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MISCELLANEOUS

No. 34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

UNITED FEDERAL WORKERS OF AMERICA (C.I.O.) et al., *Appellants*

vs.

HARRY B. MITCHELL, LUCILLE FOSTER McMILLIN AND ARTHUR S. FLEMMING, *Appellees*

On Appeal From the District Court of the United States for the District of Columbia

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BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the court below (R. 116-126) is reported in 56 F. Supp. 651.

JURISDICTION

The judgment of the court below was entered on September 26, 1944 (R. 126-127). A petition for appeal was filed on October 26, 1944, and was allowed on that day (R. 127-128, 130). Successive orders of the court below extended the time for filing of the record in this Court (R. 130, 131, 133). The record was docketed in this Court on February 2, 1945 (R. 136). Thereafter, the Government filed a suggestion that the appeal be dismissed for want of jurisdiction or lateness in the filing of the record, and appellee filed a reply.* On March

* The Court is respectfully referred to the brief filed by the appellant in reply to the Government's suggestion.

12, 1945, this Court issued an order postponing further consideration of its jurisdiction to the hearing on the merits (R. 135). The jurisdiction of this Court on the appeal rests on the provisions of the Act of August 24, 1937, 28 U.S.C. Sec. 380 (a), 50 Stat. 751.

QUESTION PRESENTED

Whether rights of free expression protected by the First Amendment to the Constitution and other provisions of the Bill of Rights are unconstitutionally abridged by Section 9 (a) of the Hatch Act which forbids persons employed in the Executive Branch of the Federal Government, upon penalty of immediate dismissal, to "take any active part in political management or in political campaigns," when activities so forbidden include acts, performed by the employees in their capacity as private citizens on their own time and without coercion or abuse of official authority, such as publishing a newspaper, publishing a letter or article, making speeches, initiating or circulating petitions, marching in a parade, where these acts constitute expression of support for a political candidate, party, or measure as part of a political campaign.

STATUTES INVOLVED

The Constitution of the United States

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Hatch Act

The statute here challenged is the second sentence of section 9(a) of the Hatch Act as amended, Act of August 2, 1939, C. 410, section 9(a), 53 Stat. 1147, 1148; Act of July 19, 1940, C. 640, section 2, 54 Stat. 767; Act of March 27, 1943, C, 199, section 701, 56 Stat. 181, 18 U.S.C. section 61 h(a). Section 9 in its entirety provides as follows:

> (a) It shall be unlawful for any person employed in the executive branch of the Federal Government, or any

agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, except a part-time officer or part-time employee without compensation or with nominal compensation serving in connection with the existing war effort, other than in any capacity relating to the procurement or manufacture of war material, shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purpose of this section the term "officer" or "employee" shall not be construed to include (1) the President and Vice President of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal laws.

(b) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any act of Congress for such position or office shall be used to pay the compensation of such person.

Section 15, Act of July 19, 1940, C. 640, section 4, 54 Stat. 767, 18 U.S.C. sec. 61(o), provides:

"The provisions of this Act which prohibit persons to whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of employees in the classified civil service of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns."

Civil Service Rules and Regulations

Civil Service Rule I, Section 1, 5 C.F.R. Sec. 1.1 (Supp., 1941), provides:

> 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 their opinions on all political subjects, shall take no active part in political management or in political campaigns.

Civil Service Rule XV, 5 C.F.R. Sec. 15.1 (Supp., 1941), provides:

> Legal appointment necessary to compensation. Whenever the Commission finds, after due notice and opportunity for explanation, that any person has been appointed to or is holding any position, whether by original appointment, promotion, assignment, transfer, or reinstatement, in violation of the Civil Service Act or rules, or of any Executive Order or any regulation of the Commission, or that any employee subject thereto has violated such act, rules, orders, or regulations, it shall certify the facts to the proper appointing officer with specific instructions as to discipline or dismissal of the person or employee affected. If the appointing officer fails to carry out the instruction of the Commission within 10 days after receipt thereof, the Commission shall certify the facts to the proper disbursing and auditing officers, and such officers shall make no payment or allowance of the salary or wages of any such person or employee thereafter accruing.

STATEMENT

This is an action instituted by twelve individuals employed by the Federal Government in positions which are under the classified civil service and by the United Federal Workers of America (C.I.O.) an unincorporated labor union composed of employees of the Federal Government on behalf of those of its members who are in the classified civil service. The action was brought to secure a declaration of the invalidity of, and an injunction against the enforcement of the provision of the second sentence of section 9(a) of the Hatch Act, 18 U.S.C. Sec. 61 h(a) forbidding Federal employees "to take any active

part in political management or in political campaigns" on the grounds that the prohibitions imposed by this section deprive plaintiffs of the basic civil rights of freedom of speech, of assembly, and of the press, the right to be free from arbitrary discrimination with respect to their Federal employment, and the right to engage in political activity guaranteed to them by the First, Fifth, Ninth, and Tenth Amendments to the Constitution of the United States.

The individual appellants are employed by the Federal Government in a variety of capacities of widely different character, so far as concerns the nature of the duties performed, the extent of their official authority, their contact with the public and their participation in formulating policy. Four of the appellants are employed in professional capacities. These are: Jack M. Elkin, who is employed by the Railroad Retirement Board as a Senior Economic Statistician (R. 2); Olivia Israeli Abelson, who is employed by the Social Security Board of the Federal Security Agency as an Associate Financial Analyst (R. 2-3); Joseph D. Phillips, who is employed by the War Shipping Administration as a Labor Economist (R. 3); and Margery Mitchell, who is employed by the National War Labor Board as a Wage Analyst (R. 3). Four of the appellants are employed in administrative positions of varying degrees of responsibility. Thus, Patrick T. Fagan is employed by the War Manpower Commission as an Area Director (R. 2); Harry T. Winegar is employed by the Bureau of Prisons of the Department of Justice as a Senior Officer (R. 2); Rudolph Hinden is employed by the Federal Security Agency as a Procedural Assistant (R. 2); and Albert J. Rieck is employed by the Veterans Administration as a Stock Clerk (R. 3). The last four appellants are employed in such establishments as navy yards, arsenals, and the Mint, as industrial workers. George P. Poole is a Roller in the United States Mint (R. 2); Charles G. Shane works in the Frankford Arsenal of the War Department as a Lens Grinder (R. 3); Richard Weber works at the same place as a Machinist Specialist (R. 3); and Lester E. Tempest works at the Philadelphia Navy Yard as an Electric Welder (R. 3).

These appellants instituted suit in April 1944, when the nation was yet engaged in the conduct of the war. The political campaigns in connection with the 1944 elections which were then getting under way centered around vital issues relating to the conduct of the war, the cost of living, and the rights of organized and unorganized workers (R. 9). Appellants, other than Poole, in their affidavits accompanying their prayer for declaratory and injunctive relief, expressed their desire to participate in the political processes by which decisions on these issues of grave importance were being made (R. 11-29). They desired to do so by engaging in the following acts on their own time, as private citizens, without recourse to any official authority; write for publication letters and articles in support of candidates for office; be connected editorially with publications which are identified with the legislative program of U.F.W.A. and candidates who support it; make speeches to rallies, conventions, and other assemblages; solicit votes, aid in getting out voters, act as accredited checker, watcher, or challenger; transport voters to and from the polls without compensation therefor; post banners and posters in public places; participate in and help in organizing political parades; distribute leaflets; "ring doorbells" and engage in discussion; initiate petitions, and canvass for the signatures of others on such petitions; serve as party ward committeeman or other party official; and perform any and all acts not prohibited by any provision of law other than the second sentence of section 9(a) and section 15 of the Hatch Act, which constitute taking an active part in political management and political campaigns (R. 4, 10-12, 14-27).

The appellants were, however, deterred from engaging in these activities by the second sentence of section 9(a) of the Hatch Act, which forbids these activities and requires the dismissal of appellants from their Federal employment if they engage in any of these activities. And they are unwilling to suffer the deprivation of their jobs, which would result in immediate and serious financial loss and other injury to them. They therefore seek relief by way of declaratory judgment of the invalidity of these prohibitions of the Hatch Act, and injunctive relief against their threatened enforcement by the Civil Service Commission (R. 9, 10-12, 14-27).

The Civil Service Commission in its Form 1236, *Political Activity and Political Assessment of Federal Officeholders and Employees* (R. 36-70). has stated that it possesses jurisdiction to inflict the penalty of dismissal prescribed by section 9(b) of the Hatch Act for performance of any of the acts prohibited under section 9(a), and that it may, by application of its Rule XV, cause such dismissal independently of action by the appointing officer (R. 41). In addition, an opinion of the Attorney General, given on January 8, 1941, recognizes the authority of the Civil Service Commission to cause such dismissal of employees in the classified civil service. And in a warning poster, conspicuously posted in places where employees in the classified civil service perform their duties, it has widely publicized to appellants and other Federal employees its intention to cause the dismissal of any employee in the classified civil service who performs any of the forbidden acts (R. 114A, 115).

In the case of appellant Poole, the Civil Service Commission had in fact instituted proceedings on January 12, 1944, to cause his dismissal on the ground that he committed acts which constitute taking an active part in political management and political campaigns, by holding the political party office of Democratic ward executive committeeman in the city of Philadelphia, Pennsylvania, by aiding and assisting the Democratic party in the capacity of worker at the polls on general election day, November 5, 1940, and by assisting in the distribution of funds in paying party workers for their services on that general election day (R. 7, 33). It was not alleged that these acts were accompanied by coercion or other impropriety or violated any other statute or rule (R. 33-35). Appellant Poole in his affidavit admits that he has performed these acts, on his own time as a private citizen, as well as others which constitute taking an active part in political management and political campaigns, among them: visiting residents of his ward and soliciting them to support his party and its candidates; circulating campaign literature; placing banners and posters in public places; distributing leaflets, and assisting in organizing political rallies and assembles (R. 13). He further states that he does not wish to, and will not deny his political

activity and proposes to engage in such activity since it is for him the most important activity in which any citizen can engage (R. 14).[1]

Appellants' motion for an interlocutory injunction and appellees' motions to dismiss and for summary judgment were argued together on June 29, 1944, before a statutory District Court composed of three judges. On August 4, 1944, the court below filed an opinion holding that a timely controversy was presented by the actions of the individual appellants, and that, on the merits, the statute was valid. And on September 26, 1944, it entered an order granting appellee's motion to dismiss the complaint and for summary judgment.

