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Political Rights of Government Employees

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MILLIONS OF FEDERAL EMPLOYEES, and hundreds of thousands of certain state and local employees, are denied political rights enjoyed by all other Americans. There are nearly three million federal employees, of whom 50.8 percent are professional, technical or administrative personnel.[1] These federal employees and those individuals employed by a state or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a federal agency are subject to the United States Civil Service Commission rules regulating political activity.[2] "State or local agency employees" means an individual employed by a state or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a federal agency. This does not, however, include those employed by educational or research institutions. Under Civil Service rules, individuals may be removed from their employment for doing what every other American may consider a constitutionally protected right; namely, participating actively in partisan politics.[3]

The Civil Service Commission rules which govern political activities of federal and other affected employees had an early historical beginning. President Jefferson in 1801 indicated his dissatisfaction with government officials taking an active part in the election of public functionaries.[4] Evidence of executive concern for maintaining an impartial civil service was seen in 1841 and 1877.[5] Congress in 1883 passed the Civil Service Act for the protection of government employees. It forbade specified conduct relating to political contributions by government employees.[6] In 1907, President Theodore Roosevelt revised the then existing Civil Service Rule 1 to enlarge its scope. Rule 1 after revision is worthy of note as it very closely resembles the present Civil Service Commission rule. It provided that:

> Persons, who, by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and

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1 The Federal Career Service at Your Service (pamphlet), U.S.C.S.C. (1967).

2 Rule IV, § 4.1, U.S.C.S.C. (1940).

3 5 U.S.C. § 118 (1) (1964 ed.); 18 U.S.C. § 607 (1964 ed.).

4 10 Richardson, Messages and Papers of the Presidents 98-99 (1899).

5 4 *Id.* at 52, 7 *Id.* at 450-451.

6 22 Stat. 403 (1883), 5 U.S.C. § 633 (1940).

to express privately their opinions on all political subjects, shall take no active part in political management or in political campaigns.[7]

This rule guided the regulation of political activities of federal employees until Senator Carl A. Hatch of New Mexico introduced legislation to further control political activities of federal employees. The legislation which became effective on August 2, 1939, was designated the "Hatch Political Activities Act" [8] and is usually called simply the "Hatch Act," even in Civil Service Commission decisions. The objectionable section of the Act is Section 9(A), the second sentence of which states: [9] "No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, shall take any active part in political management or in political campaigns." In 1940, on President Roosevelt's recommendation, Congress extended the Hatch Act by amendment with Section 12(A) to include certain state and local employees whose employment is directly connected with federally sponsored activities.[10] It is the Hatch Act, its amendments, and the Civil Service Commission rules based thereon,[11] which today restrict the political activities of so many individuals.

The maximum penalty for violating the Hatch Act as provided in Section 9(B) is removal from office or position,[12] with a minimum penalty of 30 days suspension without pay.[13] The power to determine violations of the Hatch Act was placed in the Civil Service Commission in 1940.[14]

It is of interest to note that Congress has provided for exceptions to the Act. Section 9(A) exempts policy-determining officers, heads of departments and executive office personnel from the Act.[15] Further, in the 1940 Amendment to the Act, Congress gave the Civil Service Commission the power to grant exemptions where there are "special or unusual" circumstances.

Section 16 of the Act provides:

Whenever the United States Civil Service Commission determines that, by reason of special or unusual circumstances which exist in any municipality or other political subdivision, in the immediate vicinity of the National Capitol in the States of Maryland and Virginia or in the municipalities the majority of whose voters are em-

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[7] Rule 1, U.S.C.S.C. (1907).

[8] 53 Stat. 410 (1939).

[9] 53 Stat. 1148 (1939).

[10] 54 Stat. 640 (1940).

[11] Rule IV, § 41, U.S.C.S.C. (1940).

[12] 53 Stat. 410, § 9 (B) (1940).

[13] 5 U.S.C.A., § 7325 (1966 ed.).

[14] 54 Stat. 771 (1940).

