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Muzzling and Caging Administrative Law Judges: The Social Security Administration Attempts to Control its Most “Notorious” Employees

By Allen E. Shoenberger*

The Social Security Administration (SSA) has published proposed rules¹ that will seriously impact the ability of federal administrative law judges (ALJs) to speak, write, or become associated with various groups without prior approval from the agency upon thirty days notice.² Several aspects of the proposed rules are quite disturbing both from the perspective of United States constitutional law and from the perspective of public policy. Among other problems, the proposed rules impose prior restraints on the ability of ALJs to speak, write, and associate with other Americans, despite the profound commitment in First Amendment jurisprudence against such prior restraints. Moreover, these prior restraints are imposed without a serious attempt to justify the need for such limitations.

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1. Supplemental Standards of Ethical Conduct for Employees of the Social Security Administration, 70 Fed. Reg. 7192 (proposed Feb. 11, 2005) (to be codified at 5 C.F.R. § 9101.102).

2. The proposed rules are not limited in application to ALJs but indeed, apply to all SSA personnel. However, this article concentrates its analysis on ALJs for two main reasons: First, the proposed rules apply in a more automatic way to ALJs; and second, as a practical matter, the major controversies involving SSA over the last several decades have largely involved the cadre of ALJs, not other SSA employees, so the rules are more likely to be actively applied to ALJs than other SSA employees.

Putting aside aspects of the rules that appear to portray administrative law judges as a kin to Bonnie and Clyde,³ ALJs are a valuable resource for our society because of their training, experience, and perspectives. To muzzle them, as these proposed rules do, does a great disservice to American citizens. It is particularly disturbing to realize that many ALJs have backgrounds of service in the U.S. armed forces.⁴ They were willing to die for their country, but now they are not being trusted to speak to their country.

Unfortunately, this appears to portend yet another round in the continued battles between the high level administrators of the SSA and ALJs that decide social security disability cases.⁵ There is a significant history of such conflict going back decades. In the 1980's the SSA implemented a "Bellmon review program" which initially targeted for case review SSA ALJs with high grant rates in disability cases.⁶ That program produced "a significant furor in Congress, the courts, the states and the disability bar."⁷ In hindsight it is pretty

3. 70 Fed. Reg. at 7193 ("Due to their heightened notoriety by the public as compared to other SSA employees . . ."). Why such loaded language was chosen by the SSA is unclear.

4. Because of the veteran's preference accorded to applicants for ALJ positions, virtually the entire corps of SSA ALJs are veterans, mostly male veterans. Discrimination against women has become an issue in this context. See Elaine Golin, Note, *Solving the Problem of Gender and Racial Bias in Administrative Adjudication*, 95 Colum. L. Rev. 1532 (1995); Special Committee on Gender, *The Litigation Process in This Circuit*, 84 Geo. L.J. 1702, 1770-71 nn. 179-82 (1996) (men were 93.1% of the administrative law judges in the District of Columbia while 21% of the bar of the federal district court were female at the same time).

5. In the 1980s the Bellmon review program implemented a statutory requirement to "implement a program of reviewing, on the [Secretary's] own motion," ALJ decisions in the disability insurance program. Social Security Disability Amendments of 1980, Pub. L. No. 96-265, § 304(g), 94 Stat. 441, 456 (1980).

6. As initially implemented, ALJs with high allowance rates were targeted for review with half of their decisions reviewed on their own motion by the Office of Hearings and Appeals, and over seven percent of their decisions by the Appeals Council. ERNEST GELLHORN ET AL., *CASES AND COMMENTS ON ADMINISTRATIVE LAW* 389 (10th ed. 2002).

7. For a review of the political history of disability in the 1980 – 1985 period, see Jerry L. Mashaw, *Disability Insurance in an era of Retrenchment: the Politics of Implementing Rights*, in *SOCIAL SECURITY: BEYOND THE RHETORIC OF CRISIS*,

clear that the SSA overreacted with the Bellmon review program and was forced to back off.⁸ Eventually review was made random without targeting any particular group of ALJs and the controversy subsided somewhat.

Serious conflict then arose between SSA and ALJs over another SSA policy, that of “non-acquiescence.” SSA instructed ALJs to disregard applicable decisions of the United States Courts of Appeals when those decisions conflicted with the Secretary’s policies.⁹ In other words, ALJs were instructed to ignore controlling law. The SSA’s activities in adopting its non-acquiescence rule were described as “explosive.”¹⁰ ALJs reacted with outrage to orders which were understood to “ignore” the law. Potential explanations for such multiple, public, heated controversies about SSA actions include the massiveness of the regulatory program, the problems of processing thousands of cases, the vulnerability of the claimant groups and the political visibility of the issues.¹¹

Since the brouhahas of the 1980s and 1990s, none of these latter factors have changed. The Social Security Disability determination system remains one of the largest adjudicatory systems in the world.¹² Even appeals from initial ALJ decisions to the Appeals Council remain enormous.¹³ By contrast, federal district courts

(Theodore R. Marmor & Jerry L. Mashaw, eds., (1988); *see also* Jerry L. MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 499 (5th Ed. 2003)).

8. *See Nash v. Bowen*, 869 F.2d 675 (2d. Cir. 1989) (litigation generally challenging the Social Security Administration’s efforts to improve “the quality and efficiency of the work of Administrative Law Judges”). The court in *Nash* noted that policies designed to encourage a reasonable degree of uniformity are to be encouraged so long as they do not directly interfere with “live” decisions except insofar as the usual administrative review is performed by the Appeals Council. *Id.*

9. *See Steiberger v. Heckler*, 615 F. Supp. 1315 (S.D.N.Y. 1985), *vacated and remanded*, 801 F.2d 29 (2d. Cir. 1986).

10. GELLHORN ET AL., *supra* note 6, at 931.

11. *Id.*

12. In 2003, SSA ALJs disposed of 602,009 cases (virtually all after a hearing or trial before the ALJ), but had 586,895 pending cases at the end of the year. SSA, *Annual Statistical Supplement*, SSA (2003), *available at* <http://www.ssa.gov/policy/docs/statcomps/supplement/2003/>. Normally these involve an actual trial hearing, although most hearings are an hour or less.

13. *Id.* The Appeals Council disposed of 99,045 cases, with 59,781 pending at the end of the year. The words “Appeals Council” are slightly misleading. In fact,

(Article III courts) tried only about two percent as many cases in Fiscal Year 2003 and in total dispositions terminated about half as many cases that year as did SSA ALJs.¹⁴ Disability claimants remain just as vulnerable; the system remains just as complex.