SUMMARY OF ARGUMENT

I

The general prohibition of the second sentence of Section 9(a) of the Hatch Act, as originally passed in 1939, could have been so construed as not to impair substantial rights of freedom of expression of Federal employees. But the enactment of Section 15 of the Hatch Act in August, 1940, made such a construction impossible. For it provided that interpretations which the Civil Service Commission had theretofore given under its Rule I, Section 1 were to define the acts forbidden by section 9(a). These interpretations expressly forbid Federal employees from doing specified acts, even on their own time, without coercion or other abuse, in their capacity as private citizens, so long as these acts amount to taking an active part in an organized political campaign. Among the acts so forbidden are: writing for publication a letter or article in favor of, or against any political party, candidate, faction, or measure; addressing a meeting; marching in a political parade. In prohibiting these acts and other like acts, section 9(a) clearly curtails rights of expression enjoying the protection of the First Amendment. The permission granted by

[1] On September 8, 1944, Justice Bailey, a member of the statutory three judge court in this case, entered an order pursuant to stipulation of the parties, providing that, pending disposition of the appeal to this Court, the appellees will not cause the removal of appellant Poole so long as, and upon condition that he does not engage in any of the activities proscribed in Section 9(a) of the Hatch Act.

section 9(a) to Federal employees "to express their opinions on all political subjects and candidates" has been limited to such expression as does not amount to taking an active part in an organized political campaign. It therefore does not serve to avoid conflict with the First Amendment, for the rights are limited under the very circumstances when their exercise would have significance.

Presented with a statute which plainly curtails rights of expression, the court below upheld it on the ground that the end sought is a permissible one, and the question of how it is to be achieved is for Congress, and not the courts, to decide. But this application of the usual presumption of validity to a statute which on its face limits rights of expression is plainly erroneous. For when it is sought to curtail basic rights of expression a substantial showing of the necessity for the limitation must be made. *Schneider* v. *New Jersey,* 308 U. S. 147, 161. This stringent test must be applied since rights of expression are the most vital to the existence of our democratic institutions. *Thornhill* v. *Alabama,* 310 U. S. 88, 101-102; *Bridges* v. *California,* 314 U. S. 252, 262-263. To deny rights of expression to any group is to cut it off from an opportunity to participate in the processes which have their outcome in legislative and other decisions affecting its interests. *U. S.* v. *Carolene Products Co.,* 304 U. S. 144, 152-153. Congress, therefore cannot be its own judge of the propriety of curtailing rights of expression to achieve other ends. It must be therefore determined whether any substantial justification for the prohibition of section 9(a) exists.

II

Three grounds have been generally urged in support of a sweeping prohibition on political activity of government workers. The first is that participation in political affairs may invite reprisals from superior officers or a new administration of an opposite complexion. Curtailment of such activity is therefore necessary to preserve security of tenure and efficiency of service. The second is that the possibility that Federal employees may use their official power and position to coerce subordinates or members of the public in the exercise of their political rights, creates an evil which the gov-

ernment may suppress. The third is that barring Federal employees from political activities is necessary to preserve the purity and impartiality of the civil service, and to promote public confidence in the fairness of administration.

While these grounds may justify invasion and suppression of other interests, they do not succeed in justifying the sweeping prohibition of rights of expression imposed by section 9(a) and its comprehensive application to almost all Federal employees, whatever the nature of their duties. These prohibitions pass the bounds of necessity for dealing with the evils without needlessly suppressing the rights.

Preservation of security of tenure by eliminating occasions for reprisals cannot at all serve to justify the prohibition. A merit system of civil service promotes security of tenure by curtailing powers of dismissal, not basic rights of employees. This is reflected in the Civil Service Act itself, 5 U.S.C. sec. 633(a) (5) and (6), and the Lloyd-La Follette Act, 5 U.S.C. sec. 652. It cannot be argued that these statutes do not afford adequate protection to the employee, so that in any event his political activity will place his tenure in jeopardy. For if that is so, the solution lies in strengthening the guarantees against arbitrary dismissal, and not in curtailing basic rights of employees.

The aim of suppressing coercion and other abuse of authority also cannot justify the prohibition. Other provisions of the Hatch Act itself comprehensively deal with coercion and abuse of authority. In addition, a large body of other Federal statutes cover the subject of coercion and exploitation of office in a manner showing regard for preservation of Federal employees' rights of expression and rights to engage in political activity. Congress is free to attack evils of improper political activity, but cannot totally deprive Federal employees of the rights themselves. *Ex parte Curtis,* 106 U. S. 371; *U. S.* v. *Thayer,* 209 U. S. 39.

The theory which most clearly underlies the prohibition of section 9(a) is that it is necessary to create an impartial body of civil servants, which would serve to protect the merit system and promote public confidence in administration. Whatever else may be done to achieve this end, freedom of expres-

sion of all Federal employees may not be suppressed to attain it. There is little or no public interest in the impartiality and fairness of the largest part of the civil service which consists of minor clerical, service, and industrial employees with no contact with the public, authority over it, or participation in policy making. The foreign practice of Great Britain and Canada affords no precedent for a sweeping prohibition applicable to all government workers, industrial as well as administrative, the most subordinate clerks as well as high policy officers. Nor does the history of the Civil Service in this country provide any such precedent. And the legislative history of the Hatch Act reveals no factual basis for such a prohibition of political activity of all Federal employees. The harm likely to result from cutting off so large a body of citizens from their full rights of citizenship and participation in public affairs, clearly outweighs the theoretical benefits of "political neutrality." Even without such a requirement of neutrality, the merit system insures fairness and able administration by selection of personnel on the basis of merit, and promotion of efficiency and independence of judgment by providing security in freedom from arbitrary dismissals.

III

Congress in legislating on the subject of government employment is limited by the First Amendment and other Constitutional guarantees. It cannot be assumed that individual officers possess unlimited removal power, therefore Congress possesses such power, and short of exercising it, it may impose any condition to public employment. For no case holds that any officer deriving authority from an Act of Congress may use his authority to abridge freedom of expression or of religion.

The doctrine that there is no property right in a job does not establish an unlimited power over public employment. It deals with two entirely different matters, the forum in which a public officer may seek redress in connection with claimed improper exercise of discretion in appointment and dismissal, and the extent to which the authority of the several states to establish and change the incidents of a public office, or abolish

it are limited by the Federal Constitution. None of these cases hold that the states may by statute impose arbitrary conditions or discriminations without invalidly abridging constitutional guarantees. See *Snowden* v. *Hughes*, 321 U. S. 1, 7. The courts have taken the contrary view. See *People* v. *Crane*, 214 N. Y. 154, affirmed 239 U. S. 195.

No cases disclose a power in the government to condition the grant of privileges as it pleases, without regard for the Bill of Rights. The cases establish rather that the conditions must be within constitutional limits. Thus, for example, barring of conscientious objectors from public benefits has been upheld on the ground that the recognition of conscientious objection is itself a matter of legislative grace rather than a basic right historically within the content of the guarantee of freedom of religion. *Hamilton* v. *Board of Regents*, 293 U. S. 245; *In re Clyde Wilson Summers*, —— U. S.——, 89 L. Ed. 1304 (decided June 11, 1945). See also *West Virginia* v. *Barnette*, 319 U. S. 624, 632.

Since, therefore, Congress is limited by the Bill of Rights in its powers to legislate as to Federal employees, and since no substantial showing of justification can be made for the general prohibition of rights of expression exercised in political activity of Federal employees, imposed by the second sentence of section 9(a), that provision is repugnant to the First Amendment and invalid.

ARGUMENT

I. THE SECOND SENTENCE OF SECTION 9(A) OF THE HATCH ACT CLEARLY INVADES AND INFRINGES RIGHTS OF FREE EXPRESSION AND THEREFORE CANNOT ENJOY A PRESUMPTION OF VALIDITY.

At the outset it is well to mark out the precise limits of our position in this case. We concede that the government has adequate power to limit political activities of Federal employees where they involve coercion, abuse of official authority, venality or any other substantial evil. We agree that the government may impose limitations reasonably designed to cope with substantial evils which the government may sup-

press. We do contend, however, that where the subject of regulation is rights of free expression, the limitation imposed must be moulded to deal with the evils without needlessly and wastefully suppressing rights of expression. We claim that the prohibitions imposed by section 9(a) of the Hatch Act are unduly sweeping in their application to all employees of the Executive branch, with negligible exceptions, and are designed to suppress obvious exercises of rights of free expression without adequate justification. Such evils as exist may be properly met in a more carefully drafted enactment which does not unnecessarily deprive Federal employees of rights of free expression and participation in public affairs which they are entitled to exercise in common with all other persons.

Section 9(a) of the Hatch Act as originally passed on August 2, 1939, provided that "no officer or employee in the executive branch of the Federal Government or any agency or department thereof . . shall take any active part in political management or in political campaigns." This extremely general language could readily have been so construed and applied as not to result in conflict with the First Amendment. Thus, it might be reasonably contended that no issue under the First Amendment is raised by a statute forbidding Federal officers to run for political office, or to act as campaign managers for others. It is clear from President Roosevelt's message issued when he signed the original Hatch Act on August 2, 1939, that he based his conclusion that the Act was valid on the view that it would be so interpreted as not to preclude government employees from effective exercise of their rights of free speech. 84 Cong. Rec. 10745-10746.

However, the passage of section 15 of the Hatch Act, 28 U.S.C. Sec. 61(o), a year later, on July 19, 1940, thereafter made it impossible to intepret the broad language of Sec. 9(a) as to avoid conflict with the First Amendment. For that section expressly provides that the then current interpretations of the Civil Service Commission of the language of its Rule 1, Section 1, which is substantially identical with the prohibition of section 9(a) of the Hatch Act, shall define the acts pro-

hibited by section 9(a). These interpretations which thus became incorporated into section 9(a) are contained in Civil Service Commission Form 1236, dated September 1939, *Political Activity and Political Assessments of Federal Officeholders and Employees* (R. 32, 71-111).