[15] 53 Stat. 1148 (1939).

ployed by the Government of the United States, it is in the domestic interest of persons to whom the provisions of this Act are applicable, and who reside in such municipality or political subdivision, to permit such persons to take an active part in political management or in political campaigns involving such municipality or political subdivision, the Commission is authorized to promulgate regulations permitting such persons to take an active part in such political management and political campaigns to the extent the Commission deems to be in the domestic interest of such persons.[16]

Civil Service Rule IV, Section 4.1, regulates such political activity.[17] The Federal Personnel Manual describes those activities which are prohibited and the requirements for areas of the country to qualify as "Privileged Localities" for exemption from the Act.[18] Under the Hatch Act and Rule IV, an employee may *not*:[19] 1) campaign for a political party or candidate, 2) transport voters other than members of the family to the polls to vote, 3) distribute campaign material, 4) march in a political parade, 5) promote political dinners, 6) take active part in conventions, 7) initiate petitions or solicit signatures for petitions on behalf of a partisan candidate, 8) distribute campaign literature, badges or buttons, 9) be connected editorially or managerially with any newspaper generally known as partisan, and 10) be a candidate for nomination or election to a National, State, County or Municipal office.

Subchapter 5 of the Federal Personnel Manual of the Civil Service Commission describes some ten other restricted political activities affecting federal employees, and Chapter 15 of the Supplement defines those political activity restrictions placed on certain State and local employees.[20] The formulators of the Hatch Act and Civil Service Rule IV have not placed restrictions on federal employees' right to vote.

Under Section 4-9 of the Manual, Subsection A(3),[21] an employee subject to the restrictions of the Hatch Act may sign a nominating petition being circulated on behalf of a partisan condidate, but under Subsection (B)[22] may not initiate or circulate such a petition. Apparently, the distinction is that simply signing a petition is merely personal expression, while circulating or initiating a petition on behalf of a candidate is political campaigning.

One of the most subtle restrictions imposed by the Commission is Section 4-10 which deals with ill defined "expression of opinions."[23] It

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16 54 Stat. 771 (1940).

17 *Supra* n. 2.

18 Fed. Per. Man. of U.S.C.S.C., Ch. 733 (1965).

19 *Id.*, Subch. 4 (15).

20 *Id.*, Supp. Ch. 15, also 5 U.S.C.A. § 1501 to 1508.

21 *Id.*, Subs. A(3).

22 *Id.*, Subs. B.

23 *Id.*, Subch. 4 (10).

states that employees have the right to express their opinions and views on all political subjects and candidates as provided for in the Hatch Act. This section then goes on to point out that public expression which may be construed as taking a part in politics is prohibited. The practical difficulty here is how to determine what expressions or stated opinions will, in the eyes of the Commission, be sufficient to constitute a violation.

Another section of the rules prohibiting various activities which is wrought with potential pitfalls for employees is Section 4-11, Subsection (A), dealing with publishing or writing for newspapers. An employee may not publish or be connected editorially or in a managerial position with a newspaper generally known as "partisan." [24] He may not write any letter or article for publication, either signed or unsigned, soliciting votes. According to Subsection (B) [25] the newspaper does not have to be "continuously partisan"; being partisan at election time is sufficient. It does not have to be officially connected with any party or political organization. The Hatch Act gives federal employees the right to express their opinions with respect to all political subjects and candidates. While most would probably consider an editorial in a newspaper an expression of an opinion, the Commission apparently feels that the newspaper's political views would taint the article even if it were an expression of an opinion on behalf of the opposition.

Section 4-12 of the rules, prohibiting the distribution of campaign literature, badges or buttons, allows the individual the right to wear or display the same unless when done as a part of organized politics or a political campaign.[26] What badge, button or sticker is not distributed as part of some organized campaign? Do political parties go to the expense of having such material produced without some organized plan as to whom and how the material is to be distributed?

