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Public Employees and the Hatch Act

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COMMENTS

PUBLIC EMPLOYEES AND THE HATCH ACT

BY JAMES W. IRWIN*

INTRODUCTORY STATEMENT

A recent issue of *Vanderbilt Law Review* featured an article by Dalmas H. Nelson, Instructor in Political Science, University of Nebraska, entitled "Public Employees and the Right to Engage in Political Activity,"[1] a broadside blast at the Hatch Political Activities Act, section 9[2] and section 12.[3] It is strikingly well written, and reflects exhaustive research as evidenced by voluminous bibliography and quotations. Noteworthy is the citation of many authorities whose views differ from the author's.

Notwithstanding admiration for those virtues, it is admitted that the views of the author of the article call to mind a sentiment expressed by the distinguished Irish author, C. S. Lewis:[4]

> But the Second Friend is the man who disagrees with you about everything. . . . Of course he shares your interests; otherwise he would not become your friend at all. But he approached them all at a different angle. He has read *all the right books* but has got the wrong thing out of every one. How can one be so nearly right, and yet, invariably, just not right? (Emphasis added.)

The term "Hatch Act" will be applied to its sections 9 and 12, the prohibitory provisions over which the United States Civil Service Commission has jurisdiction, although the statute embraces several other parts. Section 9 applies to officers and employees, with stated exceptions,[5] of the executive branch of the federal government, and prohibits their using official authority or influence to affect an election, or taking "any active part in political management or in political campaigns."[6] The penalty is dismissal or suspension for not less than ninety days.[7] Section 12 applies the same proscriptions to officers or

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1. 9 VAND. L. REV. 27 (1955).
2. 53 STAT. 1148 (1939), 5 U.S.C.A. § 118i (Cum. Supp. 1950).
3. 54 STAT. 767 (1940), 5 U.S.C.A. § 118k (Cum. Supp. 1950).
4. LEWIS, SURPRISED BY JOY (1955).
5. The President and Vice-President, those paid from the appropriation for the Office of the President, heads and assistant heads of executive departments, and presidential appointees confirmed by the Senate.
6. 53 STAT. 1148 (1939), 5 U.S.C.A. § 118i(a) (Cum. Supp. 1950).
7. *Id.* § 118i(b).

employees of state or local agencies, with similar exceptions, whose principal employment is in connection with activities receiving federal aid.[8] When the Commission finds a violation of section 12, it may find a penalty not warranted. If one is imposed, it is removal from employment, but the respondent may be reinstated after eighteen months.[9]

Section 12 is not actually "prohibitory." Congress, of course, did not assert that state employees must not engage actively in politics. It merely asserted its right to condition federal appropriations so as to secure most effective use. The employing state or local agency may disregard the commission's finding that removal is warranted, but then a relatively modest deduction will be made from federal aid.[10]

Mr. Nelson's primary attack on the Hatch Act is that it is (a) unconstitutional (the Supreme Court's *United Public Workers*[11] and *Oklahoma*[12] decisions notwithstanding); (b) arbitrarily oppressive of public employees; and (c) against public interest. Since (b) and (c) are stepping stones to his major thesis "unconstitutionality," the propositions will be taken in reverse order. Naturally, the topics are overlapping.

PUBLIC INTEREST

Concededly as a general rule it is in the public interest for citizens to form a considered opinion on political questions, and then actively to support it. But in some public employments there are limitations.

It is axiomatic that those in military service do not, and should not, take an active part in political management or in political campaigns. So true is this that the public usually does not know the political affiliation, if any, of even our most famous soldiers—even those destined to exercise most outstanding political leadership when military service ends. Soldiers are not employed to be politically active, but to protect from potential enemies.

"Political judges" are no more demanded than political soldiers, although in intellect and patriotic motive the judiciary would be the peer of any for political leadership. Judges are not selected to exert political influence, but to be nonpartisan arbiters.

In other public positions the aims of employment are specialized. The legislative branch affords a forum for political battle. An element of political leadership may be inherent in policy-making positions in the executive branch. Hatch Act exemptions give scope for that. A government clerk, supervisor, lawyer, or scientist is not hired to make

8. 54 STAT. 767 (1940), 5 U.S.C.A. § 118k (Cum. Supp. 1950).
9. *Id.* § 118k(b).
10. *Ibid.*
11. United Pub. Workers, CIO v. Mitchell, 330 U.S. 75 (1947).
12. Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947).

his persuasive powers available to political parties or candidates. The public's "stake" is not that he have rampant "freedom of expression," but that nothing interfere with effective service in his job. Congress determined that things prohibited by the Hatch Act do interfere.

