

Spring 1947

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Recommended Citation

(1947) "Civil Servants and the Right to Engage in Political Activity," *Indiana Law Journal*: Vol. 22 : Iss. 3 , Article 5.
Available at: <http://www.repository.law.indiana.edu/ilj/vol22/iss3/5>

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CONSTITUTIONAL LAW

CIVIL SERVANTS AND THE RIGHT TO ENGAGE IN POLITICAL ACTIVITY

Employees in the classified civil service of the United States have for many years been prohibited from engaging

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14. Ind. Stat. Ann. (Burns, 1933) §19-402 (3).
 15. Ind. Stat. Ann. (Burns, 1933) §19-402 (4).
 16. Ind. Stat. Ann. (Burns, 1933) §19-406. There may be actual or constructive notice; the latter is a legal inference from established facts. When an alleged defect appears on the face of the instrument and is a mere matter of inspection, the question becomes one of law for the court. Norton, "Bills and Notes" (4th ed. 1914) 438. Bigelow seems to adopt the doctrine of actual (or subjective test) bad faith but later qualifies this when notice is proved or presumed from disclosures on the instrument. In such cases the statute has not abolished the rule that notice maybe established by circumstantial evidence. Bigelow, "Bills, Notes and Checks" (3rd ed. 1928) §473-476.
 17. See notes 12 and 13 supra.
 18. 1. The title of the holder's transferor was defective; 2, an infirmity existed in the instrument; or 3. facts so strongly indicated the existence of 1 or 2 that taking the instrument would amount to bad faith. Ind. Stat. Ann. (Burns, 1933) §19-406.
 19. "That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." Ind. Stat. Ann. (Burns, 1933) §19-402 (4).

in certain political activities.¹ In 1939 the Hatch Act brought substantially all employees in the executive branch of the federal government within the purview of similar prohibitions.² Dismissal is the penalty prescribed for federal employees engaging in the prohibited activities.³ State employees whose principal employment is in connection with an activity which is financed in whole or in part from federal funds, were made subject to these prohibitions in 1940.⁴ If the Civil Service Commission finds that a state employee has violated the prohibitions against political activity, the state is notified. If it does not choose to dismiss the employee, a sum equal to two years' salary for that employee is withheld from the grant to the state.⁵

The State of Oklahoma and the United Public Works of America (C.I.O.) in separate actions recently challenged the constitutionality of this legislation. In *Oklahoma v. United States Civil Service Commission*,⁶ a member of the State High-

1. (Civil Service Act of 1883), 22 Stat. 403-04 (1883), 5 U.S.C.A. §633 (1927).
2. 53 Stat. 1147 (1939), as amended, 18 U.S.C.A. §611 (Supp. 1946) hereinafter referred to as the Hatch Act) important policy making officials who change with administrations and dollar a year men are excepted. The specific sentence under fire makes it unlawful for any person employed in the executive branch of the Federal Government with the exceptions before noted, "to take any active part in political management or in political campaigns."
3. Actually the Civil Service Commission's inquiry is limited to those employees in the classified civil service. Other employees are subject to removal by their department heads for violation of the regulations. Actual discharge in all cases is made by the department head concerned, but where the Commission has jurisdiction it can notify the Comptroller to withhold any further compensation from an employee it has determined to be guilty. Dismissal is mandatory if a violation is found by a federal employee; the Commission has discretion to leave a state employee in office if his transgression does not in its opinion justify removal. 40 Op. Atty. Gen. No. 2.
4. Section 12(a) of the Hatch Act applies to employees of any state or local agency financed "in whole or part by federal funds." They are forbidden "to take any active part in political management or in political campaigns."
5. Section 12 of the Hatch Act provides for this penalty unless the employee is dismissed from all state activity, federally financed or not. This would appear to be a violation of the Tenth Amendment. However, since Oklahoma kept the employee on his same position the question did not arise. See n. 6 infra.
6. 67 S.Ct. 544 (1947). There was doubt in this case as to whether a justiciable controversy was presented. The court distinguished *Massachusetts v. Mellon*, 262 U.S. 447,480 (1923) on its facts. The distinction is tenuous. The "Maternity Act" in the Mellon case authorized appropriations to be made among states accepting its

way Commission, which administered a program financed in part with federal funds, served simultaneously as Chairman of the Democratic Party's State Central Committee. The United States Civil Service Commission held the required hearing and notified the State that there had been a violation of the Hatch Act warranting dismissal of the Highway Commissioner. After thirty days, no action having been taken by the State to dismiss the employee, the Civil Service Commission certified an order to the appropriate federal agency requiring it to withhold two years' salary from further grants to Oklahoma.⁷

Oklahoma contended that the enforcement provisions in the Hatch Act invaded the powers reserved to the states. The Hatch Act, however, is carefully worded so that no order is given to the state. If it decides to resist the suggestion of removal, that is the state's privilege, but federal funds are no longer forthcoming to pay the salary of the employee.⁸ The Tenth Amendment in nowise restricts the use of powers granted to the federal government nor means appropriate to their implementation.⁹ The power of the federal government to fix the terms and conditions upon which grants to the states shall depend is firmly established.¹⁰ The decision on this point is clearly in accord with past cases.

provisions, the purpose being to reduce infant mortality. There was to be joint federal and state expenditure with the former having the power to withhold funds if it decided they were not being properly expended. The Supreme Court held there was no invasion of state sovereignty, no required submission. Only an abstract question of political power, the power of Congress to pass such a statute existed, and that was not thought to be a matter for court decision.

