

Assault on Hatch Act Signals Political Activity for Government Workers

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ASSAULT ON HATCH ACT SIGNALS POLITICAL ACTIVITY FOR GOVERNMENT WORKERS

Since the Supreme Court's 1947 decision in *United Public Workers v. Mitchell*,¹ it has been virtually unquestioned that Congress is constitutionally authorized to control the political conduct of government workers and, more particularly, that the Political Activities Act of 1939² (commonly known as the Hatch Act) represents a proper exercise of that authority. Unlike other constitutional precedents, and strikingly unlike most first amendment cases, *Mitchell* has apparently been considered relatively unassailable — until recently. In December, the Supreme Court agreed to hear arguments on an appeal from a three-judge court decision that has signaled the most drastic potential changes in political freedoms for government workers since the passage of the Civil Service Act of 1883.³ In *National Association of Letter Carriers, AFL-CIO v. United States Civil Service Commission*,⁴ a District Court for the District of Columbia panel found the key section of the Hatch Act "unacceptable under the First Amendment."⁵

¹ 330 U.S. 75.

² 5 U.S.C. §§ 1501-08, 7321-27 (1970).

³ The Civil Service Act of 1883 made the Civil Service Commission responsible for administering the merit system for federal employees. The Act attempted to curtail the "spoils" system which had traditionally caused post-election replacements of government employees by those who supported the most recently victorious political party. The assassination of President John Garfield in 1881 by a disappointed office seeker is generally credited with having led to the downfall of the spoils system. See generally C. FISH, *THE CIVIL SERVICE AND THE PATRONAGE* (1904).

The Civil Service Act forbade specified conduct relating to the making of political contributions by government employees. It also prohibited the use of official authority to coerce the political action of any person. 22 Stat. 403 (1883), as amended, 5 U.S.C. § 3301 *et seq.* (1970).

⁴ 346 F. Supp. 578 (D.D.C. 1972), *appeal filed*, 41 U.S.L.W. 3241 (U.S. Oct. 24, 1972) (No. 72-634), *review granted*, 41 U.S.L.W. 3324 (U.S. Dec. 11, 1972). The Court has also granted review in an appeal from another three-judge court opinion that upheld the constitutionality of Oklahoma's "little Hatch Act." *Broadrick v. Oklahoma ex rel. Okla. Personnel Bd.*, 338 F. Supp. 711 (W.D. Okla. 1972) (*mem.*), *review granted*, 41 U.S.L.W. 3324 (U.S. Dec. 11, 1972) (No. 71-1639). Thus, it appears that the Supreme Court will rule on the first amendment validity of state "Hatch Acts" at the same time it decides what limits may constitutionally be placed on the political activities of federal employees. See note 84 *infra*.

⁵ 346 F. Supp. at 584. The action was brought by the National Association of Letter Carriers and six federal employees who sought a judgment declaring 5 U.S.C. § 7324(a)(2) (1970) unconstitutional. The section reads as follows:

(a) An employee in an Executive agency or an individual employed by the government of the District of Columbia may not—

(2) take an active part in political management or in political campaigns. For the purpose of this subsection, the phrase "an active part in political management or political campaigns" means those acts of political management or

Although the court strongly endorsed the congressional goal of curbing "pernicious" political activity on the part of government employees, it nevertheless struck down the provision that prohibits federal employees⁶ from taking "an active part in political management or in political campaigns."⁷ The section was found to have a "'chilling effect'" on freedom of speech and association due to the "vice of overbreadth and attendant vagueness."⁸

The policy considerations articulated in restrictions on the political activities of government workers have had a long history in this country. In 1801, Thomas Jefferson warned that it was "improper" for officers of the executive to "attempt to control or influence the free exercise of the elective right."⁹ Though presidential concern for a neutral civil service was reiterated in 1841,¹⁰ 1877,¹¹ and 1886,¹² it was not until 1907 that President Theodore Roosevelt, a former Civil Service commissioner, prohibited employees in the competitive classified service

political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under rules prescribed by the President.

It is important to note at the outset of this discussion that the current dispute does not involve the provision of the Hatch Act that prohibits an employee from using "his official authority or influence for the purpose of interfering with or affecting the result of an election." 5 U.S.C. § 7324(a)(1) (1970). The Hatch Act itself contains a number of other sections and there are also other statutes that regulate the political conduct of government employees. See note 123 *infra*.

⁶ The Act's prohibitions exclude only those federal employees paid by the office of the President, heads or assistant heads of executive or military departments, and presidential appointees whose nominations are advised and consented to by the Senate. 5 U.S.C. § 7324(d) (1970).

The individual plaintiffs in *Letter Carriers* are all employees whose positions fall under the control of the Civil Service Commission although they vary in administrative responsibility. The six plaintiffs hold the following positions: executive officer in the Internal Revenue Service, systems analyst for the National Library of Medicine, director in the political and legal analysis branch of the National Center for Health Services Research and Development of the Department of Health, assistant regional field director of the National Association of Letter Carriers, letter carrier and member of the National Association of Letter Carriers.

⁷ 5 U.S.C. § 7324(a)(2) (1970).

⁸ 346 F. Supp. at 584.

⁹ 10 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 98 (1899). In England, a 1710 statute provided a fine and dismissal for any post office employee who attempted to influence another person's vote. 9 Anne, c. 10, § 44 (1710). For a discussion of English prohibitions today, see text accompanying notes 117 and 118 *infra*.

¹⁰ In 1841, President John Tyler had his Secretary of State, Daniel Webster, issue an order restricting political activity by federal employees. 4 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 52 (1899).

¹¹ In 1877, President Rutherford Hayes ordered a restriction of political activities by and political assessments against federal employees. 7 *id.* at 450-451.

¹² In 1886, three years after the passage of the Civil Service Act, President Grover Cleveland issued yet another executive order restricting political activities by federal office holders. 8 *id.* at 494.

from taking an active part in political activity.¹³ Roosevelt's executive order did not interfere with an employee's rights to vote as he pleased and to express privately his views on political subjects.¹⁴ Civil Service Rule I, which incorporated Roosevelt's executive order, remained in effect until the Hatch Act was passed.¹⁵

LEGISLATIVE HISTORY

In 1937, Senator Carl Hatch introduced an amendment to the 1938 Works Progress (later Work Projects) Administration (WPA) appropriations bill that would have prevented federal employees in administrative capacities from using their influence to interfere with elections or primaries. This effort to apply to the WPA the same restrictions as were then imposed on competitive employees by the Civil Service Commission failed to pass a Senate vote.¹⁶ Following the amendment's defeat, a special committee was formed under the chairmanship of Senator Morris Sheppard to investigate the use of relief and relief-work funds¹⁷ for political ends. Public indignation concerning the reported misuse of funds during the 1938 Kentucky Democratic primary added to apprehension about the rapid expansion of government employee rosters that accompanied New Deal programs.¹⁸

¹³ Exec. Order No. 642 (June 3, 1907). Roosevelt's executive order, which later became Civil Service Rule I (and also the basic wording of the Hatch Act's political activity section), did not specifically define the acts prohibited. It is clear, however, that Roosevelt's restrictions were more severe than the provisions of the Hatch Act in that employees could express their political views only in private. During the years before the Hatch Act was passed, the Civil Service Commission handed down some 3,000 determinations under Rule I which the Hatch Act later incorporated as its definition of prohibited activities. See note 5 *supra*.