These interpretations specify the activities specifically prohibited to government employees. These activities are forbidden without regard to whether they are performed by government employees on their own time, without coercion or abuse of authority or any other context of impropriety. And they are forbidden to all Federal employees in the Executive branch of the government including minor administrative, service, and industrial, with negligible exceptions. Federal workers may not "publish or be connected editorially or managerially with any political newspaper, and may not write for publication or publish any letter or article, signed or unsigned, in favor of or against any political party, candidate, faction, or measure" (R. 84). They may not address a meeting, convention, or caucus, or make motions or assist in preparing resolutions (R. 81, 82). While federal employees may become a member of a political organization, they may not attempt to influence other members by actions or utterances (R. 81). And while they may sign petitions addressed to state, county, or municipal governments, they may not initiate them, circulate them, or canvass for the signatures of others (R. 85). Federal employees may not march in a political parade, organize, or be an officer or leader of such a parade (R. 84). Finally, "a government employee may not take part in the activities of a musical organization in any parade or other activities of a political party" (R. 85).

Section 9(a) of the Hatch Act and Rule 1, Section 1 of the Civil Service Commission do indeed contain the language:

> "All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates."

The right to express opinions on all political subjects, apparently reserved by Section 9(a), has however been held by the Civil Service Commission to be qualified by the prohibition on taking an active part in political management and political

campaigns (R. 83, 44-45). See also *Op. Atty. Gen.* (Jan. 8, 1941), pp. 8, 13-14. Thus, any expression of opinion which constitutes active participation in a political campaign, such as addressing a caucus, a convention, a rally, or other meeting, or writing a letter or article in the newspapers advocating the program of a particular political party or the election of a candidate, is forbidden. This language therefore does not serve to avert constitutional difficulties under the First Amendment. While Congress may require that speech be removed from a context of coercion *(Virginia Electric Co.* v. *N.L.R.B.,* 318 U. S. 752), it may not require that it be removed from a context of significance and effectiveness *(Bridges* v. *California,* 314 U. S. 252, 269). For the same reason these difficulties are not avoided by the dispensation granted by section 16 of the Hatch Act, 18 U.S.C. sec. 61 p, which enables the Civil Service Commission to authorize such activities in the local affairs of a municipality composed of a majority of Federal employees, or by Section 18 of the Hatch Act, 18 U.S.C. sec. 61 r, which permits participation in purely local campaigns in which the national political parties are not involved.

Activities other than those singled out above are prohibited in Civil Service Commission Form 1236. Appellant agrees that some of them, were they separately imposed, and not commingled with the restrictions here challenged, and sweepingly applied, would raise no constitutional issues. But the question is unavoidably presented how the express curtailments of obvious instances of the exercise of the rights of freedom of speech, of the press, and of assembly, set out above, and the broad provision which imposes them, can stand in the face of the First Amendment.

The court below resolved this question simply by finding that the removal of government employment from politics is a permissible legislative end, and that the question of how this end is to be pursued is one for the Congress, and not the Courts to decide (R. 124-125). In so deciding, the court below is applying the usual test for the validity of regulatory legislation, without regard to the fact that the rights substantially invaded and suppressed by the legislation here challenged are ones within the ambit of the First Amendment. But this view of

the court below is improper and erroneous. For this Court has consistently held that where interests protected by the First Amendment are obviously invaded, the usual test for the validity of regulatory legislation is inapplicable and a far more rigorous test must be applied. Thus, in *Schneider* v. *New Jersey*, 308 U. S. 147, 161, this Court stated:

> "This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government of free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.
>
> "In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effects 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."

Every consideration underlying this test is particularly applicable in this case. Since this Court is being asked to declare an Act of Congress unconstitutional, it is appropriate to analyze and lay bare the basic elements of this test, and to show that this Court would not be exceeding its competence in embarking upon a stringent examination of the sufficiency of the grounds offered in justification of the curbs on expression imposed by the Hatch Act.

Ordinarily, when regulatory legislation is challenged on the ground that it conflicts with the individual's interest (pecuniary or otherwise) in being free from regulation, its validity can be established by a showing that a permissible legislative power is being reasonably exercised. Regulatory legislation must inevitably impinge on, and limit some individual's private interest in being free from regulation. But under our form of government the authority to make the judgment as to whose interest must yield is vested in the legislature. *Miller* v. *Schoene*, 276 U. S. 272. Indeed a premise of our democratic

system is that the individual is able to participate in the legislative decisions affecting his private interest through the ordinary political processes, and the exercise of his right to be heard. *U. S.* v. *Carolene Products Co.*, 304 U. S. 144, 152-153. When freedom of expression and the right to engage in political activity exist, there is an opportunity to influence and receive redress from adverse official action. When these rights are curtailed, however, that opportunity is cut off. It is therefore not the case that the right of free expression is simply one of a multitude of private interests which the legislature may treat with as it sees fit. It is, as this Court has so often recognized, the core of our democratic system of government.[2] *Schneider* v. *New Jersey*, 308 U. S. 147, 161; *Thornhill* v. *Alabama*, 310 U. S. 88, 101, 102; *Bridges* v. *U. S.*, 314 U. S. 252, 262, 263. See *Palko* v. *Connecticut*, 302 U. S. 319. And the purpose of the First Amendment is not simply to protect all sorts of expressions of trivial or esoteric views, but is rather primarily designed to enable all persons to be heard on the immediate, pressing, and controversial issues of public importance vital to all. "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression." *Bridges* v. *California*, 314 U. S. 252, 269. See also *DeJonge* v. *Oregon*, 299 U. S. 353, 364-365.

The statute here challenged commands particular scrutiny for two important reasons. In the first place it suppresses the exercise of a right upon which the very existence of a democratic government depends. This is so not only in the positive

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[2] And it was viewed in that very light from the beginnings of our form of government. Madison in his report on the Virginia Resolutions directed against the Alien and Sedition laws of 1798 stated:

> "Of this act it is affirmed—1. That it exercises, in like manner, a power not delegated by the Constitution; 2. That the power, on the contrary, is expressly and positively forbidden by one of the amendments to the Constitution; 3. That this is a power which, more than any other, ought to produce universal alarm, because it is levelled against that right of freely examining public character and measures, and of freely communicating thereon, which has ever been justly deemed the only effectual guardian of every other right." IV Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (1836), 561.

sense already indicated, by cutting off from nearly three millions of citizens the means of giving effective voice to their political preference but also in the negative sense that it correspondingly weakens the disposition to accept majority decisions which is a concomitant of the right to influence or reverse legislative decisions. In the second place, this statute is operative at precisely that point in this extremely vital area of political expression at which civil rights have their deepest meaning—where others are sought to be persuaded; and their greatest value—where the issues are most controversial.

When, therefore, a statute has the ascertainable effect of circumscribing or suppressing freedom of expression, particularly involving political rights, conflict with the First Amendment can be avoided only by a substantial showing that the purpose of the statute is not the curtailment of free expression but rather the achievement of some other legislative purpose which is a permissible one; that the means utilized are reasonably necessary to achieve that purpose, or in other words, that the incidental infringement is unavoidable if the purpose is to be achieved; and that the legislative interest in achieving that purpose is so vital and substantial as to justify the incidental curtailment of expression which results. Thus the interest in preventing the obstruction of recruiting an army justifies suppression of speech which creates a "clear and present danger" of that eventuality. *Schenck* v. *U. S.*, 249 U. S. 47. However, the interest in keeping the streets clean does not justify licensing of distributors of leaflets. *Schneider* v. *New Jersey*, 308 U. S. 141, 162. Inevitably this Court must weigh the substantiality of the evil dealt with by the legislature against the extent of curtailment of free expression which would result, and determine whether or not the curtailment is justified by any substantial and pressing necessity for dealing with the evil.

It was never intended that the legislature should be its own judge of the propriety of legislation which invades interests expressly protected by the Bill of Rights.[8] For it is in terms

[8] See the statement of James Madison on the introduction of the Bill of Rights in Congress. I *Annals of Congress*, 1st Cong., 1 Sess. (1789), 453-458.

a ban on Congressional action. And if Congress is free to make its own judgment as to when to observe the ban and when to disregard it, it would be rendered nugatory. The court below was therefore in error in refusing to inquire into the sufficiency of the grounds urged in justification of the substantial curtailment of free expression worked by section 9(a) of the Hatch Act. That inquiry, when made, reveals that no sufficient justification exists for the sweeping deprivation of Federal employees' rights of free expression on political issues.

The legislative history of the Hatch Act, the argument of the Government in the court below, and the opinion of that court set out three theories as grounds of justification for the curtailment of government workers' rights of expression worked by the Hatch Act. The first is that the possibility that superior employees may use their position and power to coerce inferiors, and Federal officials to coerce private citizens in the exercise of their political rights, creates a substantial evil which the government may correct. The second is that participation in political affairs by Federal employees may invite reprisals from superior officers or a new administration of an opposite political complexion, and that the government may therefore limit such participation in order to protect the security of tenure and promote the efficiency of service of Federal employees. And the third is that barring Federal employees from any political activities tends to diminish their incentive to do favors for, and seek the support of, successful political candidates or others, and thus serves to promote the purity of the civil service by securing the impartiality of civil servants in their dealings with the public. Analysis of these three theories reveals that they achieve plausibility in apologizing for sweeping prohibition of rights of free expression only by commingling improper and proper activities and by assuming that these cannot be separated so that the evils themselves can be met without suppressing the proper activities; by supposing that less sweeping remedies accommodated to deal only with the evil cannot be devised; and that in any event the government is free to impose any limitation whatsoever on government employment and is itself the sole judge

of the propriety of the limitations imposed. All of these assumptions are unwarranted and utterly fail to supply the substantial justification necessary for the validity of the challenged statute.

II. NO SUBSTANTIAL JUSTIFICATION EXISTS FOR SO BROAD A PROHIBITION AS EXTENSIVELY APPLIED AS SECTION 9(a).

A. Permissibility of the object is not sufficient to satisfy the Required Showing. Necessity for the Limitation and the Appropriateness of the Means Must Be Shown.