In attempting to administer so vast an adjudicatory system as the Social Security Disability Determination System, it is not surprising that various tensions emerge between the cadre of ALJs and the upper SSA. Judges want to function as judges, deciding individual cases correctly and obeying controlling law. High level administrators are concerned with cost, management of an enormous bureaucracy, and case through-put. However, these factors alone fail to explain the acrimony that has arisen between the ALJ corps and high level SSA administration over the years. Only one other cadre of federal employees has had similar difficulties: federal air traffic controllers.

Nor should it be surprising that SSA attempts to avoid potential embarrassments from its employees. Other federal agencies have tried to control their employees' speech by cumbersome prior approval mechanisms. For example, the Federal Environmental Protection Agency (EPA) attempted to distinguish between an employee receiving travel expenses from private entities for unofficial speeches or writing engagements concerning the subject matter of the employee's work. If the agency pre-approved the speech or writing, the employee was permitted to accept reimbursement.¹⁵ If the agency did not, the employee was not permitted to receive expense money.¹⁶ The United States Court of Appeals for the D.C. Circuit (en banc) held these regulations invalid as conflicting with the First Amendment rights of the employees.¹⁷ The EPA was concerned with perceptions of private gain from such

in virtually all cases decided by the Appeals Council, only one ALJ at the Appeals Council level looks at a particular case. In some instances a second ALJ at the Appeals Council level will examine a case, but the notion of an en banc or collective panel, as suggested by the title, is simply wrong.

14. Federal district courts held 12,948 civil and criminal trials in FY 2003. Total dispositions in FY 2003 were 318,643. News Release, Administrative Office of the U.S. Courts, March 16, 2004.

15. *Sanjour v. EPA*, 56 F.3d 85 (D.C. Cir. 1995) (en banc).

16. *See id.*

17. *Id.* at 99.

use of public office.¹⁸ The en banc court stated: “We doubt that a bus ticket to Baltimore and a box lunch en route could possibly be construed as using public office for private ‘gain,’ yet they would be equally as offensive to the challenged regulations as a lobster and a Lear jet to Lake Tahoe.”¹⁹

More important than the details of the proposed rules are the general principles of law that might be applicable to curtailing or limiting the activities of ALJs.²⁰ The Social Security ALJs are among the persons most knowledgeable about the practical operation of the massive, complex social security disability scheme. Even if these particular proposed rules were to be retracted, the principles discussed herein would be just as applicable to any subsequent rule proposals.²¹

I. THE PROPOSED RULES: THE CONTENTS

The proposed rules are rules intended to supplement the Office of Government Ethics (OGE) Standards of Ethical Conduct for Employees of the Executive Branch (effective February 3, 1993).²²

The OGE standards already prohibit outside employment of an executive branch employee in an activity related to the employee’s governmental duties as well as compensation for teaching, speaking, or writing on matters relating to official duty.²³ The OGE standards

18. *See id.*

19. *Id.* at 97-98.

20. And other governmental employees as well.

21. For example, it would appear that any rule limiting speech of ALJs concerning their employment activities would likely touch off the highest scrutiny requirements implicated by First Amendment jurisprudence, strict scrutiny, requiring the government to demonstrate both a compelling state interest for regulation and that the regulations adopted were narrowly tailored to achieve the governmental interest. *See Republican Party of Minn. v. White*, 536 U.S. 765, 774-75 (2002) (prohibitions on campaign speech by judicial candidates violate the First Amendment).

22. The OGE rules as promulgated required an agency to adopt new rules regarding any prior approval requirements, revoking any existing agency rules a year after the effective date of the OGE rules. 57 Fed. Reg. 35,006 (Aug. 7, 1992).

23. 5 C.F.R. § 2635.807(a) (2001). Expenses in connection with such activity may be reimbursed. § 2635.807(a)(2)(iii)(D). Criminal liability also attaches to a federal government employee who receives any reimbursement from any source

limit compensation for outside speeches or writing for related activity to reimbursement of expenses; for example, expenses to attend a conference at which the employee may be speaking in an unofficial capacity.

The OGE rules do permit prior approval of certain activities if an agency has promulgated such rules.²⁴ SSA failed to adopt or propose such rules until now, although another agency, the Department of the Interior, has done so.²⁵ Instead, it appears that the SSA and its ALJs informally continue to apply the provisions of an ethics handbook issued in 1989 which do refer to prior approval in certain situations.²⁶ One can certainly argue that the passage of more than a decade with no examples of improper activity by ALJs suggests that these proposed rules are superfluous and unnecessary.

The SSA proposed rules apply to a far broader set of activities than those covered by OGE rules. Outside employment is covered whether or not there is compensation and whether or not any relatedness to government employment exists.²⁷ Speeches, writings, editing, and assuming membership on boards or groups, such as a planning commission, are also covered.²⁸ Federal ALJs would be automatically subjected to these proposed rules since the rules apply to any provision of consultative or professional services, even if

other than authorized governments for performing their governmental services. 18 U.S.C. § 209 (2000).

24. 5 C.F.R. § 2635.803 (2005). Such supplemental regulations must be issued subsequent to February 3, 1993. *Id.*

25. The Department of Interior requires prior approval for outside employment. 5 C.F.R. § 3501.105(b) (2005). "Approval *shall* be granted unless a determination is made that the outside employment is expected to involve conduct is prohibited by statute or Federal regulation." § 3501.105 (b)(3) (emphasis added).

26. Teaching, lecturing, writing, and editing is encouraged, but advance approval is required if the institution does business with an ALJ's office. 5 C.F.R. § 3501.105(b). If the writing or editing activity relates to the ALJ's office, prior approval is required and certain disclaimers are also required. An Ethics Handbook for Employees of the Department of Health and Human Services 30 (June 1989). Such prior requirements were grandfathered in by the 1992 Regulations for one year. 57 Fed. Reg. at 35,062.

27. Supplemental Standards of Ethical Conduct for Employees of the Social Security Administration, 70 Fed. Reg. 7192 (proposed Feb. 11, 2005) (to be codified at 5 C.F.R. § 9101.102).

28. *See id.*

provided to certain enumerated nonprofit groups.²⁹ All attorney ALJs are obviously professionals trained in the law.