¹⁴ *Id.* See generally THEODORE ROOSEVELT, AN AUTOBIOGRAPHY, ch. V (1913).

¹⁵ The only significant difference between the Hatch Act and Rule I is that, under the Act, employees are permitted, in most instances, to publicly express their views on political subjects.

¹⁶ 83 CONG. REC. 5569, 7999-8000 (1938).

¹⁷ During the years following President Franklin Roosevelt's inauguration, many non-merit employees were added to the federal work rolls under relief-work programs to combat the Depression. By 1939, 40 per cent of federal workers were not regulated by the merit system. P. VAN RIPER, HISTORY OF THE U.S. CIVIL SERVICE 340 (1958).

¹⁸ COMMISSION ON POLITICAL ACTIVITY OF GOVERNMENT PERSONNEL, FINDINGS AND RECOMMENDATIONS, vol. 1, at 9 (1967) [hereinafter COMMISSION ON POLITICAL ACTIVITY]. The 1938 Kentucky Democratic primary included a race between Governor "Happy" Chandler and Alben Barkley for the senatorial nomination. That contest gave rise to widespread reports of political corruption. Large numbers of WPA workers were said to be working for Barkley as well as being pressured to vote for him. State workers, on the other hand, were reported to have been assessed percentages of their salaries to aid Chandler's efforts in addition to being pressured to vote and work for his election. N.Y. Times, Sept. 9, 1938, at 10, col. 3.

The Sheppard Committee, the only fact-finding effort to precede passage of the Hatch Act, determined that funds appropriated for relief programs had been diverted to political activities.¹⁹ However, none of the 16 Sheppard Committee recommendations suggested prohibiting voluntary political activity. Shortly after the Sheppard Report was presented, Senator Hatch introduced his bill which became law several months later.

In passing the Hatch Act, Congress extended prohibitions concerning political activity to non-competitive Civil Service employees of the federal government as well as to certain state and local employees.²⁰ Until 1966, violations of the Act's prohibitions were punished by mandatory removal of an offending employee from his job.²¹

The goals of the Hatch Act have been summarized as follows: (1) preventing the party in power from making political demands of employees designed to ensure that party's continuation in power; (2) alleviating the danger of government workers organizing into a self-seeking political force; (3) ensuring continuity of efficient administration when department heads change by eliminating the distrust that might arise from political differences; and (4) preventing the demoralization of employees that would result from political competition for promotions.²²

Though most authorities recognize the wisdom of the Act's goals, many take issue with its sweep. As presently written, the Act's prohibitions apply to approximately three million federal employees.²³ Some critics would limit prohibitions to coerced political activity and thus allow workers to voluntarily engage in political activity.²⁴ Other critics

¹⁹ S. REP. No. 1, 76th Cong., 1st Sess. 1 (1939).

²⁰ 5 U.S.C. §§ 1502-07 (1970) applies Hatch Act restrictions to state and local officers or employees 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 Federal agency. . . ." *Id.* § 1501(4). The issues involved in those provisions of the Act that cover state and local employees are essentially the same as the federal restrictions and, as *Letter Carriers* did not grant standing to consider those issues, they will not be treated separately in this article.

²¹ Today the Civil Service Commission can impose less severe penalties if the Commission members unanimously agree that the violation does not warrant removal. 5 U.S.C. § 7325 (1970).

²² Esman, *The Hatch Act—A Reappraisal*, 60 YALE L.J. 986, 994-95 (1951). For a pre-Hatch Act discussion of the evils inhering in a permissive policy regarding partisan political activity by public employees, see Catherwood, *Political Activity by Civil Service Employees*, 7 ILL. L. REV. 160 (1912).

²³ U.S. BUREAU OF FOREIGN AND DOMESTIC COMMERCE, DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. at 388 (1971).

²⁴ Provisions of the Hatch Act other than those at issue in *Letter Carriers* provide safeguards against coercion of employees for political purposes and solicitation of funds for the same purposes. 5 U.S.C. §§ 7321-23 (1970). Thus, even if the Supreme Court should affirm the three-judge court opinion, these strictures would remain in effect.

would limit application of the Act to administrative employees and lift restrictions on industrial-type workers.²⁵ Still others note vagueness and contradictions in the Act's provisions and would spell out the specific activities intended to be prohibited. This problem of vagueness was the basis of the court's decision in *Letter Carriers*.

In considering the Hatch Act, Congress debated the issue of definition as well as the question whether the prohibitions should extend to voluntary activity.²⁶ The possibility of granting the Civil Service Commission authority to promulgate rules and regulations defining prohibited activity and the alternative possibility of spelling out restrictions were both considered but Congress opted for neither, deciding instead to incorporate the Commission's earlier rulings as to acts prohibited under Civil Service Rule I.²⁷ By limiting the reach of the Act to Rule I decisions promulgated by the Commission between 1907 and 1940, Congress hoped to achieve precision of definition while withholding a broad delegation of authority from the Commission.²⁸

When he introduced the compromise proposal of incorporating the prior rulings, Senator Hatch asserted that interpretations of activities prohibited by the Act would be strictly limited to those decisions.²⁹ This substitute definition by incorporation was adopted by the Senate on the same day it was proposed by Senator Hatch despite the fact that, according to one commentator, a responsible investigation of the substance of the rulings would have precluded adoption of every one of the 3,000 pre-1940 decisions.³⁰ Some of those rulings led to disciplinary action where an employee engaged in one of the following activities: making a wager on an election; wearing a political button while on duty; denouncing a political party while in a jovial mood due to alcohol; failing to discourage a spouse's political participation; disparaging the President.³¹

There is evidence that members of Congress were uncertain as to whether they were incorporating all of the rulings issued under Rule I or merely the incomplete summaries which the Commission

²⁵ See text accompanying note 117 *infra*.

