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The Ethics Reform Act of 1989: Why the Taxman Can't Be a Paperback Writer

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I. INTRODUCTION

In an effort to promote ethical behavior in government, Congress passed the Ethics Reform Act of 1989 (Reform Act).[1] The Reform Act principally addressed such areas as honoraria, outside earned income, acceptance of gifts, ethics committee procedures, financial disclosure, and the use of official resources.[2] The consequences of the Reform Act's treatment of one area in particular, honoraria, have been felt nation wide. The Reform Act bans *all* federal employees from receiving honoraria. This means that the Reform Act prohibits both House Speaker Tom Foley and your postman from earning *any* money from speeches, writings or appearances. The extent of the honoraria ban has surprised thousands of federal workers and even some congressmen who passed it. In fact, one congressman regarding the honoraria ban said: "I do not believe that it was the intent of Congress to impact negatively upon the vast majority of Federal employees. I do not see the harm in allowing a clerk for the Customs Service to write fishing articles for his local newspaper."[3] The extension of the honoraria ban to all federal employees was actually a last-minute addition to the Reform Act.[4] There was an attempt at the end of the last session to amend the act to exclude low to mid-level federal employees, but the attempt failed.[5] While the goal of the Reform Act is noble—preventing conflict of interest among public employees—its effect on low to mid-level federal employees is intolerable.

After introducing the Reform Act, this note discusses conflict of interest laws generally and proposes a model to use in analyzing conflict of interest laws that apply to the public sector. The note then focuses on the constitutionality of the honoraria

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1. Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 stat. 1760 (1989).
2. H.R. REP. No. 165, 101st Cong., 1st Sess., pt. 2 (1989).
3. 137 CONG. REC. S1104 (1991) (statement of Mr. D'Amato).
4. Priest, *Ethics Law's Deep Reach into Bureaucracy Honoraria Ban Curtails Employees' Outside Work, Court Challenge Cites First Amendment*, Wash. Post, Jan. 3, 1991 at A19.
5. *Id.*

prohibition of the Reform Act under the first and fifth amendments. The constitutional analysis examines the ban both in light of pertinent Supreme Court decisions and under the proposed model. Finally, the note analyzes pending legislation designed to "fix" the honoraria ban and recommends a constitutional alternative.

II. The Reform Act

A. *Background*

The Bipartisan Task Force that composed the Reform Act stated that "[t]he purpose of the [Reform Act] is to restore public confidence in the integrity of government officials by promoting the highest professional and ethical standards in public service."[6] Indeed, to many Americans the terms "integrity" and "government" have become incongruous. In fact, a 1988 survey found that only thirty-one percent of the public thought that government is run for the greater public interest.[7] Another poll in 1989 determined that seventy-five percent of Americans believe that members of Congress favor special interests groups over the interests of the average citizen and that over fifty percent of the members of Congress profit improperly from their office.[8] The high-profile conflict-of-interest scandal surrounding former House Speaker Jim Wright typified the reasons for the public's mistrust of government. Wright resigned from office after an ethics investigation accused him of sixty-nine improper activities.[9] In the now well-known story, Wright was accused of, among other things, circumventing legal limits on honoraria by receiving royalties from book sales.[10] One aim of the Reform Act was to effectively prevent not only Wright's practice, but also the receipt of honoraria altogether. As the Task Force put it:

> The current limitations on outside earned income and honoraria were prompted by three major considerations: First, substantial payments to a Member of Congress for rendering personal services to outside organizations presents a significant

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6. 135 Cong. Rec. H9253 (1989).

7. *Congress Gets Ethical, Shuns Any Hint It Is in Debt to Big Givers*, Wall St. J., Aug. 4, 1989, at A1, col. 1.

8. *Majority in Poll Criticize Congress*, Wash. Post, May 26, 1989, at A8, col. 1.

9. Jackson, *The Resignation of Jim Wright; Speaker's Downfall*, L.A. Times, June 1, 1989, § 1, at 16, col. 5.

10. *Id.*

and avoidable potential for conflict of interest; second, substantial earnings from other employment is inconsistent with the concept that being a Member of Congress is a full-time job; and third, substantial outside earned income creates at least the appearance of impropriety and thereby undermines public confidence in the integrity of government officials.[11]

B. The Reform Act and Its Reaches

With the above noted lofty intentions, Congress acted on the Task Force's recommendations. The part of the Reform Act dealing with honoraria reads as follows:

> (b) HONORARIA PROHIBITION.—An individual may not receive any honorarium while that individual is a Member, officer or employee.
>
> . . . .
>
> For purposes of this title:
>
> (1) The term 'Member' means a Representative in, or a Delegate or Resident Commissioner to, the Congress.
>
> (2) The term 'officer or employee' means *any officer or employee of the Government* except (A) any individual (other than the Vice President) whose compensation is disbursed by the Secretary of the Senate[12] or (B) any special Government employee (as defined in section 202 of title 18, United States Code).
>
> (3) The term 'honorarium' means a *payment of money or any thing of value for an appearance, speech or article* by a Member, officer or employee, excluding any actual and necessary travel expenses . . . ."[13]

While the public may have welcomed the government's self-imposed honoraria ban, low to mid-level federal employees were less than enamored with the far-reaching act. For instance, one Congressman reported:

> [M]y office and many other congressional offices, as well as the

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11. 135 CONG. REC. H9256 (1989). For a detailed look at the ethical problems associated with members of Congress receiving honoraria, see McBride, *Ethics in Congress: Agenda and Action*, 58 GEO. WASH. L. REV. 451, 458-64 (1990).

12. This means, ironically, that the honoraria ban does not apply to the members of the U.S. Senate and their staff.

13. Pub. L. No. 101-194 §§ 501, 505, 103 stat. 1760, 1761-62 (1989) (emphasis added). In addition the act authorizes the Attorney General to bring an action against violators of the act to assess "a civil penalty of not more than $ 10,000 or the amount of compensation, if any, which the individual received for the prohibited conduct, whichever is greater." *Id.* at § 504, 103 stat. at 1761.

