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Constitutional Law- Hatch Act- Time for Reevaluation?

Constitutional Law—HATCH ACT—TIME FOR RE-EVALUATION?— *United States Civil Service Commission v. National Association of Letter Carriers*, 93 S. Ct. 2880 (1973).

The initial attempt at restricting the political activities of federal employees appears to have been the establishment of the U. S. Civil Service Commission.[1] When the Commission failed as a strong enough deterrent to political activity, an amendment of § 1 of Civil Service Rule I was approved[2] to tighten the reigns on members of the competitive classified service. Finally, in the wake of the political campaigns of 1936 and 1938, the Hatch Political Activity Act was introduced[3] as a prohibition against participation by federal government employees in political management or campaigning.

In the recent case of *United States Civil Service Commission v. National Association of Letter Carriers*[4] the United States Supreme Court reexamined the constitutionality of the Hatch Act, in a challenge by the National Association of Letter Carriers, AFL-CIO, and six federal employees. These plaintiffs requested a declaratory judgment that the Act's ban against federal employees taking an active part in political management or campaigns[5] was unconstitutional on its face. At the district level a

1. The Commission was established by the Civil Service Act of Jan. 16, 1883, ch. 27, 22 Stat. 403.

2. In 1907 President Theodore Roosevelt issued Executive Order 642 which authorized the amending of § 1 of Civil Service Rule I so that it would read:

> 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 results 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 all political subjects, shall take no active part in political management or in political campaigns. TWENTY-FOURTH ANNUAL REPORT OF THE CIVIL SERVICE COMMISSION 104 (1908).

3. Act of Aug. 2, 1939, ch. 410, 53 Stat. 1147. The Act was originally enacted to extend Civil Service Rule I's prohibitions (*see* note 2 *supra*) to the entire federal service. It was amended in 1940 to extend the prohibitions to state and local agencies financed by the U.S. government. Act of July 19, 1940, ch. 640, 54 Stat. 767.

Although the Hatch Act was basically the product of the two aforementioned enactments, the idea behind the introduction of this Act was expressed more than a century earlier when Thomas Jefferson spoke out against the far reaching effects political activities of government employees had on elections and jobs. THE COMMISSION ON POLITICAL ACTIVITY OF GOVERNMENT PERSONNEL, A COMMISSION REPORT 7 (1968).

For purposes of this case the pertinent sections of the Hatch Act can be found in 5 U.S.C. §§ 1501-1508, 7323-7327 (1970) (Although it is codified in scattered sections of Titles 5, 18).

4. 93 S. Ct. 2880 (1973).

5. 5 U.S.C. § 7324(a)(2) (1970) provides:

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

divided three judge court found the section to be vague and overly broad, declaring it unconstitutional and enjoining its enforcement.[6] The Supreme Court reversed the judgment of district court, relying on a prior decision[7] upholding the constitutional validity of the Hatch Act.

The majority in *Letter Carriers* dealt with the entire development of the law concerning political activities of government employees. Justice White announced in reaffirming the Court's holding in *United Public Workers v. Mitchell*[8] that the decision in *Letter Carriers* merely confirms a judgment of history, that federal employees political activities should be carefully limited.[9] Rejecting the claim that the Act is unconstitutionally vague and overly broad, the Court relied in part on the volumes of interpretations of Civil Service Rule I[10] made available by the Civil Service Commission.[11] The Court's reasoning here is based on the belief that its duty was to construe the Act to agree with constitutional limitations, while recognizing the intention of Congress that the body of law developed by the Commission be looked on as controlling questions concerning prohibited political activities of government employees.[12] Specifically, the Court in *Letter Carriers* stated that it felt the list of prohibited activities[13] drawn up by the Civil Service Commission was laid out in terms the average person could understand and comply with, without harming the public interest, and therefore the Act was not impermissibly vague.[14] This line of reasoning

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(2) take an active part in political management or in political campaigns.

The phrase "an active part in political management or political campaigns" means those acts of political management or 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 the rules prescribed by the President.

6. National Ass'n of Letter Carriers v. United States Civil Serv. Comm'n, 346 F. Supp. 578 (D.D.C. 1972).

7. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 93 S. Ct. 2880, 2886 (1973); *see* United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) (4-3 decision) (Rutledge, Douglas & Black, J.J., dissenting) (Murphy & Jackson J.J., not participating). The Court upheld the constitutionality of the Act's ban on federal employee political activity; a lowly roller for the United States Mint was dismissed for acting as a party ward chairman.