²⁶ 86 CONG. REC. 2920-63 (1940).

²⁷ S. REP. NO. 1236, 76th Cong., 3d Sess. 4 (1940).

²⁸ Some Senators felt that to authorize the Commission to define the prohibited activities would be equivalent to granting it legislative power. 86 CONG. REC. 2928 (1940).

²⁹ Circuit Judge MacKinnon's dissent in *Letter Carriers* views the incorporated definition as a set of "outer limits" within which Congress intended the Civil Service Commission to define prohibited acts in the future. 346 F. Supp. at 593. See text accompanying note 101 *infra*.

³⁰ Rose, *A Critical Look at the Hatch Act*, 75 HARV. L. REV. 510, 515 (1962).

³¹ 346 F. Supp. at 581.

published at irregular intervals under the designation "Form 1236."³² Senator Hatch circulated a post card-size summary of 18 categories of interpretations of Rule I.³³ Although some senators protested incorporation of decisions not before the Senate, the majority leader, Senator Alben Barkley, argued that individual consideration of each Commission interpretation would unnecessarily delay a vote.³⁴ One writer has stated that no member of Congress, not even Senator Hatch, read the actual rulings which the Act incorporated by reference.³⁵

Mitchell

In *United Public Workers v. Mitchell*,³⁶ the Supreme Court decided, by a 4-3 vote, that application of the Hatch Act's prohibitions and penalty clause to the political activities of the single plaintiff granted standing to challenge the Act was constitutional.³⁷ The action which sought to enjoin enforcement of the Act's prohibitions against employees taking an active part in political management and campaigns was instituted by 11 federal employees and the United Public Workers of America. Plaintiffs also asked that the provisions in question be declared unconstitutional.³⁸

The Court first addressed itself to the standing problem, holding that George Poole, an industrial worker in the Philadelphia mint, was the only plaintiff having the requisite interest in the constitutionality of the Act to institute the litigation. Poole had already been charged

³² POLITICAL ACTIVITY AND POLITICAL ASSESSMENTS OF FEDERAL OFFICEHOLDERS AND EMPLOYEES, FORM 1236, U.S. CIVIL SERVICE COMMISSION (1939).

³³ Some of the interpretations printed on the card prohibited participation in state, county and municipal, as well as national, politics; involvement as a delegate, alternate or proxy at a political convention; organization of political rallies; political speech-making; solicitation of votes; publication of material in, or in connection with, political newspapers; placement of wagers on election results; distribution of campaign literature. 86 CONG. REC. 2943 (1940).

³⁴ 86 CONG. REC. 2949 (1940).

³⁵ Rose, *A Critical Look at the Hatch Act*, 75 HARV. L. REV. 510, 514 n.18. Professor Rose cites a letter which he received from former Senator Hatch in 1960. The letter reportedly stated that the ex-Senator had no recollection that a study of the rulings had been made.

³⁶ 330 U.S. 75 (1947).

³⁷ Although the *Mitchell* decision has been widely relied upon as authority for the proposition that the Hatch Act is constitutional *in toto*, the very narrow factual context in which the legislation was examined makes such reliance questionable. See text accompanying note 40 *infra*. The fact that Justices Murphy and Jackson took no part in the decision makes it clear that the 4-3 opinion was in fact a minority decision.

³⁸ Though labor unions are united in their support of the Letter Carrier's union today, in 1947 the United Public Workers organization received only limited support for its efforts from the National Federation of Federal Employees and the American Federation of Federal Employees. Epstein, *Political Sterilization of Civil Servants: The United States and Great Britain*, 10 PUB. ADMIN. REV. 281, 287 (1950) [hereinafter Epstein]. See text accompanying note 130 *infra*.

with committing prohibited political acts and an order for his dismissal had been adopted.³⁹ As a ward executive committeeman of a political party, he was active at election polls and was a paymaster for the services of other political workers.

Although the Court recognized that the Hatch Act interfered with what would otherwise be rights guaranteed by the first, ninth and tenth amendments, it narrowed its deliberations to the question whether "such a breach of the Hatch Act [Poole's activities] . . . can, without violating the Constitution, be made the basis for disciplinary action."⁴⁰ It concluded that such sanctions were indeed constitutional. Relying on the separation of powers doctrine, the court endorsed Congress's authority to regulate the conduct of government employees "within reasonable limits." Justice Reed wrote for the majority:

When actions of civil servants in the judgment of Congress menace the integrity and competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional.⁴¹

The majority found support for its decision in *Ex parte Curtis*,⁴² a decision in which the Court had earlier affirmed Congress's power to regulate the political conduct of government workers. *Curtis* upheld the conviction of a federal employee for violating a statute that prohibited government employees from soliciting or receiving money for political purposes from each other. The decision noted the existence of a legislative right to "maintain proper discipline in the public service. Clearly such a provision is within the just scope of legislative power. . . ."⁴³ Justice Bradley, dissenting in *Curtis*, argued, however, that the statute went too far in combating the limited evil of "political assessments."⁴⁴ He reasoned that Congress could not condition employment on a requirement that a citizen surrender the fundamental right to promote his views on public affairs.⁴⁵

The *Mitchell* Court followed the *Curtis* majority in recognizing such a legislative prerogative to condition employment on the relinquishment of first amendment rights and cited a declaration made by Judge

³⁹ 330 U.S. at 91-92.

⁴⁰ *Id.* at 94.

⁴¹ *Id.* at 103.

⁴² 106 U.S. 371 (1882).

⁴³ *Id.* at 373.

⁴⁴ *Id.* at 378.

⁴⁵ *Id.*

(later Justice) Holmes as he declined to overturn the removal of a policeman for political activity: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." ⁴⁶

Mitchell also relied on the Court's earlier decision in *United States v. Wurzbach*⁴⁷ where the doctrine of legislative power over government officials was held valid as applied to members of Congress itself. In *Wurzbach*, the defendant was convicted under the Federal Corrupt Practices Act of 1925 on charges that he received sums of money from government employees for his own political purposes while a member of Congress.