> office of government ethics, received many phone calls and letters from government employees and organizations representing them and other interested parties who think that this new rule is . . . unfair. Letters have been received from the National Treasury Employees union, American Civil Liberties Union, American Federation of Government Employees, Federal Bar Association, National Academy of Public Administration, American Military Institution, and the Association of American Medical Colleges.[14]

On the other hand, Congress did not seem to take the ban too hard. But, they had their reasons. First, Congress had only themselves to blame since they passed the Reform Act. Second, House members and senior executive branch employees got a twenty-five percent pay raise as part of the package.[15] And third, the Senate was, of course, exempted.[16]

III. Conflict of Interest Laws

The honoraria ban in the Reform Act is designed to prevent conflicts of interest. To understand clearly the special problems conflict of interest laws pose to public employees, a general discussion of conflict of interest laws is useful.

A. Definition of Conflict of Interest Laws

Broadly stated, conflict of interest laws are government's attempt to aid individuals in resolving certain internal conflicts. These "internal conflicts" originate when an individual owes a duty to a person or group that conflicts with either the individual's self-interest or a duty owed to a different person or group. The individual has an interest both in fulfilling a duty to one person or group and in pursuing his self-interest (or duty to another). Conflict arises within the individual in determining which interest to serve. A classic example is the conflict a trustee may face. A trustee has an interest in fulfilling her duty to the trust beneficiaries to manage the trust's assets according to the trust agreement.[17] The trustee also might have an interest in absconding with the trust's funds, or at least somehow using them

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14. 137 Cong. Rec. S1011 (1991) (statement of Mr. Glenn).

15. Moss, *Pay Raises Will Cost $359 Million By 1992*, Wash. Times, Jan. 18, 1990, § B, at B5.

16. *See supra* note 12 and accompanying text.

17. *See, e.g.*, UNIF. TRUSTEES' POWERS ACT § 3 (1964).

to her own advantage. Trust law helps solve the trustee's internal conflict by imposing penalties on the trustee for breaching her duty to the beneficiaries.[18]

It is helpful to identify the origin of duties that an individual owes. This note proposes that duties have either contractual, legal, or moral origins, or a combination of the three. Put another way, we may impose a duty on ourselves because we feel it is the "right" thing to do (a moral duty). We may agree, for consideration, with another to impose a duty on ourselves (a contractual duty). Finally, society may simply impose a duty on us (a legal duty).[19] The interest in filling any of these duties may conflict with self-interest, which may not be of moral, contractual, or legal origin, but simply the interest of the individual to maximize his own idea of happiness.

B. "General" Conflict of Interest Laws

In a general sense, all laws are conflict of interest laws to the extent that they help individuals make "correct" decisions when faced with "internal conflicts." For instance, both society and its individual members have an interest in protecting human life.[20] However, an individual also might have an interest in taking life. The individual's interest in taking life then conflicts with his interest in supporting the societal interest in preserving life. In some instances, the law will punish the individual for taking life.[21] In other instances, the law will justify the individual's interest in taking life.[22] However, by making its interests and the consequences for conflicting with its interests known, society gives a person incentive to solve the "internal conflict" "correctly." This note refers to these types of conflict of interest laws as *general* conflict of interest laws. An example of a general conflict of interest law more to the point of this note is a law that prohibits letter carriers from stealing mail. Such a

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18. *See, e.g.*, UNIF. TRUSTS ACT §§ 3-7, 14 (1937).

19. This is not to say a legal duty is not a moral duty or that laws are not morally based. Rather, the focus here is on the source rather than the character of the duty. If a duty is imposed from within, it is moral. If a duty is imposed because the majority of the people think such a duty is "right," it is a legal duty because it is imposed externally. The three duties, obviously, are not mutually exclusive. For example, we might feel it is "right" not to murder so we impose that duty on ourselves (a moral duty). Of course, that duty is also imposed on us by law (a legal duty).

20. This could be imposed morally, contractually and legally.

21. Laws defining and prohibiting murder accomplish this.

22. Laws allowing self-defense as a defense to murder are an example of this.

law seeks to channel the letter carrier's self-interest into harmony with the societal interest of preventing mail theft.

C. *"Specific" Conflict of Interest Laws*

A narrower definition of conflict of interest laws include only those laws that prohibit individuals from being in specific circumstances that are conducive to "internal conflicts." Rather than allowing the individual to decide the best course in a particular situation, *specific* conflict of interest laws remove the alternative completely. Specific conflict of interest laws are much more intrusive than general conflict of interest laws. The government is essentially saying: "the potential conflict is so great when this situation arises that we will not even allow you to get into the situation."

The honoraria ban on government employees is an example of a specific conflict of interest law. If a member of Congress receives money from a special interest group, a conflict arises between favoring the group and representing the people. Even if the representative does not favor the group that is giving the money, the potential that she might is so great that the mere receipt is prohibited.

D. *The Danger Public Employees Face From Conflict of Interest Laws*

Public employees are just that, employees of the public. As such, they have a greater interest in serving the public's interest than regular citizens.[23] Government represents the interests of the public. When government employees act in a way that conflicts with the interests of the government, the employees' actions can be characterized as conflicting with the interest of the public. Public employees are prime targets for conflict of interest laws because of their ability to harm the public interest. The proliferation of laws regulating government employees poses a risk of unfair regulation to the public employee that the average citizen does not encounter. The task then is to determine when it is appropriate to regulate government employees.

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23. Not only do they have all the legal duties of a general citizen, but they also have the moral and contractual obligations of an employee.

