

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNITED STATES, ET AL., Petitioners v. NATIONAL
TREASURY EMPLOYEES UNION, ET AL.

CASE NO: 93-1170

PLACE: Washington, D.C.

DATE: Tuesday, November 8, 1994

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES, ET AL., :

4 Petitioners :

5 v. : No. 93-1170

6 NATIONAL TREASURY EMPLOYEES :

7 UNION, ET AL. :

8 - - - - -X

9 Washington, D.C.

10 Tuesday, November 8, 1994

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:04 a.m.

14 APPEARANCES:

15 PAUL BENDER, ESQ., Deputy Solicitor General, Department of
16 Justice, Washington, D.C.; on behalf of the
17 petitioners.

18 GREGORY O'DUDEN, ESQ., Washington, D.C.; on behalf of the
19 respondents.

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1 PROCEEDINGS

2 (10:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 93-1170, United States v.
5 National Treasury Employees Union.

6 Mr. Bender.

7 ORAL ARGUMENT OF PAUL BENDER

8 ON BEHALF OF THE PETITIONERS

9 MR. BENDER: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 This case concerns the constitutionality of the
12 honorarium provision contained in the Federal Ethics
13 Reform Act of 1989, a provision that prohibits Federal
14 employees in all three branches of Government from
15 accepting compensation beyond ordinary and necessary
16 travel expenses for making appearances, giving speeches,
17 or writing articles.

18 Regulations of honoraria of this kind for these
19 same activities have been part of Federal statutory law
20 since the mid-1970's. In 1974, Congress imposed a -- not
21 a total ban, but a monetary limit on the amount that
22 Federal employees could be paid in honoraria. It was
23 \$1,000 per appearance and a \$15,000 annual limit that was
24 later raised to \$2,000 per appearance and a \$25,000 annual
25 limit. In 1981, the annual limit was removed, but the

1 \$2,000 limit remained.

2 In the Ethics Reform Act of 1989, Congress
3 decided to, instead of dealing with this by putting a
4 monetary limit on the amount that a Federal employee could
5 obtain through honoraria for these activities, to
6 eliminate them altogether.

7 It did this on the advice of two Federal
8 Commissions, one the Quadrennial Commission, which makes
9 periodic reports and gives advice on Federal salaries, and
10 the other an ethics commission, Ethics in Federal
11 Government Commission, appointed by President Bush in the
12 last 1980's.

13 Both of those commissions recommended that the
14 policy be changed from a limit on the amount of honoraria
15 to total prohibition of Federal employees in all three
16 branches obtaining honoraria.

17 Congress did this, as well, in light of very
18 strong public concern about the use of honoraria for those
19 activities as a way of steering compensation to Federal
20 employees who might have, when the person steering the
21 compensation might have some reason to want some favors or
22 special treatment from the Federal employees.

23 That had been most prominent with regard to
24 Members of Congress and congressional staffs, but the
25 commissions recommended, and Congress followed their

1 advice, that it made sense to apply the ban across the
2 board and not just to limit it to the legislative branch.

3 Initially, it did not apply to the Senate, or
4 Senate staff members, and in response to that, the Senate
5 decided not to take a pay raise that went to the House at
6 that time, but a couple of years later, the Senate voted
7 itself into the ban, it and its staff, so that the ban now
8 applies to all Federal employees in all three branches of
9 Government.

10 QUESTION: Mr. Bender, in the definitions
11 section, 505(3), which defines the term, honorarium,
12 apparently it was amended to add some parenthetical
13 material so that it now provides -- "the term, honorarium,
14 means a payment of money or anything of value for an
15 appearance, speech, or article (including a series of
16 appearances, speeches, or articles, if the subject matter
17 is directly related to the individual's official duties,
18 et cetera)."

19 MR. BENDER: Right.

20 QUESTION: I am unclear what the purpose of that
21 amendment was. It seems to provide, as it's written, that
22 a person can't get an honorarium for a single speech or
23 article, but can if the person gets several, and I just
24 don't understand what we do with a provision like that.

25 MR. BENDER: When I first saw that, it seemed to

1 me that a person had made a typographical error, and that
2 the parenthesis should have been moved up several words,
3 but the history of the statute shows that it was, in fact,
4 intended to be exactly as it was written.

5 As originally written, that whole parenthesis
6 was --

7 QUESTION: You mean, you think that it was
8 intended to, as structured with the other provisions of
9 the statute, to prohibit an honorarium if it's a single
10 speech or article, but to allow it if there are several?

11 MR. BENDER: Yes, I think that's the clear
12 intention, because at the time in Congress there was a
13 proposal to apply the nexus requirement. That is, which
14 says that the honorarium is prohibited only if it's
15 directly related to the official's -- to the individual's
16 official duties, or payment is made because of the
17 individual's status with the Government.

18 There was a proposal in the Senate to apply that
19 to the whole definition, and that failed, and instead this
20 was put in.

21 QUESTION: I don't think that makes sense.

22 MR. BENDER: It seems counterintuitive.

23 QUESTION: Is that absurd?

24 MR. BENDER: I don't think it's absurd, although
25 I admit that it is counterintuitive.

1 QUESTION: You can get hung for a sheep -- for a
2 lamb, but not for a sheep.

3 MR. BENDER: Well, I think the difference is
4 that first of all the reason they did that was that the
5 statute, as originally written -- if you just leave out
6 the parenthesis, you will see how it was originally
7 written.

8 It says, for an appearance, speech, or article,
9 and there was confusion about whether the statute would
10 apply to a series, because it was stated in the singular,
11 and this was put in to make it clear that it did apply to
12 a series, because that wasn't clear before.

13 The difference, I think, between a series and an
14 individual speech can be seen if you think about the
15 reason for the prohibition in the first place. The
16 problem with honoraria -- honoraria, not any payment for
17 anything you do. Moonlighting is not generally prohibited
18 in the Federal Government.

19 The problem with honoraria is that they can be
20 paid for relatively little or no work. You can make an
21 appearance without doing any work. You can just go there.
22 You can make a speech without doing very much work. You
23 can write an article and have somebody else write it for
24 you and put your name on it, or circulate the same article
25 again. Those are the things that the statute meant to

1 stop, payment for things that could be used to transfer
2 payment to Government officials who really didn't earn the
3 money. They were favors.

4 QUESTION: You can be a consultant without doing
5 any work.

6 (Laughter.)

7 QUESTION: Somebody can pay you money as a
8 consultant.

9 MR. BENDER: There's no question of that,
10 Justice Scalia, and I think it would be possible for
11 Congress to have broadened this and made it a much broader
12 ban on lots of other outside compensation. I think
13 Congress --

14 QUESTION: The question is whether it's rational
15 if it just selects one way in which you can get paid for
16 doing nothing and does not select any of the other ways in
17 which you can get paid for doing nothing.

18 MR. BENDER: Ordinarily, Congress does not have
19 to deal with all problems. It can limit its prohibitions
20 to the things that have proved to be the biggest problem.
21 I think --

22 QUESTION: Mr. Bender, on the subject of doing
23 something, I know there was a time when lawyers were paid
24 by the word, but a great man said, "It takes time to write
25 it short," and this notion that many words, spreading it

1 out into a series, is somehow a guarantee that there is
2 more work that will be done, is problematic.

3 MR. BENDER: It's obviously not an absolute
4 guarantee. This is a broad, prophylactic statute. The
5 lines are not absolutely precise.