Section 12 came in 1940 as an amendment to the 1939 statute which contained section 9.[13] Some, while not objecting to the federal government's regulation of political activity by its own employees, have thought that section 12 impinges upon "states' rights." It is suggested that they read *Administration of Federal Grants to States* by V. O. Key, Jr.[14] That volume was published three years before passage of section 12, by the Committee on Public Administration, Science Research Council.[15] It dealt with problems to a considerable degree common to all types of federally aided functions. A sentence of special import in connection with the topic of the instant paper is: "The key to the problem of recruiting competent personnel is the elimination of political turnover." Speaking of state highway commissions, which, incidentally, have been a fruitful field for Hatch Act cases, Mr. Key said:

> Millions of dollars are wasted every year because of . . . rotation in office.
> The position of chief highway engineer . . . in about three-fourths of the states is classed as a political position to be changed by the incoming governor or highway commission.
> [I]n a few departments it is customary for the incoming governor to discharge every employee. Those who can muster sufficient partisan support are rehired. . . . In a goodly number of States there are two sets of personnel sufficient to man the department almost completely. When one party or faction comes in, it brings with it its highway organization.[16]

Continuing refutation of the idea that "the evils against which the Hatch Act are directed are largely hypothetical,"[17] has been demonstrated in the Commission's Hatch Act proceedings. No, not "hypothetical," very real.

Since the Civil Service Act of 1883,[18] the Hatch Act (will it not be conceded?) is the most effective bulwark against public employment being the handmaiden of politics. And Alfred E. Smith said, "There are two things that don't fit together, political patronage and reduction in the cost of Government." Franklin D. Roosevelt in a message to Congress on August 2, 1939, said, "It is my hope that, if properly ad-

13. 54 STAT. 767 (1940), 5 U.S.C.A. § 118k (Cum. Supp. 1950), amending 53 STAT. 1148 (1939).

14. KEY, ADMINISTRATION OF FEDERAL GRANTS TO STATES (1937).

15. Louis Brownlow was chairman of the Committee and its roster was most eminent.

16. KEY, ADMINISTRATION OF FEDERAL GRANTS TO STATES 294 (1937).

17. Nelson, *supra* note 1, at 43.

18. 22 STAT. 403 (1883).

ministered, the measure [the Hatch Act] can be made an effective instrument of good Government."

The author of the law review article believes that legitimate purposes of the Hatch Act can be accomplished without its "broadly restrictive powers."[19] That theory will be adverted to later.

The question whether "entrance into public service of individuals of high caliber can be maintained on an adequate scale"[20] because of the Hatch Act, seems unduly apprehensive. It is the antithesis of what Mr. Key saw as "the problem of recruiting competent personnel." A few who have talents—or so imagine—for politics will be deterred from entering or remaining in civil service. For those who do not want, or are willing to forego, the glamor of political activity, the Hatch Act is no bar to satisfaction in public service. It has been said that the average person by entering civil service multiplies many times the possibility of affecting government; that in a very "unimportant" position, he, for instance, by suggesting even the change of one word in a document, may exert far-felt and lasting influence.

Among the merits of the Hatch Act is elimination of a potential source of office discord, and even of divided loyalty. To cite an example of the latter, the Commission proceeded in a section 12 case against a young lady who had worked at the polls on election day. She testified that she had procured her employment through political "sponsorship," and said: "I thought if I should refuse to cooperate with my Committeewoman ... just probably she could be angry, and I could lose my position."[21] She added that she considered that doing good and efficient work in her job and loyalty to her sponsor were equal obligations.[22]

EMPLOYEE INTEREST

If majority desire is the touchstone, it is ventured that lament over Hatch Act oppression of public employees is misplaced sympathy. With the advantage of some opportunity for observation, the writer believes that the statute is, to a great degree self-enforcing, because the large majority of those subject thereto, welcome it. They do not want to be politically active, personally or financially, and it enables them gracefully to remain aloof. It is doubtful that the cliché "second-class citizens" or the term "sub-citizenship status" has been less appropriately applied than to those affected by the Hatch Act.

When section 12 was before Congress, Senator Neely presented affidavits on collection of campaign contributions from state em-

19. Nelson, *supra* note 1, at 47.
20. *Id.* at 43.
21. U.S. CIVIL SERVICE COMM'N, HATCH ACT DECISIONS 246 (Irwin ed. 1949).
22. *Ibid.*

ployees, which Senator Reynolds characterized "appalling"; and Senator Clark said that he had been "almost moved to tears by the piteous eloquence of those who insist . . . upon the right of even the humblest employee to contribute two per cent, voluntarily, to a fund to maintain the State machine." In Hatch Act cases much has been seen of this "voluntary" contributing. A witness was asked on cross examination by defense counsel whether his donation had not been "purely voluntary." He gave the revealing answer, "Oh, yes; that is always the term used. You are never *ordered* to do anything. You are always *requested* to do things, if you want to do them."[23]

In the writer's opinion, the theory that it would be enough to forbid political exercise of official influence, and political coercion or solicitation by official superiors, is a major fallacy. In the first place, the Hatch Act is not only for protection of individual employees. As to section 12, it would seem that protection of individuals does not enter into the Constitutional foundation. As to section 9, public interest is the primary concern.