Prior approval is required for any activity, whether paid or not, whether related to government employment or not.³⁰ A submission must be made to the ALJ's superior who has broad discretion to approve or disapprove the request with neither a requirement that reasons for denial be cited nor any requirement that the superior act in a timely or expeditious manner.³¹ No requirement for judicial review is built into the prior approval system.³²

The reasons stated for the proposed rules are quite general,³³ and, with respect to ALJs, most rules specifically refer only to attempts to preserve the appearance of impartiality and fairness.³⁴

29. *See id.* (to be codified at 5 C.F.R. § 9101.102(d)). No enumeration of permitted nonprofits is contained in the proposed rule. *See id.*

30. *See id.*

31. *See id.*

32. *See id.* The most specific part of the prior approval system is the detailed nature of the list of items to be contained in a request and the requirement that approval be sought thirty days or more prior to the speech, writing, editing, or joining. *Id.*

33. The listed reasons include the following:

1. Fear that participation in outside employment or other outside activities would adversely affect operations within the employing component; or
2. Place the employee at risk of violating applicable statutes and regulations governing employee conduct.
3. The prior approval requirement is deemed necessary to preclude the appearance that outside employment or other outside activity may have been obtained through the use of the employee's official position;
4. And to address a number of other potential ethical concerns.
5. The SSA annually provides millions of dollars of funding in SSA grants, contracts, etc., and the SSA has determined prior approval before participating in such activity is critical to protecting against questions regarding impartiality or objectivity of employees and the administration of SSA programs.

Id. In sum, SSA is concerned with the use of SSA public position or connections to inure to private gain.

34. *See id.*

II. THE PROPOSED RULES: THE OMITTED

Not one reference in the proposed rules specifically indicates that the current rules already prohibit employment for gain. Nor do the proposed rules reference or exempt communications approved by 5 U.S.C. § 2302(b)(8), including disclosure of information the employee reasonably believes evidences a violation of the law or rules, gross mismanagement, gross waste of funds, abuse of authority, or a substantial danger to the public health or safety.³⁵ No reference is even made to disclosures to Congress.³⁶ No specific references are made to examples of past improper actions by ALJs.³⁷

No suggestion is made that SSA ALJs have anything to do with grant making or other similar activity involving SSA dispensing funds for research, contract, or other such purposes.³⁸

III. THE PROPOSED RULES: POLICY QUESTIONS

Among other important public policy questions posed by the rules, are the following: Should ALJs be required, on penalty of possible disciplinary action, to refrain from speaking in public about the 911 attack on the following days and weeks? Should they be prohibited from speaking out on the killings of Federal District Judge Joan Lefkow's husband and mother for a minimum of thirty days after the shootings? Should they be prohibited from testifying to Congress or a congressional committee absent prior clearance with thirty days notice? Must a whistleblower ALJ receive prior approval before disclosing corruption, ineptitude, or the ordinary bureaucratic foul-ups of the SSA? Questions such as these are serious matters not addressed by the proposed rules.

35. "[I]f such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interests of national defense or the conduct of foreign affairs." 5 U.S.C. § 2302(b)(8) (2000).

36. *See id.* § 2302(b). "This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress." *Id.*

37. *See id.*

38. *See id.*

The proposed rules apply broadly to all employees of SSA, including persons appointed and serving as ALJs within SSA.³⁹ Such employees are prohibited from “engaging in consultative, or professional services, for compensation”⁴⁰ Prior written approval from SSA is required for all such consultative or professional service activity whether or not engaged in for compensation.⁴¹ Prohibited outside employment or activities are specifically defined to include engaging in consultative or professional services, for compensation, and to prepare or assist in the preparation of any grant applications, contract proposals, programs reports, or other documents that are intended for submission to SSA.⁴²

Such prohibitions might be unobjectionable if it were completely possible to understand the concept of “employment which doesn’t involve compensation.” Since executive branch-wide standards already prohibit “conflicting outside employment” under 5 C.F.R. § 2635.802(a), it is unclear why additional rules are being proposed unless the agency intends to seriously implement the “prior approval” aspects of the proposed rules.⁴³ Certainly, ALJs already risk serious sanctions if they engage in any type of outside employment for pay related to their SSA work.⁴⁴

39. 70 Fed. Reg. 7192 (proposed Feb. 11, 2005) (to be codified at 5 C.F.R. § 9101.102).

40. *Id.* (to be codified at 5 C.F.R. § 9101.102(c)). However, activity such as writing and speaking, even if engaged in on an uncompensated basis, while not expressly prohibited, would still be subjected to prior approval requirements discussed below. *Id.* (to be codified at 5 C.F.R. § 9101.102(d)). The proposed rule defines employment quite broadly as the provision of personal services whether or not for compensation (including self-employment). *Id.* Later on, the same proposed rule extends its provisions to SSA employees “[p]roviding services to a non-Federal entity.” *Id.* (to be codified at 5 C.F.R. § 9101.102(d)(iii)). In effect, membership is also restricted whenever an ALJs professional advice might be useful, regardless of whether conflicts of interest with SSA related activity might be involved. *Id.*

41. *Id.* (to be codified at 5 C.F.R. § 9101.102(d)).

42. *Id.* (to be codified at 5 C.F.R. 9101.102(c)) (even if undertaken without compensation, such work must still be approved in writing prior to such activity).

43. *See id.*

44. *See id.*

However, the proposed rules go much further and require prior approval not only for “employment and consultative activity,” but also for:

[E]ngaging in teaching, speaking, writing, or editing . . . [or] providing services to a non-Federal entity as an officer, director, or board member, or as a member of a group such as a planning commission advisory council, editorial board, scientific or technical advisory board, or panel, which require the provision of advice, counsel, or consultation⁴⁵

Such prior approval must be secured by providing at least thirty days ahead of time a set of information to the employee’s immediate supervisor.⁴⁶ However, the proposed rules do not mention a time frame within which the immediate supervisor, or any other SSA employee, must make a decision regarding the grant of written permission.⁴⁷ The “standard for permission” involves a

45. *Id.* That is “unless the service is provided without compensation to a non-profit charitable, religious, professional, social, fraternal, educational, recreational, public service or civic organization” and does not involve the provision of professional or consultative services. *Id.*

46. The required information includes the following: A) the “employee’s name, organizational component, position, title, grade and salary;” B) the “nature of the proposed outside employment or other outside activity, including a full description of the specific duties or services to be performed;” C) a “description of the employee’s official duties that relate in any way to the proposed activity;” D) the “name and address of the person or organization for whom or with which the work or activity will be done, including the location where the services will be performed;” E) the “estimated total time that will be devoted to the activity,” including a “statement of the estimate of number of hours per year and a statement of the anticipated beginning and ending date;” F) a “statement as to whether the work can be performed entirely outside of the employee’s regular duty hours;” G) the “method or basis of compensation” if any; H) a “statement as to whether the compensation is derived from” any SSA source; I) for activities involving the provision of professional or consultative services a statement as to whether to person or entity receiving the services is receiving or intends to *seek* SSA or federal government benefits, contracts, grants, etc, for “activities involving the provision of professional and consultative services;” and J) a disclaimer of the absence of SSA endorsement or support for the speech, writing, etc., for proposed writing, speaking, and editing unless a form disclaimer is included. *Id.*