Another rule which borders on the absurd is that related to activities on election day. An employee may not help to get out votes on election day nor transport voters other than "members of his immediate family to the polls." [27] This means of course that if a federal employee's neighbor is ill on election day and is asked to drive a member of the neighbor's family to the polls, the employee runs the risk of losing his employment in an effort to be a good neighbor and a good responsible citizen.

In examining cases over a ten year period following the enactment of the Hatch Act, it must be admitted that the Civil Service Commission exercised considerable self-restraint in its decisions and recommenda-

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[24] *Ibid.*

[25] *Id.*, Subs. B.

[26] *Id.*, Subch. 15.

[27] *Ibid.*

tions for removal from employment for violations of the Hatch Act.[28] Nonetheless, in certain cases, the violation hardly seemed to justify the penalty. *In the matter of Samuel F. McClaren,*[29] for example, McClaren was charged with four violations on the Hatch Act, one of which was that he distributed political handbills. It was found that he had distributed some of them at a private sales pavilion. The case was heard by the Commission on September 24, 1946, the alleged violation occurring during the Roosevelt Administration. The handbill in question referred to both President Roosevelt and his wife and read as follows:

> NO FOURTH TERM—FOR EITHER
>
> A fourth term means more war, more indebtedness, more regimentation, more Roosevelt-created emergencies, more taxes and millions more miles of travel.

These words were considered by the Commission to be plainly political and a violation of the Hatch Act and the Civil Service Commission's Rule IV. McClaren was dismissed from his employment as a rural mail carrier.

In the matter of J. Ernest Kerr,[30] the concept that "agency" is not a defense was applied by the Commission. Kerr, on leave from his Government employment, at the National War Labor Board where he was a wage analyst, delivered a speech for a friend who was unable to do so. Kerr was careful to preface the speech with statements to the effect that the speech were the words of his friend, which he, Kerr, was merely quoting. The Commission found that although he acted as an agent for his friend, he had engaged in politically prohibited activity. (An interesting aspect of the case was that the Commission heard the case when Kerr was no longer a Government employee.)

The case of *Wilson v. United States Civil Service Commission*[31] demonstrates how extremely restricted the activities of Government employees are and how carefully they must guard their actions. In this case, a government employee, Wilson, mailed to a newspaper an isolated unsolicited letter recommending the defeat of a certain partisan candidate for state office. This was found by the Commission to constitute a violation of the Hatch Act, and was supported by the District Court for the District of Columbia in a summary judgment for the Civil Service Commission.[32] The court said that federal employees "run a risk when they express their political views," even though the Hatch Act permits them to express their opinions on all political subjects and candi-

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[28] Irwin, Hatch Act Decisions of U.S.C.S.C., 3-57, G.P.O., Washington (1949).

[29] *Id.* at 210.

[30] *Id.* at 202.

[31] Wilson v. United States Civil Service Commission, 136 F. Supp. 104 (D.C.D.C. 1955).

[32] *Id.* at 107.

dates. The Commission in the *Wilson* case appeared overzealous in its willingness to discharge an employee for one single letter to a newspaper expressing his views as to a candidate.

There have been violations of the Hatch Act where the party involved ran for some elected office. One such case, *In Re Ramshaw,*[33] involved the removal of a civil service employee for running for the elected office of sheriff. The Court upheld the Commission's decision. The Courts have seemed reluctant to substitute their judgment for that of the Commission.[34]

The Constitutional Question

The first case to question the constitutionality of the Hatch Act and reach the Supreme Court for decision was *United Public Workers of America v. Mitchell* in 1947.[35] The appellants, with the exception of one George Poole, sought a declaratory judgment as to the legal limits of the regulation. The Court held that this would be an advisory opinion rather than a declaratory judgment and refused to take jurisdiction. Poole, who had violated the Act, did present a justifiable case for declaratory judgment and the Supreme Court, 4 to 3 agreed that on the merits the second sentence of Section 9(A) of the Hatch Act was constitutional. The issue in the case was whether the Hatch Act violated the political rights reserved to the people under the Ninth and Tenth Amendments. Justice Black, dissenting, raised the First Amendment Issue.