Also, is it realistic to assume that subordinate officials or employees uniformly would think that such a limited approach would protect them, if they were "free" to take an active part in political campaigns? With the second prohibition eliminated, they might still feel exposed to intangible coercion. Most might be loath to assume an active political role unless in support of the opinions of those who controlled their promotion and conditions of employment. And no one would say that there could be no justification for that attitude.

Constitutionality: Conclusion

"One of the most significant abridgements of the Constitutional rights of public employees that the Courts have sustained concerns the right to engage in political activity."[24] This may be considered the leading statement of the before-mentioned article. Indulging a bit of semantic analysis, is it possible legally to abridge a Constitutional right? It can be acknowledged without invidious implication, that the Constitution is what the Courts (meaning the Supreme Court) say it is; for the Constitution would be ineffective without a final arbiter of its terms. The Supreme Court has sustained the Hatch Act. Therefore, the law is that as public employees those to whom the statute applies never had a fixed Constitutional right to do the things prohibited. Concluding, the article says: "The upshot of the *Mitchell* decision and the general line of related cases is that the government may act arbitrarily in hiring or firing. . . ."[25] The language seems extreme.

23. *Id.* at 279.
24. Nelson, *supra* note 1, at 33.
25. Nelson, *supra* note 1, at 35.

Popular understanding of "arbitrary" follows this definition by Webster: "Fixed or arrived at . . . by caprice, without consideration or adjustment with reference to principles, circumstances, or significance. . . ."[26] Surely the cited cases imply nothing like that.

It would be the understatement of the year to say that Thomas Jefferson knew a good deal about the Constitution, and was not unmindful of public interest and individual rights. Yet he applied restrictions like those of the Hatch Act. By his direction as president, the heads of the executive departments issued the following directive:

> The President of the United States has seen with dissatisfaction officers of the General Government taking on various occasions active parts in elections of the public functionaries. . . . The right of any officer to give his vote at elections as a qualified citizen is not meant to be restrained, nor, however given, shall it have any effect to his prejudice; but it is expected that he will not attempt to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it.[27]

Daniel Webster, to make another facetious understatement, had standing as a constitutional lawyer. As Secretary of State, by direction of President William Henry Harrison, he issued an official circular in which this appears:

> The President . . . directs that information be given to all officers and agents in your department of the public service that partisan interference in popular elections, whether of State officers or officers of this Government . . . will be regarded by him as cause of removal.
>
> It is not intended that any officer shall be restrained in the free and proper expression and maintenance of his opinions respecting public men or public measures. But persons employed under the Government and paid for their services out of the public Treasury are not expected to take an active or officious part in attempts to influence the minds or votes of others, such conduct being deemed inconsistent with the spirit of the Constitution and the duties of public agents acting under it. . . .[28]

The most famous of all civil service commissioners was Theodore Roosevelt. A biographer, William Dudley Foulke, wrote: "His six years' experience as Civil Service Commission head gave him a better knowledge of the needs of the civil service than any other President ever had."[28a] He was the president who by executive order added to the civil service rule on political activity, the prohibition against taking "an active part in political management or political campaigns," so that the rule stood:

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26. WEBSTER, NEW INTERNATIONAL DICTIONARY (2d ed. unabridged 1955).
27. 10 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 98 (1904).
28. 4 *id.* at 52.
28a. FOULKE, ROOSEVELT AND THE SPOILSMEN 52 (1925).

> *Rule I.* No person in the executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. Persons who by the provisions of these Rules are in the competitive classified service, while retaining the right to vote as they please and to express privately their opinions on political subjects, shall take no active part in political management or in political campaigns.

These prohibitions (after elimination of the word "privately") are those contained in the Hatch Act.[29]

Apparently the eminent statesmen who have been quoted would have concurred in the *Public Workers of America* and *Oklahoma* decisions. It is said that when President Coolidge was asked about a book minimizing the virtues of George Washington, he looked out the White House window and said, "I see that the Washington monument still stands." It would be supererogatory to recapitulate here the Supreme Court's reasons for declaring the Hatch Act constitutional. But the law of the *Public Workers* and the *Oklahoma* decisions "still stands."

The classic statement of Justice Holmes while a judge of the Supreme Judicial Court of Massachusetts, in *McAuliffe v. Mayor of New Bedford*[30] provides appropriate last words for this paper. (The writer is unable to follow the thought that "the apparent nature of the doctrine disappears upon closer analysis.")[31] New Bedford's police regulations provided that no member of the department should solicit money or aid for any political purpose. Policeman McAuliffe did this and the mayor, under his statutory authority to remove police for cause, ordered him removed. McAuliffe challenged the regulation as "invading the petitioner's right to express his political opinions." The court said:

> The petitioner may have a Constitutional right to talk politics, but he has no Constitutional right to be a policeman.[32]

29. 54 STAT. 767 (1940), 5 U.S.C.A. § 118k(a) (Cum. Supp. 1950).
30. 155 Mass. 216, 29 N.E. 517 (1892).
31. Nelson, *supra* note 1, at 40.
32. 29 N.E. at 517.