Justice Black, dissenting, protested the majority's reliance on *Curtis* and *Wurzbach*. He argued that both cases related to statutes "which did no more than limit the right of employees to collect money from other employees."⁴⁸

Though the *Mitchell* majority rested on Congress's right to reasonably regulate government employee conduct and disclaimed any need "to examine . . . further *at this time* into the validity of the [Act's] definition of political activity,"⁴⁹ Justice Black refused to restrict his examination to Poole's transgressions and condemned the definition as "too broad, ambiguous, and uncertain."⁵⁰

[L]aws which restrict the liberties guaranteed by the First Amendment should be narrowly drawn to meet the evil aimed at and to affect only the minimum number of people imperatively necessary to prevent a grave and imminent danger to the public.⁵¹

Justice Douglas's dissenting opinion called for a distinction between restrictions imposed on administrative workers and those applied to industrial workers. "Poole," he asserted, ". . . is as remote from contact with the public or from policy making or from the functioning of the administrative process as a charwoman."⁵² Since the specific evils which a "spoils" system might impose on industrial workers could be dealt with by more narrowly drawn legislation,⁵³ Justice Douglas saw no need to politically sterilize the industrial group.

⁴⁶ 330 U.S. at 99 n.34, quoting *McAuliffe v. New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892).

⁴⁷ 280 U.S. 396 (1930).

⁴⁸ 330 U.S. at 112 (Black, J., dissenting in part).

⁴⁹ *Id.* at 103-04 (emphasis added).

⁵⁰ *Id.* at 110 (Black, J., dissenting in part).

⁵¹ *Id.*

⁵² *Id.* at 122 (Douglas, J., dissenting in part). See generally 15 GEO. WASH. L. REV. 443 (1947).

⁵³ 330 U.S. at 123 (Douglas, J., dissenting in part).

The *Mitchell* decision has been criticized as a "dangerous step"⁵⁴ toward the abrogation of fundamental rights. In focusing on the separation of powers doctrine, the Court disregarded an observation it had previously made concerning first amendment rights:

In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.⁵⁵

Mitchell's divergence from prior first amendment doctrine indicates that the Court relied heavily on the factual context of Poole's activity and the special nature of public employment.

Mitchell is still law and will remain so at least until the Supreme Court rules on the *Letter Carriers* appeal.⁵⁶ How the Court will act this term to dispose of the constitutional issues posed by the Hatch Act can best be predicted by examining decisions subsequent to *Mitchell* and by noting changes in the political and merit systems since 1947. Perusal of a series of first amendment opinions issued during the sixties and reviewed and summarized in the 1972 case, *Grayned v. City of Rockford*,⁵⁷ compels one to conclude that the Court will be unable to avoid inquiring into the validity of the Hatch Act on the basis of the doctrines of vagueness and overbreadth.⁵⁸ The *Grayned* opinion de-

⁵⁴ Mosher, *Government Employees Under the Hatch Act*, 22 N.Y.U.L.Q. REV. 233, 253 (1947).

⁵⁵ *Schneider v. State*, 308 U.S. 147, 161 (1939). *Schneider* struck down municipal ordinances that forbade distribution of leaflets on public streets as violative of the first amendment freedoms of speech and press. In *Thomas v. Collins*, 323 U.S. 516 (1945), the Court had said:

The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible legislation.

Id. at 530.

⁵⁶ The *Letter Carriers* injunction against enforcement of the disputed sections of the Hatch Act was coupled with a stay of the order pending a determination by the Supreme Court. 346 F. Supp. at 585.

⁵⁷ 408 U.S. 104 (1972). *Grayned* reviewed the conviction of a defendant who had violated two Rockford, Illinois, ordinances, one prohibiting picketing near a school and the other prohibiting willful noise and disturbances near a school. The Court reversed the anti-picketing conviction and struck down that ordinance as violative of the equal protection clause of the fourteenth amendment. *Id.* at 107. However, the Court upheld the anti-noise conviction, concluding that the second ordinance was not violative of the doctrines of vagueness and overbreadth. *Id.* at 108.

⁵⁸ See generally Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV.

clared, "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."⁵⁹

The Court has stated three reasons for its void-for-vagueness doctrine: (1) laws must give a person of ordinary intelligence an opportunity to know what he may and may not do within the law; (2) laws must be explicit in order to prevent arbitrary and discriminatory enforcement; and (3) vague laws that relate to first amendment rights tend to inhibit the exercise of those rights since persons affected conduct themselves with greater restraint than would be required by clearly drawn laws.⁶⁰ Overbreadth, on the other hand, may occur even in precisely drawn legislation "if in its reach it prohibits constitutionally protected conduct."⁶¹ An overbroad law is one that "sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments."⁶²

RECENT FIRST AMENDMENT DECISIONS

In *Cramp v. Board of Public Instruction*,⁶³ the Court struck down as unconstitutionally vague a Florida statute that required every employee of the state and its subdivisions to execute, under penalty of dismissal, a written oath that he had never lent his support or influence to the Communist Party.⁶⁴ The Court criticized the statute for failing to "objectively" define the terms "influence" and "support."⁶⁵ Although the Hatch Act's definition by incorporation of prohibited activities can be "objectively" determined, such determination requires study of some 3,000 pre-1940 rulings of the Civil Service Commission. The interpretations of those rulings as published by the Commission⁶⁶ does not have legislative authority and is, therefore, an unreliable list. Confusion on the part of many employees⁶⁷ illustrates the fact that the definition has not been clearly understood.

The *Cramp* opinion also concluded that the issue of whether there exists a right to public employment, as opposed to the notion of

844 (1970); Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. OF PA. L. REV. 67 (1960).

⁵⁹ 408 U.S. at 108.

⁶⁰ *Id.* at 108-09.

⁶¹ *Id.* at 114.

⁶² *Id.* at 115.

⁶³ 368 U.S. 278 (1961). See also *Baggett v. Bullitt*, 377 U.S. 360 (1964).

⁶⁴ 368 U.S. at 288.

⁶⁵ *Id.* at 287.

⁶⁶ 5 C.F.R. § 733 (1972). In 1971 the Commission issued a three-volume compilation of its rulings under Civil Service Rule I from 1886 to 1940. UNITED STATES CIVIL SERVICE POLITICAL ACTIVITY REPORTER (1971).

⁶⁷ See text accompanying notes 113 and 114 *infra*.

public employment as a privilege, would not be a factor determinative of the first amendment question.⁶⁸ By so concluding, the Court added to a series of opinions⁶⁹ which have repudiated the so-called "right-privilege" distinction on which the *Mitchell* majority relied.⁷⁰ Absent clear justification, public employment, particularly in view of the soaring number of employees since Justice Holmes' declaration,⁷¹ can no longer be conditioned on relinquishment of constitutional rights.