47. *See id.*

determination that the outside employment or activity is not expected to involve conduct prohibited by statute or regulation including both the instant rules as well as 5 C.F.R. § 2635 (which involves general standards of ethical conduct applicable to most employees of the executive branch).⁴⁸

The proposed rules thus have at their core a requirement of a specific written request, provided thirty days in advance, to an SSA's immediate superior.⁴⁹ That superior is apparently designated with the power and duty to decide on some unstated time frame whether to grant permission or not.⁵⁰ No provision is made for appeals within the agency against a negative decision, nor are there any provisions for judicial review.⁵¹ So far as the proposed rule is concerned, the immediate superior is vested with virtually unconstrained power to censor, on a time frame of their own whim, with no regard for considerations of consistency.⁵²

IV. CONSTITUTIONAL IMPLICATIONS

Against this confused scheme of regulation of outside employment activity (where payment is deemed irrelevant by the definition sections) and other speaking, writing or membership activity, what principles apply to protect ALJs, who are qualified professionals trained in the law?

The answer is deceptively simple: All First Amendment protections regarding speech, the press, and association apply.

Speech by public employees is constitutionally protected. No administrative agency can completely prohibit it. A complex balancing test has been applied by the Supreme Court to determine

48. *Id.* (to be codified at 5 C.F.R. § 9101.102(d)(4)). The proposed rules do provide for the possibility of the issuance of instructions or manuals that would specify the procedures governing submission and containing examples of permitted and non-permitted activities. *Id.* (to be codified at 5 C.F.R. § 9101.102(d)(5)). The proposed rule references the possibility of an agency designating an agency ethics official or designee. *Id.*

49. *Id.* (to be codified at 5 C.F.R. § 9101.102(d)).

50. *Id.*

51. *See id.*

52. *Id.*

whether public employees could be regulated.⁵³ Even in the context of paid speech, blanket bans on such speech are scrutinized carefully, and the government is obliged to justify restrictions with particularized, and adequate reasons.

Limits upon governmental employee membership with civic, political, and other associations also implicate First Amendment concerns

V. LIMITS ON BANNING GOVERNMENT EMPLOYEE SPEECH

In *Pickering v. Board of Education*, the United States Supreme Court limited the ability of public school boards to dismiss a teacher for public speech criticizing the school system.⁵⁴ The majority opinion rejected the idea that teachers forfeited their First Amendment rights when they became public school teachers.⁵⁵ As the Court stated, “[T]he threat of dismissal from public employment is nonetheless a potent means of inhibiting speech.”⁵⁶ Nor do federal ALJs forfeit their First Amendment rights when they become ALJs.

While *Connick v. Meyers* recognized the possibility that an employee can engage in unprotected speech activity if the speech is unrelated to matters involving political, social or other concerns of the community, *Connick* still limited the ability of any branch of government to muzzle governmental employees.⁵⁷ The Court in *Connick* grounded its decision on the “long standing recognition that the First Amendment’s primary aim is the full protection of speech

53. The balancing test consists of two parts: First, courts must determine whether the employee’s speech can be fairly characterized as constituting speech on a matter of public concern; and second, the employee’s right to free speech must be balanced against the interests of the state. *Connick v. Meyers*, 461 U.S. 138, 146, 150 (1983). The particularized balance test is described by the Court as difficult and one in which the Supreme Court is compelled to make an independent constitutional judgment on the facts. *See id.* at 150 n.10.

54. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

55. *Id.*

56. *Id.* at 574. “[A]bsent proof of false statements, knowingly or recklessly made by him, a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for dismissal from public employment.” *Id.*

57. *Connick*, 461 U.S. at 147.

upon issues of public concern, as well as the practical realities involved in the administration of a government office.”⁵⁸

Pickering and its progeny require the application of a rather complex balancing test. It would be quite surprising were the ordinary “superior” employee in the SSA to have any background or skill in the application of such balancing tests. The Court’s statement in *Pickering* and repeated in *Connick*, that it was neither feasible nor appropriate to lay down a general standard against which all such statements should be judged,⁵⁹ constitutes a broad caution against the SSA initiative reflected in the proposed rules.

Serious attention must be paid to the value of speech in the context of our deep respect for free speech. For example, in *Rankin v. McPherson*, the Supreme Court held it improper to dismiss a public employee just because the employee stated, after an attempted assassination of President Reagan, “If they go for him again, I hope they get him.”⁶⁰ Respect for free speech means respect for speech we detest.

VI. THE BALANCING TEST APPLIES EVEN TO REGULATION OF PAID SPEECH BY GOVERNMENTAL EMPLOYEES

Broad bans upon paid speech for public employees are suspect.⁶¹ In *United States v. National Treasury Employees Union* (“*NTEU*”), the Court noted that federal employees while so employed by the federal government wrote literary masterpieces, including writers such as Nathaniel Hawthorne, Herman Melville, Walt Whitman, and Bret Harte.⁶²

In *NTEU* the Court invalidated executive branch bans on the receipt of particular honorariums under the rules and regulations issued by the Office of Government Ethics pursuant to 5 C.F.R. §§ 2306.201 et seq. While the Court normally accords a stronger presumption of validity to congressional judgments than to an individual disciplinary action, the widespread impact of the honoraria ban, “gives rise to far more serious concerns than could any single

58. *Id.* at 154.

59. *Id.* (citing *Pickering*, 391 U.S. at 569).

60. *Rankin v. McPherson*, 483 U.S. 378, 380 (1987).

61. *United States v. Nat’l Treasury Employees Union*, 513 U.S. 454 (1995)

62. *Id.* at 464-65.

supervisory decision.”⁶³ The Court then examined in detail the justifications for placing the honorarium ban on nearly 1.7 million executive branch employees⁶⁴ in the absence of any evidence of misconduct related to honoraria in the vast rank and file of federal employees below GS-16.⁶⁵ While the honorarium ban at issue in *NTEU* concerned speech unrelated to government employment, in partial distinction to the proposed rules banning outside employment related to matters such as grant submission to SSA,⁶⁶ the complexity of the balancing test as applied by the Supreme Court is daunting. In *NTEU* the Court considered the limited evidence of alleged or actual impropriety by legislators and high-level executives,⁶⁷ including abuses by members of Congress,⁶⁸ as compared to the scant harm were an employee of the Mint to lecture on the Quaker religion or write dance reviews.⁶⁹ The Court was particularly concerned that

63. *Id.* at 468.

