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Constitutional Law-Relation of State and Federal Governments-Application of the Hatch Act to the Political Activity of a State Official

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CONSTITUTIONAL LAW—RELATION OF STATE AND FEDERAL GOVERNMENTS —APPLICATION OF THE HATCH ACT TO THE POLITICAL ACTIVITY OF A STATE OFFICIAL—Plaintiff brought an action to set aside a determination of the United States Civil Service Commission that his political activities while Illinois State Director of Conservation were in violation of the Hatch Act.[1] The district court held that such an application of the Hatch Act would infringe upon the plaintiff's vested rights, and would contravene the constitutional guarantee to the state of a republican form of government.[2] On appeal, *held*, reversed. Application of the Hatch Act to state

1 The Hatch Act provides: "No officer or employee of any State or local agency whose principal employment is in connection with any activity financed in whole or part by loans or grants made by the United States or any Federal agency shall . . . take any active part in political management or in political campaigns." Hatch Act of 1939, § 12(a), added by 54 Stat. 767 (1940), 5 U.S.C. § 118k (1958). Throughout his tenure in office Palmer also served as chairman of the Kendall County Republican Committee. During this time the State of Illinois received $2,263,661 under federal aid programs for wildlife restoration, fish restoration and management, and forest fire prevention.

2 Palmer v. United States Civil Serv. Comm'n, 191 F. Supp. 495, 520, 535 (S.D. Ill. 1961).

employees does not deprive them of any vested rights under the United States Constitution.[3] *Palmer v. United States Civil Serv. Comm'n*, 297 F.2d 450 (7th Cir. 1962).

In this century there has been a great expansion of the prohibition against political activity on the part of public servants, with few attempts on the part of Congress to relieve any group of workers from the all-encompassing effect of the legislation concerning such activity.[4] It is settled that Congress has the power to regulate the political conduct of federal employees, within reasonable limits, in order to promote efficiency and integrity in the public service.[5] In upholding the extension of such legislation to cover state employees whose employment is connected with activity financed by federal loans or grants, the Supreme Court has made it clear that the United States is neither concerned with nor has the power to regulate the political activity of state officials or employees as such.[6] Rather, the courts have consistently held that the power to prohibit state employees from taking part in political activity stems from congressional power to fix the terms on which the money allotments of the United States shall be disbursed.[7] Since it is clear that the United States can offer benefits to the states conditioned on cooperation with federal plans, Hatch Act provisions authorizing the withholding of funds when the recipient state does not comply with the recommendation of the Commission to remove an employee do not constitute an infringement of the powers of the state under the tenth amendment.[8] The right of the individual to engage in political activity is undeniably guaranteed by the freedom of expression clause of

3 The court summarily disposed of the contention that the Hatch Act deprived the state of a republican form of government, on the ground that matters relating to the maintenance of a republican form of government are dealt with by the political branches of government.

4 Theodore Roosevelt's proclamation in 1907 that those in the competitive classified service of the federal government should not take an active part in political campaigns or political management was incorporated into the United States Civil Service Rules. The Commission also has developed a body of decision law which was deemed applicable to violation of like provisions in the Hatch Act. See IRWIN, HATCH ACT DECISIONS (1949). The Hatch Act of 1939 extended this prohibition to all employees of the executive branch of the federal government, with few exceptions. Hatch Act of 1939, § 9, 53 Stat. 1148, 5 U.S.C. § 118i (1958). In 1940 this act was extended to apply to all state and local employees whose principal employment was connected with federal loans or grants. Hatch Act of 1939, § 12(a), added by 54 Stat. 767 (1940), 5 U.S.C. § 118k (1958). On the other hand, Congress lifted this restriction as applied to employees of state educational and research institutions. Hatch Act of 1939, § 21, added by 56 Stat. 986 (1942), 5 U.S.C. § 118k (1958). And the House passed a resolution repealing the 1940 amendment which was not acted upon by the Senate. H.R. Res. 3084, 84th Cong., 2d Sess. (1956).

5 See United Public Workers v. Mitchell, 330 U.S. 75, 96-103 (1947); United States v. Wurzbach, 280 U.S. 396 (1929); *Ex parte* Curtis, 106 U.S. 371 (1882).

6 Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 143 (1947).