The Court struck down another oath requirement in *Elfbrandt v. Russell*.⁷² Arizona public employees were required to declare that they would not become members of any organization which had as one of its purposes the overthrow of the government. *Elfbrandt* was based on the "cherished freedom of association"⁷³ and declared the oath unconstitutionally overbroad because those who join an organization but do not share its unlawful goals pose no threat.⁷⁴ Although the Hatch Act does not prohibit membership in political organizations, it does restrict certain activities in those organizations. *Elfbrandt* appears clearly applicable to the *Letter Carriers* situation in that it may cogently be argued that, if freedom of association is to be meaningful, employees who join political organizations must be permitted to take part in the activities of those organizations.⁷⁵

In *Sherbert v. Verner*,⁷⁶ the Court held that South Carolina could not constitutionally apply eligibility provisions of an unemployment compensation statute so as to deny benefits to a claimant who had refused employment because her religion prohibited working on Saturday. The Court declared that it was incumbent upon the state "to

⁶⁸ 368 U.S. at 288.

⁶⁹ See *Speiser v. Randall*, 357 U.S. 513 (1958); *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551 (1956); *Wieman v. Updegraff*, 344 U.S. 183 (1952). In *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Court reversed the dismissal of an Illinois school teacher for sending a letter to a newspaper which was critical of the school board's revenue raising program. The Court said:

To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court.

Id. at 568.

⁷⁰ See text accompanying note 46 *supra*.

⁷¹ *Id.*

⁷² 384 U.S. 11 (1966).

⁷³ *Id.* at 18.

⁷⁴ *Id.* at 17. See also *United States v. Robel*, 389 U.S. 258 (1967); note 83 *infra*.

⁷⁵ A federal employee is permitted to be a member of a political party and to attend conventions and rallies but he may not serve as an officer of a political party or of a local committee of a political party, actively engage in fund-raising, or take an active part in the management of a political campaign. 5 C.F.R. §§ 733.111, 733.122 (1972).

⁷⁶ 374 U.S. 398 (1963).

demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."⁷⁷ In the current *Letter Carriers* dispute, the government should be required, therefore, to show that legislation less sweeping than the Hatch Act is not a feasible alternative.⁷⁸

*Keyishian v. Board of Regents*⁷⁹ held unconstitutionally vague a New York statute which made "treasonable" or "seditious" words or acts grounds for removal from the public school system. The Court noted the potential effect of the "obscure wording" on those who would scrupulously undertake to apply it.⁸⁰ Although New York's goal of protecting its educational system from subversion was recognized as legitimate, the statute's "chilling effect" upon the exercise of vital first amendment rights was condemned.⁸¹

Keyishian did much to clarify the Court's void-for-vagueness doctrine, indicating that it is not only a principle that regulates the permissible relationship between written law and the potential offender but is also as an instrument that mediates between the potential for coercion by government bodies and the government's duty to protect the individual's interests.⁸² The Court has also clearly condemned overbreadth in statutory language, particularly where the threat of sanctions may deter the exercise of first amendment rights:

Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.⁸³

⁷⁷ *Id.* at 407. *NAACP v. Button*, 371 U.S. 415, decided in the same year as *Sherbert*, made it clear that the same standard applies to freedom of speech and association cases. There, the Court ruled that "only a compelling state interest in the regulation of a subject . . . can justify limiting First Amendment freedoms" and that "precision of regulation must be a touchstone" when such regulations are promulgated. *Id.* at 438.

⁷⁸ The overbreadth doctrine might be used to limit political activity prohibitions to certain categories of government employees. The Hatch Act may be deemed overbroad in that it (1) applies to activities that may not constitutionally be prohibited and (2) restricts classes of employees whose activities may not validly be restricted as well as classes of employees whose activities may validly be restricted. *See* text accompanying notes 52 and 53 *supra*.

⁷⁹ 385 U.S. 589 (1967).

⁸⁰ *Id.* at 599. The Court undoubtedly feared the use of obscure regulations to punish and threaten individuals whose activities, if spelled out in the statute, could not legitimately be made a basis for disciplinary action.

⁸¹ *Id.* at 604.

⁸² Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 81 (1960).

⁸³ *NAACP v. Button*, 371 U.S. 415, 433 (1963). *See also* *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940). In *United States v. Robel*, 389 U.S. 258 (1967), the Court held that a section of the Subversive Activities Control Act making it unlawful for a member of a Communist action organization to engage in any employment in any defense facility was unconstitutional in that it sought

In scrutinizing the Hatch Act, the Supreme Court will find it necessary to deal not only with the opinions of the last decade which subject legislation to strict first amendment scrutiny but also with decisions (other than *Letter Carriers* itself) which have held *Mitchell* to be less than binding.⁸⁴ Last year, the District Court for the District of Rhode Island, in *Mancuso v. Taft*,⁸⁵ supported a policeman's right to be a candidate for nomination to the state General Assembly and deemed unconstitutional city charter provisions that prohibited public employees from participating in political activities. "[I]t appears that the facts of *Mitchell's* world are not the facts of life today,"⁸⁶ the court wrote.

The Fifth Circuit Court of Appeals recently declared that the *Mitchell* standard of review, "with its almost wholesale deference to the legislature's judgment,"⁸⁷ was

a broad prophylactic rule against political activity — which, in the individual case, might proscribe conduct unrelated to a significant

to bar employment both for those types of association that may be proscribed and those types of association that may not be made the subject of sanction consistently with first amendment rights. *Id.* at 266.

⁸⁴ In addition to courts which have specifically criticized *Mitchell*, two state courts have ruled that so-called "Little Hatch Acts," which apply to state and local agency employees, are unconstitutional.

Bagley v. Washington Township Hospital District, 65 Cal.2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966), held that a statute that prohibited government employees from taking part in campaigns for or against any candidate of their political sub-division or ballot measure was overbroad. The Supreme Court of California noted that more specific legislation could be drafted to prohibit an employee from campaigning against his superior.

The Supreme Court of Arizona, in *Huerta v. Flood*, 103 Ariz. 608, 447 P.2d 866 (1968), struck down a statute which provided that no government employee could ask another employee to contribute anything of value to any organization for political purposes. The court approved the aim of curbing corrupt practices in politics but reasoned that the vague language of the statute might cause employees to refrain from activity not prohibited.

The Supreme Court has recently granted review of a three-judge district court opinion which, contrary to these earlier decisions, upheld the validity of an Oklahoma statute which prohibits state employees from taking part in the management or affairs of any political party or campaign. *Broadrick v. Oklahoma ex rel. Okla. Personnel Bd.*, 338 F. Supp. 711 (W.D. Okla. 1972) (*mem.*), review granted, 41 U.S.L.W. 3324 (U.S. Dec. 11, 1972) (No. 71-1639). The district court panel was clearly influenced by the notion that an "inferior court can never 'erode' a decision of the United States Supreme Court [*Mitchell*]." *Id.* at 716. It is interesting to note that the memorandum opinion of the Oklahoma district court, with its assumption of the applicability and continuing validity of *Mitchell*, is in marked contrast to the approach taken in *Letter Carriers*.