64. *Id.* at 474.

65. *Id.* at 472. Today federal ALJs are no longer compensated on the GS scale. *See* Pub. L. No. 101-509, § 104(a), 104 Stat. 1389, 1445-46 (1990) (codified as amended at 5 U.S.C. § 5372 (2000)) (establishing separate pay schedule for administrative law judges). Although when the scale did apply to ALJs, some were classified at the GS-15 level and others at the GS-16 level. *See* 56 Fed. Reg. 6208, 6210 (Feb. 14, 1991) (listing different GS grades of administrative law judges including GS-15 and GS-16 grades). The reason reference is made in *NTEU* to the GS-16 level is that Congress had earlier traded off a ban on receiving compensation for outside activity related to government service in return for increasing compensation to GS-16 and above government employees. *See NTEU*, 513 U.S. at 458-59.

66. 70 Fed. Reg. 7192, 7192-93 (proposed Feb. 11, 2005) (to be codified at 5 C.F.R. § 9101.102). The definition section of the proposed rule, § 102(c), defines prohibited Outside Employment and Other Activity as:

[E]ngaging in consultative or professional services, for compensation, to prepare, or assist in the preparation of, any grant applications, contract proposals, program reports, or other documents that are intended for submission to SSA. Note that such conduct, if undertaken on any uncompensated basis, thought not expressly prohibited by proposed paragraph (c) would be subject to the prior approval requirement in proposed paragraph (d).

67. *NTEU*, 513 U.S. at 472.

68. *Id.*

69. *Id.* at 473.

expressive activity was singled out for special regulation,⁷⁰ and emphasized that it was the government's burden to demonstrate that the "harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."⁷¹

In contrast, the justifications for the proposed rules cite no particular instances of actual harm. The stated justification for the proposed rules are that the SSA annually provides millions of dollars of funding through grants, contracts, cooperative research and development agreements and other funding relationships.⁷² No specific relationship is required between any particular SSA employee, including ALJs, and the provision of such funds, before the ban on "employment" applies.⁷³ Pre-clearance of speaking engagements and writing and editing uniformly applies.⁷⁴

SSA further states that it is concerned that reasonable persons might be concerned that SSA employees having employment relationships (without mentioning speaking and writing) might compromise their impartiality and objectivity.⁷⁵ No attempt is made to connect the responsibilities of SSA ALJs who decide social security disability cases to any speech related activity or indeed any employment-related activity whatsoever. While SSA asserts that ALJs are the most visible SSA employees to the public, the reality is that citizens are five times more likely to have contact with other SSA employees than they are to have contact with ALJs.⁷⁶

70. *Id.* at 475.

71. *Id.* (citing *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994)).

72. 70 Fed. Reg. 7192, 7193 (proposed Feb. 11, 2005) (to be codified at 5 C.F.R. § 9101.102).

73. *Id.*

74. *Id.*

75. *Id.* at 7192.

76. Comments of the Association of Administrative Law Judges International Federation of Professional and Technical Engineers, AFL-CIO (Judicial Council 1) Regarding Notice of Proposed Rulemaking Supplemental Standards of Ethical Conduct for Employees of the social Security Administration 13 n.15 (filed Mar. 14, 2005) (hereinafter Comments), *available at* <http://policy.ssa.gov/erm/rules.nsf/> (follow "Search" hyperlink). Four million claims are filed each year in social security district offices, while ALJs decide about 700,000 cases a year. "Assuming an equal number of District Office visits to request information as claims filed, the

Would an ALJ be at risk were she to encourage a storefront church to apply for faith-based initiative funds (were they available) from SSA for a project to enhance public awareness of the social security programs? Would a speech related to the same topic without pre-clearance pose problems with objectivity and/or impartiality?

Were ALJs involved in the provision of grant monies and/or contracts from SSA, a conflict issue might arise that justified additional regulation. The proposed rules, however, make no case for such needed regulations. Indeed, existent rules contained in 5 C.F.R. pt. 2635 already incorporate a ban for activities such as teaching, speaking, and writing where the employee will receive compensation if such activity “relates to the employee’s official duties.”⁷⁷ Thus the ALJs use of his or her public office for private gain already has been banned.

The proposed rules, nevertheless, subject all employment (regardless of compensation) and outside activities, to prior approval requirements. Such pre-clearance requirements would apparently cover most of the activities used as examples of permitted activity in 5 C.F.R. § 2635.807(a) to illustrate that rule’s impact on outside activities.⁷⁸ For example, an ALJ speaking on the law of stamp collecting now would be covered, as would an ALJ who wrote an article about making clear presentations in social security hearings or drafted a guide to navigating the complexities of the social security application process. Receipt of payment for the last two of these activities already would be prohibited by 5 C.F.R. § 2635.807(a), but payment for the speech would not be prohibited. The proposed rule would uniformly require pre-clearance for each activity, regardless of compensation.

Covered activity includes the provision of professional or consultative services, including service as an expert witness.⁷⁹ No condition appears to be attached to such activity linking coverage to a

inescapable conclusion is that the ‘notorious’ face of SSA best known to the public is the District Office information clerk or claims manager.” *Id.*

77. 5 C.F.R. § 2635.807(a) (2005).

78. An explanatory note after the text of the section illustrates the application of the ban of section 2635.807(a)(2)(i)(E) gives nine examples. 5 C.F.R. § 2635.807.

79. 70 Fed. Reg. at 7195 (to be codified at 5 C.F.R. § 9101.102(d)).

relationship to an ALJ's official duties.⁸⁰ Pre-clearance would thus also be required for an ALJ asked to draft a will for a female soldier about to ship out to Iraq, since such activity would be professional. Covered activity also includes teaching, speaking, writing, or editing that relates to an ALJ's official duties within the meaning of 5 C.F.R. § 2635.807 (a)(2)(i)(B) through (E).⁸¹ Were an ALJ to discover and wish to speak about serious corruption and bribery in the social security district office, pre-clearance would apply. Indeed, pre-clearance would apply were the "corruption" to be that of the immediate superior of the ALJ (i.e. the person required to give pre-clearance authority under the proposed rule).