E. When are Conflict of Interest Laws Appropriate?

Before proceeding to a constitutional analysis of the circumstances in which government regulation of employee conduct through conflict of interest laws is permissible, this section attempts to discuss, intuitively, when such regulation *should be* permissible. First, conflict of interest laws imposed on government employees should not prohibit public employees from ever acting in their personal interests. Such laws should only prohibit government employees from acting when the employees' personal interests conflict with his interest in serving the government's (and in so doing the people's) interest. The problem, then, becomes one of defining the government's interest. This is indeed difficult. The government represents the public. The public, comprised of individuals, has no unified interest. In fact, interests of individual members of the public are often at odds with one another. Since government resources are limited, an emphasis on one or more government programs can only come at the expense of other programs. These programs and the interests of the public in them are, at some level, conflicting. This conflict is solved politically—Congress determines how to allocate funds among the needs and wants of the public. Public employees then implement Congress' mandate. Yet the very implementation of one program conflicts with the interests of the part of the public that wished a competing program to be implemented. Intuitively, conflict of interest prohibitions on government employees should not be intended to limit all action by an employee that comes in conflict with an interest of the public. Otherwise the very performance of the employee's job would be a prohibited.

Since the public's interests are varied, a public employee should only have to worry about the possible conflicts of her own interests with *her own job*. That is, she should only worry about a possible conflict with the section of the public that she serves in the scope of her employment. Outside the scope of her own job, she is a general citizen and should only be regulated as a general citizen, not as a federal employee.

F. The Paradigm

As discussed above, the only time conflict of interest laws should be appropriate is when they regulate employees' interests that conflict with the interests of the sector of the public that

they serve. This definition breaks down into two components: conflict of interest laws should be implemented only (1) when the interests involved conflict, and (2) when the interests are related to the employee's job. The following matrix illustrates the possible combinations of these two factors.

	No Conflict	Conflict
Job Related	1	2
Job Unrelated	3	4

Four situations are possible. Only in situation two should conflict of interest laws apply to government employees.

1. Situation one:

In situation one, the interests of the employee are related to but not in conflict with the interests of her job. An example of this is when an employee considers "blowing the whistle" on a dangerous practice at her work. The employee considers speaking out on a particular danger to the public stemming from her job because she feels it is the "right" thing to do. The speech obviously concerns her job, but the interests she is serving by speaking out are not in conflict with the interests she should be serving when she performs her job. In fact, the interests are congruent. The government should not be allowed to prevent such employee conduct.

2. Situation two:

In situation two, the interests of the employee are related to and in conflict with the interests of his job. An example would be a ranking member of the house banking committee doing consulting work for a failing savings & loan. The congressman would face the conflicting interests of representing the interests of his constituents and using his influence to help the failing savings & loan avoid an audit. The government should be allowed to prevent such employee conduct since helping the failing savings & loan avoid an audit will hurt the interests of the congressman's constituents.

3. Situation three:

In situation three, the interests of the employee are unrelated to and not in conflict with the interests of her job. An example of this is when a Marine who is not a recruiter encourages her brother to join the armed forces. This is not against the interests of her employer and is not connected with her job. Common sense dictates that she should not be subject to regulation in this instance.

4. Situation four:

In situation four, the interests of the employee are unrelated to and in conflict with the interests of her job. An example of this might be the Marine in situation three who persuades her brother *not* to join the armed forces. This is not in the interest of her employer, but is not connected with her job[24] and thus the government should not be allowed to prevent such employee conduct. While she is going against a government interest, it is an interest not sufficiently connected to her own job.

In the real world, the lines separating these four categories are blurred. Still, this simple paradigm may serve as a model to analyze the constitutionality of conflict of interest laws applied to government employees. The proposition here is that only regulation falling into situation two is permissible in a "common sense" analysis and therefore only such regulation should be constitutional. The note now analyzes this proposition in light of relevant Supreme Court decisions.

IV. Constitutionality of the Honoraria Ban Under the First Amendment

The honoraria ban potentially abridges at least two enumerated constitutional rights. One is the first amendment's guarantee of freedom of speech. The other is the fifth amendment's guarantee of due process. Each is examined in order. In analyzing the constitutionality of the honoraria ban under the first amendment, the steps followed are: (1) does the prohibition restrict a first amendment right and (2) is the restriction justified under the appropriate constitutional test and the Paradigm?

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24. Since she is not a recruiter, depending on the means she used to persuade her brother, her conduct probably did not affect her performance at work or the performance or efficiency of those around her.

A. *Does the Honoraria Ban Restrict a First Amendment Right?*

The first amendment reads: "Congress shall make no law . . . abridging the freedom of speech. . . ."[25] The issue then is what constitutes an abridgment of speech?

An obvious restriction of free speech occurs when government prohibits an individual from speaking. Such prohibitions are usually aimed at certain types of speech—they are content based. The honoraria ban's restriction of speech is not content based; rather, it prohibits receiving money for speech. Congress likely believes this type of ban is not a prohibition of speech[26] and thus is not violative of the first amendment protection. Yet, a prohibition on payment may work to restrict speech just as effectively as a ban on the speech itself.

The following illustrates this principle: Imagine that a war breaks out in the Middle East. One news agency manages to corner the market on coverage in one of the battling countries. As a result, ratings at this news agency increase. Proportionate to an increase in ratings, revenue at the news station also increases. The government is worried about the ethics of making a profit on war. The government believes it is unethical for a news agency to collect a windfall from the pain and suffering of war. In addition, the government is concerned about a possible conflict of interest the news agency faces. If the agency reports the truth, it may fall into disfavor with the foreign government and be ousted, losing ratings points. Yet, if the news agency reports only what the foreign government wants it to report, then an inaccurate picture may be broadcast to the world, perhaps generating support for the foreign country and resentment in the United States. The well-meaning government solves this problem by passing the Ethics in Broadcasting Act. One provision of the Act ensures that such a conflict of interest will never take place since it makes it illegal for any United States based news agency to make a profit on covering a war in which the United States is involved. The news agency can still broadcast from the foreign country and thus, in the government's opinion, no freedom of speech is restricted. Yet the potential for a conflict of interest is avoided.

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25. U.S CONST. amend. I.

26. Of course Congress might believe that the ban *is* a prohibition on speech—a permissible prohibition. In that case, the analysis in this part is unnecessary.