The three grounds of justification urged do indeed concern objectives which may properly be the subject of legislative action. The government may endeavor to protect the security of tenure of Federal employees and promote the efficiency of service. It may also prevent coercion and other abuse of official power. And it may seek to secure the impartiality of government officers and promote public confidence in the fairness of administration. But it may not seek these objectives at any cost and by any means whatsoever. For the First Amendment makes it clear that the interests of freedom of expression and freedom of religion cannot be curtailed merely because, by the curtailment, the legislature may reasonably achieve some other objective which appears to it desirable. Any other interest not enjoying express constitutional protection must yield to such a legislative judgment. Thus the authority to dismiss of superior officers must undoubtedly give way to a legislative purpose of promoting security of tenure. Solicitation of funds by government employees may be wholly forbidden to prevent coercion. And public officers may be required to give up all connections and financial interests in private enterprises in order to promote impartiality of administration. These may be done even if the evils apprehended are only possible ones and not present or imminent, so long as the means is rationally related to the end sought. For these are not interests enjoying the express protection of the First Amendment, which unequivocally states "Congress shall make no law abridging the freedom of speech. . . ." And, "The

command 'Thou shalt not . . .' is usually rendered as to forbid and we think here it was employed without subtlety or contortion and in its usual sense." *Conn. Power & Electric Co.* v. *Federal Power Commission,* 324 U. S. 515, 532. Just as the agencies must accord respect to the will of Congress expressed in the language of prohibition, so must Congress accord respect to the express prohibitions of the Constitution.

Study of the three asserted grounds of justification leads to the conclusions that Congress has in the past pursued these objectives without encroaching on interests enjoying constitutional protection, indeed, with a scrupulous regard for the preservation of these constitutional rights; that in any event, substantial achievement of the objectives sought does not at all require sweeping suppression of freedom of speech; and that, to the extent that their accomplishment may be thought to do so, their achievement does not justify extinguishment of basic rights. In sum, while pursuit of these objectives may permit many kinds of enactment curtailing a wide variety of interests, it does not permit so cavalier a suppression of rights of free expression as is effected by section 9(a) of the Hatch Act. To establish that this section passes the bounds of necessity and substantial regard for the prohibitions of the bill of rights, we shall take up each ground of justification and consider the character of the end sought, the aptness of the means utilized to achieve it, other means Congress has resorted to for reaching the same result, and the extent to which attaining the result sought is worth curtailment of freedom of expression.

It has been suggested that Federal employees are trading release from insecurity in exchange for loss of their political rights. One Congressman has observed that civil service employees "take the veil" in exchange for insurance against separation from the payroll. 84 *Cong. Rec.* 9602. As to other employees, he stated that without such a quid pro quo, they should not be compelled to surrender their constitutional rights of opportunity and free speech. Whatever the adequacy of the protection of the civil service employee against separation, there should be no necessity to surrender constitutional

rights to secure economic security.[4] But the Constitution and the basic principles of democracy do not offer citizens of this country merely their choice between two types of serfdom. There is every reason to believe that patronage in the Federal service, if deemed evil, can be eradicated; that coercion of political speech and action can be eradicated; that efficiency and the merit system can be advanced without, in any way, impairing the free exercise by government employees of their basic rights of freedom of speech. The method is clear: the devising of a technique to assure, in the words of the court below, that "the employment, promotion and dismissal of government employees" shall be made on bases having no relation to their political activities. Such a method can assure an efficient merit system without curtailing the rights of employees; that the present system may not now be perfect and that improving it may require thought and effort does not mean that government is free to drop its efforts to improve its system and adopt a blanket solution which controverts basic rights guaranteed by the Constitution.

B. Preservation of Security of Tenure and Promoting Efficiency of Service.

The ground urged most strongly by the Government and relied on by the court below is that section 9(a) of the Hatch Act does not curtail political rights, but on the contrary, protects them. It does so by protecting the government employee in the security of his tenure, by removing any occasion for infliction of reprisals by superior officers based upon the inferior officer's refusal to render political service or by his expression of opinion or activity on behalf of a political party or candidate obnoxious to the superior officer. And by so preserving the Federal employee in the security of his tenure, it promotes the efficiency of the civil service. This argument,

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[4] Of course, the situation of a non-classified employee, not involved in this case, is even more precarious for there is no indication of quid pro quo to him for his surrender of basic rights other than the privilege of staying on the payroll at the will of his employer.

as presented below, assumed an unlimited power to dismiss in the appointing officer, in absence of limiting statute, and invited the further assumption that, *a Fortiori,* Congress possesses the power to do so by statute. These unwarranted and unsupported assumptions are discussed in Part III A, *infra,* pp. 50-53.

Obviously, the Hatch Act does curtail rights of expression of Federal employees, and can be said to protect them only in the fashion in which "protective custody" affords protection. A more candid formulation is that it is necessary to deprive Federal employees of a large measure of the rights of free expression enjoyed by other citizens in order to protect government workers in the enjoyment of the residue, without fear of dismissal or other reprisal. But is it in fact necessary to do so? Is the method utilized by section 9(a) necessary because there is no other way to protect tenure, or is it necessary in the sense that it is the most convenient and easiest for Congress to adopt, and achieves the most complete results in solving a problem by the simple expedient of wiping out the rights which create the problem? And is it in fact the case that a merit system of civil service can be preserved only at the price of severely limiting the rights of expression of civil servants?

Reflection serves to answer some of these questions, and history answers others. A merit system of civil service is indeed concerned with eliminating from the public service insecurity and inefficiency flowing from political causes. It seeks, however, to do so not by appeasing the appointing officer's pique, by barring inferior officers from activities which might provoke reprisal, but rather by limiting his powers of appointment and dismissal. For the kinds of political activity with which it is concerned are political favoritism in appointment to the exclusion of merit, coercion of political services and political contributions, and dismissals based on the *appointing officer's* desire to serve political ends such as making a spot available for a henchman, and not on the subordinate's expression of views. And the security which it seeks to promote is security flowing from elimination of political consider-

ations in appointing and dismissing actions of superior officers. So far as this affects political activity of subordinates it is designed to do so by establishing that political service or contribution shall lack efficacy as a consideration for appointment, and failure to render service or make contribution shall not be a cause or incentive for removal. It thus serves to make it clear that some motive other than desire to acquire or retain a public post should govern political activity of public servants, and not suppress such activity altogether. That such an approach is reasonably adapted to achieving the end of security of tenure is manifest from the fact that it has been employed in the Civil Service Laws and other Congressional legislation on the subject.

Even prior to the acceptance of a merit system, Congress had sought, in particular instances, to protect Federal employees in the enjoyment of their rights of expression against reprisals or dismissal occasioned by exercise of these rights. Thus, the Act of March 2, 1867, 34 U.S.C. Sec. 510, 14 Stat. 492, provides:

> No officer or employee of the Government shall require or request any workingman in any navy yard to contribute or pay any money for political purposes, nor shall any workingman be removed or discharged for political opinion; and any officer or employee of the Government who shall offend against the provisions of this section shall be dismissed from the service of the United States.

There is no evidence that "political opinion" in this section means the circumscribed and ineffectual expression of opinion divorced from a live context of a political campaign, permitted by the Civil Service interpretations embodied in section 9(a) of the Hatch Act. In any event, whatever the scope of the right, this statute makes it at least clear that Congress has on occasion protected security of tenure, not by suppressing rights, the exercise of which might invite reprisal by the superior, but rather by guaranteeing them and by limiting the superior officer's removal power when its exercise would infringe such rights.

Although some have failed to perceive it there, the Civil

Service Act itself clearly discloses an intent to promote security of tenure by curtailing the superior officer's removal powers when its exercise would result in curtailing rights of free expression and kindred rights of subordinate officers.

The Civil Service Act authorized the Civil Service Commission to aid the President in promulgating rules and regulations (5 U.S.C. Sec. 633(1)) and further required that (5 U.S.C. Sec. 633(2)):

> Among other things such rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:
>
> 5. *Contributions for political purposes.* Fifth. No person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service and that he will not be removed or otherwise prejudiced for refusing to do so.
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> 6. Political coercion by officers; distrimination due to marital status. Sixth. No person in said service has the right to use his official authority or influence to coerce the political action of any person or body . . .

The plainest instance of Congressional action to protect government workers in the exercise of their rights of expression by limiting official power to inflict reprisal and cause dismissal because of the exercise of those rights is the passage of the Lloyd-LaFollette Act of August 24, 1912, 5 U.S.C. 652, 37 Stat. 555, which forbids dismissal of Federal employees except for cause, and requires service of a written statement of the grounds for dismissal, and affording the employee an opportunity to reply.[5] It also guarantees to postal employees (and has been universally construed to apply to Federal employees generally) the right to join an employee's organization or union for the purpose of seeking betterment of conditions of employment and to petition Congress for the redress of grievances.

This statute was occasioned by the so-called "Gag Rules" of Presidents Theodore Roosevelt and Taft, the Executive

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[5] The statute thus embodies the substance of the Civil Service Rule which was rendered nugatory in the case of *U. S. ex rel Taylor v. Taft*, 24 App. D. C. 95, *infra*, pp. 52–53.

Orders of Jan. 31, 1902 and Jan. 25, 1906, which prescribed dismissals as a penalty for agitation by civil employees for an increase in wages, and the Executive Orders of Nov. 26, 1909 and April 8, 1912, which forbade communications to members of Congress save through the heads of Departments. See *Myers* v. *U. S.*, 272 U. S. 52, 263-264 n. The very purpose of the statute was thus to protect the freedom of expression of Federal employees and to prevent arbitrary dismissals.[6]

It may perhaps be contended that whatever the extent of the rights of Federal employees to engage in political activity and to express their views, as a practical matter it is impossible both to permit them to enjoy these rights and to achieve security of tenure. For superior officers could in any event exercise their dismissal power to inflict reprisals for political reasons, and any prohibition on this could be readily evaded by fabricating some other pretext. And higher officials might condone the action or else not inquire into the sufficiency of the grounds advanced for the action taken. The courts, reluctant to be involved in such matters, might declare themselves powerless to intervene in details of internal management and fail to afford any rapid, effective remedy. Therefore the Federal employee would fare better to surrender the

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[6] It would be a grudging construction indeed to contend that the removal for cause limitation is not designed to achieve this result, and that the only liberty of expression protected by the Lloyd-LaFollette Act is the right of postal employees to join a union and to petition Congress or any member of Congress for the redress of grievances. And the legislative history of the course of the Act through Congress, as well as the immediate occasion for passing it, makes it evident that it could be so read only by a "jaundiced eye" insensitive to its obvious purpose. Representative Rouse stated "This provision simply places all employees (of the government) on the same footing with all other American citizens . . ." (48 Cong. Rec. 5080). And Representative Konop observed (48 Cong. Rec. 5207):

> "Any man in public service should have a right as a citizen to know why he is discharged from public duty . . . For years, American citizens under civil service in this free country have been denied the right to be heard . . . I do not believe that an American citizen when he enters the civil service should by that act lose his right as an American citizen."