6 If this were a statute dealing with a
7 prohibition on speech, rather than merely a prohibition on
8 payment for speech, if this were a statute dealing with
9 people who were not Federal employees, that kind of
10 grossness of the statute I think would pretty clearly make
11 it unconstitutional.

12 QUESTION: Might not the parenthetical material
13 that we've been discussing, Mr. Bender, have been intended
14 to allow someone to teach a course?

15 MR. BENDER: That's one of the functions that --
16 that's one of the functions that it serves, and I think
17 that's a good example of the kind of thing which is not
18 likely to produce a payment made to curry favor with a
19 Federal employee and is much more likely to be made
20 because of some real value that the person has given.
21 It's hard to teach a whole course and not do any work.
22 It's a lot easier to give a single speech.

23 These are not perfect lines. It is obvious that
24 a speech can reflect a lot of work, and a series of
25 speeches, the Office of Government Ethics has interpreted

1 series to mean three -- certainly you could do three
2 speeches without doing a tremendous amount of work, but
3 what Congress was trying to do here, and I think it's
4 important to bear that in mind, is not to be overbroad.

5 It wanted to preserve as much as possible
6 without -- without casting doubt on the integrity of the
7 Federal Service, it wanted to preserve as much as possible
8 the opportunity to earn some money on the side.

9 QUESTION: Well, Mr. Bender, this -- it would
10 make a lot more sense if the opening of the parenthesis
11 were inserted just before "if," and after "series of
12 appearances, speeches, or articles." Then it would be
13 clear that honorarium means payment of money or anything
14 of value for an appearance, speech, or article, or a
15 series of appearances, speeches, and articles, if the
16 subject matter is directly related.

17 MR. BENDER: I agree with you, Justice O'Connor.
18 If I were doing it, that's what I would have done, and
19 many people in Congress wanted to do that, but the
20 question --

21 QUESTION: Well, maybe it was just a drafting
22 error. They just put the parenthesis in the wrong place.

23 MR. BENDER: The legislative history I think
24 makes it clear that it wasn't just a drafting error
25 because, as I say, there was a proposal to add that nexus

1 limitation to the whole thing, and that proposal failed,
2 and this proposal passed.

3 The issue is not what you or I think would make
4 more sense. The issue is whether what Congress has done
5 is unconstitutional.

6 QUESTION: But it does present you with a
7 different problem here, and that is, part of your argument
8 for sustaining the breadth of the ban is the difficulty in
9 line-drawing if you were to have a narrower ban, and yet
10 here is an example in which you've got to do some line-
11 drawing, in which Congress in effect is saying, yes, we
12 can draw lines if we want to, because there is a
13 germaneness requirement in the series.

14 MR. BENDER: In the series, yes, and I think the
15 reason for that, or the explanation for that, might well
16 be that there are many less cases where people do a
17 series.

18 For example, some people teach courses, but
19 there aren't very many of those, and therefore it's
20 possible for the ethics officials who have to administer
21 this to have to deal with that small number of cases.

22 QUESTION: Well, I can --

23 QUESTION: Mr. Bender, can you explain on the
24 question of exceptions why one appearance or one writing
25 is okay if you are faculty or a student of a military

1 school? What was the basis for allowing that exception?

2 MR. BENDER: I believe it was, Congress wanted
3 to make the exception for the military, and I think it had
4 to do with -- I can explain this much more easily for the
5 faculty than the students.

6 The faculty of military academies wanted to be
7 considered on the same plane, and I think they should be
8 considered of the same plane, as faculty of other
9 institutions, and to say that they could not make speeches
10 for compensation the way other faculty members do treats
11 them as not really like regular faculty members. I think
12 that was the reason for doing it.

13 QUESTION: And the students?

14 MR. BENDER: I have no explanation for the
15 students. Congress decided to make the exception.

16 But I think here there are things that will
17 occur to all of us, and when you read the regulations, you
18 can see other things that occur to you. Fiction, for
19 example, is -- the regulations say is not covered by this.
20 Poems are not covered by this.

21 There are things that seem to be irrational, but
22 if you think of it from the point of view of
23 administrability, I think the rationale becomes a little
24 clearer.

25 The problem with a single speech and applying a

1 nexus requirement is, you have to know what's in the
2 speech. The ethics official -- for example, everyone
3 would agree that if the speech is directly connected to
4 the work of the person, then Congress may ban it.

5 QUESTION: Well, but if it's a series, the
6 statute requires that evaluation --

7 MR. BENDER: Right, but with a series it's --

8 QUESTION: -- so it just doesn't make sense.

9 MR. BENDER: I think with a series it's easier
10 to know what the subject matter is. For example, in Chief
11 Justice Rehnquist's example of someone teaching a course,
12 a course will have a name, the course will have a
13 description, the university will require the course to be
14 tailored to the name and the description, so you can
15 tell -- I think more easily with a series you can tell
16 whether or not the subject matter is a problem.

17 And also I think the intention was to permit
18 teaching, because Congress probably thought that teaching
19 by some Federal officials was something that was very
20 strongly in the public interest.

21 QUESTION: It isn't limited to teaching. It
22 doesn't even say teaching.

23 MR. BENDER: Right, and again, it's blunter than
24 it might be. The question for the Court is whether that
25 bluntness -- there's no question that, I think -- I think

1 it's common ground both with the court of appeals and with
2 respondents that there is a core of activity to which this
3 statute plainly constitutionally applies.

4 QUESTION: Mr. Bender --

5 MR. BENDER: If a member of the Solicitor
6 General's office were to --

7 QUESTION: -- would you explain something to me?
8 I really have to say I'm kind of puzzled about the reason
9 why the content of the speech or writing makes any
10 difference at all. If you want to curry favor with
11 someone by paying them something that they haven't really
12 earned, what difference does it make whether they write a
13 lyric poem, a mystery story, or talk about what they do
14 every day at the office?

15 MR. BENDER: Currying favor is one of the
16 problems, but there are others. For example, suppose a
17 member of the Solicitor General's Office was asked to go
18 to a law firm and give a talk about tips on arguing before
19 the Supreme Court, sharing your experience. The problem
20 with that kind of thing is, the people who can pay for
21 that information, gleaned or amassed as part of one's
22 Federal employment, can get information from a Federal
23 officer that people who can't pay for it can't get.

24 You could have a doctor who works at NIH giving
25 lectures about the work he does to drug companies or

1 insurance companies about the work he does, and that
2 information just goes to those people.

3 So I think to have a Federal employee be paid
4 for talking about the work the Federal employee does
5 raises a different concern, which is that people who are
6 able to pay for it shouldn't be able to get information
7 from Federal employees that people who can't pay for it
8 can't get.

9 QUESTION: Would you agree that insofar as your
10 concern with corruption, the subject matter doesn't make
11 any difference?

12 MR. BENDER: I agree with that, right.

13 QUESTION: Under that theory a Federal employee
14 shouldn't be able to publish a book. The only people who
15 can get the information from a book are those who can
16 afford --

17 MR. BENDER: There's a balance I think that
18 Congress is drawing in saying that a book is likely to be
19 so valuable that we want to permit people to do it, and a
20 book is easier to police, because it's a public thing that
21 is published and can be seen and can be looked at by an
22 ethics official to see whether there's anything in the
23 book that compromises the Federal official, whereas
24 speeches are evanescent, they're gone. Does a Federal
25 ethics official have to go to the speech?