Three cases were relied on by the majority. Justice Reed, in his opinion for the Court cited *Ex Parte Curtis,*[36] *United States v. Wurzbach*[37] and *United States v. Thayer.*[38] The difficulty is that all three cases dealt with the collection of money by federal employees from fellow employees for political purposes. Poole, in the *Mitchell* case, violated the Hatch Act because he held the position of a ward executive committeeman of a political party while being federally employed as a roller in the mint. The question of collection of money did not arise in *Mitchell.* It would appear that the majority in the *Mitchell* decision balanced the individual rights to engage in politics with Congressional judgment. The *Mitchell* case holding the Hatch Act constitutional is the last consideration of the Hatch Act by the Supreme Court.

In *Meehan v. Macy* (1968),[39] the Court in reference to the Hatch Act and the *Mitchell* decision, said that government employees have

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33 *In Re* Ramshaw, 266 F. Supp. 73 (E.D. of Idaho 1967).

34 Gray v. Macy, 239 F. Supp. 658 (D.C. of Ore. 1965).

35 United Public Workers of America v. Mitchell, 330 U.S. 75, 67 S. Ct. 556 (1947).

36 Ex Parte Curtis, 106 U.S. 371, 1 S. Ct. 381 (1882).

37 United States v. Wurzbach, 280 U.S. 396, 50 S. Ct. 167 (1930).

38 United States v. Thayer, 207 U.S. 425, 28 S. Ct. 426 (1908).

39 Meehan v. Macy, 392 F. 2d 822 (D.C. Cir. 1968).

"lesser rights" than other individuals have under the constitution because of the restrictions placed on their political activity. The question to be asked is, "why should they?"

The Hatch Act and the First Amendment

It was held in *N.A.A.C.P. v. Alabama*[40] that the right of political association is clearly protected by the First Amendment. The case of *United States v. Robel*[41] demonstrates the extent to which the Court will go to protect the rights of individuals to associate under the First Amendment. In that case, the Court held that a registered Communist could not be denied his right to hold a job in a "defense facility" simply because he was a Communist. The Court held that Section 5 (A) (1) (D) of the Subversive Activities Control Act of 1950 was unconstitutional because it ran afoul of the First Amendment. The Court said in essence that one's right to a job could not be made to depend on the exercise of his right of association which is protected by the First Amendment. It is difficult to see how it is unconstitutional to deny one the right to work in a "defense facility" simply because he belongs to an organization which advocates the overthrow of our form of government, but it is constitutional to deny millions of individuals the right to actively engage in normal political activities which are part of the very essence of our form of government.

Even at the time of Madison and Hamilton the political rights of the people were fully recognized.[42] They tell us that our political privileges are of two kinds. The first is that the people have *all* political authority and the second, that the people play an *active* and dominant part in the administration of the government. In both of these relationships, the "Federalist" declares that the citizens, as the sovereign power, must be kept free from *any* dependence on their representatives. In the eyes of Madison and Hamilton, would employees under the Hatch Act be considered free from dependence upon their representatives?

In regard to the First Amendment the assumption is made by the Supreme Court that this includes freedom of association in political organizations.[43] This assumption is based upon the belief that unless people can join together in political organizations their First Amendment right to speak freely is inhibited. Further, the Court in *Pickering v. Board of Education*,[44] a case involving a teacher's right to criticize his

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[40] N.A.A.C.P. v. Alabama, 357 U.S. 449, 78 S. Ct. 1163 (1958).

[41] United States v. Robel, 389 U.S. 258, 88 S. Ct. 419 (1967).

[42] Hamilton, Madison and Jay, The Federalist or the New Constitution, 253 (1787-1791).

[43] Shelton v. Tucker, 364 U.S. 479, 81 S. Ct. 247 (1960); Louisiana v. N.A.A.C.P., 366 U.S. 293, 81 S. Ct. 1333 (1961); Communist Party of United States v. Subversive Activities Control Board, 367 U.S. 1, 81 S. Ct. 1357 (1961).