Most would agree in such a hypothetical that the Ethics in Broadcasting Act would restrict the newspaper's freedom of speech. The government could argue that there is no restriction since the law is not aimed at the content of the message, and thus allows any type of speech. The Act will continue to allow the news agency to make its own broadcasting decisions. The government is merely removing a potentially "corrupting" influence. However, the news agency is in the business of reporting news. Even if the government allows the agency to report on the war, the agency does so at the opportunity cost of reporting on revenue generating events. Since a news agency must maximize profit to stay in business, the news agency is limited in its ability to report on news items that do not generate revenue. If revenue from reporting on a certain event is denied, the ability to report on that event is restricted. Even though the law is not aimed at the content of the message, it restricts the ability to give the message.

The hypothetical is analogous to the government's honoraria ban.[27] By prohibiting its employees from collecting money for their writing or speaking, the government restricts the amount of writing or speaking that its employees can do. If revenue from writing or speech is denied, the amount that an individual can do is restricted. Even though the law is not aimed at the content of the employee's message, it restricts her ability to give the message. This restriction on free speech is unconstitutional[28] unless the government's regulation meets the appropriate constitutional test.

B. Is the Abridgement Justified?

The following Supreme Court cases illustrate the standard applied to government restriction of employee speech. In addition, the cases are analyzed under the Paradigm. If the Para-

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27. The hypothetical is not perfectly analogous if one assumes the freedom of the press guarantee in the first amendment is somehow a stronger protection than the freedom of speech guarantee. This debate is beyond the scope of this note. Even if not perfectly analogous, the hypothetical still illustrates the principles of the abridgement.

28. This argument does not imply that government has a duty to subsidize its employee's speech so that they can speak. Rather it focuses on the effects of government placing an obstacle in its employees' paths. When the government does places an obstacle, it restricts speech. Also, this argument is not intended to prevent government from taxing the income its employees earn from speaking as long as it is the same tax rate private citizens pay on such income.

digm is congruent with the Supreme Court decisions, it may used as a model to analyze the Reform Act.

1. Right-Privilege Distinction

In early cases involving government regulation of the speech of its employees, courts did not extend constitutional protection to civil servants. *McAuliffe v. Mayor of New Bedford*[29] is a classic illustration of the early approach. *McAuliffe* involved a policeman who was fired for engaging in political activities. In *McAuliffe*, Justice Holmes, then a member of the Supreme Court of Massachusetts, rejected the policeman's claim of free speech abridgement. Holmes stated that the policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[30] Holmes' reasoning essentially was that the firing, though based on an exercise of free speech, did not abridge the first amendment since the policeman was, in fact, "free" to speak. Instead, the firing merely denied the policeman's continued employment. Since continued employment was not a constitutional right, but rather a privilege, there was no constitutional violation. Thus the court held that public employees, under a right-privilege distinction, effectively give up constitutional protection as a condition of continued employment.

It is difficult to categorize *McAuliffe* under the Paradigm since the court, in effect, determined that the policeman gave up his constitutional rights when he *accepted* employment. Under this view, the first amendment is never a restriction on government when regulating its employees. This view, in conflict with the Paradigm, makes government regulation in *all four* categories of the Paradigm permissible. The court did not determine whether the policeman's firing resulted from job related conflicts. Thus it is unclear whether the policeman's activities were job related and in conflict with the interests of his job. The policeman's conduct might have been adverse to some sector of the public,[31] but his conduct was not necessarily adverse to the public interest that he served as a policeman. Absent a showing by the government that the policeman's campaigning was related to

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29. 155 Mass. 216, 29 N.E. 517 (1892).

30. *Id.* at 517.

31. For instance, the policeman's campaigning was surely adverse to the sector of the public supporting the other candidate.

his job and conflicted with an interest he was obligated to serve through his job, under the Paradigm, the policeman should have been treated as a private citizen. If other private citizens could campaign, he also should have been allowed to campaign. Yet the court, in effect, held that government employees gave up their first amendment rights on accepting employment. The Paradigm is clearly not a model of the early courts' view.

2. *The balancing test of* Pickering v. Board of Education

The modern Court specifically rejected the *McAuliffe* holding in a number of cases. One such case, *Pickering v. Board of Education*,[32] became the standard for government to follow in regulating the speech of its employees. In *Pickering*, a teacher was dismissed for writing a letter to a local newspaper criticizing the district's board of education and superintendent. The board, in dismissing the teacher, claimed that the teacher's statements caused harm to the efficient operation and administration of the schools in the district. In its analysis, the Court first recognized that the teacher had not given up any constitutional rights by accepting employment:

> To the extent that the [state court's] opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court.[33]

The Court further emphasized that "[t]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."[34]

Once the Court recognized that citizens do not give up constitutional rights upon acceptance of public employment, the issue became one of deciding when the government could regulate an employee's first amendment right. The Court determined

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32. 391 U.S. 563 (1968).

33. *Id.* at 568. The Court cited Wieman v. Updegraff, 344 U.S. 183 (1952), Shelton v. Tucker, 364 U.S. 479 (1960), and Keyishian v. Board of Regents, 385 U.S. 589 (1967).

34. *Pickering*, 391 U.S. at 568 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 605-06). For an excellent overview of the Court's abandonment of the right-privilege distinction, see Van Alystyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

that solving the problem required a "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[35] In applying the balancing test, the Court focused on the effect the statements had on "maintaining either discipline by immediate superiors or harmony among coworkers. . . ."[36] It concluded that the teacher's statements:

> [a]re neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.[37]

Restated, the government's interest in regulating an employee's speech is only strong enough to overcome the employee's first amendment right when the employee's speech impedes or interferes with the efficiency of serving the part of the public she has a duty to serve. This is congruent with the Paradigm. The Court essentially used the balancing test to determine whether the teacher's interests in writing the letter were job related and conflicted with his job. The Court acknowledged that the letter "consist[ed] essentially of criticism of the Board's allocation of school funds . . . and of both the Board's and the superintendent's methods of informing, or preventing the informing of, the district's taxpayers of the real reasons why additional tax revenues were being sought for the schools."[38] This could be viewed as a conflict of interest with the board. But the Court stated that the teacher's "employment relationships with the Board and . . . with the superintendent are not the kind of close working relationships for [which] . . . personal loyalty and confidence are necessary to their proper functioning."[39] In essence, the Court did not consider the teacher's relationship with the board to be sufficiently connected to his job. Further, the court held that the letter itself showed no conflict with what it did

35. *Pickering*, 391 U.S. at 568.
36. *Id.* at 570.
37. *Id.* at 572-73 (Citation omitted).
38. *Id.* at 569.
39. *Id.* at 570.

consider to be his job since "[t]he [teacher's] statements [were] in no way directed towards any person with whom [he] would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers [was] presented here."[40] Since the Court found that the letter conflicted only with the board's interest, which was not sufficiently related to the teacher's job, it was protected speech. The Paradigm is consistent with the Court's analysis, the letter to the editor falling into situation four.