See also remarks of Senators Reed, Poindexter, Jones, and LaFollette, 48 Cong. Rec. 10728-10733, and Senators Smith, Johnston, Sutherland, Martine, and Bourne, 48 Cong. Rec. 10790 *et seq.*

bulk of his rights of expression on political subjects, or have Congress do so for him, and to enjoy the meagre residue in peace and security.

But this counsel of appeasement can hardly serve as the showing of substantial justification necessary for the validity of incidental curtailment of rights of expression. For it has been demonstrated that rights of this character can be preserved. Comparable rights which at one time had an even more precarious existence have been effectively secured and protected by legislative action. Thus, it is notorious that at one time employees in private industry were dismissed or discriminated against solely because of their union membership or activity. Where that reason was not expressly given for dismissal, some other was easily improvised. However, Congress, by the passage of the National Labor Relations Act, made it unlawful for employers in industries affecting interstate commerce to discriminate against, or dismiss employees because of their union membership or activity, 47 U.S.C., Sec. 157, 158. And it set up a mechanism for the protection of these rights. By conscientious enforcement of the statute, the N.L.R.B. has given substantial protection in the enjoyment of these rights to a number of employees undoubtedly much larger than the total number of Federal workers, and under circumstances at least as difficult as any which could be presented by an unwarranted dismissal of a government employee for engaging in political activity on his own time, without coercion or other abuse of authority.

Whatever the specific means Congress might choose to adopt, it is at least clear that there are other methods at hand for protecting the security of tenure of Federal employees and preventing arbitrary dismissals. That devising these methods may involve painstaking care and analysis does not excuse Congress from making that effort. Indeed if it is at all possible to do so, the Constitution requires that the effort be made, and forbids resort to some sweeping prohibition needlessly destructive of basic rights merely because it is convenient.

C. Prevention of Coercion and Abuse of Authority

There are two other arguments generally made in defense of a wholesale prohibition on political activity of Federal workers. These the Government apparently found it unnecessary to present in detail below because of the tacit assumption of an unlimited power to legislate any condition to public employment, flowing from the supposed existence of an unlimited dismissal power, discussed in Section III, *infra*, pp. 50-53. The first of these arguments is that elimination of Federal employees from political activity serves to prevent coercion, favoritism, and other abuse. And in removing political pressures on Federal employees, it serves to protect the merit system and to preserve public confidence in the civil service. The second is that the creation of an impartial body of expert civil servants divorced from the political life of the nation could be depended on to serve faithfully whatever party may be in power. This would also create public confidence in the impartiality of administration and preserve the merit system by removing incentive from a victorious party to purge the civil service and place its own adherents in office. So far as danger of coercion, venality and partiality may be thought to endanger the merit system and undermine public confidence in administration, these two arguments raise the same problems and will be considered together. Since the aim of creating an impartial body of expert civil servants divorced from the political life of the nation also involves curtailing rights of expression even when there is no coercion or other abuse present or imminent, it will be separately considered.

A pervasive assumption in this field is the notion that political activity as such is an evil, and that participation in it can only corrode and corrupt, so that those most remote from it are truly blessed. It is readily understandable, in the light of the bitter battle for civil service reform, why writers on public administration should feel so. But the Constitution places limits upon the indulgence of this sentiment in legislation. For, as we have seen (pp. 16-18, *supra*) the right to engage in free expression on public measures, is basic to our system of government.

Since political activity as such is not an evil which the government may deal with as it sees fit, Congress must restrict its prohibitions to those forms of political activity which do create evils, such as coercion of inferior officers and members of the public, favoritism, and venality. It may well be contended that it is practically impossible to deal with the evils alone, without barring federal employees from substantial participation in political affairs. However, the body of legislation on this subject enacted prior to the Hatch Act indicates that Congress has carefully limited itself in the past to dealing with the evils themselves without extinguishing the rights. No showing has been made that the continuance or extension of that method of dealing with the evils will be ineffective and that the extinction of constitutional rights is essential. A mere examination of the broad scope of statutory regulations dealing with the above evils will indicate the extent to which they give promise of success in reaching the anticipated evils only, and they serve to show the lack of necessity for the blanket provisions of Section 9(a). Thus, in dealing with coercion by government workers directed against other government workers or private citizens and coercion of government workers by private citizens, Congress has scrupulously observed the limitation that legislation of this character must be appropriately designed to suppress the evil without also infringing on constitutionally protected rights. Indeed, the primary purpose of legislation in this field has been to insure the opportunity for the exercise of their constitutional rights by government employees as well as other citizens, free from coercion, intimidation, and improper use of authority by others. There are obvious methods of preventing improper political activities. Amongst these is the punishment of those who actually engage in them. Cf. *Schneider* v. *New Jersey*, 308 U. S. 147, 162.

Prohibition on the use of official authority for political purposes is but one aspect of the general principle that a public officer or employee shall not derive private advantage and gain from the prestige or power of his office. Numerous statutes exist which prohibit the exploitation for private gain of the opportunities which may be created by public office.[7]

[7] 5 U.S.C. Sec. 243 (prohibits the Secretary of the Treasury from

In the hierarchy of government administration, superior officers enjoy authority over their subordinates, which may be so extensive as to include the power to dismiss. Just as the federal government seeks to protect the members of the public from improper exercise of authority and opportunity by any public officer or employee, so it seeks to protect subordinates in the exercise of their rights of expression from coercion and intimidation by superiors.[8]

In dealing with possible coercion which may be applied in the solicitation of funds for political purposes, Congress has recognized that coercion and intimidation may be applied to federal employees not only by superiors,[9] but also by other government employees,[10] and by private persons who may seek

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being concerned or interested in carrying on the business of trade or commerce); 31 U.S.C. Sec. 155 (*Id.* as to Treasurer of the United States); 31 U.S.C. Sec. 163 (*Id.* as to Register of the Treasury); 12 U.S.C. Sec. 11 (unlawful for Comptroller or Deputy Comptroller of the Currency to be interested in National Banks); 43 U.S.C. Sec. 11 (officers, clerks, and employees in General Land Office prohibited from being interested in purchase of public lands); 28 U.S.C. Sec. 373 (unlawful for United States judges to be engaged in the practice of the law); 28 U.S.C. Sec. 249 (unlawful for members of Congress to practice in Court of Claims); 22 U.S.C. Sec. 38 (diplomatic officers prohibited from transacting business involving trade with country to which they are accredited); 18 U.S.C. Sec. 192 (prohibits officers collecting or disbursing public revenues from trading in public obligations or public property); 18 U.S.C. Sec. 193 (prohibiting judges and other court officers from purchasing claims for fees of witnesses, etc., at less than their face value); 18 U.S.C. Sec. 198 (prohibits officers and employees in legislative and executive departments from prosecuting or being interested in claims against the United States); 18 U.S.C. Sec. 201 (unlawful to use money appropriated by Congress to pay for personal service to influence member of Congress with respect to legislation); 18 U.S.C. Sec. 202 (prohibits Congressmen and government officers from taking consideration for procuring contracts with the government); 18 U.S.C. Sec. 203 (prohibits Congressmen and other government employees from taking consideration for services rendered in connection with any matter pending before any government agency); 18 U.S.C. Sec. 204 (prohibits members of Congress from being interested in government contracts. Declares such contracts void).

[8] 34 U.S.C. Sec. 510 (quoted *supra*, p. 24).

5 U.S.C. Sec. 113 (prohibits government workers from soliciting other government workers for gifts for superiors; also prohibits the making of a contribution and the receiving of a gift).

[9] See 34 U.S.C. Sec. 510.

[10] 18 U.S.C. Sec. 208; 18 U.S.C. Sec. 211.

to solicit them in their capacity as government workers.[11] Significantly, Congress has not imposed an absolute prohibition on solicitation of political contributions of government employees by private individuals, but has limited the prohibition to solicitation on government property. See *U. S.* v. *Thayer,* 209 U. S. 39. Nor indeed, is the government employee prohibited from making political contributions to persons who are not government employees if he desires to do so.[12]

Examination of the statutes cited in connection with the foregoing discussion reveals that they are framed in such terms as to preserve the rights of government employees to participate in political activity when no coercion, intimidation or abuse of authority is created thereby, and fall within the permissible limits of the government's power to regulate the political activity of its employees. These limits were extensively discussed in the case of *Ex Parte Curtis,* 106 U. S. 371. In that case the Supreme Court held valid a statute prohibiting certain officers of the United States from requesting, giving to, or receiving from, any other officer money or other thing of value for political purposes. The Supreme Court made it clear that this result was reached on the ground that the prohibition was a proper exercise of the government's power and was not an unreasonable limitation upon the civil rights of the employees subject to the provision. Thus, Chief Justice Waite, speaking for the Court, stated (pp. 371-372):

> "The act is not one to prohibit all contributions of money or property by the designated officers and employees of the United States for political purposes. Neither does it prohibit them altogether from receiving or soliciting money or property for such purposes. It simply forbids their receiving from or giving to each other. Beyond this no restrictions are placed on any of their political privileges."

Indeed, the very ground of the decision of the Court is that government officials may not properly make contributions to

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[11] 18 U.S.C. Sec. 209 makes it unlawful for any person to solicit political contributions from government employees on government property.

[12] 18 U.S.C. Sec. 210 provides that no government employee shall suffer official reprisal for giving or withholding political contributions.

political causes which they may espouse a condition to continued employment. But the Chief Justice also makes it clear in this connection that the curtailment of such an evil must not entail suppression of the rights of government employees to participate in political activity. Thus he stated (p. 375):

> "Political parties must almost necessarily exist under a republican form of government; and when public employment depends to any considerable extent on party success, those in office will naturally be desirous of keeping the party to which they belong in power. The statute we are now considering does not interfere with this. The apparent end of Congress will be accomplished if it prevents those in power from requiring help for such purposes as a condition to continued employment."