[44] Pickering v. Board of Education, 391 U.S. 563, 88 S. Ct. 1731 (1968).

supervisors handling of tax funds, said that the threat of dismissal from public employment is a very potent means of inhibiting speech. This is the very penalty imposed by the Hatch Act.

The foregoing decisions indicate that the Court has held the right to associate in political activities is a right protected by the First Amendment, and that to make employment contingent upon the non-exercise of that right clearly inhibits First Amendment rights. It is difficult, indeed, to reconcile the *Mitchell* decision with these more recent cases.

The Hatch Act and the Fifth Amendment

With respect to the Act being so discriminatory, as to violate due process under the Fifth Amendment, it could hardly be doubted that the Act denies rights to federal and certain state and local employees enjoyed by other citizens. In order for such classification to be lawful, it must be reasonable and designed to promote a compelling government interest.[45] The standard test applied to determine whether legislation is classifying or discriminating is the "without any reasonable basis" test. It was first applied in the case of *Lindsley v. National Carbonic Gas Co.*[46] If a logical or reasonable basis is wanting the courts will consider it discriminatory. In *Shapiro v. Thompson,*[47] the Supreme Court said that the standard test does not apply in cases where fundamental rights are involved. In those cases where classification touches on a fundamental right, the constitutionality of the legislation must be judged by a stricter standard. The stricter standard is that for the classification to be held constitutional, it must promote a compelling state or governmental interest.

At a time when the Courts are rendering decisions to give equal protection with respect to political rights, it is difficult to envision just how the Hatch Act might be held constitutional. When Chief Justice Warren was asked, at his retirement from the bench, which decision he felt was the most important during his almost sixteen years in the Supreme Court, he cited *Baker v. Carr.*[48] That case dealt with reapportionment and the affirmation of the concept of the one man—one vote. The appellants claimed a denial of equal protection of the laws because of debasement of their votes. The Court, in deciding the case, considered that it involved the vindication of a political right, rather than being a political question.

It should be noted that *Baker v. Carr* dealt not with a denial of the right to vote but with a diminution of the effect of a vote. What the court said in essence was that "the right to vote" includes more than the

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[45] Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322 (1969).

[46] Linsley v. National Carbonic Gas Co., 220 U.S. 61, 31 S. Ct. 337 (1911).

[47] *Supra* n. 45.

[48] Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691 (1962).

simple casting of a ballot. Incorporated within "the right to vote" is the right to have that vote count equally with every other vote. Can it be denied that the selection of those to be voted for, and the support of those individuals throughout a campaign is just as much a part of the voting process? In *N.A.A.C.P. v. Button*[49] the Court said that *every* citizen shall have the right to engage in political expression and association. Certainly, political expression and association must include the right to actively assist in the selection and support of political candidates.

Arguments in Favor of the Act

The arguments most frequently advanced in favor of the Hatch Act and the Civil Service Commission rules relating to it is that it protects federal and other affected employees from efforts to force the rendering of political service or tribute.[50] The purpose of the Act and the Commission rules as stated by the Commission are twofold. The first is to protect tenure of Government employees by taking political activity out of employment and promotion. The second is to take the dismissal of government employees out of the political arena. The difficulty is that the cure is worse than the disease.[51]

While one must be impressed with the concern expressed by the formulators of the Hatch Act and the Civil Service Rules for the well-being of federal employees, their reasoning is difficult to follow. Consider an analogy which may help to establish the illogic of their logic. Let us say that a certain city the name of which shall remain anonymous has a park called Central Park. The City finds it is unsafe for a female to walk in the park because of attackers. The city passes an ordinance designed to protect its female populous. The ordinance denies access to the park to all females except those accompanied by two large males in excess of six feet in height and who weigh more than 200 pounds each, the major portion of which must be muscle and not fat. Common sense would dictate that rather than deny females the right of enjoyment of the park, the better, more sensible approach would be to better police the park with a more diligent effort to apprehend and prosecute those who would make the presence of females in the park unsafe.