3. United States Civil Service Commission v. National Association of Letter Carriers: Pickering *applied to the Hatch Act*

In *United States Civil Service Commission v. National Association of Letter Carriers*[41] a group of federal employees challenged the constitutionality of section 9(a) of the Hatch Act of 1940,[42] which prohibited federal employees from engaging in certain political activities.[43] The constitutionality of the Hatch Act had been upheld in *United Public Workers v. Mitchell.*[44] However, since *Mitchell* preceded *Pickering*, *Letter Carriers* illustrated *Pickering*'s effect on the Hatch Act. In applying the *Pickering* balance, the Court examined the government's interests in regulating its employees. In Part A of the opinion the Court summarized Congress's extensive historical concern over the political activities of Federal employees—a summary that spanned from the time of Jefferson to the time of the case.[45] The Court then identified three important governmental interests Congress validly intended to "serve[] by the limitations on partisan political activities."[46] The first interest was to insure that federal employees "enforce the law and execute the programs of the Government without bias or favoritism for or against any political

40. *Id.* at 569-70.
41. 413 U.S. 548 (1973).
42. 5 U.S.C. § 7324(a)(2) (1988).
43. Section 7324(a) provides:
An employee in an Executive agency . . . may not:
(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or
(2) take an active part in political management or in political campaigns.
Id.
44. 330 U.S. 75 (1947).
45. *Id.* at 557-63.
46. *Letter Carriers*, 413 U.S. at 564.

party or group or members thereof."[47] Secondly, Congress was concerned that the "Government work force [might be] employed to build a powerful, invincible, and perhaps corrupt political machine."[48] Finally, Congress wanted to ensure "that Government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs."[49] The Court determined that these government interests outweighed the employees' interests in participating in partisan politics.

The Court's analysis in *Letter Carriers* is congruent with the Paradigm. The Court did not make a blanket assumption that government could regulate the speech of its employees however it wanted, i.e., in all four parts of the Paradigm. Rather, the Court, relying on the Congressional debate behind the Hatch Act, concentrated on the prohibited activities' relationship to the efficiency of employee performance. Essentially, the Court's analysis centered on whether the government was restricting employee speech that was related to and in conflict with job performance. The Court decided that the government interest validly related to acts of employees that affected efficiency of employee job performance.[50] Additionally, the Court focused on the reach of the Hatch Act to ensure that it did not prohibit acts that, in the Court's opinion, were unrelated or not in conflict with job efficiency. The Court was careful to point out the boundaries of the Hatch Act by noting, among other permissible activities, that the Act allows an employee to "express his opinion as an individual privately and publicly on political subjects and candidates."[51]

From the plaintiffs' point of view, the outcome of *Letter Carriers* was no different than that of *McAuliffe*. In both cases the government was allowed to regulate the political activities of its employees. However, the analysis in the two cases was markedly different. While *McAuliffe* held that employees gave up their first amendment right when they *accepted* employment, the Court in *Letter Carriers*, in following *Pickering* (and the Paradigm), determined that regulation was proper only when

47. *Id.* at 565.
48. *Id.*
49. *Id.* at 566.
50. *See supra* notes 42-45 and accompanying text.
51. *Id.* at 576 n.21 (quoting 5 C.F.R. § 733.111 (1972)).

the employees' speech was sufficiently related to and in conflict with the employees' employment.

4. *Matters of "public concern" in* Connick v. Myers

The *Pickering* balance included weighing the employee's interest in speaking on matters of "public concern."[52] *Connick v. Myers*[53] illustrated what the Court meant by matters of public concern. In *Connick*, an assistant district attorney, Myers, opposed a departmental transfer. After expressing opposition to the transfer to her superiors, Myers circulated a questionnaire soliciting the views of her fellow workers. Connick, the district attorney, terminated her, listing refusal to accept the transfer as a reason. He also stated that he regarded the circulation of the questionnaire as an act of insubordination. Myers, claiming that she had been fired because of the questionnaire, filed suit alleging that Connick had violated her first amendment right.

The Court characterized all but one question on Myer's questionnaire as dealing with matters of merely private concern:

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead *as an employee* upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State[54]

The Court concluded that government officials should be given wide latitude to manage their offices when an employee's speech "cannot fairly be considered as relating to any matter of political, social, or other concern to the community."[55] Further, "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."[56] The

52. *See supra* text accompanying note 31.
53. 461 U.S. 138 (1983).
54. *Id.* at 147 (citation omitted and emphasis added).
55. *Id.* at 146.
56. *Id.* at 147-48.

Court applied the *Pickering* balance to the one question that was of public concern and determined that the question impacted efficiency of performance in the office and thus was not protected.

A government employee is speaking "only as an employee" when he is speaking on matters of private or personal interest to his fellow employees or his employer. In terms of the Paradigm, the classification of speech as being of public or private interest determines the *burden* the plaintiff-employee will have in proving that his interest does not fall into situation two of the Paradigm. If the Court finds the speech to be of private interest, it gives great deference to the employer's determination of a job related conflict—a determination the plaintiff-employee will not likely overcome.[57] This deference is an administrative filter to prevent every employee grievance from becoming a federal cause of action simply because the employer happens to be the government.