1 An appearance is even harder to judge, and even
2 with regard -- for example, if somebody makes a speech at
3 a garden club to talk about how to grow roses, and the
4 person who does that is a lawyer in the Department of
5 Justice, that seems perfectly innocent, but maybe the head
6 of the speaker's bureau of the garden club has a case
7 before that lawyer. How in the world would the Federal
8 ethics official ever know that? I think it's --

9 QUESTION: Mr. Bender, in the event that your
10 main argument doesn't prevail, may I ask what you think of
11 the Silberman solution by way of a remedy, which would in
12 effect be changing the place of the open paren?

13 MR. BENDER: I think that, or something very
14 similar to it, is the correct solution. If the Court
15 feels that Congress did not have the right to write a
16 broad, prophylactic statute here and that the extension to
17 honoraria that have no nexus is unconstitutional, then the
18 right remedy is to say that the statute cannot be applied
19 to those honoraria rather than --

20 QUESTION: Does the answer to that question,
21 whether or not Congress has the constitutional authority
22 to do this, turn in part, or in large part, on an
23 assessment, either by us or by the Congress, as to how
24 often these speeches do, in fact, implicate the interest
25 that the Government is wishing to vindicate and to

1 protect?

2 MR. BENDER: To some extent, I think it does.

3 If --

4 QUESTION: What -- and what kind of empirical
5 data do we have to make that assessment, or did Congress
6 have to make it?

7 MR. BENDER: I think Congress has no formal
8 empirical data but its understanding of the way Federal
9 Government works and what Federal employees do, and that's
10 what you have to use as well.

11 I think because it's so hard to know the facts
12 there, deference to Congress is appropriate.

13 QUESTION: If we thought, or the Congress
14 thought, that the improper kind of speaking takes place
15 only 5 percent of the time, would that have been enough to
16 sustain this statute?

17 MR. BENDER: I think that would be very
18 doubtful, but I'm almost positive that those would not be
19 the facts here.

20 There are people who have hobbies, and there are
21 people who make some money on their hobbies by giving
22 speeches or writing articles, but I think it is almost
23 worthy of judicial notice that it's much, much more likely
24 that people will speak about their work, the things that
25 they do for most of their time, and that the dangers of

1 permitting honoraria generally are much more Federal
2 employees who would be paid to speak about their work, be
3 paid to speak about the things that they work on, than
4 things that are just hobbies for them.

5 QUESTION: When we're making this assessment and
6 this evaluation, since speech is involved, is there some
7 heightened form of scrutiny?

8 MR. BENDER: There is certainly some heightened
9 form of scrutiny, but I think two things, and as I said
10 before, I think if this statute were a prohibition on
11 conduct of non-Government employees, or even perhaps a
12 prohibition on conduct of Government employees, the answer
13 might be different.

14 But here, I think two factors which go to
15 permitting Congress to do this are 1) that this does not
16 prohibit any speech at all, it prohibits compensation for
17 speech, and these are all people who have another job, and
18 so it is unlikely in many cases that the compensation will
19 in any sense be necessary to permit them to give the
20 speech, and if it is necessary to permit them to give the
21 speech, that raises other problems. With Federal
22 employees dependent upon this kind of outside income, I
23 think Congress could be worried about that.

24 QUESTION: I take it, Mr. Bender, you would
25 admit, would you not, that the net effect of the statute

1 is to decrease the quantity of speech?

2 MR. BENDER: I'm sure that that's true, because
3 there are some people who will not do it, and that is --
4 there's no question about that.

5 I think the closest analogy in this Court's
6 history are the Hatch Act cases, where I think you could
7 similarly say, as we all have said about this, that there
8 are some things that the Hatch Act prohibits that really
9 don't cause any danger at all, but Congress, rather than
10 drawing the lines at which kind of political campaigning
11 cause the problem and what offices there was political
12 pressure by superiors on inferior people, instead of
13 drawing those lines, Congress decided that it wanted to
14 ban the whole thing.

15 QUESTION: The Hatch Act I understand is an
16 analogy. What about the Son of Sam cases?

17 You're focusing on speeches, but these
18 plaintiffs are not talking about speeches, these
19 plaintiffs are a Nuclear Regulatory Commission attorney
20 who wants to write an article about Russian history, or a
21 Labor attorney who wants to write an article about
22 Judaism.

23 So -- and these are low-level people, often, who
24 really aren't, I take it, invited always -- they're not
25 politicians. They're nonpolitical people in the Civil

1 Service who want to write articles about the Quaker
2 religion, or Judaism, or the Russian history.

3 If a triple ax murderer, I take it, cannot be
4 constitutionally prohibited from selling his story for
5 money, why can a low-level civil servant be
6 constitutionally prohibited from giving a talk about
7 Judaism, or Quaker religion, or Russian history, writing
8 an article about it which has nothing whatsoever to do
9 with their job, before an audience that has nothing to do
10 with their job, on their own time?

11 MR. BENDER: Two --

12 QUESTION: I mean, why does the Constitution
13 seem to apply to one and not the other?

14 MR. BENDER: Well, two things about that,
15 Justice Breyer. 1) I don't think the Court said in the
16 Son of Sam case that a triple ax murderer could not be
17 prohibited. It said --

18 QUESTION: It was too broad. --

19 MR. BENDER: -- the statute was overbroad.

20 QUESTION: It's too broad.

21 MR. BENDER: I think --

22 QUESTION: So why is that too broad, when this
23 one, which says you can't write an article about the
24 Quaker religion, and so forth, is not too broad?

25 MR. BENDER: The Court has always given Congress

1 a lot more discretion in dealing with regulating the
2 activities of Federal employees, and the Hatch Act case
3 again shows that. You could obviously not prohibit the
4 kind of activity the Hatch Act prohibits for Federal
5 employees if you were prohibiting it for people generally.

6 QUESTION: But why is -- my question, basically,
7 is why is the public interest in taking a GS-14 or 15
8 civil servant and saying, you can't, on your own time,
9 write an article about Russian history, why is the public
10 interest there greater than the public interest in saying
11 to serious criminals you cannot make money out of your
12 story?

13 MR. BENDER: I don't think it is greater, and a
14 statute that was tailored to the serious criminals would
15 be constitutional.

16 But let's come back to the example of -- let's
17 come back to the example of the person writing an article.
18 First of all --

19 QUESTION: If that's so, then should not this be
20 tailored in the same way?

21 MR. BENDER: The statute does not prohibit
22 writing the article. The statute prohibits being paid for
23 it. That may seem totally innocent, and in most cases,
24 and in probably an overwhelming number of cases, it will
25 be totally innocent.

1 But suppose the article is being paid for by
2 someone who has business before the agency? Then, I
3 think, it would raise problems. Congress I think was
4 worried, and I think it is proper for them to be worried,
5 about who was going to supervise that.

6 How will you know that the speaker chairman of
7 the garden club who hires a secretary in the Justice
8 Department to give a talk about how to grow roses does not
9 have business before the Justice Department and wants the
10 secretary help him to get an appointment with some
11 officials?

12 You could have written a statute which said, it
13 turns on that, which would mean that Government ethics
14 officials in each agency would have to enforce that. One
15 of the problems that Congress knew about was the
16 unevenness of enforcement of these ethical regulations in
17 different agencies if you permit them to be enforced by
18 the people in the agencies, and Congress thought it was
19 worth -- and they must have known that they were trenching
20 on some ground where they would be stopping people from
21 speaking and where there would be no reason for doing it
22 in that particular case.