7 *Ibid.* The power to fix these terms in turn stems from congressional power to see that the money which it appropriates is spent according to its intent. See United States v. Bekins, 304 U.S. 27, 51-54 (1938); Steward Mach. Co. v. Davis, 301 U.S. 548, 593-98 (1937).

8 Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 142-44 (1947).

the first amendment, and is a right reserved to the people by the ninth and tenth amendments.[9] However, the Supreme Court has upheld provisions of the Hatch Act compromising these rights with respect to state[10] and federal[11] employees on the ground that these guarantees must be balanced against the congressional determination that political activity of such persons presents a danger to democratic society. Nevertheless, although the Hatch Act as presently interpreted and applied is generally thought to be constitutionally valid,[12] the fact that it affects an ever-increasing number of people justifies a careful appraisal of its scope and application.[13]

The court in the principal case disagreed with the holding of the district court that a *de minimis* rule was applicable, basing its decision upon the case of *Oklahoma v. United States Civil Serv. Comm'n.*[14] There the Supreme Court upheld the Commission's withholding of funds from the state of Oklahoma[15] when the state failed to comply with the Commission's request that it discharge an employee who had simultaneously been chairman of the Democratic State Central Committee and State

9 United Public Workers v. Mitchell, 330 U.S. 75, 94-96 (1947).

10 Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947). State decisions upholding a variety of statutes designed to curb the political activity of state employees have generally been based on the proposition that while one may have the right to talk politics, there is no corresponding right to be in the civil service. See, *e.g.*, McAuliffe v. Mayor of City of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892); McCrory v. Philadelphia, 345 Pa. 154, 27 A.2d 55 (1942). However, the United States Supreme Court has limited the application of this "privilege" doctrine with respect to the due process clause of the fourteenth amendment, and its continuing efficacy in other areas of constitutional law is thus questionable. See Wieman v. Updegraff, 344 U.S. 183, 192 (1952).

11 United Public Workers v. Mitchell, 330 U.S. 75 (1947).

12 One commentator has departed from this general acceptance of constitutionality and suggested that the clear-and-present-danger test should be applied to the Hatch Act, as this is the usual basis for compromising first amendment freedoms. Still, *The Hatch Act—Political Immaturity?*, 45 GEO. L.J. 233 (Winter 1956-57). For general information on the regulation of public employees under the Hatch Act, see Nelson, *Public Employees and the Right To Engage in Political Activity*, 9 VAND. L. REV. 27 (1955), and an answer to this article in Irwin, *Public Employees and the Hatch Act*, 9 VAND. L. REV. 527 (1956). See also Esman, *The Hatch Act—A Reappraisal*, 60 YALE L.J. 986 (1951); Freedman & Klinger, *The Hatch Act*, 7 FED. B.J. 5 (1945); Heady, *The Hatch Act Decisions*, 41 AM. POL. SCI. REV. 687 (1947); Wormuth, *The Hatch Act Cases*, 1 WESTERN POL. Q. 165 (1948).

13 The increasing effect of the Hatch Act is due in a large part to the fact that the federal grants-in-aid to the states have increased from $1.9 billion in 1948 to $6.5 billion in 1960. U.S. News & World Rep., April 6, 1959, pp. 100-02.

14 330 U.S. 127 (1947).

15 The United States Civil Service Commission, on receiving a report of the prohibited activity, fixes a time and place for a hearing at which a determination is made by the Commission whether a violation has in fact occurred. If a violation warranting removal of the employee is found, notification is mailed to the employee and the appropriate state or local agency. If the Commission finds that the employee has not been removed within thirty days of such notification an order is sent to the source of federal funds requiring an amount equal to twice the salary of the employee in question to be withheld from the state or local agency concerned. Any party aggrieved by the proceedings has the right to have the determination of the Civil Service Commission reviewed by a district court. Hatch Act of 1939, § 12(a), added by 54 Stat. 768 (1940), 5 U.S.C. § 118k (1958).