Such a case has already been heard by the United States Supreme Court (involving, however, neither the SSA, nor any ALJ). In *Arnett v. Kennedy*, the Court considered due process and free speech-related issues regarding an Office of Economic Opportunity employee who complained about bribery by his immediate supervisor.⁸² The supervisor then discharged the employee. The employee's appeal from such discharge was to the supervisor complained about who had just discharged him.⁸³

VII. PRIOR RESTRAINT WITHOUT PROCEDURAL SAFEGUARDS TO PROTECT SPEECH INTERESTS

United States constitutional law contains a strong prohibition against prior restraints upon speech or writings.⁸⁴ The Court in *Near v. Minnesota* held unconstitutional an injunction prohibiting publication of a scurrilous newspaper. In *New York Times v. United States*, an injunction against publishing the Pentagon Papers was similarly held improper despite purported interests in national security.⁸⁵ In *Nebraska Press Association v. Stuart*, the Court

80. *See id.*

81. *Id.*

82. *Arnett v. Kennedy*, 416 U.S. 134 (1974).

83. *Id.* at 197. Ultimately in a multiplicity of opinions with no majority opinion, the Court found no constitutional violations. *Id.* at 164.

84. *See Near v. Minnesota*, 283 U.S. 697 (1931); *N.Y. Times v. United States*, 403 U.S. 713 (Pentagon Papers case); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (fair trial issues).

85. *N.Y. Times*, 403 U.S. at 714.

severely curtailed the possibility of judicially imposed gag orders for criminal trials, rejecting a pre-trial ban on publishing confessions or statements or other matter “strongly implicative” of the accused, despite the state’s claim it was protecting the accused’s right to a fair trial.⁸⁶

However, the proposed rules mandate a thirty-day pre-clearance period for any speeches and writings by an ALJ of any sort, apparently without limitation to content or subject matter, and only in the context of the vaguest expressed governmental interests.⁸⁷

Facially, the proposed rules are unconstitutional as prior restraints, to say nothing about their serious problems with vagueness and susceptibility to arbitrary enforcement. No explicit justification is proffered based upon some need for initial notice to SSA of the content of speeches or writings.⁸⁸

VIII. PROCEDURAL GUARANTEES

Public-issue related speech “occupies the highest rung of hierarchy of First Amendment values and is entitled to special protection.”⁸⁹ The protections of appropriate procedures are central to applicable Supreme Court decisions.

For example, the Supreme Court has held that any censor must work in a system that makes available a rapid, certain, resort to judicial review.⁹⁰ Nowhere do the proposed rules provide for prompt, or, indeed, any judicial review, nor do the rules require that a

86. *Stuart*, 427 U.S. at 541, 542, 570.

87. Section 2635.807 conditions its application upon activity that relates to the official duty of the employee. 5 C.F.R. § 2635.807 (2005). In contrast, the proposed rule sweeps into its ambit any professional or consultative services. 70 Fed. Reg. 28 (proposed Feb. 11, 2005). It is also not limited to matter that relates to official duties within the meaning of 5 C.F.R. § 2635.807(a)(2)(i)(B)-(E), although such activities are also covered regardless of compensation. 70 Fed. Reg. 28 (proposed Feb. 11, 2005).

88. Compare with *Barnard v. Jackson County*, 43 F.3d 1218, 1222-25 (8th Cir. 1995) where a county legislative body had adopted an ordinance that an auditor should first notify it of audit results before releasing the audit results to third parties. *Id.* Violating this requirement was held not to infringe on the auditor’s first amendment rights. *Id.* at 1225.

89. *Id.* at 1225 (quoting *Connick v. Meyers*, 461 U.S. 138, 145 (1982)).

90. *Freedman v. Maryland*, 380 U.S. 51 (1965) (State Board of Censors required to seek prompt judicial review).

decision must be made within a day, a week, a month, or even a year. Thus, the proposed rules are comparable with those struck down in *Freedman v. Maryland*, which imposed no time limit for completion of action by the Board of Censors.⁹¹ As was the case in *Freedman*, there is no provision for judicial participation in the procedure.⁹² The argument in *Freedman* (that review by the Board of Censors, if made unduly onerous by reason of delay or otherwise, makes the Board's determination final) is just as applicable under the proposed rules.⁹³ In *Freedman*, the Court placed the burden of proving that a film was unprotected speech on the Board of Censors.⁹⁴ Advance submission requirements could not be administered in a manner that lends an effect of finality to the censor's determination.⁹⁵ Moreover, within a specified, brief time, the Board must either issue the license sought or petition a court for an order to restrain the film.⁹⁶ Any interim restraint imposed must be for the shortest time period compatible with prompt judicial review.⁹⁷ The procedures provided must assure prompt final judicial review to minimize the deterrent effect of an interim, and possibly erroneous, denial of a license.⁹⁸

The proposed rules contain nothing that in the slightest way comports with the *Freedman* requirements. In contrast to the *Freedman* Court, which displays considerable concern over potential chills of protected expression, the proposed rules simply ignore the issue.

91. *Id.* at 55.

92. *Id.*

93. *Freedman*, 380 U.S. at 58. The *Freedman* Court was particularly concerned with judicial review of the initial Board of Censors decision, in part because the business of the Board of Censor is to censor. This means that the censor may be particularly insensitive to First Amendment interests, especially as contrasted with the independent branch of the judiciary. *Id.* at 57-58. Under the proposed rules, it can be argued, the business of the SSA is to make their superiors content, and no particular concern with First Amendment considerations forms part of the SSA mandate.

94. *Id.* at 55.

95. *Id.*

96. *Id.* at 59.

97. *Id.*

98. *Id.*

IX. PRIOR RESTRAINTS REGARDING MEMBERSHIP

One of the most puzzling aspects of the rules is their extension to require thirty-day advance notice of membership in various groups.⁹⁹ SSA advances no specific or particularized justification for this part of the proposed rules.