⁸⁵ 341 F. Supp. 574 (D.R.I. 1972).

⁸⁶ *Id.* at 576. The court noted the evolution of the Supreme Court's first amendment doctrines, the marked increase in the number of government employees since *Mitchell*, and the context in which *Mitchell* was decided, a context of fear that political activity would corrupt a neutral civil service. *Id.* at 576-77.

⁸⁷ *Hobbs v. Thompson*, 448 F.2d 456, 472 (5th Cir. 1971). *Hobbs* held a Macon, Georgia, ordinance that prohibited firemen and policemen from taking an active part in electioneering unconstitutionally vague and overbroad. *Id.* at 475.

state interest It is this approach in *Mitchell* which we think is no longer good law.⁸⁸

The courts' evident confusion concerning *Mitchell's* continued validity is well demonstrated in *Northern Virginia Regional Park Authority v. United States Civil Service Commission*,⁸⁹ a case in which the Fourth Circuit Court of Appeals recently felt bound to apply *Mitchell* although it acknowledged the "considerable weight" of arguments that tend to detract from the strength of that precedent.⁹⁰

Letter Carriers

Letter Carriers is a class action brought by the National Association of Letter Carriers, AFL-CIO, a union representing 200,000 postal employees, and six federal employees⁹¹ on behalf of all federal workers and seeking a declaratory judgment that sections of the Hatch Act are unconstitutional and an injunction to prevent enforcement of the penalties prescribed for violation. The three-judge federal court⁹² did not grant standing to six Republican and Democratic committees which sought to represent all state employees who are also governed by the Hatch Act.⁹³

The majority opinion is based on the ambiguity inhering in the Hatch Act's definition of proscribed behavior.⁹⁴ The court does not consider whether the statute is overbroad in restricting both voluntary

⁸⁸ *Id.*

⁸⁹ 437 F.2d 1346 (4th Cir. 1971), *cert. denied*, 403 U.S. 936. The court upheld the Civil Service Commission's directive that monies be withheld from a federally funded local agency on the ground that its director had violated the Hatch Act and the agency had refused to dismiss him.

⁹⁰ *Id.* at 1350. The court agreed with the appellants' contentions that Supreme Court decisions subsequent to *Mitchell* established more rigorous constitutional standards and cited several first amendment cases which reflect those standards. *Id.* at 1349.

⁹¹ Four of the federal employees are administrative workers and two are letter carriers. *See* note 6 *supra*. The Supreme Court might, therefore, distinguish between the two types of employees represented and rule that prohibitions acceptable for one group would be unacceptable for another. *See* text accompanying notes 52 and 53 *supra*.

⁹² The three-judge court was convened pursuant to 28 U.S.C. §§ 2282, 2284 (1964). The standards for convening a three-judge panel have been described by the Supreme Court as follows:

When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute.

Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715 (1962).

⁹³ 5 U.S.C. § 1502(a)(3) (1970) prohibits covered state employees from taking an active part in political management and campaigns. None of the original plaintiffs were state employees governed by the restrictions.

⁹⁴ *See* note 5 *supra*.

and coerced political action nor does it demand that the government justify its infringement of first amendment rights by spelling out the "clear and present danger"⁹⁵ felt to be present in the absence of such restrictions particularly with respect to industrial workers. The majority notes that the Hatch Act contains a qualifying provision which guarantees an employee "the right to vote as he chooses and to express his opinion on political subjects and candidates."⁹⁶ This provision is seen as contradicting the provision prohibiting active campaigning and management: "one fixes the definition and the other makes the definition fluid."⁹⁷

Although the Civil Service Commission has not enforced the dictates of many of the pre-1940 rulings, the federal employee is still threatened by the broad incorporated definition and "will not know when his words or acts relating to political subjects will offend."⁹⁸ The court argues that *Mitchell* is outmoded and is inconsistent with subsequent Supreme Court decisions.⁹⁹

Circuit Judge MacKinnon's dissenting opinion asserts *Mitchell's* vitality and argues that the majority discussion on vagueness ignores a Supreme Court policy of rejecting literal interpretations of disputed statutes.¹⁰⁰ Judge MacKinnon argues that Hatch did not "immutably fix" the definition of prohibited political activity and cites a series of Supreme Court decisions suggesting that all laws should receive sensible (i.e., constitutional) constructions.¹⁰¹ However, none of the cited cases deals with first amendment issues. The dissent sees the legislative history, not as incorporating the pre-1940 rulings, but as giving the Civil Service Commission interpretive powers and including the earlier decisions merely to impose a "ceiling on the Commission's power to

⁹⁵ In *Cantwell*, the Court said:

[I]n the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of constitutional guarantees, raises no such clear and present menace to public peace and order

310 U.S. at 311.

⁹⁶ 5 U.S.C. § 7324(b) (1970).

⁹⁷ 346 F. Supp. at 581.

⁹⁸ *Id.* at 582-83. For a discussion of the Commission's enforcement policies as a possible "administrative gloss" upon the Act, see notes 102-04 and accompanying text *infra*.

⁹⁹ Heavy reliance is placed on the Supreme Court decisions in *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *United States v. Robel*, 389 U.S. 258 (1967); *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967); *NAACP v. Button*, 371 U.S. 415 (1963).

¹⁰⁰ 346 F. Supp. at 590-91.

¹⁰¹ *Id.* at 590, citing, *inter alia*, *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 250 (1970); *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943); *American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 293 (1907); *Holy Trinity Church v. United States*, 143 U.S. 457, 461 (1892).

restrict individual political activity."¹⁰² The definition by incorporation is seen as a congressional limitation on the Civil Service Commission's power to curtail political activity rather than as a standard in itself.¹⁰³ When viewed in this light, the dissent contends, the statute as interpreted by the courts and the Commission in the post-1940 era is constitutional.¹⁰⁴

Moreover, as to the incorporated rulings, Judge MacKinnon suggests that Congress include only those decisions "which remain consistent with evolving concepts of individual freedom of political expression protected by the First Amendment, as announced by the courts."¹⁰⁵ This interesting theory of Judge MacKinnon thus suggests that this (and other) statutes contain, as it were, self-adjusting mechanisms that update the legislation to concur with evolving interpretations of first amendment rights. If this theory were logically extended, few statutes would ever require judicial review because those provisions which are inconsistent with first amendment guidelines would automatically be deemed modified. If it is unnecessary for the courts to review and strike down unconstitutional statutes, one wonders where the evolving first amendment guidelines, by which statutes are to self-adjust, are to come from.