23 QUESTION: But administrative efficiency --

24 MR. BENDER: I think --

25 QUESTION: -- demanded it.

1 MR. BENDER: Yes. I think that it's -- that's a
2 way of saying it in a way that kind of denigrates it as an
3 interest.

4 QUESTION: -- the way our opinions have.

5 (Laughter.)

6 MR. BENDER: Yes. It's -- I think it's
7 administrative efficiency is a label. There's a reality
8 behind that label.

9 QUESTION: Well, may I ask you the empirical
10 question on that? What do we know, what is there for us
11 to consult in determining just how much of a burden the
12 reality is? I have no doubt in the world that it's going
13 to be harder to administer if we draw the line on some
14 germaneness criterion, but how inefficient is it going to
15 be? What is the administrative burden going to be? I
16 don't quite know how to weight it.

17 MR. BENDER: It's very difficult, and I think
18 it's because it's very difficult that unless it appears
19 very clearly that Congress weighed it incorrectly, the
20 Court should defer to Congress' judgment that that's the
21 way to do it. Congress considered putting a nexus
22 provision in. It thought about it and decided not to do
23 that.

24 I think that their knowledge of the Federal
25 system, their knowledge of the pressures on employees, and

1 their knowledge of the dangers and their sense of the
2 public perception of the dangers --

3 QUESTION: But how is that consistent with your
4 concession earlier that there is some element of
5 heightened scrutiny to be applied here? That isn't
6 heightened scrutiny. I mean, that is basically deference,
7 if there is any conceivable rational basis, I suppose.

8 MR. BENDER: Well, I think there's -- there is
9 some heightened scrutiny. It is hard to say exactly what
10 that is. I think it --

11 QUESTION: What is the mechanism for the series?
12 Is there some screening? Do you have to check that in
13 advance, and how much more of a burden would it be if
14 that, whatever that mechanism was, was simply extended?

15 MR. BENDER: Well, there would be many, many
16 more cases that would have to be screened. That's one
17 thing, because there are many less series of speeches than
18 there are individual speeches and appearances, and
19 articles, and as I said, with a series, it is usually
20 possible to tell the subject matter of the series with
21 some confidence from some written materials. That's much
22 harder to do with a single speech or a single appearance,
23 so I think the administrative problems would be greater.

24 Just one more word about -- in response to your
25 question, Justice Souter, I think one way that a

1 heightened scrutiny shows up is in the question Justice
2 Kennedy asked about what percentage would have to be
3 overbroad to strike it down.

4 I think that if the statute didn't involve
5 speech, and there was any conceivable, rational objective
6 that Congress was pursuing, one would uphold it here. I
7 think if the Court were convinced that 95 percent of the
8 statute's application was on speech that caused absolutely
9 no danger of a public perception of lack of integrity,
10 then you would strike it down, whereas if it weren't
11 speech, then I think you wouldn't strike it down.

12 QUESTION: But shouldn't we be able to get some
13 sense from prior experience in the agencies of the amount
14 of screening that would be necessary?

15 MR. BENDER: Yes. The problem, though, with
16 that, is it -- the prior experience is very uneven. Some
17 agencies are quite strong and concerned about applying
18 these ethics regulations.

19 QUESTION: Well, the --

20 MR. BENDER: Other agencies are not.

21 QUESTION: Excuse me. The results may have been
22 uneven, but I presume the number of occasions on which
23 they had to screen was not a matter of judgment, and if we
24 even knew the amount of screening that had to be done, we
25 would at least have a way of making some kind of guess

1 about the administrative burden.

2 MR. BENDER: Right. I don't know that there are
3 any figures collected. At least, I was not able to get
4 any central figures collected about how many of these
5 requests were made, or how much investigation was done at
6 the particular agency level, because the immediate
7 enforcement of this statute is at the agency level. The
8 Office of Government Ethics does not do a comprehensive
9 screening.

10 QUESTION: What I understand you to say, though,
11 is if you're wrong about the constitutionality of this,
12 you would prefer extension of this -- it's got to be a
13 screening device extension of what's done for the series
14 to all of the speeches to total destruction of the
15 statute.

16 MR. BENDER: It's not that the Government would
17 prefer it, it's that I think Congress deserves that
18 recognition. It's clear to me that if --

19 QUESTION: The overbreadth doctrine doesn't
20 apply to Congress? I mean, I thought --

21 MR. BENDER: Of course it does.

22 QUESTION: -- in First Amendment cases, if
23 you're too broad, the whole thing's bad. There's no such
24 thing as overbreadth, then.

25 MR. BENDER: There is.

1 QUESTION: What we should do in all cases is
2 just cut it back to what would be constitutional.

3 MR. BENDER: If it was 95-percent overbroad, or
4 if you couldn't easily separate the constitutional from
5 the unconstitutional applications, then I think you might
6 strike the statute down, but here it's quite easy.

7 QUESTION: You can usually easily separate it.
8 I don't think that's usually a problem.

9 MR. BENDER: Sometimes it's --

10 QUESTION: Well, I don't see how this differs
11 from any normal overbreadth case.

12 MR. BENDER: Well, in the --

13 QUESTION: Maybe the overbreadth doctrine is no
14 good. Maybe we should reconsider that.

15 MR. BENDER: The Court has said that --

16 QUESTION: But it seems to me inconsistent with
17 that to say just, you know, narrow it as much as is needed
18 to make it constitutional.

19 MR. BENDER: The Court has said repeatedly since
20 Broadrick that it will use the overbreadth doctrine only
21 as a last resort, that it is very strong medicine to be
22 reserved for very unusual cases.

23 This Court, for example, in holding that the
24 statute --

25 QUESTION: Where it is substantially overbroad.

1 That's the issue we were directing ourselves to. Don't
2 you think if this is overbroad, it is substantially
3 overbroad, if it covers not just speeches related to the
4 work, but all speeches? I think that's substantial
5 overbreadth.

6 MR. BENDER: Well, substantial in comparison to
7 the part of the statute that is constitutional? No, I
8 don't think it is substantial. I would guess that there
9 is a much smaller number of these speeches made on topics
10 that have nothing to do with a person's work than there
11 would be speeches made for compensation on topics that
12 have something to do with a person's work, so I don't
13 think it's substantial in that sense.

14 I'd like to reserve the rest of my time, if I
15 may.

16 QUESTION: Very well, Mr. Bender.

17 Mr. O'Duden.

18 ORAL ARGUMENT OF GREGORY O'DUDEN

19 ON BEHALF OF THE RESPONDENTS

20 MR. O'DUDEN: Mr. Chief Justice, and may it
21 please the Court:

22 In its brief, the Government has offered three
23 main justifications for the statute. It has said that it
24 is needed to guard against the appearance of impropriety,
25 it has argued that this is a needed prophylactic measure,

1 and it has also said that there are administrative reasons
2 that justify the existence of the statute.

3 Much of the discussion this morning has focused
4 on the last justification. If I understand the Government
5 correctly, it is agreeing that there is no appearance of
6 impropriety when a career employee writes or speaks about
7 something that has no connection to his job, and where the
8 payor has no interest pending before the Government.

9 But what the Justice Department seems to argue
10 this morning is that even if that's the case, it's just
11 too hard to enforce a nexus requirement, and with all
12 respect to the Justice Department, I believe that that
13 argument is just a bit thin.