7. 53 Stat. 1147 (1939), as amended, 18 U.S.C.A. §611 (Supp. 1946).
8. The following cases illustrate application of the statute in this respect: *Ohio v. United States Civil Service Commission*, 65 F. Supp. 776,780,781 (1946), is factually about the same as the following case. *Stewart v. United States Civil Service Commission*, 45 F. Supp. 697,701 (1942), plaintiff was Director of Georgia State Bureau of Unemployment Compensation and while in that position solicited campaign funds from employees. *Neustein v. Mitchell*, 52 F. Supp. 531 (1943), plaintiff, a member of the New York Unemployment Insurance Appeal Board was removed for actively participating in a political campaign.
9. *United States v. Darby*, 312 U.S. 100 (1941); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288,338 (1935); *McCullough v. Maryland*, 4 Wheat. 316,405 (U.S. 1819). If Federal and state powers conflict, the latter must yield, *Oklahoma v. Atkinson Co.*, 313 U.S. 508 (1941).
10. *Steward Machine Co. v. Davis*, 301 U.S. 548,578,595 (1936); *United States v. Butler*, 297 U.S. 1,73 (1935); Cf. *Massachusetts v. Mellon*, 262 U.S. 447,482 (1923).

The challenge to the Act by a group of federal employees presented in *United Public Workers of America v. Mitchell*¹¹ involved more serious considerations. In an injunction and declaratory judgment proceeding, the plaintiffs claimed that the provisions of the Hatch Act in question violated their constitutional rights to free speech and to engage in political activity.

In the case of *Ex Parte Curtis*,¹² decided in 1882, the Court permitted a reasonable regulation of civil servants in the interests of efficiency and good government. The statute attacked in that case forbade money contributions by government employees solicited by or made to other officials or employees for political purposes, but did not restrict any other type of contribution. The opinion of the court by Chief Justice Waite emphasized the authority of Congress to pass laws necessary for the proper exercise of delegated powers. He also observed that contributions made under the proscribed conditions were in all likelihood not given to exercise a political privilege, but to escape the displeasure of superiors. The statement was also made, and it seems as pertinent today as then, that ". . . when public employment depends to any considerable extent upon party success, those in office will naturally be desirous of keeping the party to which they belong in power."¹³ The majority in *Ex parte Curtis* were necessarily aware of the full implications of their decision for the forceful dissent of Justice Bradley anticipated most of the civil rights objections to the type of legislation under discussion.¹⁴

Contrasting with the reasonable regulation doctrine of the *Curtis* case, stand the galaxy of civil rights cases which have in late years given the guarantees of the Bill of Rights new stature and increased meaning.¹⁵ In the now famous

11. 67 S.Ct. 556 (1947).

12. 106 U.S. 371 (1882).

13. Today dismissal must be for cause but nevertheless, many subtle ways exist in which superiors could advance the politically partisan for their efforts if the Hatch Act did not outlaw such action. In this sense the Act is felt to be a safeguard against the conceivable development of a one party system.

14. 106 U.S. 371 (1882).

15. E.g. *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Schneider v. State*, 308 U.S. 147 (1939); *Lovell v. Griffin*, 303 U.S. 44 (1938); *DeJonge v. Oregon*, 299 U.S. 353 (1937).

footnote four to *United States v. Carolene Products Co.*,¹⁶ the late Chief Justice pointed out that the presumption operating in favor of the constitutionality of legislation would be narrower in scope when an area covered by a specific prohibition of the Constitution, particularly the first ten commandments, was invaded. The present Court's policy to strike down legislation restricting civil rights in the absence of a "clear and present danger" is firmly established.¹⁷ The *Public Worker's Case*, then, posed conflicting policies, one the reasonable regulation of the civil service by Congress, the other the high respect due civil rights. The majority does not feel that the requisite protection of civil rights has overridden the reasonable regulation permitted to Congress.

The Court in the *United Public Worker's* case asserts that the act is directed at active participation in political management and political campaigns by government employees. Money contributions are prohibited only when solicited from or made to another employee, so here the contributions of energy prohibited are those to partisan activity. The basic rights to vote and to express opinions outside the actual arena of party strife remain inviolate. The Court seems to assume that the clear and present danger doctrine does not apply to legislation promulgated for the regulation of government employees. Here, perhaps the famous "if reasonable men can differ" doctrine, consistently advanced by Holmes in fields other than civil rights¹⁸ is the proper criterion. Indeed, the Court points out that if the "reasonableness" test is not adopted, Congress would be powerless at this time to cope with threatened evils, particularly one-party perpetuation, regarded by many persons as a material threat to our democratic system of government.