Judge MacKinnon also finds notice of the statute's prohibitions to be fair and ample,¹⁰⁶ reasoning that the availability of aids, such as the Form 1236¹⁰⁷ summary of prohibited activity, is relevant to the issue of

¹⁰² 346 F. Supp. at 592.

¹⁰³ It is difficult to accept this interpretation when one examines the statute's language which clearly incorporates the pre-1940 rulings as definition and the congressional debate which evinced a clear intent not to grant the Commission power to define the prohibited acts in the future. See note 29 *supra*.

¹⁰⁴ 346 F. Supp. at 593. The administrative interpretations of the Hatch Act, according to the dissent, have been consistent with first amendment guidelines. This, however, should not be the standard by which the statute is examined as Congress never granted the Commission the power to promulgate substantive rules which would define prohibited activities. Congress explicitly limited the definition to the pre-1940 rulings. Although courts *may* choose to give great weight to interpretative rulings of an administrative agency which has not been given explicit authority to promulgate statutory regulations, the courts are not bound by such interpretations. See *Skidmore v. Swift & Co.*, 323 U.S. 138 (1944).

The majority opinion rejects, on two grounds, the dissent's conclusion that the "administrative gloss" renders the statute constitutional. The majority contends that (1) the Commission has no authority under the Hatch Act to define its terms and (2) even if the Commission's post-1940 rulings be deemed an authorized "administrative gloss" on the Act's terms, the only discernible standard promulgated by the Commission is still far too vague to afford fair notice of its contents to government workers. 346 F. Supp. at 582-83.

¹⁰⁵ 346 F. Supp. at 594.

¹⁰⁶ *Id.* at 593-99.

¹⁰⁷ See note 32 and accompanying text *supra*.

vagueness — that, in short, the existence of such summaries clarifies the statute.¹⁰⁸ Despite this latter finding, the dissenting opinion evinces a basic uneasiness with the administration of the Hatch Act when it notes that there is doubt as to whether the Commission's post-1940 interpretations have been explicit (presumably so as to overcome the vagueness and overbreadth problems) or merely the result of prosecutorial discretion.¹⁰⁹ The dissent would order the Civil Service Commission to change any of its published interpretations of the pre-1940 decisions which may not conform to evolving first amendment doctrines as reflected in Supreme Court opinions.¹¹⁰ This suggested order to review and change the statutory interpretations seems, at the least, highly unusual in an opinion which affirms the constitutionality of the Act.

Critics of the Hatch Act point out that, today, upwards of three million federal employees and as many as six million state employees, 15 per cent of the total working force, are denied full political participation.¹¹¹ In addition to quantitative reasons for questioning the scope of the Hatch prohibitions, there is the qualitative argument that many of these employees, by virtue of their experience, could make an important contribution to the discussion of public issues during election campaigns.

It is clear that many employees are unfamiliar with acts prohibited by the statute and undoubtedly restrict their participation in the political processes more than called for by the statute. Highly relevant to this question of whether there is a "chilling effect" on the exercise of first amendment rights is a fairly recent survey of federal employees which discovered widespread misunderstanding of the statute.¹¹² Sixty-four per cent of those responding gave incorrect answers to more than five out of ten questions which inquired whether particular political acts were prohibited.¹¹³ The responses to the following three items illustrate the misunderstanding:¹¹⁴

¹⁰⁸ 346 F. Supp. at 596 (MacKinnon, J., dissenting). Though it is clear that Congress also looked to a summary of Commission interpretations of Rule I, congressional history reveals considerable confusion as to the affect of the summary. See text accompanying notes 32-35 *supra*.

¹⁰⁹ 346 F. Supp. at 599.

¹¹⁰ *Id.*

¹¹¹ T. EMERSON, *THE SYSTEM OF FEDERAL EXPRESSION* 563 (1970).

¹¹² COMMISSION ON POLITICAL ACTIVITY, *supra* note 18, at 20 (1967).

¹¹³ *Id.*

¹¹⁴ Although the Civil Service Commission has attempted to clarify some of the confusion engendered by the incorporated definition of active political management and campaigning, even the Commission has revealed uncertainty in some areas. For a discussion of Commission uncertainty on the issue of whether an employee may write a

		<i>Not</i>	
	<i>Prohibited</i>	<i>prohibited</i>	<i>Not sure</i>
Can an employee make a speech at a political rally? (prohibited)	15.8%	69.4%	14.6%
Can an employee put a political bumpersticker on his car? (not prohibited)	63.0%	24.4%	12.5%
Can an employee participate in voter registration drives? (prohibited)	48.1%	35.6%	16.0%

LEGISLATIVE OPTIONS

Alternatives to the present Hatch Act prohibitions do exist. A Commission on Political Activities of Government Personnel was established by Congress in 1966 to study the effects of the Hatch Act. Chaired by Arthur Fleming, the Commission compiled information and deliberated for one year, taking testimony from senators, congressmen, government officials and political scientists. Surveys of employee reactions were also conducted.¹¹⁵

The Commission recognized that the goals of encouraging citizen participation in the political processes and assuring the integrity of the administration of government are conflicting ones. Nevertheless, it recommended modifications of Hatch Act restrictions to expand permissible political activity. Specifically, the Commission favored changes that would allow employees to freely express their political views, that would spell out prohibitions in understandable terms, and that would key the criteria for elective offices which employees are permitted to hold to the nature of the office and not to a geographical or constituency factor.¹¹⁶ The Commission also proposed that the administration of penalties be expedited, that voluntary contributions to political organizations be considered, that employees be allowed to serve as officers in political organizations and that, to ensure the voluntariness of permitted activities, an "office of employee's counsel" be

letter to a newspaper expressing his opinion concerning a partisan candidate, *see Hearings on S. 3374 and S. 3417 Before the Comm. on Post Office and Civil Service*, 92d Cong., 2d Sess., at 212 (1972). Other areas of confusion are discussed in the *Letter Carriers* opinion. 341 F. Supp. at 581.

¹¹⁵ See text accompanying notes 112-113 *supra*.

¹¹⁶ The current act authorizes the Civil Service Commission to permit employees to take part in partisan elections on behalf of independent candidates if the employees reside in communities where a majority of voters are also government employees. Sixty-three localities, mostly in Virginia and Maryland, have been designated as excepted localities. 5 U.S.C. § 7327 (1970).

established within the Civil Service Commission to receive complaints of political coercion.