Highway Commissioner during a nine-month period in which the United States contributed 2,000,000 dollars to the highway commission. The *Oklahoma* decision was arguably consistent with congressional intention, manifested in the debate over the extension of the Hatch Act, to apply it only to employees *whose employment is made possible* by federal grants.[16] However, the plaintiff in the principal case spent less than one percent of his working time on federally-financed projects.[17] It is doubtful that "but for" a federal grant or loan the plaintiff would not have had his job. Thus, the court, in refusing to apply a *de minimis* rule to the plaintiff's connection with federal finances, has reached a decision seemingly inconsistent with congressional intention. Although it may often be difficult to determine the point at which the employment of an individual becomes so intertwined with federal financial aid that the connection no longer may be considered *de minimis*, the limitation must be applied in order to keep the application of the act within the bounds contemplated by Congress: to cover only those state and local employees whose principal employment is connected with federal financing.

Although the act is entitled as one to prevent pernicious political activity,[18] Congress has chosen to prevent all political activity because of abuses that might arise therefrom, and has thus relegated millions of persons to spectator status in the political affairs determining their welfare. This approach is at variance with the idea that pure government is insured by extension rather than restriction of popular participation. It is clear that only partisan political activity is interdicted under the Hatch Act, and that the government employee can comment on public affairs and personalities so long as his activities are not directed toward political party success. Although the Civil Service Commission has published a delineation of what actions are deemed "political activity or political management" in violation of the Hatch Act, it has been forced to admit in many instances that such a determination is impossible until after the fact.[19] Obviously, an employee covered by the Hatch Act whose

16 The following remarks were made by Senator Hatch during the debate in the Senate over the extension of the Hatch Act to officials and employees of the states: "We have tried to approach the task mindful of the difference between the Federal government and the several States, and mindful of our obligations to protect the funds which the Government itself appropriates, as well as the rights of the States and of the employees who are technically State employees from a legislative standpoint but nevertheless are perhaps in a greater sense Federal employees, *for their employment could not be were it not for the aid given from the Federal Treasury.*" 84 CONG. REC. 2338 (1940). "Mr. President, I think the law should be extended to every employee *whose employment is made possible by appropriations from the Federal Treasury.*" 86 CONG. REC. 2342 (1940). (Emphasis added.)

17 Palmer v. United States Civil Serv. Comm'n, 191 F. Supp. 495, 536 (S.D. Ill. 1961).

18 53 Stat. 1147 (1939).

19 United States Civil Service Commission form 1236, *Political Activity and Political Assessments* (Jan. 1944), attempts this delineation and states that "every government employee is expected to be familiar with the statutes and rules relating to political activity; ignorance does not excuse their violation." However, a United States Civil Service Commission bulletin, entitled *Interpretations of the Hatch Act and Regulations*

desired public activity falls within the "gray" area, and who is also concerned with keeping his job, is likely to refrain from partaking in public affairs even though he may have the right to participate, notwithstanding his civil service status. There is a definite need for re-evaluation of an absolute prohibition of political activity on the part of those state or local employees working in federally-financed areas. In a leading Hatch Act case the Supreme Court stated that it would interfere with congressional regulation of governmental employees only when such regulation passed beyond the existing conception of governmental power.[20] Should a case come before the Supreme Court offering an opportunity for judicial reappraisal of the extent of application of the Hatch Act, prior decisions upholding the act would have to be weighed against the ever-increasing scope of its application resulting from greater participation of the federal government in state and local affairs. However, a legislative re-evaluation of the problem with a view to limiting the blanket prohibition against political activity only to those governmental employees holding jobs connected with federally-financed activity extremely sensitive to the political arena may be in order. Congress might emulate the British policy of gradual political emancipation of public servants.[21] Any relaxation of the prohibition from political activity could be supplemented by provision for appropriate disciplinary measures in instances where there is found to be improper use of political power or pressure.

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on Political Activity (Sept. 10, 1940), states that "it is exceedingly difficult to be definite in fixing the limits of the application of this statute because in many instances a complete determination will depend on a full study of the facts in each individual case." For an extensive discussion of the Commission's administration of the Hatch Act, see Rose, *A Critical Look at the Hatch Act*, 75 HARV. L. REV. 510 (1962).

20 United Public Workers v. Mitchell, 330 U.S. 75, 102 (1947). However, Mr. Justice Douglas in his dissent suggested that the courts limit the application of the Hatch Act to those in the administrative category of the civil service. *Id.* at 122.

21 See Epstein, *Political Sterilization of Civil Servants: The United States and Great Britain*, 10 PUBLIC ADMIN. REV. 281 (1950).