14 As we know, as Justice O'Connor has pointed out,
15 the Achilles heel in each of the -- with respect to each
16 of the justifications here is the fact that an employee
17 can receive compensation if he or she writes a series of
18 articles, and, of course, what that means with respect to
19 the statute is, you can't be paid if you write one or two
20 articles, but if you repackage it as three or more, then
21 you can be paid, provided there is no nexus to employment.

22 It seems to us that the fact that there is a
23 nexus test written right in the statute is very good
24 evidence that a nexus test is eminently manageable. The
25 question was raised earlier, what concrete experience do

1 we have as to how much of a burden it is to administer a
2 nexus requirement?

3 Well, we would point the Court to a report that
4 the Government believes, at least in its brief, supports
5 its position, and I'm speaking here about the GAO report,
6 which, of course, covered a 3-year period and examined
7 outside activities that were engaged in by Federal
8 employees.

9 And if I read the report correctly, and added up
10 the numbers correctly, there were about 2,500 employees
11 who had received approval to engage in outside activities.
12 the report identifies two instances where there were
13 arguable improprieties with respect to the speaking
14 activities.

15 So in essence, what the report has said is that
16 out of 2,500 occasions, there were two concrete instances
17 of an arguable abuse, and of course --

18 QUESTION: Did this report, Mr. O'Duden,
19 consider simply appearances as well as speeches or
20 articles?

21 MR. O'DUDEN: The report is very wide-ranging.
22 It apparently considered all kinds of outside activities.
23 The focus was on consulting and speech activities.

24 QUESTION: Mr. O'Duden, what troubles me about
25 your proposal that it just be limited to things that have

1 what you call a nexus is that it's a different problem
2 from what -- I mean, that's a good idea. It might be a
3 nice statute, but there are two really quite problems.

4 One is the problem of an employee trading on the
5 expertise he's acquired from the Government. That is one
6 problem.

7 A quite separate problem is the problem of the
8 employee getting paid by someone outside the Government
9 for talking about, you know, really for the benefit that
10 he could do to somebody outside the Government but
11 disguising it under, you know, a speech or whatever. It's
12 usually disguised under a speech, is what the Government
13 says, and therefore Congress chose to address that.

14 That's a totally separate problem from the
15 problem of trading on your Government expertness, so why
16 should we substitute the one statute from the other? It's
17 a different statute.

18 MR. O'DUDEN: Well, it would seem, though, that
19 that same rationale would apply to the situation where
20 someone gave a series of speeches, or a series of
21 articles. It's not clear to me why that same notion that
22 when a Federal employee speaks about something that has
23 nothing to do with his job, would not also raise that same
24 concern in that situation.

25 QUESTION: Well, how about the Solicitor

1 General's answer that, with a series of articles or
2 perhaps with a book, you have some more guarantee of
3 authenticity? It's easier to trace if you have a series
4 of articles, a course. It's easier to spot what the
5 course was about.

6 MR. O'DUDEN: As I understand the Government's
7 argument, it is suggesting that the added volume of
8 material somehow makes it easier to determine a nexus, and
9 I think as Justice Ginsburg noted earlier, that, I think,
10 lacks a rational basis, because someone could easily write
11 a very long, very voluminous, single article with ample
12 material in it. Someone could write, on the other hand,
13 three very short articles.

14 It seems to me that it would be far easier to
15 determine whether there was a nexus in the former instance
16 as opposed to the latter, so that we do not believe that
17 is a viable argument for the Government to make.

18 QUESTION: Well, is it your position that the
19 statute would be more defensible if the series exception
20 were not in the statute and there were just a blanket
21 prohibition, whether or not it was a series?

22 MR. O'DUDEN: No. Of course, when we first
23 brought the lawsuit, the series exception was not in the
24 statute. Our main contention has been that --

25 QUESTION: Which statute is the more defensible?

1 MR. O'DUDEN: I beg your pardon, Your Honor?

2 QUESTION: Which statute is the more defensible
3 from the Government's standpoint?

4 MR. O'DUDEN: I think that they were -- they are
5 equally indefensible, but I think that the fact that there
6 is this exception now for a series, that that raises a
7 question about the credibility for limiting payment in the
8 first instance.

9 QUESTION: Would you say a statute with that
10 qualification, the series nexus test just extended across
11 the board, that such a statute would be constitutional?

12 MR. O'DUDEN: We have never questioned that if
13 there was a nexus requirement in the statute that applied
14 across the board, that that would be a constitutional
15 statute.

16 QUESTION: So then you would have no objection
17 to the solution that Judge Silberman proposed in the D.C.
18 Circuit.

19 MR. O'DUDEN: Quite frankly, Your Honor, as a
20 practical matter, no, we would have no objection to that
21 whatsoever.

22 QUESTION: Why is that statute constitutional?
23 I mean, there are a lot of times that people could
24 write -- you know, the knowledge that they bear after
25 30 years of work in the Government relates to one field.

1 They want to write an article about that one field. Why
2 shouldn't they be able to write that article? What's the
3 risk?

4 MR. O'DUDEN: Well, I think the way the nexus
5 test works, the one that is written in the statute, is
6 that you are not allowed to be paid if there is a direct
7 nexus, so there may well be that there are circumstances
8 where, if somebody is writing generally about something
9 that he has worked on, where it might be appropriate for
10 that person to engage in that kind of activity.

11 But I think the obvious concern is that if
12 you're writing about something that you learned about as a
13 result of your Government position, then that does, at
14 least arguably, create the appearance that you are trading
15 on your job, and therefore we believe that a nexus test is
16 an appropriate test for Congress to have written into the
17 statute.

18 QUESTION: Trading on the job in the sense that
19 what you have learned on the job, you're profiting from?

20 MR. O'DUDEN: That's right, using your public
21 office for private gain is the notion.

22 QUESTION: But if you do it on your own time,
23 why shouldn't you be allowed to do that, under your
24 theory?

25 MR. O'DUDEN: For the very reason that I just

1 gave. The fact that you're doing it on your own time
2 doesn't obviate the fact that you are trading on your
3 Government position, that you are using something that you
4 learned as a result of your Government job and
5 exploiting --

6 QUESTION: Why is it different than if you wait
7 until you retire and then write your memoirs?

8 QUESTION: Right.

9 QUESTION: To do that -- General Grant did that.
10 I mean, what's wrong with that? I must confess --

11 MR. O'DUDEN: Obviously, the statute only
12 governs a situation where you a current employee. I think
13 that once you've retired, I think different considerations
14 come into play.

15 QUESTION: Well, suppose you had a statute --

16 QUESTION: It's the same consideration --

17 QUESTION: -- which forbade that?

18 QUESTION: -- making use of what you learned as
19 an employee, in either event, and in neither case does it
20 interfere with your current employment, as I understand
21 it, the hypothetical.

22 MR. O'DUDEN: That's right, but I think as
23 long --

24 QUESTION: It's just an appearance problem.

25 MR. O'DUDEN: It's an appearance problem. As

1 long as you're on the Government payroll, I think that it
2 would be --

3 QUESTION: It's an appearance -- is it an
4 appearance -- I've been a judge for something like 12
5 years now, and I've learned a lot of law there, and now
6 and then I talk about the law.