8. 330 U.S. 75 (1947).

9. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 93 S. Ct. 2880, 2886 (1973).

10. *Id.* at 2892.

11. Under 5 U.S.C. § 7324(a)(2) the prior determinations of the Civil Service Commission concerning Civil Service Rule I are to be used in deciding what the phrase "taking an active part in political management or campaigns" means.

12. 93 S. Ct. at 2893-95.

13. *Id.* at 2897-98; *see* 5 C.F.R. § 733.122 (1973). This section specifies in separate paragraphs the numerous activities termed prohibited by § 7324(a)(2) of the United States Code under title 5 (Hatch Act).

14. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 93 S. Ct. 2880, 2896-97 (1973).

appears to be based on the Court's feeling that Congress enacted the Act relying on the "teaching of experience,"[15] and still deems it appropriate today.[16] Therefore, any modification of this law will be for the legislature to propose.

Furthermore, the Court noted that only partisan political activity is forbidden by the Hatch Act, so public expressions could in fact be made on matters of public interest, provided these activities were not directed toward party success.[17] The Court's point is that contrary to the appellees' claim, the political freedoms a public employee enjoys are indeed quite broad. Dealing with the recent Civil Service Regulations[18] the Court found little difficulty in reconciling two seemingly contradictory sections,[19] ultimately reasoning that with the questionable sections clarified, the statute could withstand any attack of overbreadth.[20] Finally, the Court stated that if the provisions forbidding partisan campaign endorsements and speechmaking were found to be unconstitutionally overbroad in some respects, they would not invalidate the entire statute.[21] The Court's reasoning here is that the Civil Service Regulations are merely regulatory guidelines for interpreting part of the Hatch Act and therefore can be found unconstitutional without affecting the constitutionality of the Act itself.

The right of a federal employee to engage in political activity is unmistakably guaranteed by the freedom of expression clause of the first amendment and is a right reserved to the people by the ninth and tenth amend-

15. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 93 S. Ct. 2880, 2886 (1973) *quoting* United Pub. Workers v. Mitchell, 330 U.S. 75, 99 (1947).

16. Although many bills have been introduced to liberalize the restrictions of the Hatch Act, no new legislation has developed. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 93 S. Ct. 2880, 2889 (1973).

17. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 93 S. Ct. 2880, 2886 (1973) *quoting* United Pub. Workers v. Mitchell, 330 U.S. 75, 100 (1947).

18. 5 C.F.R. §§ 733.111, 733.122 (1973).

19. Under 5 C.F.R. § 733.111(a)(2) the employee is privileged to "[e]xpress his opinion as an individual privately and publicly on political subjects and candidates." But § 733.122(a)(10) prohibits the endorsement of "a partisan candidate for public office or political party office in a political advertisement, a broadcast, campaign literature or similar material," and subparagraph (a)(12) prohibits "addressing a convention, caucus, rally or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office."

The Court reasoned that the prohibited conduct stated above was ordinarily performed by one taking an active role in partisan campaigns and as such could be sustained on the same basis that the other acts of political campaigning are proscribable. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 93 S. Ct. 2880, 2896-98 (1973).

20. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 93 S. Ct. 2880, 2898 (1973).

21. *Id.*

ments.[22] However, as Justice White pointed out in delivering the opinion of the Court in *Letter Carriers*, neither the right to associate nor the right to engage in political activities is absolute in any event.[23] The question to be determined here is whether the supposed evil of political partisanship is a compelling enough reason for permitting these constitutional rights to be abridged.[24] Recognizing the fact that the object of the Hatch Act is commendable indeed, the question arises as to whether the Congress actually considered the far reaching effect this legislation would have on individual freedom.[25] Although the majority in *Letter Carriers* stated the political freedoms a public employee enjoys under the Act are sufficiently broad,[26] it has been argued they are, in fact, rather limited.[27] The Court

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

23. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 93 S. Ct. 2880, 2891 (1973). *See, e.g.*, Rosario v. Rockefeller, 93 S. Ct. 1245 (1973); Jenness v. Fortson, 403 U.S. 431 (1971); Williams v. Rhodes, 393 U.S. 23, 30-31 (1968).