Mr. Justice Bradley in dissenting from the opinion of the Court did not at all dispute the premise of the majority that the power of the government to regulate the employment relationship was limited to reasonable regulations. Thus he stated (p. 378):

> "The legislature may, undoubtedly, pass laws excluding from particular offices those who are engaged in pursuits incompatible with the faithful discharge of the duties of such offices. That is quite another thing.
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> "The legislature may make laws ever so stringent to prevent the corrupt use of money in elections or in political matters generally, or to prevent what are called political assessments on government employees or any other exercise of undue influence over them by government officials or others. That would be all right. That would be clearly within the province of legislation."

Justice Bradley dissented from the judgment of the Court on the sole ground that in his opinion the statute in issue trespassed beyond the agreed limits of the proper powers of the government to suppress substantial evils, and infringed upon fundamental civil rights of Federal employees.

In contrast with the second sentence of section 9(a) of the Hatch Act, Sections 1 through 8 of that Act, 18 U.S.C. secs. 61-61g, and the first sentence of section 9(a) are well within these permissible limits of legislation on political abuses. The major purposes of the Hatch Act were to insure that the authority and funds of the federal government would not be improperly used to affect state and national elections, and that

no person, whether or not a government employee or recipient of federal funds, would be coerced by any other person in the exercise of his right to vote in a national election. Congress quite properly recognized, at least in sections 1-8, of the Hatch Act, that the achievement of these objectives entailed the imposition of prohibitions on intimidation, coercive activities and improper use of government authority and funds, not only by government employees but also by private citizens. Thus, a political boss, not employed by the government, could nevertheless coerce persons in their right to vote by representing that he is able to secure federal employment or benefits for them. Similarly, he could intimidate government employees by representing that he is able to bring about their dismissal. Congress, therefore, was concerned with evils which were not caused solely by the conduct of government employees as such, nor, indeed, could be solved by regulating the activities of government employees alone. Clearly, in dealing with these evils, it could not suppress the rights of private citizens by as sweeping a prohibition as the second sentence of section 9(a).

In fulfilling the purposes of the Hatch Act, Congress aptly extended the prohibitions on coercion, intimidation, and improper use of official authority and federal funds to all persons, whether or not federal or other governmental employees. Thus, section I of the Act makes it unlawful for *any person* to intimidate or coerce *any other person* for the purpose of interfering with the right of such other person to vote in connection with an election for President, Vice President, Presidential electors, or members of Congress.

Similarly, sections 3 and 4 of the Act, which deal with coercion and intimidation of voters by promises of federal employment or work or relief benefits, or threats to deprive any person of such employment or benefits, are not restricted to federal employees, but are applicable to *any* person. In like fashion, sections 5 and 6, which prohibit political solicitation of recipients of federal work or relief benefits, and disclosure of any list of such recipients for political purposes, are applicable to *any person* and not to government employees alone.

Section 2 and the first sentence of section 9(a) are appropriately limited to government employees, since these sections

deal with the use of official authority by such employees for the purpose of interfering with elections. Section 2 makes it unlawful for persons employed in administrative positions in the United States government, including government corporations, to use their official authority for the purpose of interfering with elections for President, Vice President, Presidential electors, or members of Congress. Violation of section 2 is made a criminal offense by section 8 of the Act. The first sentence of section 9(a) forbids persons employed in administrative positions in the United States government to use their official authority for the purpose of interfering with any election whatsoever. The penalty for violation of this section is dismissal from office as prescribed by section 9(b).

Since the subject of improper political activity is so thoroughly covered in legislation which is scrupulously designed to reach the evils without suppressing proper exercise of political rights, the sweeping prohibition of section 9(a) can find no justification in the claim that it deals with evils. For it has been shown that the evils can be separated from the rights. No showing has been made that it is impossible to do so. And, under those circumstances, the Constitution requires that the separation be made. *De Jonge* v. *Oregon,* 299 U. S. 353, 364-365; *Thomas* v. *Collins,* 323 U. S. 516, 540-541.

D. "Political Neutrality" as a Device for Preservation of Purity and Impartiality of the Civil Service

1. The prohibition of Section 9(a) is designed to preserve the "Political Neutrality" of Federal employees. The argument which has been most widely urged in favor of an absolute ban on participation by government employees in political affairs, even when no coercion or other abuse is present or imminent, is that such an absolute prohibition is necessary to create an impartial body of civil servants which could be depended upon to serve faithfully and impartially, and whatever party the public may place in power. The existence of such a body of impartial civil servants would also serve to protect and perpetuate the merit system by discouraging a victorious party from purging the public service and placing its own adherents in office. For it would have the assurance of

knowing that a competent body of experts was at hand to do its will and carry out its policies faithfully without conflict or breach of faith occasioned by loyalty to some other party. This is the ground most widely urged by writers on public administration and personnel problems.[13]

Indeed, this is the very ground which gave rise to the prohibition that no Federal employee in the classified civil service "shall take any active part in political management or in political campaigns" and its sweeping interpretation by the Civil Service Commission. Theodore Roosevelt, while Civil Service Commissioner, coined this language, in the belief that application of such a rule to the federal civil servant "prevents him from turning his official position to the benefit of one of the parties in which the whole public is divided; and in no other way can this be prevented," and that only by refraining from political activity can the civil servant serve the whole public.[14] This language of prohibition was formally embodied in Civil Service Rule I, Section 1, in 1907, while Theodore Roosevelt was President.[15]

This body of opinion on the indispensability of enforcing "political neutrality" is quite formidable. In addition, the circulars of earlier Presidents exhorting Federal officeholders to refrain from an active role in elections have cited in its support. And the practice of Great Britain and Canada has also been relied upon. Indeed, were any interest here involved other than a freedom given express constitutional protection, a legislative judgment that it is desirable to have an "impartial" body of civil servants divorced from the political life of the notion could hardly be challenged. When, however, an almost total sacrifice of effective freedom of expression on political issues by nearly all government workers, without re-

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[13] See: White, *Government Career Service* (1935), 78 *et seq.*; Dawson, *The Principle of Official Independence* (1922) 93–94; Wei-Kiung Chen, *The Doctrine of Civil Service Neutrality in Party Conflicts in United States and Great Britain* (1937); Kirchheimer, "The Hatch Law", in *Public Policy* (ed. C. J. Friedrich, 1941), 353; Finer, "Civil Service" in III *Encyclopedia of The Social Sciences*, 522.

[14] Eleventh Annual Rept. of the Civil Service Commission (1894), 20–21.

[15] Twenty-fourth Annual Rept. of the Civil Service Commission (1907), 9. The formula appears to be an expansion of more restricted language which did not encroach on rights of expression, used by President Hayes. See note 36, *infra*.

gard to the character of their positions, is deemed necessary to achieve this result, a grave political judgment as to the form of our government is made, which passes beyond the limits of regulating conditions and tenure of government employment and resolving conflicting interests in that area. And this judgment trenches into an area where the Constitution already embodies another political judgment about the form of our government, that enjoyment of the most complete freedom of expression by all citizens is indispensable to its preservation. The creation of this body of politically neutralized "impartial" civil servants must therefore be justified, like any other incidental encroachment on that vital freedom, by a substantial showing of the existence or imminence of an evil so grave that its suppression can be achieved only in that way and that it is worth the resulting incidental curtailment of rights of free expression of an extensive body of citizens.

This substantial showing cannot successfully be made in support of the validity of the prohibition of section 9(a). This is so, not because the government cannot preserve impartiality where there is a vital interest in doing so, but because section 9(a) applies to so wide a variety of employees that the impartiality of many of these is a matter of complete indifference to the effective performance of their functions in the Federal service. The actual diversity of the nature of duties and functions embraced in the public service is too often lost sight of by authorities on public administration. And in their reaction to the "spoils system" they lose sight of the grave political judgment involved in the creation of a body of "impartial" civil servants cut off from the political life of the nation. They also misconceive the actual character of the foreign experience, of Great Britain, of Canada. Finally, this theory of political neutrality was not the basis on which Congress originally enacted, and the President, on August 2, 1939, signed the Act embodying Section 9(a). The theory of political neutrality for all government workers was imported by Congress, without any serious consideration of its consequences, into section 9(a) by the enactment of Section 15 on July 19, 1940, which made the

Civil Service Commission's interpretations the content of Section 9(a). These points will be discussed.

*2. **The actual diversity of the kinds of employment within the civil service makes the prohibition obviously indefensible as to some classes of employees.*** Writers on civil service matters are prone to assume a Dante-like picture of the civil service as a host of administrative officers similarly occupied in making policy or assisting in doing so and steadily working their way through the various grades of the service. In truth, the civil service is not a unified hierarchy of administrative officials slowly aspiring upward to positions of increasing responsibility with wider latitude of discretion. As of August, 1945, there were 2,795,213 persons employed in the Executive branch of the Federal government.[16] Only a small fraction of these are engaged in positions of direct contact with and authority over the public, such as Collectors of the Revenue, Postmasters, Immigration Inspectors, United States Attorneys, Marshals, F.B.I. and Treasury Agents. Another small portion occupy positions which involve disposition of private interests. These include officers delegated adjudicatory, licensing, or other dispensing powers by cabinet and agency heads, hearing officers, trial attorneys, claims adjusters, etc. Another group is comprised of professional and administrative officers who supply data and assist in the formulation of policy. But the largest number of Federal workers do not fall into any of these categories. Thus, there is a large body of administrative personnel which includes filing clerks, machine operators, and typists. Another large body of employees is comprised of service employees, messengers, elevator operators, charwomen, maintenance men. Yet another large group is employed in industrial and other enterprises which the Government itself operates, such as navy yards, arsenals, the Government Print-

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[16] United States Civil Service Commission, Monthly Report of Employment, Executive Branch of the Federal Government *(August, 1945)*. In this report, a total of 983,532 is reported in the category of "wage" employees, as distinguished from "salaried" employees.