7 MR. O'DUDEN: That's right.

8 QUESTION: And some of the things I know about
9 the law, I've learned in these 12 years --

10 MR. O'DUDEN: But you don't talk --

11 QUESTION: -- and that's a wicked appearance.

12 MR. O'DUDEN: -- about your cases, do you? You
13 don't talk about your cases --

14 QUESTION: No --

15 MR. O'DUDEN: -- or the cases that are pending
16 before you.

17 QUESTION: -- I don't talk about cases that are
18 pending.

19 MR. O'DUDEN: I've seen Your Honor speak --

20 QUESTION: I talk about past cases, sometimes.

21 MR. O'DUDEN: Very carefully, though.

22 (Laughter.)

23 QUESTION: Well, I hope so. I hope so.

24 QUESTION: No, but you're not concerned with
25 revealing confidential information. We're assuming --

1 MR. O'DUDEN: I beg your pardon, Your Honor.

2 QUESTION: -- everything is in the public domain
3 that this person is talking about. You're not talking
4 about revealing Government secrets, or judicial secrets.
5 You might be a heart surgeon out at Bethesda, you've had a
6 lot of cases and learned about it, you want to give
7 lectures to heart surgeons.

8 MR. O'DUDEN: That's right, and I think --

9 QUESTION: I don't understand what's wrong with
10 that.

11 MR. O'DUDEN: I'm not saying there's anything
12 wrong with that. In fact, we see from the current regime,
13 from the prior regime of Government regulations, when a
14 Government employee, I suppose including a justice of the
15 Supreme Court, speaks generally about the issues before
16 him, that has been deemed properly not to create the
17 appearance of impropriety.

18 QUESTION: I'd like to know what your position
19 would be if Congress passed a statute, a hypothetical,
20 that for a period of 10 years after you leave the
21 Government you may not write about what you learned at the
22 agency.

23 MR. O'DUDEN: I think that that would be a
24 tougher case for us to challenge. A 10-year period would
25 seem to be a long period of time. A lot, of course, would

1 also depend on the category of the employee that the law
2 addressed.

3 There is a well-recognized interest in avoiding
4 this syndrome of the revolving door, where people take
5 advantage of what they learned as a result of serving in
6 the Government, particularly at a high level of the
7 Government, so I think that there's an arguable interest
8 in preventing that to a certain degree. Whether 10 years
9 is too onerous or not, I think it would depend on how the
10 interest was actually articulated and what kind of problem
11 was actually demonstrated.

12 QUESTION: I'm still -- my basic question is
13 what the standard is. I mean, I might say, look, these
14 are not political people. These are civil servants. They
15 don't go have thousands of freebies thrown at them. They
16 want to write articles about their job or not about their
17 job on their own time. All right, what standard do we
18 apply?

19 If I -- I might think, look, this is good that
20 they write about their work, not bad, it educates people,
21 but Congress might decide differently.

22 I referred to the Son of Sam statute because I
23 wonder if that isn't the appropriate test, that what you
24 are going to say, Congress can or cannot pay. Congress
25 can't -- the State can't tell -- it's overly broad. Do

1 you remember that? I mean, if you're not -- do you see
2 what I'm thinking? Is there an analogy?

3 MR. O'DUDEN: Well, there certainly is an
4 analogy to the Simon & Schuster case, the Son of Sam
5 statute, and the principal analogy that it provides to us
6 in this case is that the Court has recognized that a law
7 that imposes a financial disincentive like the honoraria
8 statute, like the Son of Sam statute, that that
9 demonstrates that, contrary to what the Government has
10 argued, that the law is a direct and substantial burden on
11 speech. That is the main reason that we cite to the Simon
12 & Schuster case.

13 If Your Honor is asking me what is the standard
14 of scrutiny that should apply, we believe that the court
15 of appeals got it exactly right when it said that the test
16 here is whether or not the law limits speech in a way that
17 goes beyond what is reasonably necessary to secure the
18 Government's interest and, of course, that formulation is
19 essentially that which is found in Brown v. Glines, and
20 the court of appeals -- the court of appeals recognized
21 that the starting point with respect to the proper
22 standard is, of course, this Court's decision in
23 Pickering, where the basic general question is whether the
24 Government's interest in efficiency outweighs the
25 employee's interest in speaking freely on matters of

1 public concern.

2 QUESTION: That's a heightened scrutiny test
3 that you're talking about. Normally, of course, we just
4 say -- ask whether it has a reasonable basis, and we don't
5 presume to weigh on our own whether it's more than is
6 reasonably necessary, right? But it seems --

7 MR. O'DUDEN: I don't believe that the Brown v.
8 Glines formulation is a heightened scrutiny test. I think
9 what it suggest is --

10 QUESTION: When we review a normal statute, do
11 we inquire whether the statute is reasonably necessary --

12 MR. O'DUDEN: Oh, no.

13 QUESTION: -- to achieve its objective?

14 MR. O'DUDEN: No.

15 QUESTION: No. Then it's heightened scrutiny.

16 MR. O'DUDEN: Yes, outside the public employee
17 context, yes, it would be heightened scrutiny, but we're
18 not arguing for heightened scrutiny here, what we're
19 seeking here is for the Court to examine whether or not
20 there is some sort of a reasonable fit here between the
21 interests that the Government articulates and the means
22 that Congress has chosen to address that interest.

23 QUESTION: Well, I consider that heightened
24 scrutiny, you know, more than what the Equal Protection
25 Clause would normally require, which is just a rational

1 basis for the law.

2 MR. O'DUDEN: That's right, Your Honor, but of
3 course we're talking here about a First Amendment issue.
4 It's not an equal protection case.

5 QUESTION: We're also talking about an
6 employment issue, where the Government is acting as
7 employer, not just as governor.

8 MR. O'DUDEN: I don't think that we're taking
9 issue in any way with this Court's notion that its cases
10 have traditionally accorded deference to the Government
11 employer, but when you read cases like Pickering and
12 Connick and Rankin, they all make very clear that where
13 the --

14 QUESTION: Are they cases that dealt with a
15 Government-wide statute, as opposed to the Government
16 moving against an individual on the basis of some
17 particular content to the speech that that individual
18 made?

19 MR. O'DUDEN: I believe those cases purport to
20 establish a general standard that applies to assessing
21 when a limitation on public employee speech is justified,
22 and what they say is that where the speech activity in
23 question substantially involves a matter of public
24 concern, then the Government has to make some sort of
25 meaningful showing that its interest is threatened in the

1 absence of that limitation.

2 QUESTION: Don't you think there might be a
3 difference when you're moving against an individual
4 employee, as opposed to a general law like the Hatch Act?
5 Do you think we employed heightened scrutiny, really, to
6 the Hatch Act?

7 MR. O'DUDEN: No, and I emphasize again that we
8 are not arguing in favor of what we would term to be a
9 heightened standard of scrutiny. I'm glad you brought the
10 Hatch --

11 QUESTION: Do you see no difference between the
12 approach the Court took in Mitchell the first time it
13 examined the Hatch Act and Letter Carriers the second
14 time?

15 MR. O'DUDEN: I believe that there is a
16 difference between the approach the Court used in
17 Mitchell, which is similar to a rational basis test, and
18 what it has come to apply.

19 I think that as the Court pointed out in
20 Connick, the Mitchell case, the rationale was grounded on
21 the notion that public employees could be required to
22 surrender their constitutional rights when they came to
23 work for the Government. This Court has long rejected
24 that notion. It made that clear, for example, in Shelton
25 v. Tucker, where the Court looked at a statute that

1 limited the First Amendment rights of public employees.

