Stevens found merit in "the powerful and realistic presumption that the federal work force consists of dedicated and honorable civil servants."²⁸¹ This sentiment is echoed by a scientist who asserts that the vast majority of scientists do not engage in intentional misconduct.²⁸²

In *NTEU*, the Court also recognized the strong governmental interest in preventing even the appearance of impropriety.²⁸³ Congress may need to enact strict conflict of interest regulations to avoid the perception of impropriety.²⁸⁴ But the factors that determine what appears improper should vary according to the usual and customary practices for a particular profession.²⁸⁵ For scientists, engaging in extra-employment activities related to one's area of professional expertise is a usual and customary practice that can have beneficial effects for the scientist, the public, and the employing institution.²⁸⁶

279. See Biskupic, *supra* note 10, at A1, A9 (stating that members of Congress are already working on legislation to ban honoraria when activities relate to federal employment).

280. See *Office of Government Ethics Hearing*, *supra* note 1, at 173 (statement of Robert J. Cousins) (expressing concern that conflict of interest regulations could preclude government scientists from all outside activities within their areas of expertise).

281. *United States v. NTEU*, 115 S. Ct. 1003, 1018 (1995).

282. See Kenneth J. Rothman, *Conflict of Interest: The New McCarthyism in Science*, 269 JAMA 2782, 2782 (1993) (arguing that concerns about extent of misconduct are exaggerated).

283. See *NTEU*, 115 S. Ct. at 1015-16.

284. See QUADRENNIAL COMMISSION REPORT, *supra* note 130, at 229, 232 (recommending that strict rules prohibiting honoraria are needed where potential for abuse is obvious to public).

285. See *NTEU v. United States*, 990 F.2d 1271, 1278 (D.C. Cir. 1993) (contrasting expansive duties of legislators with narrower duties of executive branch employees), *aff'd in part, rev'd in part*, 115 S. Ct. 1003 (1995).

286. See *supra* Part I.A (listing benefits of outside employment activities such as information flow, enhanced utilization of technologies, and improved medical services).

After *NTEU*, the future of the honorarium ban's application to government scientists below the rank of GS-16 depends on legislative inclusion of a nexus requirement.²⁸⁷ For scientists, a connection is generally present between outside professional activities and employment area. Because of this connection, a nexus clause could infringe on the ability of government scientists to engage in virtually all extra-employment activities. For this reason, if the honorarium ban is modified to include a nexus requirement, government scientists must be expressly exempted from the prohibition.

Honorarium restrictions do not exist in isolation. If government scientists are exempted from an honorarium ban with or without a nexus provision, they will still be subject to a variety of federal outside-income restrictions.²⁸⁸ Executive branch employees were subject to extensive regulations before the passage of the honorarium ban.²⁸⁹ Similar regulations are still in place, making an additional bar to honoraria for activities that bear a relationship to government employment unnecessary.²⁹⁰ Unless government scientists are expressly exempted from such a requirement, they will again be subject to a bar that hampers professional development and decreases the attractiveness of public service.

A. *Regulations Governing Federally Funded Scientists*

The NIH is overseen by the Public Health Service (PHS).²⁹¹ In 1989, the NIH requested comments on proposed guidelines regarding financial interests of research investigators receiving federal funds.²⁹² In response, the NIH and the PHS were inundated with more than 750 comments, overwhelmingly in opposition to the proposed guidelines.²⁹³ The PHS took the comments into consideration and

287. See *NTEU*, 115 S. Ct. at 1023 (O'Connor, J., concurring in part and dissenting in part) (suggesting that Court's holding should be limited to speech without nexus to employment); see also Biskupic, *supra* note 10, at A1 (noting that legislative proposals to include a nexus requirement are already underway).

288. See generally Standards of Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635 (1995) (presenting limits on income from outside activities for executive branch employees).

289. See *supra* Part II.A.1 (detailing OGE analysis of outside income before passage of Ethics Reform Act).

290. See 5 C.F.R. § 2636.202(b) (1995) (prohibiting receipt of compensation by federal employees for expressive activities that focus on their "official duties or on the responsibilities, policies and programs of [their] employing agency"); see also *supra* Part III (evaluating legislative nexus requirements).

291. 42 U.S.C. § 203 (1994).