5. *The Paradigm Applied to* Brown v. Department of Transportation.[58]

In *Brown v. Department of Transportation* the Court of Appeals for the Federal Circuit used the *Pickering* balance to determine that government could constitutionally regulate the speech of an FAA administrator to striking employees. Brown, an FAA employee, was removed from his job for making certain statements at a gathering of striking employees in their union hall. The FAA employee's statements were somewhat ambiguous but could reasonably be construed as supporting the strike. In determining whether the government could regulate such speech, the court first determined that Brown's speech was of public concern.[59] The court then balanced Brown's interest in making the speech against his interest in fulfilling his duty as an FAA supervisor. It held that

> [m]anagement cannot function effectively unless it operates "with one voice" *vis-a-vis others*. Cohesive operation of man-

57. The Court held that when an employee speaks on matters of private concern, "*absent the most unusual circumstances*, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Id.* at 147 (emphasis added). Such a showing will undoubtedly be difficult.

58. 735 F.2d 543 (Fed. Cir. 1984).

59. *Id.* at 546.

> agement is dependent on the loyalty of inferior management to superior management. This loyalty must be maintained in situations involving management's relations with nonmanagerial employees. For management to countenance disloyalty in such situations would be for management to render itself impotent.[60]

Again, the Court's analysis is consistent with the Paradigm. *Brown* is an example of situation two. The court found that Brown's statements to the union members conflicted with the public interest in his job performance. Thus, government regulation was permissible to enhance efficiency of operation.

As illustrated above, the Paradigm is congruent with the Supreme Court's analysis in conflict of interest cases. Thus, it may be helpful as a model in determining the constitutionality of the honoraria ban.

6. *Application of the* Pickering *Standard*

The *Pickering* balance turns on the context and facts of the specific case. The application of *Pickering* to Congress differs from its application to low to mid-level federal employees. Thus each application is discussed separately.

a. Pickering *applied to Congress.* The honoraria ban as applied to Congress does not violate the first amendment. Whenever a lawmaker receives money, he receives it from a source who can benefit from the lawmaker's job. Thus, receipt of money is job related and raises a conflict of interest between servicing the interests of the people and the interests of those who gave money. Under the *Pickering* balance illustrated by the Paradigm, prohibiting members of Congress from receiving honoraria is constitutional. Congress's history of serving the interests of those who give them honoraria is too extensive to assume that receipt of honoraria is not a job related conflict. Until lawmakers, as a body, develop a moral sense of duty that coincides with their legal and contractual duty to serve the people, acts such as the Reform Act will be necessary. However, this does not mean that the Reform Act should be extended to all federal employees out of a mere sense of vertical symmetry. The Reform Act must still pass first amendment scrutiny as applied to low to mid-level federal employees.

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60. *Id.* at 547 (quoting Brousseau v. United States, 640 F.2d 1235, 1249 (1981) (emphasis in original)).

b. Pickering *applied to low to mid-level federal employees.* Two real life situations will be helpful in testing the honoraria ban as applied to lower federal employees. The first case involves a postal clerk who has written two books in his spare time.[61] One of the books, titled *A Handbook of Great Labor Quotations*, was published in 1983.[62] The clerk also serves as a labor organizer for the postal employees. The second case involves a tax examiner who conducts weddings as a part-time minister.[63] The tax examiner is often paid for conducting wedding ceremonies.

The Reform Act prohibits both employees from receiving any money. In the first case, the clerk's books constitute writings, and the Reform Act prohibits receipt of money from writings. In the second case, performing a marriage ceremony constitutes an appearance. The Reform Act also prohibits a federal employee from receiving money for an appearance.

In applying the *Pickering* test to the honoraria ban using these two specific cases, the first issue is whether the regulated speech is of public or private concern. If the speech is of private concern only, it will be difficult for the employee to overcome a governmental determination that a job related conflict exists. Speech is of public concern if it is of "political, social or other concern to the community."[64] The fact that part of the community would be willing to pay to read the clerk's books or to pay the minister to conduct a ceremony suggests that the book's contents and the marriage ceremonies are of political, social or other concern to the community.

Next, *Pickering* requires a balance between the employee's interest in making the statement and the government's interest in regulating the employee's conduct. The government's interest in regulating speech will overcome the employee's interest only if the speech is related to and in conflict with the employee's job. The Paradigm is useful here in balancing the interests. The

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61. *Clerk Sues over His Right to Write: New U.S. Ethics Law Forbids Him to Take Money for Writings*, Boston Globe Dec. 22, 1990, at 30.

62. Since the employee wrote the book before the Reform Act was passed, it seems unconstitutional to prohibit honoraria flowing from the book. However valid this issue is, it is moot if the honoraria ban as applied to lower federal employees is found unconstitutional. Since this Note concludes that the entire ban is indeed unconstitutional when applied to lower federal workers, it does not address the issue of whether *ex post facto* application of the ban is unconstitutional.

63. Priest, *supra* note 4.

64. *Connick*, 461 U.S. at 146.

issue is whether the employee's interest in receiving money from selling a book or performing a wedding is related to and in conflict with the employee's interest in fulfilling the duties of his job. In each case there must be a nexus between the prohibited conduct and the job, and the conduct must somehow conflict with the interests of the employee doing his job.

In the postal clerk's case, receiving money for a book on great labor quotes might be somewhat related to his job since the clerk is a labor organizer. Even if there is a relation to his job, nothing seems to indicate that selling the book affects the efficiency of his job performance. The only way mere receipt of money can be construed as affecting job performance is if the book is purchased in exchange for preferential treatment. Yet, as applied to the postal worker, this potential conflict is remote. Lower level employees do not have much discretion in implementing government programs. They are not involved in making laws. The greatest favor a letter carrier could do for anyone is perhaps deliver their mail earlier than normal. This potential "danger" is too remote to assume that the honoraria ban reasonably prevents job related conflicts.