The Report for April 1944, when this action was filed, discloses a total 2,850,585 employees, with 1,783,923 salaried employees, 916,624 wage employees, and the remainder in other categories.

ing Office, the Mint. Many of these are employed as laborers, machinists, typesetters, welders, etc.[17]

The interest in preserving impartiality of the Federal employee varies widely from group to group. It is a matter of grave public importance whether a Collector of the Revenue is fair and impartial in the discharge of his duties. For he possesses extensive powers over members of the public and enjoys a wide range of discretion in their exercise. But the public interest in the impartiality and fairness of plaintiff Tempest, a welder in the Philadelphia Navy Yard, or plaintiff Poole, a roller in the Mint, can hardly be said to be comparable. Indeed, the welder's duties do not differ in any essential respect from that of a similar employee in Cramp's shipyard next door and the matter of Government employment of the welders in the Navy Yard is an accident.[18] Similarly, others who happen to be employed in the locale of policy or decision making, have absolutely nothing to do with the process except to aid it mechanically and in a wholly incidental fashion. Thus a typist, filing clerk, mimeograph operator, charwoman, or maintenance man has no real part in the essential business of government so far as it is concerned with making and enforcing policy. And the public interest in the impartiality of such a Federal employee is hardly greater than its interest in the impartiality of the elevator operators or charwomen in the Old Willard building or the Shoreham building, where government agencies lease space.

In the light of these wide variations in duties and responsi-

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[17] The detailed breakdowns in the employment reports cited in note 16, *supra*, show that most of the wage employees work in the War and Navy Departments. These departments maintain such establishments as navy yards, ordnance factories, clothing factories, supply depots, etc.

[18] As to similar employees of the Admiralty, The Report of the Committee on Parliamentary Candidature of Crown Servants, CMD 2408 (1925), stated (p. 32):

> It can, we think, fairly be said of these men that in the sense of this report, their Government employment is an accident. Their general conditions of employment are governed by the craft or trade to which they belong: they are primarily craftsmen of that trade; and they are separated in organization and constant contact from the Departments staffed by those who would everywhere be primarily regarded as Servants of the Crown.

bility for public policy and its fair enforcement, a restriction reasonably designed to preserve the impartiality of a Collector of the Revenue, a U. S. Marshal, an F.B.I. or Treasury agent may be utterly absurd and unjustified when applied to a lens grinder, a stock clerk, a machinist, or an elevator operator. It is therefore impossible both to observe reasonable regard for constitutional rights and to enact sweeping prohibitions as to political rights applicable to all Federal employees whatever the nature of their duties. In dealing with so complicated and varied a subject matter, a hatchet cannot readily be substituted for a scalpel.

If, indeed, promotion of fairness and impartiality, and preservation of public confidence in the civil service are ends sought by section 9(a), the exemptions create a paradox. For the officers of government, outside of the judiciary, who enjoy the most extensive adjudicatory powers and who are the top policy makers, are exempt. These are the heads and assistant heads of the Executive Departments, and officers appointed by the President with the advice and consent of the Senate who determine policies pursued in Nation-wide administration of Federal laws. The resolution of this paradox is easy. Congress has quite properly recognized that these offices are essentially political so far as they involve formulating and carrying out of those policies which are endorsed by the people in their selection of the President and Congress. And while the interest in fair administration is great, it can be achieved in other ways, by the appointment of men of stature and honor, by judicial review of administrative determinations, or by public scrutiny and pressure applied by way of Congressional inquiry and other means. Here Congress apparently balanced the end of impartiality against the end of adequate representation of prevailing popular will by high policy makers. But it did not go on to balance the public interest in impartiality of a navy yard welder or a Veterans Administration stock clerk against the interest in preservation of those employees' rights of free expression and participation in political affairs. Or if it had done so, it did not give those interests of the employees the measure of consideration which the Constitution requires.

3. The practice in Great Britain and Canada lends no support to a general requirement of political neutrality on the part of all government employees without regard to their duties. The practice of the British Civil Service, so often cited in favor of the imposition of an absolute prohibition on political activity by all government employees does not in fact support such a conclusion. For the British practice is by no means as sweeping in its scope as is supposed. For it at least distinguishes between those obviously not administrative officers engaged in formulating policy, like dockyard workers of the Admiralty, and those who are. No general prohibition on political activity by all government employees is embodied in any statute or regulation.[19] And the practice from Department to Department varies widely, with due regard accorded to the type of position occupied. Thus, industrial dockyard employees may make political addresses and act as campaign manager.[20] A postman in the lower grade may undertake canvassing work at election times when not on duty and not in uniform.[21] And there is widespread feeling among civil servants and others, that any extensive limitation on activities of minor servants enjoying no policy-making authority are outmoded and unreasonable.[22]

Although the Canadian limitation on political activity of government employees appears to be substantially identical with section 9(a) of the Hatch Act[23] in application it is not.

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[19] Report of the Committee on Parliamentary, etc., Candidature of Crown Servants, CMD 2408 (1925), p. 8. At best there exists only a vague unwritten custom that civil servants are to maintain "a reserve" in political matters. See Kingsley, *Representative Bureaucracy* (1944), 223; Brown, *The Civil Service, Retrospect and Prospect* (1943), 39.

[20] Report . . . on Candidature of Crown Servants, *supra* note 19, at p. 12.

[21] *Id.* at p. 9.

[22] Report on Candidature of Crown Servants, *supra* note, 12–15, 24–25. Kingsley suggests that emphasis on limitation of political rights of civil servants is tied up with trends toward curtailment of civil liberties generally. *Representative Bureaucracy* (1944), 223. See also Memorandum on Practice in New South Wales, where it is observed that extension of the Civil Service to include a large body of citizens raises serious doubt about the desirability of excluding a large body of qualified citizens from participation in political affairs. Report . . . on Candidature of Crown Servants, *supra* note 19, p. 17.

[23] There is reason to believe that the Canadian political activity ban,

For that limitation does not apply to all government employees, and workers on government railroads enjoy the same political rights as workers on privately owned railroads.[24]

4. The history of the American Civil Service affords no justification for imposing a general requirement of "political neutrality" on all government employees. The sentiment that the Civil Service should consist of a body of dedicated persons who have renounced all connection with political affairs in order to insure purity and impartiality of administration on a high level of technical efficiency, is by no means universally shared by writers on public administration. Some writers, who endorse the view, perceive that a sweeping prohibition applicable to all employees is evidently unjustifiable as applied to minor non-policy making civil servants such as clerical and technical employees.[25] Other writers are more critical of the view itself, and are sensitive to the far-reaching social and political consequences of divorcing civil servants from participation in political affairs.[26] Thus, one of these, Sayre, recognizes that the principle of political neutrality is but one of many devices which may be chosen to insure that civil servants will faithfully execute policy; that the so-called "spoils system" is another such device, aimed at the same end, however wastefully and inefficiently; and that total deprivation of political rights of civil servants is not indispensable to the workings of an efficient merit system.

A good deal of the zeal for purity and the failure to reckon all the consequences of political "neutrality" exhibited by writ-

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Civil Service Act of 1918, sec. 32, Can. Stat. 8–9, Geo. V. C. 12, sec. 32, was adopted under the influence of our own Civil Service Commission's Rule I, Sec. 1. For in 1918, when the ban was introduced a body of American experts had been called in to revise the Canadian Civil Service. See Dawson, *The Principle of Official Independence* (1922), 77.

[24] Report . . . on Candidature of Crown Servants, supra note 19, at p. 20.

[25] See Kirchheimer, "The Hatch Law" art. in *Public Policy* (ed. Freidrich and Mason, 1941), 356–57.

[26] See Sayre, "Political Neutrality", art. in *Public Management in the New Democracy* (ed. Morstein Marx, 1940), 202 et seq. Sayre's views on this subject are entitled to especial weight because of his experience as a Civil Service Commissioner of the City of New York. See also memorandum on practice in New South Wales, cited in note 22 *supra*. Cf. grounds urged for the passage of Section 21 of the Hatch Act, *infra* note 45.

ers on the subject is obviously traceable to a reaction to the "spoils system" and a dread of the possibility of a reinstatement of all the abuses associated with that opprobrious epithet. But this marked emotional reaction is not conducive to clear vision. For, as in the case of other like honorific terms, the strongly implied moral judgment obscures the relevant facts. Writers in using the term "spoils system" apply it without distinction to what, in its inception in our nation's history, was not merely a mendacious device for paying off party workers after victory. This is the notion of rotation of offices, which was rather a theory of government seriously entertained by such eminent thinkers as Bentham and Jefferson, that when the locus of political power shifted markedly from one class or group to another, as from the aristocracy to the middle class, the machinery of government should be placed in the hands of members of the ascendant group, for representatives of the ousted group could not be depended upon to carry out faithfully policies hateful to them.[27] In addition, Jackson believed that public duties should be simple and within the competence of ordinary citizens to discharge, so that many citizens could in turn hold public office.[28] Jackson himself disclaimed use of this view solely as a device for distributing patronage, and observed that "the indiscriminate removal of public officers for a mere difference of political opinion is a gross abuse of power." [29]

The gross abuses developed nevertheless, for the theory of government was early lost sight of, and the search for patronage by the party supporters became an end in itself and a

[27] See Schlesinger, *The Age of Jackson* (1945) 46–47. It is of interest to note that it was Jefferson, and not Jackson, who first applied this notion in exercising the appointing power. Fish, *The Civil Service and the Patronage* (1905), 51. Contrary to the popular legend fostered for partisan purposes, Jackson applied the idea with moderation and did not turn the Federalist officeholders out wholesale. Schlesinger, *id*, at p. 47. And Jefferson, too, exercised restraint. Fish, *id.*, at pp. 38–39; *Civil Service Commission Form 2449, History of the Federal Civil Service* (1941), 9.

[28] Schlesinger, supra note 27, at p. 47. This was indeed the theory and practice of classical Athenian democracy. Finer, "Civil Service", art. in III *Encyclopedia of the Social Sciences*, 515.

[29] Quoted in *Civil Service Commission Form 2449, supra* note, 27, at p. 21.

reward for bringing political victory, indeed the very aim of victory. At this point the evils which we associate with the term "spoils system" seeped into government. For the precarious tenure of those already holding office impaired their efficiency in discharging their duties. And the new appointee might be utterly incompetent to do the job awarded as his prize. In addition the cares of dispensing patronage harassed the Executive. The merit system was a reaction from these evils, and was designed to deal with these abuses. The major objectives were to make appointment to office unavailable as prizes for party work, and to insure appointment of competent personnel secure from arbitrary dismissal. It is readily understandable how reformers, stalwartly fighting for these objectives in the face of the most intense opposition engendered in the unbridled self-seeking politics of the post Civil War period, should have become readily disposed to regard all political activity as an unmitigated evil, without realizing that the merit system itself was a most important political issue of the day, and their efforts to establish it political activity. They were not fighting to deprive federal employees of civil rights, but rather to improve the administration of government. To the extent that any supposition was made that the two must be necessarily related, it was a reaction clouded by the smoke of battle, and not the product of reflective analysis.