292. See 59 Fed. Reg. 33,242, 33,243 (1994) (discussing NIH proposal published in NIH Guide for Grants and Contracts).

293. See Christopher Anderson, *Agencies Set Rules on Financial Disclosure*, 265 SCIENCE 179, 179 (1994) (reporting that three months into comment period for proposed rules, agency received

issued proposed rules in 1994.²⁹⁴ Final rules were published in the *Federal Register* in July 1995.²⁹⁵

These rules place the onus on researchers applying for federal funds to disclose their "[s]ignificant [f]inancial [i]nterests."²⁹⁶ Payments which, in the aggregate, do not exceed \$10,000 annually do not need to be disclosed.²⁹⁷ The dollar limit was raised from \$5000 to \$10,000 because of comments indicating that "interests up to this amount do not raise conflict of interest concerns."²⁹⁸ If a possible conflict is identified by the scientist, the institution involved has discretion to order public disclosure of the interest, external oversight or modification of the research, or even divestiture of the interest.²⁹⁹

These rules indicate that the scientific community is sensitive to dangers stemming from the commercialization of scientific research.³⁰⁰ Instead of prohibiting financial ties between researchers and private industry, however, most scientific entities support requirements that combine full disclosure of all relevant interests³⁰¹ with institutional review of the information provided.³⁰² These requirements allow a researcher's peers, those most informed about what is customary in a particular field, to evaluate the propriety of a financial arrangement.³⁰³ With respect to honoraria, scrutiny should

more than 750 letters running 10-to-1 against proposal).

294. 59 Fed. Reg. 33,242 (1994).

295. 60 Fed. Reg. 35,810 (1995) (to be codified at 42 C.F.R. § 50).

296. *Id.* at 35,816. "Significant Financial Interests" are defined as "anything of monetary value, including but not limited to salary or other payments for services (e.g., consulting fees or honoraria); equity interests (e.g., stocks, stock options or other ownership interests); and intellectual property rights (e.g., patents, copyrights and royalties from such rights)." *Id.*

297. *Id.*

298. *Id.*

299. *Id.* at 35,817; see also Anderson, *supra* note 293, at 179 (noting that institutions rather than government entities have discretion about how to handle potential conflict).

300. See *Is Science for Sale?*, *supra* note 22, at 179 (listing potential problems resulting from academic-industry partnerships).

301. See *Is Science for Sale?*, *supra* note 22, at 10 (statement of Sheldon Krimsky) (recommending disclosure of financial interests when applying for grants, seeking appointments, or submitting articles for publication); George D. Lundberg & Annette Flanagin, *New Requirements for Authors: Signed Statements of Authorship Responsibility and Financial Disclosure*, 262 JAMA 2003, 2004 (1989) (informing authors that journal has added honoraria to list of financial interests that must be disclosed before publication).

302. See 60 Fed. Reg. 35,810 (1995) (to be codified at 42 C.F.R. § 50) (requiring disclosure of any interest of significant monetary value, including payments for honoraria); Maatz, *supra* note 84, at 181 (recommending disclosure of "all relevant personal interests"); Witt & Gostin, *supra* note 3, at 550 ("Disclosure of financial interests is the bedrock of any sensible scheme.").

303. See Arnold S. Relman, *Publishing Biomedical Research: Roles and Responsibilities*, HASTINGS CTR. REP., May-June 1990, at 23, 24-27 (advocating heightened responsibility in peer-review system to ensure integrity and utility of research results).

be intensified when payment comes from an individual or entity with an interest in the outcome of research conducted by the scientist.³⁰⁴

Commentators have also suggested that receipt of honoraria from sources that do not have a direct interest in a particular study requires less stringent regulation than other kinds of financial interests.³⁰⁵ Presentations and articles made by a scientist to the public or to scientific peers promote the exchange of information.³⁰⁶ Compensation agreements that involve extraordinary sums or a percentage of future profits³⁰⁷ pose greater dangers than one-time honoraria payments of a pre-determined amount, not exceeding \$10,000 annually. Placing a cap on the per incident and annual amount of honoraria that scientists may receive reduces the incentive for scientists to compromise their careers by misrepresenting or fabricating research data.