2 QUESTION: What does that mean, that you can't
3 stop public employees from engaging in political
4 campaigns?

5 MR. O'DUDEN: No, Your Honor. What we're
6 saying --

7 QUESTION: Then what does what you say mean? It
8 means nothing. You say, you can't require them to give up
9 their constitutional rights. That is a constitutional
10 right, to engage in political campaigns, certainly, a very
11 important one, isn't it?

12 MR. O'DUDEN: It is.

13 QUESTION: Can you require Federal employees to
14 give it up as a condition of their employment? Yes.

15 MR. O'DUDEN: Okay.

16 QUESTION: Therefore, what you said is simply
17 wrong.

18 MR. O'DUDEN: No --

19 QUESTION: You can, indeed, require people to
20 give up constitutional rights as a condition of Federal
21 employment. Is that true or false?

22 MR. O'DUDEN: Only where there has been a
23 showing that there are Government interests that are
24 actually at stake.

25 Let's take a look at the Hatch Act.

1 QUESTION: Different point. You can, but not --
2 but there has to be a good reason for it.

3 MR. O'DUDEN: We're happy to live with that
4 formulation, Your Honor, that there has to be a good
5 reason for it, and we think that the Hatch Act cases
6 illustrate a circumstance where there was a good reason
7 for a prophylactic measure in that case, because as the
8 Court pointed out in Letter Carriers, there was a well-
9 documented history going all the way back to the days of
10 Thomas Jefferson that when Government employees engaged in
11 political activities, that problems ensued, and it goes
12 on --

13 QUESTION: Yes, but there you see the nexus
14 between the evil prohibited and the statutory remedy was
15 existent. It was extant. It was there.

16 MR. O'DUDEN: Exactly.

17 QUESTION: Here, we're asking whether or not
18 there should be heightened scrutiny in order to compel the
19 Government to justify what its interest is as to each
20 speech, and it seems to me that that does require
21 heightened scrutiny. I'm quite surprised you say that no
22 heightened scrutiny is required --

23 MR. O'DUDEN: Well, when I --

24 QUESTION: -- and you -- and in Connick, I --
25 because you're going to be discussing this case as well,

1 Connick was a case, and that line of cases, in which the
2 speech was directly linked by the public to the
3 employment, which is not the case here.

4 MR. O'DUDEN: That's right, Your Honor.

5 QUESTION: We have cases of people writing about
6 nothing whatever to do with the Government, and you say
7 there's no heightened scrutiny?

8 MR. O'DUDEN: Well, we would welcome the Court
9 to apply a higher standard of scrutiny than it has applied
10 in cases like Connick. We're not suggesting that. The
11 only thing that I'm trying to accomplish here is to assure
12 the Court that we're not asking for the Court to apply a
13 strict scrutiny test in every Government employee case.

14 But this Court has indicated, and I think maybe
15 this is the point of Your Honor's question, where the
16 Government employee is speaking on something where there's
17 essentially really no connection to his job, where he's
18 writing an article about dance, or about music, then, as
19 this Court pointed out in Pickering, he is to be treated
20 as a member of the general public, and in that situation,
21 obviously the Court is required to take a very close look
22 at the justifications that the Government has offered in
23 support of the statute.

24 QUESTION: This is a class action, is it not?

25 MR. O'DUDEN: Yes, it is, Justice O'Connor.

1 QUESTION: And the class includes people in
2 various categories, including those who are trying to
3 trade on their job and who want to talk about something
4 that directly relates to their job and so forth. I mean,
5 the class includes everybody, as I understand it.

6 MR. O'DUDEN: The class does include everybody,
7 but the way the class was defined, it was defined in a way
8 to make clear that what people want to be able to do is to
9 engage in speech activities in the same way that they did
10 before the honoraria statute was imposed.

11 QUESTION: Do you have a certification that
12 describes the class?

13 MR. O'DUDEN: Yes, we do, Your Honor, and by
14 reference it refers to laws that were in place before the
15 honoraria statute was passed and, of course, as the court
16 of appeals opinion points out, before the statute was in
17 place, there was a nexus -- there was a nexus test
18 pursuant to Government-wide regulation that could not be
19 violated if an employee wanted to write or to speak for
20 pay.

21 And that is to say, an employee couldn't receive
22 payment if the invitation were extended because of his
23 Government status, or if the payor had an interest that
24 might be affected by the employee's performance of his
25 job.

1 QUESTION: How was it determined whether or not
2 the invitation was extended because of the Government
3 status?

4 MR. O'DUDEN: That was done on a case-by-case
5 basis.

6 QUESTION: Who did it?

7 MR. O'DUDEN: Well, in many situations, and this
8 is typical, we think, of everybody at the IRS, for
9 example, and this point is made in our brief and it's also
10 illustrated in the Joint Appendix, people who work at many
11 Federal agencies, before they can engage in any outside
12 activity, they have to get approval, prior approval from
13 their agency, so what someone would do is to say, I'm
14 intending to write an article about music or dance, and
15 the ethics agency, the officer would review that and make
16 sure that there was no ethics problem, and then that
17 activity would be approved.

18 QUESTION: Did he determine the motivation of
19 the people that was involved -- were inviting the
20 employee?

21 MR. O'DUDEN: I don't know if the analysis went
22 that deep, but what he would do is to look at whether the
23 entity who proposed to make the payment had any matters
24 that were then pending before the agency that could be
25 directly affected by that employee's performance --

1 QUESTION: Was it this process that was
2 criticized in the commission reports?

3 MR. O'DUDEN: It was this process that was
4 criticized to some degree in the GAO report that I
5 mentioned earlier, and that is the report that, as I
6 mentioned, found two instances of impropriety out of 2,500
7 employees who had been approved to engage in outside
8 activities.

9 I think it's also important to point out that
10 the GAO report, after it made its study, its conclusion
11 was not that there be a broad ban with respect to all
12 outside activities. The recommendation that it made was
13 that enforcement be tightened up.

14 It made certain recommendations to the Office of
15 Government Ethics, and as the GAO report makes clear, the
16 Office of Government Ethics adopted all of those
17 recommendations.

18 QUESTION: How about the other commission
19 report, what did it recommend?

20 MR. O'DUDEN: The other commission report, I
21 think you're referring here to the Wilkey Commission
22 report and to the Quadrennial Commission report. Of
23 course, the overriding focus there was on --

24 QUESTION: I asked what they recommended with
25 respect to this particular thing we're talking about.

1 MR. O'DUDEN: The Wilkey Commission report
2 recommended a ban on honoraria with respect to all three
3 branches of Government, but I think that any analysis of
4 the Wilkey Commission report has to begin with the
5 definition that it had of honoraria.

6 If you look at that report, you'll see that
7 honoraria was defined to refer to compensation that was
8 received for the giving of speeches and, of course, the
9 Wilkey Commission report drew on the quadrennial
10 Commission report which emphasized that the focus was on
11 situations where people were giving talks for money before
12 special interest groups.

13 The Wilkey Commission report actually points out
14 that it did not intend, by the way, to bar compensation
15 where people were engaged in the writing of scholarly
16 articles, and so our point is that when you look at the
17 definition of the Wilkey Commission report of honoraria,
18 when you look at what it said about the writing of
19 articles, there's simply no foundation there on which the
20 Government can build a reasonable case that this law does
21 not go farther than reasonably necessary.