24. The problem with upholding the validity of legislation such as the Hatch Act is that:

> It is one thing to attack the evils of improper political activity by appropriate discipline and punishment; but it is quite another thing to suppress or curtail the exercise of political rights because they *might* be abused. Mosher, *Government Employees Under the Hatch Act*, 22 N.Y.U.L.Q. REV. 233, 234 (1947) (emphasis added).

There are two possible tests which are applied in determining the constitutional standing of a statute. Ordinarily a statute being attacked is presumed constitutional and will be upheld as long as the Court can show a "reasonable justification for the legislative action." This is known as the rationale basis test. Heady, *The Hatch Act Decisions*, 41 AM. POL. SCI. REV. 687, 690 (1947). But when the legislation on its face restricts rights guaranteed by the first amendment, no presumption of constitutionality arises, because these rights "are held to occupy a preferred place in our scheme of constitutional values." *Id.* And so any limitations on these rights must be grounded on a clear and present danger. *See* Thomas v. Collins, 323 U.S. 516, 530 (1945).

25. In reading the Senate debates concerning the incorporation by reference of the numerous Civil Service Commission rulings as the regulatory guidelines for the Hatch Act it would appear from the record that the rulings were incorporated without ever being seen. For example, Senator Minton stated that, "[n]o one on the floor of the Senate, not even the Senator from New Mexico [Senator Hatch], now knows what these rules and regulations are." 86 CONG. REC. 2940 (1940). Furthermore, Senator Brown said, "I say it is very careless legislation in effect to write into statute law 62 pages of civil service rules and interpretations by the Civil Service Commission, without knowing what we are doing." *Id.* at 2947.

26. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 93 S. Ct. 2880, 2886 (1973).

27. United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) (Black, J., dissenting). The sad situation the Hatch Act leaves the employee and his family in was succinctly stated by Justice Black:

> [T]he sum of political privilege left to government and state employees, *and their families*, to take part in political campaigns seems to be this: They may vote in silence; they may carefully and quietly express a political view at their peril; and they may become "spectators" (this is the Commission's word) at campaign gatherings, though it may be highly dangerous for them to "second a motion" or let it be known that they agree or disagree with a speaker. *Id.* at 108-09. (emphasis added).

took a firm stand in deciding that the Civil Service provisions forbidding partisan campaign endorsements and speech making were constitutionally proscribable the same as other acts of political campaigning.[28] The effect of the Act's vague prohibition against taking an active part in political activity is that popular government is made the loser, because not only are individual employees harmed, the nation as a whole is deprived of the political voice of a large segment of society.[29] Justice Douglas dealt directly with this issue in his dissent,[30] further stating that if government employment were merely a privilege[31] enforcement of various conditions as pre-

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The government employee must always be checking to determine whether "an organization in which he holds office or an issue on which he expresses himself publicly has not shifted from the nonpolitical to the partisan political sphere." Esman, *The Hatch Act—A Reappraisal,* 60 YALE L.J. 986, 998 (1951). *See* Speiser v. Randall, 357 U.S. 513 (1958). The result of one constantly having to assess his position in connection with political issues is that he will from the outset "steer far wider of the unlawful zone." *Id.* at 526.

An interesting statement was made recently by John W. Macy, Jr., Chairman, United States Civil Service Commission concerning the unclear nature of the Hatch Act:

> In light of the present qualifying provision [statutory guarantee of right to vote and express political opinions], the present language of the Act is broad and somewhat unclear. It is broad in the sense that it could be construed to prohibit certain activities that may not be sufficiently detrimental to the civil service as to justify the infringement of individual political rights. It is uncertain in that it fails to define with clarity and precision the types of activities which are prohibited. COMMISSION ON POLITICAL ACTIVITY OF GOVERNMENT PERSONNEL, REPORT, 15 (1968).

This statement tends to discredit the idea that the Act is laid out in clear and concise language as the majority in *Letter Carriers* decided. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 93 S. Ct. 2880, 2892 (1973). Yet even assuming this statement to be premature in light of the recent Civil Service Regulations (*see* note 18 *supra*), a prefatory paragraph was included in the regulations which in effect, made the list of prohibited activities potentially limitless. "Activities prohibited by paragraph (a) of this section include *but are not limited to*—." 5 C.F.R. § 733.122(b) (1973) (emphasis added).

28. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 93 S. Ct. 2880, 2898 (1973). The problem with this idea is that, with the number of civil servants increasing constantly, the government is gaining a disproportionate amount of power to regulate the political conduct of its citizens.

29. United Pub. Workers v. Mitchell, 330 U.S. 75, 111 (1947) (Black, J., dissenting). The nation suffers not only because many government employees shun all political activities, but also because many promising prospective employees avoid civil service altogether because of the political restrictions imposed. Generally it appears that the average civil servant falls into the category of "those who believe the written law means what it says," and so when they cannot fully decipher what it says they will certainly strive to avoid all contact with it. Baggett v. Bullitt, 377 U.S. 360, 374 (1964).

30. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 93 S. Ct. 2880, 2906 (1973) (Douglas, J., dissenting) (Brennan & Marshall J.J., concurring). "Overbreadth in the area of the First Amendment has a peculiar evil, the evil of creating chilling effects which deter the exercise of those freedoms." Dombrowski v. Pfister, 380 U.S. 479, 486 (1965).

31. The doctrine of "privilege" simply means that assuming the government may withhold totally the privilege of public employment without an explanation, then it should be able to

requisites to employment would be permissible.[32]

In reading the opinion of the majority in the principal case, it is apparent that the Court relied considerably on the decision it rendered in *Mitchell*,[33] the reasoning and actual import of that case being rather questionable.[34] One of the difficulties with relying on this case as precedent centers around the question as to whether, in light of the changes in size and complexity of public service, and subsequent decisions delineating first amendment protections, it is still valid law.[35] Another problem with relying on this

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offer a form of conditional employment requiring the employee to surrender constitutionally guaranteed rights. However, as Justice Douglas inferred in his dissent, this doctrine was completely discredited when the Court said, "[t]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967).

Keyishian covered academic employment, but recent federal court decisions have consistently thwarted attempts by the government to place special limitations on the first amendment freedoms of public employees. *See* Torcaso v. Watkins, 367 U.S. 488 (1961) (freedom of religion); Shelton v. Tucker, 364 U.S. 479 (1960) (freedom of association of teachers); McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968) (right to join unions in the absence of legislation to the contrary); Steck v. Connally, 199 F. Supp. 104 (D.D.C. 1961) (civil servants right to petition the government for redress of grievances). But despite the encouraging *obiter dictum* in *Torcaso* typifying modern Supreme Court attitudes towards strict protection against denial of individual rights as aptly stated in Justice Black's opinion, ". . . The fact, however, that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution"; Torcaso v. Watkins, 367 U.S. 488, 495-96 (1961), the right of public employees to participate freely in politics remains to be acknowledged. Shartsis, *The Federal Hatch Act and Related State Court Trends—A Time for Change?* 25 BUS. LAWYER 1381, 1385 (1970).

32. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 93 S.Ct. 2880, 2906 (1973) (Douglas, J., dissenting) (Brennan & Marshall J.J., concurring).

33. 330 U.S. 75 (1947).

34. In arriving at its decision in United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) the Court relied on an earlier Supreme Court case believing the statute in that case to be similar to the Hatch Act. *Ex Parte* Curtis, 106 U.S. 371 (1882). However, there is a significant difference in scope of limitations between prohibiting monetary political contributions from one federal employee to another, as the statute relied on in *Curtis* did, and prohibiting "political contributions of energy" as Justice Reed in *Mitchell* felt the Hatch Act did. Nelson, *Public Employees and the Right to Engage in Political Activity*, 9 VAND. L. REV. 27, 38 (1955). In the former every other avenue of political contributions of money was left open, which saved the statute from being declared unconstitutional, *see Ex Parte* Curtis *supra* at 373-74, while the latter closes every avenue of political action. So actually instead of being valid precedent for the *Mitchell* decision, *Curtis* really represents "authority against the Hatch Acts." Nelson, *supra* at 38; Wormuth, *The Hatch Act Cases*, 1 WESTERN POL. Q. 165, 172 (1948).