Once it is conceded that the reasonableness test is applicable to this legislation, the dissent of Justice Douglas,¹⁹

16. 304 U.S. 144,152 (1937).

17. Rosenfeld and Tannen, "Civil Liberties Under the Roosevelt Administration," 5 Law G. Rev. 182 (1945); Louis Luskey, "Minority Rights and Public Interest," 52 Yale L. J. 1 (1942).

18. In fields other than those involving civil liberties, Holmes refused to strike down legislation on the reasons or policy of which reasonable men differ. *Adair v. United States*, 208 U.S. 161,191 (1907); *Lochner v. New York*, 198 U.S. 45,76 (1905). This view has now been accepted by the Court, *Nebbia v. New York*, 291 U.S. 502, 537-39 (1933).

19. 67 S.Ct. 577 (1947).

which is based on the "clear and present danger" test, loses its force. The mere fact that the method of regulation chosen might be greatly improved would not in itself justify the court in striking it down. A roller in a federal mint has little contact with the public, but reasonable men might conclude that political activity on his part would bring him preferment. Injury to the efficiency of the government is easy to conjecture under such circumstances.

Justice Black, in his dissent,²⁰ contended that the provision attacked is too broad, ambiguous and uncertain in its consequences. However, he seems to overlook the long history of such regulation²¹ and its application in the companion field of military personnel.²² No one denies that the principle of regulation can go too far but Justice Holmes has pointed out that questions of degree are inescapable²³ and not in themselves grounds for alarm. Justice Bradley in 1882²⁴ foresaw the direst consequences following in the wake of the regulation there advanced. They have yet to materialize.

Strenuous objection to the Act is made by posing hypothetical cases of injustice. In answering a similar argument in *United States v. Wurczak*,²⁵ a case involving a statute of the type under discussion, the opinion of Justice Holmes said the question of uncertainty could wait until a case of doubt arose. Much of the alleged vagueness of the rules is imaginary. The Civil Service Commission has conspicuously posted notice of specific unallowable practices.²⁶ Anyone de-

20. 67 S.Ct. 572 (1947).

21. "The petitioner may have a constitutional right to talk politics but he has no constitutional right to be a policeman." *McAuliffe v. New Bedford*, 155 Mass. 216, 220, 29 N.E. 517 (1892).

22. Army Regulations No. 600-10, 1 p. 5 provide substantially the same restriction on military personnel as Sec. 9(a) of the Hatch Act. applies to Federal employees.

23. See dissenting opinion, *Haddock v. Haddock*, 201 U.S. 562, 631 (1906). "I am the last man in the world to quarrel with a distinction simply because it is one of degree. Most distinctions, in my opinion, are of that sort, and are none the worse for it. But the line which is drawn must be justified by the fact that it is a little nearer than the nearest opposing case to one pole of an admitted antithesis."

25. 280 U.S. 396 (1930).

26. E.g. *United States Civil Service Commission, Political Activity and Political Assessments, Form 1236, September 1939.*

siring to comply with the law can read and obey the instructions on these posters. None of the employees involved in these cases appeared ignorant of the regulations.

Nevertheless the Act could be more explicit.²⁷ The faults are difficult to remedy because the Act defines active participation in politics as the same activities that the Civil Service Commission had determined to be prohibited when the act took effect in 1940. A new law might well accumulate the experiences of the last seven years into three or four basic regulations which would obviate most of the present uncertainty and doubt.

Many of the English speaking countries have adopted this type of regulation,²⁸ an indication perhaps that the problem is inescapable in a democratic form of government. The gigantic size of modern civil services and their infinitude of vital contacts with all phases of national life call for serious consideration of the subject and an orientation of our political philosophies in terms of necessities. The decisions discussed appear to reconcile individual freedom with the political facts of life produced by the large scale government of our time.

CONSTITUTIONAL LAW

INDIANA GROSS INCOME TAX AND THE COMMERCE CLAUSE

The Indiana Gross Income Tax Division has set forth the following 'prerequisites' to tax exemption under the Commerce Clause; (1) Income derived from transactions with customers who are non-residents of Indiana, and that (2) by reason of the receipt of a *prior order*, (3) delivery was required and made, and that (4) such delivery across states lines was necessary and *essential* to the consummation of the transaction. *Ind. Gross Income Tax Div., Departmental memorandum*, January 24, 1947.

This ruling was issued as a result of the recent Supreme Court decision in *Freeman v. Hewit*,¹ which held the Ind.

27. E.g. section 15 of the Hatch Act enacts into law all the previous rulings of the Commission which are thus not subject to broad changes.

28. Leonard D. White, "Civil Service in the Modern State" (1930).

1. 67 S. Ct. 274 (1946). Rutledge, J., concurring at 280; Douglas and Murphy, J.J., dissenting at 292; Black, J., dissenting without opinion. The rationale of the majority opinion by Mr. Justice