The same is true for the tax examiner. Receiving money for conducting a wedding is only remotely related to job performance. If the tax examiner wrote a book on how to beat the IRS and sold it, possibly such a book could be prohibited. In that case the book would be related to her job and, if the book caused a drop in efficiency among her co-workers or immediate supervisors, the book would be in conflict with her job. Again this depends on the contents of the book.

In both cases the honoraria ban restricts speech that falls into one of the three "protected" areas of the Paradigm. Further, there is no record that regulation is needed in the one area of the Paradigm where it would be permitted. There is nothing in the Task Force report showing the need to apply the ban to lower level federal employees. This is in stark contrast to the extensive showing of need for the Hatch Act found in congressional debates and cited in *Letter Carriers*.[65] Absent a more extensive showing of need, the honoraria ban when applied to lower federal workers violates the first amendment under *Pickering* and the Paradigm.

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65. *See supra* note 41 and accompanying text.

V. Constitutionality of Honoraria Ban Under the Due Process Clause

A second constitutional right that the honoraria ban possibly abridges is the fifth amendment guarantee of due process. In analyzing the constitutionality of the honoraria ban under the fifth amendment, the steps followed are: (1) does honoraria ban restrict a liberty interest protected by the due process clause and (2) is the honoraria ban reasonably related to a legitimate government purpose?

A. Does Honoraria Ban Restrict a Liberty Interest Protected by the Due Process Clause?

The Constitution prohibits the deprivation "of life liberty and property without due process of law."[66] The question then is whether the right to contract, to write a book, give a speech, or make an appearance falls under the constitutional protection of liberty. The Court in *Meyer v. Nebraska*[67] enumerated some of the fundamental liberties protected by the fourteenth amendment's due process clause. The statute in *Meyer* prohibited in all schools—private or public—teaching of any modern language other than English to students who had not yet reached ninth grade. In striking the statute as violative of the due process clause, the Court first discussed the protections inherent in liberty:

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual *to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[68]

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66. U.S. Const. amend. V.

67. 262 U.S. 390 (1923).

68. *Id.* at 399 (emphasis added). The Court cited the following cases to support its holding: Adkins v. Children's Hospital, 261 U.S. 525 (1923); Truax v. Corrigan, 257 U.S. 312 (1921); New York Life Ins. Co. v. Dodge, 246 U.S. 357 (1918); Adams v. Tanner, 244 U.S. 590 (1917); Truax v. Raich, 239 U.S. 33 (1915); Chicago, Burlington & Quincy R.R. Co. v. McGuire, 219 U.S. 549 (1911); Twining v. New Jersey, 211 U.S. 78 (1908); Lochner

After recognizing the liberty interest, the Court laid the standard of scrutiny to apply when a liberty interest is taken: "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without *reasonable relation* to some purpose within the competency of the State to effect."[69] The court held that the statute was arbitrary and thus unconstitutional.[70]

Under *Meyer*, the honoraria ban restricts a liberty interest if it restrains government employees in the ability "to contract [or] to engage in any of the common occupations of life" in a manner that is "arbitrary or without reasonable relation to some purpose within the competency of the [government] to effect."[71] The Reform Act's ban on paid appearances, speeches, and writings *is* a restraint on federal employees' right to contract or earn a living. The honoraria ban restricts a liberty interest—the right to make paid speeches, appearance and writings.

B. Is the Honoraria Ban Reasonably Related to a Legitimate Government Purpose?

Since the honoraria ban restricts a liberty interest, it violates due process unless it is not arbitrary or is reasonably related to a legitimate government purpose. The reasonableness of the ban varies according to the group to which it is applied.

1. The ban applied to Congress

Congress' purpose in prohibiting its members from receiving honoraria is legitimate.[72] In light of Congress' moral history, a complete honoraria ban seems reasonable. The Paradigm illustrates that the ban as applied to Congress is a reasonable means to the legitimate government end. The ban was put in place to correct a problem that was a job related conflict of interest. According to the Paradigm, regulation of activities that are job related and in conflict is reasonable. The honoraria ban as applied to Congress is constitutional.

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v. New York, 198 U.S. 45 (1905); Allgeyer v. Louisiana, 165 U.S. 578 (1897); Minnesota v. Barber, 136 U.S. 313 (1890); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Butchers' Union Co. v. Crescent City Co., 111 U.S. 746 (1884); Slaughter-House Cases, 16 Wall. 36 (1872).

69. *Meyer*, 262 U.S. at 399-400 (emphasis added).

70. *Id.* at 403.

71. *Id.* at 400.

72. *See supra* text accompanying note 11.

2. The ban applied to low to mid-level employees

In applying the honoraria ban to lower federal employees, a problem arises from the modern Court's extreme deference to Congress' regulation of the economy. As Professor Gunther puts it: "The modern Court has turned away due process challenges to economic regulation with a broad 'hands off' approach. No such law has been invalidated on substantive due process grounds since 1937."[73] Thus, if the statute as applied to lower federal workers is viewed as merely economic regulation, the Court might give undue deference to Congress and uphold the honoraria ban.[74]

However, the ban goes beyond mere economic regulation, it is a *complete*[75] prohibition on an aspect of fundamental autonomy—the right to contract, make a living, support one's family, etc. Put another way, the honoraria ban is a *specific* conflict of interest law—the more invasive type of conflict of interest law. This type of law denies personal autonomy even though no wrong is committed. Rather than punishing an employee for *acting* on an interest conflicting with the public's, this law attempts to prevent the employee from ever being in a situation where a conflict would arise. Since the Reform Act is not mere economic regulation, the Court should not blindly defer to Congress and uphold the statute.

An examination of the ban shows that it is unreasonable when applied to lower federal workers. The Paradigm illustrates this unreasonableness. While it is reasonable for the government to regulate actions that constitute job related conflicts, the government cannot reasonably regulate actions that are either not job related or not in conflict with the employee's job.[76] Yet, the ban does just this, it prohibits activity in *all four* areas of the Paradigm.