In *Keyshian v. Board of Regents*, the Supreme Court invalidated provisions of invalidated provisions of New York's Feinberg Law that made Communist Party membership prima facie evidence of disqualification from the public school systems of New York.¹⁰⁰ Mere knowing membership, without specific intent to further the unlawful aims of the Communist Party, was held not to be a constitutionally inadequate basis for discharge of a schoolteacher.¹⁰¹ Further, such knowing membership alone cannot justify criminal penalties¹⁰² or disbarment.¹⁰³

The proposed rules require no specific mental state or intent whatsoever regarding group membership.¹⁰⁴ Prior approval is always required, even to lead a Cub Scout troop.¹⁰⁵

There is only the vaguest notion in the proposed rules as to what standards a superior must follow when adjudicating membership in groups or assisting organizations to which an ALJ might render

99. The requirement applies to:

[P]roviding services to a non-Federal entity as an officer, director, or board member, or as a member of a group such as . . . unless the service is provided, without compensation other than reimbursement of expenses, to a nonprofit charitable, religious, professional, social, fraternal, educational, recreational, public service or civic organization and does not involve the provision of professional or consultative services

70. Fed. Reg. 28 (proposed Feb. 11, 2005). Providing legal advice about the likelihood of a tort suit about playground equipment to a public park district apparently touches off the prior approval requirement.

100. *Keyshian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 606 (1967).

101. *Id.*

102. *Id.* (citing *Scales v. United States*, 367 U.S. 203 (1961); *Noto v. United States*, 367 U.S. 290 (1961); *Yates v. United States*, 354 U.S. 298 (1957)).

103. *Id.* at 606; *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232 (1957).

104. *See* 70 Fed. Reg. 7192 (proposed Feb. 11, 2005).

105. *Id.*

professional advice.¹⁰⁶ Once again, this presents serious prior restraint issues.

No American case appears to deal with the specific issue of a judge's ability to join a particular group. However, the European Court of Human Rights has ruled in just such a case. In *Maestri v. Italy*,¹⁰⁷ the court held that inflicting disciplinary measures on an Italian judge because of his membership in the Order of Masons violated his freedom of association rights under article 11 of the European Convention on Human Rights.¹⁰⁸ The court determined that during the period of membership it could not have been foreseeable to the judge that membership in a non-secret order of Freemasons could give rise to disciplinary action.¹⁰⁹ A law enacted in 1982 provided that membership in a secret society was a criminal offense and that disciplinary measures could be taken against civil servants and judges.¹¹⁰ The lodge judge Maestri belonged to was not secret; indeed, it made its membership list public, contrary to the practice of other Italian associations such as political parties and trade unions.¹¹¹

106. *Id.*

107. *Maestri v. Italy*, [2004] ECHR 39748/98 (17 February 2004).

108. Article 11 – Freedom of Assembly and Association:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, or the police or of the administration of the State.

Convention for the Protection of Human Rights and Fundamental Freedoms art. 11, Nov. 11, 1950, Europ. T.S. No. 5.

109. *Maestri*, [2004] ECHR 39748/98 at 37-42.

110. *Id.* at 20. The law can be traced back to a “notorious” P2 lodge which planned to take control of public authorities and subvert democratic institutions. *Id.* at 12. The P2 lodge had colluded with the Mafia and organized crime. *Id.* at 13.

111. According to Judge Maestri's submission to the court: “Moreover, Freemasonry was not a paramilitary organization and pursued purely cultural, humanitarian and philanthropic aims.” *Id.* at 28.

For a government to fear judicial participation in Mafia controlled organizations is unsurprising, just as New York State feared participation by school teachers in communist controlled organizations. However, the SSA has not even hinted at suspicion that ALJs have belonged to, belong to, or are thinking about joining Mafia front organizations or any similar group.

The pre-clearance procedure would apply, for example, to membership on the board of directors of a condominium association where the ALJ resides. Such boards must often concern themselves with legal issues, such as easements, trespass, or rights to tuckpoint common walls.¹¹² The European Court of Human Rights predicated its decision on lack of notice.¹¹³ Under the proposed rules, it would appear there would be notice since negative responses to requests for permission would presumably be communicated to the ALJ. That still leaves the possibility of both prior restraint and prior restraint in the context of vague and overbroad standards.

The United States Supreme Court has condemned the requirement of “official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights.”¹¹⁴

The proposed rule requires approval to be given “only upon a determination that the outside employment or activity is not expected to involve conduct prohibited by statute or Federal regulation, including 5 CFR part 2635 and this part.”¹¹⁵ It appears reasonable to construe the roving commission of the ALJs superior implicates the

112. While it may seem a stretch, in theory, every owner of a condominium is, by definition, a member of the condominium association. The literal text of the proposed rules would appear to require prior approval for an ALJ contemplating purchasing a condominium, and immediate requests for permission to continue living in a condominium where the ALJ and her family currently reside.

113. See *Maestri*, [2004] ECHR 39748/98 at 37.

114. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). The Court cited various First Amendment cases regarding such unpermitted broad discretionary prior restraints: *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (permit required for public demonstration); *Cox v. Louisiana*, 379 U.S. 536, 553-58 (1965) (parade permit ordinance invalidated on its face); *Kunz v. New York*, 340 U.S. 290 (1951) (permit from the police commissioner required prior to speaking on a public street); and *Lovell v. Griffin*, 303 U.S. 444 (1938) (prior written permission required to distribute literature).

115. Supplemental Standards of Ethical Conduct for Employees of the Social Security Administration, 70 Fed. Reg. 7192, 7195 (Feb. 11, 2005).

entire ambit of federal statutory law. The proposed rules impose no time limit on granting or denying approval; nor do the rules require the decision to be in writing or contain any reasons.¹¹⁶ Disapproval could be expressed orally and without stated reasons.¹¹⁷

No United States Supreme Court decision specifically addresses the application of prior restraint “membership” rules to either judges or to SSA ALJs. But the intense, careful review that the Court has applied in related areas does not suggest that these proposed rules are constitutional. Most importantly, the failure of the SSA to identify particular abuses related to membership activity of ALJs is a serious failure in the proposed rules under the traditional balancing test described above.¹¹⁸

X. THE APPLICABLE STANDARD OF REVIEW FOR SPEECH RESTRICTIONS ON JUDGES AND ALJs

The Supreme Court recently applied the strict scrutiny standard of review while reviewing restrictions on judicial candidate speeches. Strict scrutiny requires that the government identify a compelling state interest and adopt narrowly tailored regulations to achieve that purpose.¹¹⁹ In *Republican Party of Minnesota v. White*, the Court recognized that the subject matter of the regulation, political speech of persons campaigning for public office, was ““at the core of our First Amendment freedoms.””¹²⁰

Comments from ALJs on matters relating to their public employment would likely be accorded high protection as well, although the Court in *Pickering* specifically declined to lay down a general standard against which all governmental employee statements may be judged.¹²¹ It is likely, for example, that distinctions might be made. For example, speech criticizing

116. *Id.*

117. *Id.*

118. See *supra* note 53 and accompanying text.

119. *Republican Party of Minn. v. White*, 536 U.S. 765, 774-75 (2002).