The same kind of reasoning can be applied to the protection of federal and other affected employees. Rather than deny these citizens the fundamental rights guaranteed them by the constitution, let Congress and the Civil Service Commission enact laws and rules, in the case of the latter, that are aimed at those who would seek to corrupt and exploit government, state and local employees. Certainly, legislators can devise

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[49] N.A.A.C.P. v. Button, 371 U.S. 505, 83 S. Ct. 328 (1963).

[50] Political Activity—Rules for Federal Employees, Fed. Emp. Facts No. 2, March, 1964.

[51] 5 U.S.C.A. Sec. 7324 (1966 ed.).

laws which are designed to punish the wrongdoer without denying federal employees, those of who the late President John F. Kennedy said, "the success of the Government, and thus the success of our Nation depend . . ." [52] the rights enjoyed by all other citizens.

Congress and the Civil Service Commission in effect have already provided the required proscription of certain activities. Many of the sections of the Hatch Act as enacted contain provisions aimed at the proper parties. Section 1 is designed to prevent intimidation or coercion of voters, Section 2, interference with elections, Section 3, the promise of benefits for support, Section 5, contributions for political purposes, Section 8 provides penalties for violators. Section 11 of the Hatch Act is a saving clause, holding that if any provision of the Act is held invalid the remainder of the Act shall not be affected.

It appears, therefore, that should Section 9(A) of the Hatch Act and Rule IV of the Commission be held unconstitutional, much of the needed legislation to protect federal, state and local employees would still exist for their benefit. They would only lose legislation which has denied them First and Fifth Amendment rights enjoyed by other citizens.

Another argument advanced in favor of the Hatch Act is that of protecting the public interest. It is argued to be in the best interest of the nation that federal employees not actively engage in politics. Here the potential evils of political involvement must be weighed against the denial of First Amendment rights. Any law, however, which impairs First Amendment rights must be aimed at removing the "clear and present danger" of a substantial evil. The evil sought to be prevented must be imminent, serious, involving some act and with a fair probability of its uprooting orderly proceedings. In light of these elements, necessary for the evil to warrant denial of First Amendment rights, it is difficult to imagine how (in the *Mitchell* case[53]), Poole's activity as a ward committeeman had any effect on his job as a roller in the mint or adversely affected the public interest. It is equally difficult to imagine, even multiplying Poole's situation a thousand times and adding numerous variations thereto, that the "evil" of such activity is seriously going to affect the public interest or well-being.

Conclusions

It is submitted that the right to vote is accompanied by corollary rights in securing proper candidates. All citizens must exert efforts to ensure that the proper parties are selected to run for office. The active participation in the placing of candidates on the party platform is every

[52] *Supra* n. 1.

[53] *Supra* n. 35.

bit as important as the act of voting for them. To deny federal and certain state and local employees the right to actively assist in this selection process is in essence to deny them an essential role in the very nature of our form of government. Democracy, by its very definition, means political equality for all. If we are to ensure that our form of government will prevail, we must ensure that all of our citizens enjoy the same fundamental right to assist in that mechanism which helps to maintain a government that truly represents the full choice of all the people. To deny federal, and certain state and local employees the right to participate in political activities is to deny them a voice in the selection of those who will govern, abridging their fundamental right of association by lodging their rightful role in this selection process in the hands of others.

In light of recent Supreme Court decisions[54] it is difficult to imagine the Court upholding its decision in the *Mitchell* case[55] were it to be faced with a similar factual situation today. It is contended that Section 9(A) of the Hatch Act and the United States Civil Service Commission rules relating thereto, considering recent Court decisions, violate the constitutional rights of millions of Americans. It is submitted that they deny rights of political association guaranteed by the First Amendment, and violate substantial due process guaranteed by the Fifth Amendment.

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[54] *Supra* n. 40, 43, 44, 48 and 49.

[55] *Supra* n. 35.