Just because regulation is allowed in one area of the Paradigm does not mean that it is permissible in all areas of the Par-

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73. G. GUNTHER, CONSTITUTIONAL LAW 472 (1985).

74. This is, of course, assuming the due process challenge is the only grounds for attack. Obviously, if a first amendment right is abridged by operation of the act, there is also a due process claim. This case would then not involve pure economic regulation and the Court would give less deference to Congress. *See id.* at 474.

75. As opposed to a regulation of employment that sets price (minimum wage laws), length of time (minimum hours laws), or licensing that still allows a person to work.

76. *See* discussion of conflict of interest laws in part III E and the discussion of the paradigm in part III F.

adigm. The due process clause may prohibit a complete restriction of a right even in cases where a partial restriction of the right comports with due process.[77] In *Connick*, a general conflict case, a *specific* conflict of interest law that banned all inter-office questionnaires thereby removing the potential conflict of wanting to pass around a questionnaire about one's supervisor would likely have been unconstitutional. In *Brown*, another general conflict case, a specific conflict law that banned Mr. Brown from ever going to a union assembly hall, thereby removing the possibility of conflict arising between his interests as a supervisor and his interests in supporting his union friends. too would have likely been struck down. Even though general conflict laws were upheld in *Connick* and *Brown*, specific conflict laws would have been unreasonable since they would have restricted speech in all four parts of the Paradigm. Similarly, while a general conflict of interest law punishing an employee for entering into a job related contract is reasonable, and thus does not violate due process, it does not follow that a complete ban on contracting without regard to job relatedness or conflict will be constitutional. Thus the Reform Act unreasonably takes a liberty interest without due process.[78]

VI. Amending the Reform Act

Legislation is pending in Congress to amend the Reform Act and allow receipt of honoraria by lower federal employees. The following comment explains the amendment:

> First, senior people in each branch of government—defined as noncareer employees whose rate of basic pay is above GS-15—will be subject to an absolute ban on the receipt of hono-

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77. *Compare* San Antonio Industrial School District v. Rodriguez, 411 U.S. 1 (1973) (an equal protection case upholding a financing scheme that discriminated against predominantly Mexican-American school districts—a partial restriction of educational opportunity) *with* Plyler v. Doe, 457 U.S. 202 (1982) (an equal protection case striking a statute that denied education to the children of illegal aliens—a complete restriction of educational opportunity).

78. The ban appears even more unreasonable in light of the fact that the Reform Act *allows* lower federal employees to have outside *employment*. Pub. L. No. 101-194 Title V § 501(a)(1). For instance, lower level federal employees are allowed to have a second job with, for instance, a newspaper. But, if the federal employee was merely a free-lance writer, i.e., not an employee of the newspaper, he would not be allowed to write. In both cases the federal worker is receiving money. If receiving money is such a "danger" it is arbitrary for the legality of the receipt of money to turn on employment status and discriminate against free-lance writers.

> raria. However, *all other federal employees will be allowed to accept honoraria* as long as certain conditions are met: the subject for which the honorarium is offered cannot be related to the individual's official government duties, and the honorarium cannot be offered because of the individual's status as a government employee. In addition, the person offering the honorarium cannot have any interests that might be substantially affected by the performance or nonperformance of the recipient's official duties. Finally, the amount of the honorarium may not exceed the usual and customary fee for such services, *up to $2,000*, and confidential financial disclosure rules will apply.[79]

Applying the Paradigm to the conditions shows that even this amendment is unconstitutional.

The first condition is that "the subject for which the honorarium is offered cannot be related to the individual's official Government duties, and the honorarium cannot be offered because of the individual's status as a Government employee."[80] This corresponds to the job relation requirement under the Paradigm and is constitutional.

The next condition is that "the person offering the honorarium cannot have any interests that might be substantially affected by the performance or nonperformance of the recipient's official duties."[81] This is the conflict prong of the Paradigm and combined with the first requirement, the statute is still constitutional. Intuitively, government should not regulate the interests of its employees unless those interests relate to their job and conflict with it. *Pickering* supports this common sense rule.

Finally, the last requirement states that "the amount of the honorarium may not exceed the usual and customary fee for such services, up to $2,000, and confidential financial disclosure rules will apply."[82] Yet, receiving amounts in excess of $2,000 does not necessarily indicate that a conflict will arise. Exempting the first $2,000 from the ban would not avoid a determination under *Pickering* that the Act unconstitutionally regulates employees' speech, since the regulated speech would not be in conflict with the employees' jobs. Additionally, exempting the first $2,000 does not make regulation in all four parts of the paradigm reasonable, and thus the Act would still violate the fifth

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79. 137 CONG. REC. S1011. (Italics added).
80. *Id.*
81. *Id.*
82. *Id.*

amendment. Unless the government can show that the cap reasonably prevents a work related conflict, the amendment is unconstitutional. However, if Congress passes the amendment without the $2,000 cap, the Reform Act would indeed be constitutional since the Act would only reach area two of the Paradigm.

VII. CONCLUSION

Improved ethics in government is a laudable goal. Progress towards this goal is possible by making moral imperatives legal ones. The honoraria ban is such an imperative. Yet, when a legal imperative is applied to a group for which it was not designed, freedom is usually lost. Such is the case when the honoraria ban—designed for Congress—is applied to lower federal workers. As Gilmore said:

> Law reflects but in no sense determines the moral worth of society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.[83]

The Reform Act reflects the values of Congress, and is justified when applied to Congress. However, the Reform Act does not reflect the values of low to mid-level federal employees. When Congress applies the law to those federal employees, freedom is unjustifiably taken. The regulation violates the first and fifth amendments when it reaches all four situations in the Paradigm. Supreme Court cases support this view. The pending amendment will not remedy this constitutional conflict. Congress should move to pass the amendment without the $2,000 cap or the courts should strike the statute's application to low to mid-level employees as unconstitutional. To maintain freedom, the Constitution must shield the people from their government. This protection should extend to all, even those who work for the government.

David A. Golden

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83. G. GILMORE, THE AGES OF AMERICAN LAW 110-11 (1977).