22 QUESTION: Did any of these reports deal with
23 the travel expense side of it at all?

24 MR. O'DUDEN: I believe that the Wilkey
25 Commission report did recommend an exclusion for travel

1 expenses, Your Honor. I believe it did.

2 QUESTION: But the legislation doesn't have
3 any --

4 MR. O'DUDEN: Well, the --

5 QUESTION: -- ceiling, or exclusion.

6 MR. O'DUDEN: Well, the legislation says that
7 you can be reimbursed for travel expenses for yourself and
8 for one relative and, of course, as a practical matter, I
9 think that that underscores once again that this is a very
10 odd law, at least with respect to career employees,
11 because I think in the real world, career employees are
12 not the beneficiaries of that kind of exclusion.

13 QUESTION: Well, Congress obviously just didn't
14 agree with these reports. I mean, do they have to agree
15 with every report that they ask to be done? Maybe the
16 reports were wrong.

17 I suppose that for purely factual material
18 contained in the report, they're worth something, but as
19 to their recommendations, they recommended one thing,
20 Congress, our elected representatives, decided that their
21 judgment was wrong.

22 MR. O'DUDEN: Well, of course, there's no
23 indication at all in the history or the legislative record
24 that Congress made any such considered judgment, and the
25 main import of our --

1 QUESTION: The statute says that. I mean --

2 MR. O'DUDEN: Of course it does, but I -- we
3 believe that it is very odd for the Government to be
4 relying on the Wilkey Commission report and the
5 Quadrennial Commission report where in fact those reports
6 do not provide a foundation on which the Government may
7 rely. It doesn't provide a rationale here for what the
8 Government says or for what Congress did, for that matter.

9 QUESTION: You're just negating their reliance
10 on the reports.

11 MR. O'DUDEN: Yes, Your Honor.

12 QUESTION: Mr. O'Duden --

13 MR. O'DUDEN: Yes --

14 QUESTION: -- do you think that the Government
15 could, consistent with the First Amendment, simply ban all
16 moonlighting?

17 MR. O'DUDEN: I think that that would present a
18 different question. I think it would be a much harder
19 case for us to bring.

20 It's arguable that there may be a due process
21 argument there to be made, depending on what the reasons
22 were for the moonlighting ban, but of course --

23 QUESTION: Well, you mentioned earlier that
24 there were 25,000 instances in which permission was
25 granted --

1 MR. O'DUDEN: 2,500 --

2 QUESTION: 2,500 --

3 MR. O'DUDEN: -- in the GAO report, sir.

4 QUESTION: Well, that would seem to be a larger
5 problem than the two in which honorariums were involved.

6 MR. O'DUDEN: I'm not sure that I understand
7 your question.

8 QUESTION: You mentioned that there were two,
9 only two instances in which there were problems with
10 honoraria.

11 MR. O'DUDEN: There were problems with respect
12 to speeches, Your Honor, that's right.

13 QUESTION: That's right, so there seem to be
14 more instances, and I know from my own limited experience
15 in the executive branch that there were more instances of
16 moonlight -- cab-driving, outside practice of law, those
17 sorts of things -- as opposed to speeches.

18 MR. O'DUDEN: That's right.

19 QUESTION: So it would seem to me that the
20 Government would have a stronger case for banning
21 moonlighting than it does for speeches at the civil
22 servant level.

23 MR. O'DUDEN: Arguably. I don't want to suggest
24 that the GAO report concluded that there was a
25 moonlighting problem in the Federal work force, but of

1 course, what we have here is not a statute that is a ban
2 on moonlighting, it is a law that singles out only speech
3 activities and I think, as this Court's precedent makes
4 quite clear, when a law singles out speech activities,
5 that, by definition, makes it suspect.

6 Unless there are further questions --

7 QUESTION: Would it have the -- would you have a
8 First Amendment problem with a total ban on moonlighting?

9 MR. O'DUDEN: I think that would be a difficult
10 argument to make, because the Court's decisions indicate
11 that laws of general applicability do not lend themselves,
12 at least not very readily, to a First Amendment challenge.

13 QUESTION: And you -- but it would have no less
14 of an effect on speech, on honorariums, than the current
15 law?

16 MR. O'DUDEN: The problem, again, is that a law
17 like that would not be singling out speech. I think that
18 the Court has --

19 QUESTION: But would there be a different effect
20 on speeches by Federal employees from this law. This law
21 simply says --

22 MR. O'DUDEN: If there were a flat-out
23 moonlighting ban?

24 QUESTION: This law simply says --

25 MR. O'DUDEN: No.

1 QUESTION: -- you can't get paid for speeches
2 and articles, right?

3 MR. O'DUDEN: That's right.

4 QUESTION: A total ban on moonlighting simply
5 says, with respect to this class of plaintiffs, that you
6 can't get paid for speeches and articles.

7 MR. O'DUDEN: Or anything else.

8 QUESTION: So is there a different impact?

9 MR. O'DUDEN: No, there is no different impact.

10 QUESTION: So the Government can solve its First
11 Amendment problem simply by banning all moonlighting.

12 MR. O'DUDEN: Perhaps.

13 I think that there is some suggestion, maybe,
14 from this Court's earlier precedent, the Murdock case,
15 that you might be able to make a First Amendment
16 challenge, but again, this Court has treated in a special
17 way statutes that single out speech activities.

18 We've seen it do so in cases like Minneapolis
19 Star and, of course, the Arkansas Writers Project, so it
20 is no defense for the Government to say that it could pass
21 a moonlighting statute, because that is not what it has
22 done here.

23 Thank you very much for your time.

24 QUESTION: Very well, Mr. O'Duden.

25 Mr. Bender, you have 1 minute remaining.

1 REBUTTAL ARGUMENT OF PAUL BENDER

2 ON BEHALF OF THE PETITIONERS

3 MR. BENDER: With regard to the commission
4 reports, on page 8 of our reply brief, we quote a
5 paragraph from both of the commission reports, which says
6 that honoraria should be defined so as to close present
7 and potential loopholes. They mentioned more loopholes
8 there than Congress decided to close, but I think the
9 spirit of those reports was the prophylactic spirit that
10 the statute has.

11 With regard to the standard --

12 QUESTION: Were those reports addressed just to
13 executive branch --

14 MR. BENDER: No. Those were addressed to all
15 three branches.

16 QUESTION: Well, aren't there quite different
17 problems with respect to the legislative branch, and
18 perhaps the judicial branch, than there is with respect to
19 the executive branch --

20 MR. BENDER: I think if you --

21 QUESTION: -- simply in the level of the
22 officials involved, for --

23 MR. BENDER: Well, but there are people who work
24 in the legislative branch who are at the lowest levels and
25 people who work in the judicial branch, there are

1 secretaries and file clerks who work there, and there are
2 people who work in the executive branch at the highest
3 levels where I think the problems are the same, so I don't
4 think there's a major difference there.

5 Thank you.

6 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bender.
7 The case is submitted.

8 (Whereupon, at 11:04 a.m., the case in the
9 above-entitled matter was submitted.)
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CERTIFICATION

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UNITED STATES, ET AL., Petitioners v. NATIONAL TREASURY EMPLOYEES UNION, ET AL.

CASE NO.: 93-1170

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Ann Marie Federico*

(REPORTER)