Accurately assessing the frequency or degree of conscious or unconscious bias introduced into biomedical research by financial conflicts of interest is difficult.³⁰⁸ Many of the publicized cases of alleged wrongdoing involve significant sums of money.³⁰⁹ Restricting honoraria to reasonable amounts, as judged against sums received by other scientists for comparable work, should help deter incentives to engage in unethical conduct. Moreover, disclosure by scientists of any and all honoraria would allow institutions,³¹⁰ medical journals,³¹¹ and the public³¹² to assess the reasonableness of amounts

304. See Maatz, *supra* note 84, at 186 ("[U]niversity researchers should not . . . receive honoraria or other payment from private sources if their university research involves evaluating the effectiveness of a product developed by the private company."); cf. *supra* notes 40-42 and accompanying text (describing allegations of misconduct by researcher who received large honoraria from drug companies whose products he was evaluating).

305. See Witt & Gostin, *supra* note 3, at 550 (suggesting that honoraria and consulting fees require least restrictive regulation).

306. See Eisenberg, *supra* note 23, at 182 (noting idea that prompt disclosure of observations within scientific community "facilitates the progress of science"); Relman, *supra* note 303, at 23 (pointing to scientific journal articles as major source of medical information for public).

307. See *Is Science for Sale?*, *supra* note 22, at 316 (reprinting NIH proposed guidelines prohibiting "personal equity holdings or options in any company that would be affected by the outcome of the research").

308. See *Is Science for Sale?*, *supra* note 22, at 10 (statement of Sheldon Krimsy) ("There are no good data that link commercial affiliation with fraud or arise in actual conflicts of interest as compared with the appearance of conflicts of interest.").

309. See SCIENTIFIC MISCONDUCT REPORT, *supra* note 3, at 10-50 (listing several cases of possible scientific misconduct where scientists received more than \$10,000 in non-salary compensation including stocks in pharmaceutical companies).

310. See 42 C.F.R. § 50.103 (1995) (requiring disclosure to institutional official who will evaluate acceptability).

311. See Lundberg & Flanagan, *supra* note 301, at 2004 (reporting requirement of disclosure to editors, who will evaluate possibility of bias in articles).

312. See Relman, *supra* note 303, at 23 (citing peer-reviewed journal articles as most important source of science stories in popular media).

received by government scientists and to evaluate the interests of the payor in the government employee's work. Restrictions on the amount of honoraria, combined with public disclosure will bring unusual circumstances to the attention of anyone evaluating the expressive activity of a scientific researcher.³¹³

B. The Benefits from Honoraria Outweigh the Costs

Restrictions on amounts of acceptable honoraria and public disclosure requirements impose a greater burden on the government and regulating institutions than does a flat ban on honoraria.³¹⁴ Arguments that this burden is too great, however, are undercut by three factors. First, federal standards regulating financial conflicts of interest for researchers who are not federal employees, but who receive federal funds, already require the government to review all interests disclosed by those individuals.³¹⁵

Second, the flat ban on honoraria has been lifted for certain federal employees at Department of Defense academies.³¹⁶ These individuals may receive honoraria for speeches on topics within their areas of expertise, as long as the speeches are unrelated to the official responsibilities of the academies.³¹⁷ Circumscription of permissible topics suggests that government ethics officers must evaluate the character of the expressive activity. Moreover, this legislation highlights Congress' recognition of the importance of honoraria for certain scholarly professions and the non-essentiality of identical ethical regulations for all federal employees.

Finally, in 1992 Congress amended the definition of honoraria to include a nexus requirement when an employee engages in a series of expressive activities as opposed to a single activity.³¹⁸ This amendment indicates that institutional ethics officers are capable of

313. See *Is Science for Sale?*, *supra* note 22, at 182 (statement of Erich Bloch) (listing replication of results and peer review as measures for "self-correction" within scientific community); Lundberg & Flanagan, *supra* note 301, at 2004 ("When appropriate, notices of financial disclosure are published as a part of the article so that readers may be aware of possible biases the authors may have.").

314. See *United States v. NTEU*, 115 S. Ct. 1003, 1016-18 (1995) (recounting government's assertion that ease of administration justifies broad ban).

315. See 60 Fed. Reg. 35,810 (1995) (presenting final conflict of interest rules for research scientists receiving funds from the Public Health Service); *Is Science for Sale?*, *supra* note 22, at 298-99 (reprinting PHS Form 2590 requiring disclosure of all federal and nonfederal support for grant applicants).