35. National Ass'n of Letter Carriers v. United States Civil Serv. Comm'n, 346 F. Supp. 578, 585 (D.D.C. 1972). In the past federal courts have religiously construed the Hatch Act in line with the decision in *Mitchell, e.g.*, Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947). Yet in two recent cases courts stated they felt obliged to regard it as binding precedent. Northern Va. Regional Park Authority v. United States Civil Serv.

earlier decision is that the Court there avoided the crucial question as to what constitutes political activity[36]—the very question the Court in *Letter Carriers* was confronted with. Furthermore, Justice Douglas in his dissent condemns the use of this case as precedent emphasizing the fact that it is out of step with current thinking on the question of first amendment infringement, stating that since 1947 a number of decisions have demonstrated the need for conscientiously drawn statutes that touch first amendment rights.[37]

The *Letter Carriers* decision apparently rejects the current trend toward the expansion of the first amendment freedoms of speech and association and regresses instead to the hard line approach that political activity of government employees must be limited at all costs.[38] Although the circumstances surrounding the introduction of the Hatch Act may have justified its original enactment, it is questionable whether the policy reason for having such a law still exists today,[39] especially bearing in mind that the

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Comm'n, 437 F.2d 1346 (4th Cir. 1971), *cert. denied*, 403 U.S. 936 (1971); Wisconsin State Employees Ass'n v. Wisconsin Natural Resources Bd., 298 F. Supp. 339 (W.D. Wis. 1969). Both cases appear to have followed *Mitchell* largely because they felt, as lower courts, duty demanded they respect the prior decision of the Supreme Court. However, two even more recent cases have decided the time has come to reexamine the Act "in light of controlling precedents." National Ass'n of Letter Carriers v. United States Civil Serv. Comm'n, 346 F. Supp. 578, 585 (D.D.C. 1972) *citing* Hobbs v. Thompson, 448 F.2d 456 (5th Cir. 1971); Mancuso v. Taft, 341 F. Supp. 574 (D.R.I. 1972).

36. United Pub. Workers v. Mitchell, 330 U.S. 75, 94 (1947). In *Mitchell* the court stated that the plaintiff's activity clearly fell within the prohibition of the Hatch Act against taking an active part in political management or political campaigning and so the constitutionality of the broad definition of "political activity" was not passed on. Instead the Court held the Hatch Act could make the plaintiff's conduct the basis for disciplinary action without violating the Constitution.

37. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 93 S.Ct. 2880, 2906 (1973) (Douglas, J., dissenting) (Brennan & Marshall J.J., concurring).

38. In deciding the case the Court gave little or no credence to the possible validity of several recent state decisions which found "little Hatch Acts" in their respective states facially unconstitutional. *See* Huerta v. Flood, 103 Ariz. 608, 447 P.2d 866 (1968); Kinnear v. San Francisco, 61 Cal.2d 341, 392 P.2d 391, 38 Cal. Rptr. 631 (1964); Fort v. Civil Serv. Comm'n, 61 Cal.2d 331, 392 P.2d 385, 38 Cal. Rptr. 625 (1964); Minielly v. State, 242 Or. 490, 411 P.2d 69 (1966).

39. Though originally enacted with political bossism in mind, it appears in light of recent developments in and around the District of Columbia, that possibly the Act needs some redirection of its prohibitions. It seems odd that an Act, which restricts millions of lower and middle level government employees, while permitting higher officials who have much more actual power to be as politically partisan as possible, 5 U.S.C. § 7324(d) (1970), can be said to be effectively accomplishing its objectives.

The weight of legal commentary in connection with the Hatch Act seems to be in keeping with the suggestion that a thorough re-evaluation of the act is long overdue. In support of the foregoing, *see* Esman, *The Hatch Act — A Reappraisal*, 60 YALE L.J. 986 (1951); Nelson,

average individual's substantive constitutional rights are being unjustifiably abridged in guarding against *possible* harm to the public interest.

D.J.M.

Public Employees and the Right to Engage in Political Activity, 9 VAND. L. REV. 27 (1955); Rose, *A Critical Look at the Hatch Act,* 75 HARV. L. REV. 510 (1962); Note, *The Hatch Act — Political Immaturity?* 45 GEO. L.J. 233 (1956); Wormuth, *The Hatch Act Cases,* 1 WESTERN POL. Q. 165 (1948).