Another alternative approach to Hatch Act goals is the English system in which restrictions on political activity by government employees is limited to specified categories of jobholders.¹¹⁷ Government service, maintenance and industrial employees have the same political rights as are enjoyed by citizens not on the government payroll. Though technical, clerical, lower professional and lower administrative employees may not be candidates for national office, they may actively participate in politics with the permission of their agencies. Executives and senior civil servants are prohibited from political activity and must resign their jobs if they wish to become candidates.¹¹⁸

Although there is much appeal to the English idea of permitting certain categories of federal employees full participation in the political process, it must be emphasized that the English were never confronted with all the problems of the American civil service. The spoils system in England never did more than reward friends, unlike its American counterpart which put opposition party appointees out in order to reward friends.¹¹⁹ Consequently, English prohibitions had only one goal: the smooth running of government machinery. American legislation, on the other hand, attempted to reform politics as well.¹²⁰

If the Supreme Court does strike down the challenged provisions of the Hatch Act, the public interest in preserving the integrity of government functions will not be without safeguards while Congress considers alternative legislation. It is well settled that the unconstitutionality of one section of a statute "does not necessarily defeat or affect the validity of its remaining provisions."¹²¹ So long as the remaining provisions of a statute are operative as law and it is clear that the responsible legislative body would have intended them to stand alone, they may stand.¹²² The uncontroverted sections of the Hatch Act afford safeguards in the areas of political contributions and the use of authority to influence an election result.¹²³

¹¹⁷ See generally Epstein, *supra* note 38, at 284.

¹¹⁸ 5 & 6 Eliz. 2, c. 20, §§ 1-15 (1957).

¹¹⁹ Epstein, *supra* note 38, at 282.

¹²⁰ *Id.*

¹²¹ *Champlin Ref. Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932).

¹²² *Id.*

¹²³ 5 U.S.C. § 7321 (1970) authorizes the President to prescribe rules which protect government employees from being penalized for refusing to contribute to a political fund or perform political services.

5 U.S.C. § 7323 (1970) prohibits certain federal employees from receiving or giving gifts for political purposes.

Regardless of the outcome of the Court's review of *Letter Carriers*, it is apparent that modification of the Hatch Act is inevitable. Bills that would bring about significant change have already been introduced in the Senate.¹²⁴ Senator Gale McGee (D. Wyo.), chairman of the Senate Committee on Post Office and Civil Service, has indicated that action by the 93rd Congress will depend on the Supreme Court decision in *Letter Carriers*.¹²⁵ Senator McGee, who characterizes the district court majority opinion as "cogent and well-reasoned,"¹²⁶ has introduced legislation which removes most restrictions on political activity with the exception of those that apply to candidacy for elective office.¹²⁷

Former Senate Bill 3417 (S. 235 in the 93rd Congress), introduced by Senator Frank Moss (D. Utah), would allow an employee to run for a "local office." By "local office" is meant a position involving "a subdivision of a state the duties of which require less than full-time service and the compensation of which is nominal."¹²⁸ The Moss bill permits employees to actively campaign in elections involving national partisan issues. Prohibitions are specifically spelled out as are penalties and procedures for enforcement. The bill also maintains the prohibitions against an employee using his official position to influence or interfere with the results of an election; soliciting and giving funds for partisan purposes; and engaging in political activity while on duty.

House of Representatives Bill 914,¹²⁹ introduced by former Representative Abner Mikva (D. Ill.), would permit all activity, including candidacy for public office, except soliciting, giving, and receiving funds or items of value for political purposes.

Employee union reaction to these proposals has been positive.¹³⁰ However, one area of disagreement centers on the consequences of leaving a federal employment position to assume public office. It is

18 U.S.C. § 595 (1970) prohibits employees from using official authority to influence elections.

18 U.S.C. § 600 (1970) forbids the promise of employment in consideration for any political activity.

18 U.S.C. § 606 (1970) prohibits promotion of employees for agreeing to make political contributions.

¹²⁴ S. 3374 and S. 3417, 92d Cong., 2d Sess. (1972). These bills have been reintroduced in the 93d Congress as S. 350 and S. 235, respectively.

¹²⁵ Letter from Senator Gale McGee to *ST. JOHN'S L. REV.*, Oct. 26, 1972.

¹²⁶ *Id.*

¹²⁷ S. 3374. See note 124 *supra*.

¹²⁸ S. 3417 § 1602.

¹²⁹ H.R. 914, 92d Cong., 1st Sess. (1971). The status of this bill in the 93d Congress is as yet undetermined.

¹³⁰ See *Hearings on S. 3374 and S. 3417 Before the Comm. on Post Office and Civil Service*, 92d Cong., 2d Sess. (1972).

clear that as long as employees are forced to sacrifice years of seniority and accumulated benefits, few will be encouraged to exercise what Senator McGee has termed "basic citizenship responsibility."¹³¹

Despite growing employee and congressional support, the Civil Service Commission remains opposed to the changes embodied in the proposed legislation. Civil Service Commission Chairman Robert Hampton suggests that employee involvement in political campaigning "would deal a crippling blow to merit principles"¹³² because of the favoritism that would ensue. Hampton does, however, favor clarification of permitted and prohibited activity. The fears expressed by the Civil Service Commission might be effectively overcome if an ombudsman-type office to which employees could report instances of political coercion by other employees and supervisors were established. In addition to this "office of employee counsel,"¹³³ strict enforcement of prohibitions against political coercion should be provided for.¹³⁴

Although, in its present form, the Hatch Act is an affront to the first amendment doctrines of vagueness and overbreadth, Congress must seriously inquire, before adopting the concepts proposed by the McGee-Moss bills, a more permissive Mikva-type bill, or complete freedom for certain categories of workers, whether the type of political environment that bred the spoils system exists today.¹³⁵ This writer feels that the influence of the spoils system of the 1880's and 1930's which led to the severe restrictions under discussion has substantially dissipated. The time is ripe to test the strength of the merit impact. With proper safeguards, that experiment can succeed.

William Hibsher

¹³¹ *Id.* at 1.

¹³² *Id.* at 51.

¹³³ See text following note 116 *supra*.

¹³⁴ See 1 REPORT, COMMISSION ON POLITICAL ACTIVITY OF GOVERNMENT PERSONNEL 5 (1967).

¹³⁵ See generally F. MOSHER, DEMOCRACY AND THE PUBLIC SERVICE (1968); P. VAN RIPER, HISTORY OF U.S. CIVIL SERVICE (1958).