120. *Id.* at 774 (citation omitted).

121. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 569 (1968), cited in *Connick v. Meyers*, 461 U.S. 138, 154 (1983). “[W]e do not deem it either appropriate or feasible . . . to lay down a general standard against which all such statements may be judged.” *Pickering*, 391 U.S. at 569.

superiors, the subject in *Pickering* and *Connick*, might receive somewhat lesser review, and speech relating to the SSA program itself might be accorded higher protection.

The proposed rules draw no distinctions between different subjects of the speech. No distinction, for example, is made between job-related speech in which the personal interests of the speaker are also involved, and job-related speech in which no personal interests of the speaker are involved. Indeed, the rules lump together speech that is employment-related and speech that is not employment-related.

The Court's decision in *NTEU* invalidating restrictions on honoraria paid to governmental employees for matters unrelated to governmental employment is authority that a higher burden is imposed on government than in either *Pickering* or *Connick* before non-employment-related speech, editing, or association can be curtailed.¹²² In addition, as discussed above, the prior restraint system itself may require stronger justification than any that has been suggested as of yet. Indeed, the Court in *NTEU* cited *Near v. Minnesota* in the same paragraph where it articulated the "greater burden" test for the proposition that "this ban chills potential speech before it happens."¹²³

In *NTEU*, the Court also identified the level of burden upon the covered employees in relationship to their likelihood of appearing and speaking. The denial of compensation was seen as "inevitably diminish[ing] their expressive output."¹²⁴ In addition, the Court noted "[t]he large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to

122. *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 468 (1995) ("NTEU").

123. *Id.*

124. *Id.* at 470. This is particularly evident when contrasted with officials such as legislators and policymaking executives or other high-ranking officials who often receive invitations to appear and talk about their official responsibilities. An honoraria ban is unlikely to impede speech by the latter groups, so long as they receive travel reimbursement for the speaker and one relative as "an alternative form of remuneration." *Id.* at 469. Also, "[i]n contrast, invitations to rank-and-file employees usually depend only on the market value of their messages." *Id.* at 469-70.

read and hear what the employees would otherwise have written and said.”¹²⁵

On the other side, in *NTEU*, the Government asserted an interest in avoiding immediate workplace disruption, as in *Pickering*, or interference with the efficiency of public service. In response to the Government’s claimed justification through *Public Workers v. Mitchell*, the case proceeding the passage of the Hatch Act,¹²⁶ the Court stated that the Hatch Act was aimed at protecting employees’ rights, most notably their rights to free expression. The Hatch Act eliminated the possibility of pressure to vote or perform political chores to curry favor with superiors rather than acting on their own beliefs.¹²⁷ The Court failed to see how honoraria threatened employees’ morale or liberty.¹²⁸ Speeches on non-employment-related topics rarely would threaten workplace harmony.

In *NTEU*, the Government also advanced as a justification fear of misuse (or appearance of misuse) of governmental power by the acceptance of compensation for speaking or writing.¹²⁹ However, the failure to identify evidence of misconduct by the rank-and-file employee related to honoraria meant that extension of the ban to such employees was unreasonable.¹³⁰ Predicating such an extension, as the Government did in *NTEU*, upon the misdeeds of some legislators and high-level executives, simply was not proper.¹³¹

In the supporting rationale for the proposed rules, as discussed above, no examples of ALJ misconduct were cited. The Government did raise a general concern with fairness. In *Republican Party of Minnesota v. White*, the lower court had identified as compelling

125. *Id.* at 470.

126. *Pub. Workers v. Mitchell*, 330 U.S. 75 (1947) (curtailing political activity of federal employees) (citing 5 U.S.C. § 7324(a)(2) (limits on partisan political activity by all classified federal employees)).

127. *NTEU*, 513 U.S. at 471.

128. *Id.*

129. *Id.* at 470.

130. *Id.* at 472.

131. *Id.* In a footnote, the Court noted that a General Accounting Office report cited by the government to bolster its case, in its 112 pages, contained not one example of any real or apparent impropriety related to a lower-level employee or to any employee engaged in writing, speaking, or any other conduct unrelated to his or her government job. *Id.* at 472 n.18.

interests the preservation and appearance of impartiality.¹³² However, the Court found the word “impartiality” to be an undefined term, although it is frequently used in briefs, as well as by the lower court, the Minnesota Code of Judicial Conduct, and the ABA Codes of Judicial Conduct. None of these sources bothered to define it, and the Court needed clarity on this point before it could announce whether impartiality was a compelling state interest and if so, whether the rule at issue was narrowly-tailored to achieve it.¹³³ The Court then went on to consider several possible meanings of impartiality, including as regards a particular party before the Court, or with respect to a particular legal view, or open-mindedness.¹³⁴ The challenged rule was found not to be sufficiently narrowly-tailored to serve impartiality in the party sense, because it restricts speech for or against particular issues.¹³⁵ As far as issues of law are concerned, the Court found no compelling state interest implicated, “since avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the ‘appearance’ of that type of impartiality can hardly be a compelling state interest.”¹³⁶ The last justification, related to “open-mindedness” was not one that the Court thought the Minnesota Supreme Court had adopted; if applicable, it was “so woefully underinclusive as to render belief in that purpose a challenge to the credulous.”¹³⁷

The proposed SSA rules contain no more specific justification than those rejected in *Republican Party of Minnesota*. As such, the proposed rules are indeed suspect.

XI. Conclusion

While there may be laudable goals in restraining outside paid employment by ALJs, the issue has already been addressed by rules that are executive branch-wide and do not single out “notorious” ALJs. The proposed rules sweep far beyond the permissible range of

132. *Republican Party of Minn. v. White*, 536 U.S. 765, 775 (2002).

133. *Id.*

134. *Id.* at 775-84.

135. *Id.* at 776.

136. *Id.* at 778.

137. *Id.* at 780.

regulation into a constitutional wasteland of problems, including matters of prior restraint, vagueness, over breadth, and a virtual total lack of particularized justification.

At a minimum, the proposed rules should be fundamentally revised, with far more justification for these rules needed. Unless such a forceful justification is forthcoming, it would probably be better to abandon the entire project and let the ordinary rules of judicial conduct regulate SSA ALJs.¹³⁸ If a need can be demonstrated, perhaps some parts of these proposed rules might be re-proposed regarding other SSA employees.

138. The extensive and well-reasoned comments filed with SSA by the union representing ALJs contain a thorough analysis of the application of professional rules already applicable to ALJs. *See* Comments, *supra* note 76.