316. 10 U.S.C. § 2161 note (1994); see *supra* Part III.B (discussing Department of Defense exception).

317. See 10 U.S.C. § 2161 note.

318. 5 U.S.C. app. § 505(3) (1994); see also *supra* Part III.A (raising issue of inconsistent treatment for single event and series of expressive activities).

performing a case-by-case analysis of situations involving receipt of honoraria.³¹⁹

Only the top researchers in a particular field receive invitations to speak and write articles for compensation.³²⁰ The honorarium ban remains in place for prominent government scientists who serve above the GS-16 level.³²¹ Consequently, these are the influential and productive members of the scientific community who will eschew government service if government scientists are subject to an honoraria bar.³²² The government's interest in efficient operation of its institutions will be undercut by the resulting loss in or continued absence of quality personnel.

Furthermore, allowing scientists to accept honoraria will not undermine the government's interest in avoiding even the appearance of impropriety.³²³ The practice of receiving honoraria is customary in scientific fields. Receipt of honoraria may be prohibited under special circumstances,³²⁴ but disclosure of compensation along with limits and peer review provide sufficient protection against misconduct. Scientists who speak or write about their research perform an important function because they disseminate information within and beyond the scientific community.

A prohibition against receipt of honoraria for activities that relate to government employment is unnecessary for scientists. The interest of the payor in the outcome of a research project triggers concern about impropriety, not the subject matter of the expression. Receipt of honoraria is not inherently unethical,³²⁵ therefore, the cost to the government of having a less prestigious, creative, or prolific workforce, will not be offset by a corresponding gain in ethical conduct.³²⁶ Overall, the benefits of allowing government scientists to accept honoraria outweigh the costs.

319. See *NTEU*, 115 S. Ct. at 1016-17 (stating that series exception unambiguously reveals congressional confidence in agency ethics officials' ability to enforce nexus test).

320. See Robert C. Young, *Honoraria Ban for Federal Workers Will Dismantle Scientific Expertise: Inflexible Net of Rules May Drive Talent Away*, WASH. POST, Jan. 14, 1992, at H6 (explaining that only best and brightest are impacted by honorarium ban).

321. See *NTEU*, 115 S. Ct. at 1018-19 (enjoining enforcement of honorarium ban to executive branch employees below GS-16).

322. See Young, *supra* note 320, at H6 (speculating that top scientists who are intermittent government employees will resign if accepting honoraria is prohibited).

323. See *NTEU*, 115 S. Ct. at 1017 (holding that government must demonstrate more than mere speculation of harm).

324. See *Is Science for Sale?*, *supra* note 22, at 181-82 (statement of Erich Bloch) (discouraging financial ties during clinical drug trials or when public policy is being decided).

325. See Rothman, *supra* note 282, at 2782 (emphasizing difference between temptation to act unethically and doing so).

326. See *Is Science for Sale?*, *supra* note 22, at 182 (statement of Erich Bloch) (questioning value of conflict of interest regulations under all but few special circumstances).

CONCLUSION

Congress crafted the prohibition against honoraria for its own members but extended § 501(b) to all government employees. The comprehensive ban, which is appropriate for legislators, is unsuitable for government researchers employed by scientific institutions. Scientists who receive federal funds, but who are employed outside the government, are subject to per incident and yearly honoraria limits, and they must disclose all financial interests for institutional and peer review. These regulations resemble standards of conduct already in effect for government scientists and are sufficient to protect against even the appearance of impropriety created by receipt of honoraria for activities that bear a nexus to government employment. Federal scientists who remain subject to the honorarium ban after *NTEU* should be exempted from it. Furthermore, new legislation imposing a prohibition on honoraria only when a nexus between the expressive activity and government employment is present is misguided. Neither the appearance of impropriety that stems from the relationship between the payor and the government employee nor the concern that government workers will be distracted by extra-employment activities are addressed by a nexus requirement. If such legislation is passed, scientists at all levels of government service should be expressly exempted from the honorarium ban so that they may contribute to the dissemination of scientific information and enjoy the benefits of extra-employment expressive activities as do their peers employed outside the government.