Similarly, the significance of the circulars of a number of Presidents relating to political activity of federal officeholders has been misconceived. These have been removed from the context of their own day, and have been given significance in the light of a civil service of quite different composition and governing principles. Thus, the court below has cited as a precedent for imposing the general prohibition of Section 9(a), a circular presumably issued by President Jefferson, admonishing Federal officeholders not to "attempt to influence the votes of others nor take any part in the business of electioneering." [30] In its contemporary setting, this was however, not a measure to insure political neutrality in order to promote efficiency or

[30] R. 123–124. A text of this circular and its provenance are set out in X Richardson, *Messages and Papers of the Presidents* (1899), 98–99.

public confidence in administration, but rather an effort to curtail activities of political opponents permitted to retain office. For appointments and removals were then on a political basis.[31] However, no clean sweep of the Federalist officeholders had been effected, and most were permitted to retain office.[32] Many of these were not at all content to exercise a reciprocal restraint out of regard for the magnanimity of the victors.[33] In addition, it must be noted that the officeholders at which it was aimed were predominantly such officers enjoying extensive authority over members of the public as revenue and customs collectors.[34] It is equally of significance, that the statute proposed in 1839, in connection with which the Jefferson circular is cited in Richardson (*supra* note 30), applied only to certain classes of Federal offices such as marshals, postmasters, and revenue collectors, and forbade efforts of such officials to influence and control elections.[35] No effort was made to cover humbler types of public employment remote from official authority. Influencing an election may also then have had a quite different meaning, since voting was open and not by secret ballot.

President Hayes' executive order of June 22, 1877, was carefully designed to prohibit only certain activities, and to preserve full rights of free expression subject only to the entirely reasonable proviso that such exercise "does not interfere with the discharge of their official duties." [36] President Cleveland's

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[31] *Supra* note 27.

[32] *Supra* note 27.

[33] On August 28, 1802, Jefferson wrote to Elbridge Gerry concerning the Federalist officeholders "after a twelve months' trial I have at length been induced to remove three or four of those most marked for their bitterness and active zeal in slandering and electioneering." Quoted in Fish, *The Civil Service and the Patronage* (1945), 38.

[34] Gallatin had earlier proposed a similar circular directed against electioneering revenue collectors, most of whom were Federalist, but because of political exigencies, it was never issued. Fish, *supra* note 27, at p. 43.

[35] Wei-Kung Chen, *supra* note 13, at pp. 69–70.

[36] VII Richardson, *supra* note 30, at pp. 450–451. The prohibition is that "no officer should be required or permitted to take part *in the management* of political organizations, caucuses, conventions, or election campaigns". Whether or not this language passes permissible constitutional bounds, it is at least clear that, reasonably interpreted, it is far more limited than the language of Section 9(a) as interpreted by the

letter, addressed to public officers, showed a similar regard for rights of expression of public employees.[37]

The notion of political "neutrality" as a device for insuring efficiency and public confidence in administration emerges as an articulate concept in Theodore Roosevelt's administrations as Civil Service Commissioner, and later as President *(supra*, p. 35). But for all of his eminence as a civil service reformer, his sponsorship of these notions cannot promote their acceptance. He did not always display sensitivity for the civil rights of Federal employees, and it was he who first imposed the "Gag Rules" which Congress found to be destructive of civil servants' rights of expression as American citizens *(supra*, pp. 25-26).

The Presidential circulars do not therefore reveal a progressive and unbroken aspiration to remove Federal employment out of the sphere of politics by imposing a requirement of political "neutrality" on all Federal employees. Most of them show in the context of their day, rather an effort to neutralize the political efforts of incumbents of important offices, such as revenue collectors, of the opposite party, under circumstances where appointment and dismissal were on a political basis, but the administration had not made a clean sweep of members of the opposite party from office. None of them prior to the predecessor of section 9(a), Civil Service Rule I, Sec. 1, disclose any effort to deprive all Federal employees, however insignificant their jobs, of freedom of expression on political issues.

5. The legislative background of the Hatch Act reveals no facts demonstrating the necessity for imposing a general

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Civil Service Commission. For the Commission has taken the transitive "in the management of . . . political organizations . . . or election campaigns" and has made a substantive out of it, giving it wider content than taking an active, leading part in running these activities, and including in its expanded scope such activities as making a public address, writing a letter to the papers, which the Hayes' order evidently permitted.

[37] Quoted in VIII Richardson, *supra* note 30, at p. 494. It is of interest to note that it has been contended that President Cleveland was partial in the enforcement of the requirement of "impartiality" and enforced it more rigorously against campaigning Republican officeholders. See Wei-Kiung Chen, *supra* note 27, at p. 79.

requirement of "political neutrality." The legislative backgrounds of the Hatch Act itself makes it clear that the investigation of the Sheppard Committee, on the basis of which the Hatch Act was enacted, developed no facts demonstrating the necessity for imposing an absolute requirement of "political neutrality" on all Federal employees. The Hatch Act had its origins in events relating to the primary and general elections of 1938. It had been charged that in a number of localities, notably Kentucky and Pennsylvania, federal relief funds were being utilized by certain officials to influence the outcome of elections. For the purpose of determining the truth or falsity of these and associated charges and recommending appropriate remedial legislation, the Senate, on May 27, 1938, by S. Res. 283, 75th Congress, Third Session, set up the Special Committee to investigate Senatorial Campaign Expenditures and Use of Government Funds. Thereafter, the authority of the committee was enlarged by the passage of Senate Resolution 290, 75th Congress, Third Session, on June 16, 1938.

Wherever the committee came upon political activities, not coercive in character or otherwise involving abuse of official power, carried on by government employees on their own time, it deemed such activities to be wholly proper. Thus, in the case of Frank S. Revell, District Commission of Immigration and Naturalization at Baltimore, charged with taking an active part in a senatorial primary campaign, the Committee reported:

> ". . . in the case of Frank S. Revell, it does not appear that he made any attempt to influence or coerce any Federal employee and that his activity consisted of expression of his support of Senator Tydings to citizens and residents of Maryland, particularly in his own county of Anne Arundel. In this activity the committee finds no grounds for criticism." (S. Rept. No. 1, Pt. 2, 76th Cong., 1st Sess., 1939, p. 134.) [88]

It is clear not only from these instances but also from the entire body of the Sheppard Committee report that the committee did not regard every manifestation of political activity on the part of a Federal employee as improper *per se* and

[88] See also *id.* at p. 21.

therefore either presently unlawful or else an evil to be dealt with by further legislation. What the Committee did regard as improper were such activities as use of official time for political purposes;[39] a supervisory employee's assembling of subordinates during official time to inform them of his position on a primary election;[40] solicitation of Federal officers or employees by other Federal officers or employees;[41] and coercion of Federal employees, relief workers and others whose salaries are derived in whole or in part from funds appropriated by Congress by such means as improper use of authority on the part of supervisory employees to order political activity on official time or to induce a particular mode of registration or voting by promises of benefits and favors or threats of dismissal or deprivation of benefits.[42]

Thus, the Sheppard Committee did not purport to uncover evils warranting nor did it recommend, a general stricture on political activities by Federal employees, when such activities are carried on during the employee's own time and are untainted by coercion, oppression, or other abuse of official power.

President Roosevelt signed the Hatch Act only after expressing the belief the Act was constitutional if it were so interpreted as not to preclude government employees from their rights of free speech.[43]

The legislative history of the Hatch Act thus fails to show that Congress even after a thorough investigation of situa-

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[39] See the *Salisbury Postmistress* case, S. Rept. No. 1, Pt. 2, 76th Cong., 1st Sess., 1939, pp. 113–120.

[40] See the case of the *Maryland Internal Revenue Collector*, S. Rept. No. 1, Pt. 2, 76th Cong., 1st Sess., 1939, pp. 103–110; See also *Id.* pt. 1, p. 32.

[41] See S. Rept. No. 1, Pt. 1, 76th Cong., 1st Sess., 1939, pp. 8–10.

[42] See S. Rept. No. 1, Pt. 1, 76th Cong., 1st Sess., 1939, pp. 11–32.

[43] 84 Cong. Rec. 10745–10746. In his message, he stated (p. 10746):

> The genesis of this legislation lies in the message of the President of January 5, 1939, respecting an additional appropriation for the Works Progress Administration. I said in that message:
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> It is my belief that improper political practices can be eliminated only by the imposition of rigid statutory regulations and penalties by the Congress, and that this should be done . . . My only reservation in this matter is that no legislation should be enacted which will in any way deprive workers of the Works Projects Administration Program of the civil rights to which they are entitled in common with other citizens.

tions where the most extreme types of interference in elections by Federal employees were claimed to exist, had before it any facts demonstrating the necessity for a sweeping prohibition of the rights of Federal employees to take part in political affairs as private citizens on their own time without coercion or other abuse.

6. The requirement of "political neutrality" is not indispensable to a merit system, and its consequences bring it into conflict with the purposes of the Bill of Rights. "Political neutrality" is, as we have seen, but one device of many for securing a faithful body of expert civil servants earning public confidence. And far from being the indispensable condition of an efficient merit system of civil service enjoying security of tenure, it is something in addition. For the heart of a merit system and the basis of public confidence in it are the initial selection of competent persons on the basis of merit and the promotion of their efficiency, security, and independence by eliminating arbitrary dismissals.[44]

Most of the writers on public administration fail to reckon the price which must be paid for this neutral body of experts ready to serve any party which may come to power. It is, of course, difficult to determine precisely the consequences of imposing a blanket prohibition on the active participation of nearly 3,000,000 citizens in the affairs of government. It is not at all difficult to perceive, however, that they are not likely to be salutary. Civil service positions, with but few exceptions, require educational qualifications. In addition, many positions require college and professional training. Thus, what is perhaps the largest single well-defined group of citizens thoroughly equipped to participate intelligently in the political processes of government is barred from doing so.[45] Such a

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[44] See Dawson, *Principle of Official Independence* (1922), 88. Dawson himself points out that the principle of impartiality, or dismissal for active political partisanship was itself the subject of abuse in Canada:

> This rule which appeared to make for political purity in reality brought political corruption, and had the unintended result of producing a special Canadian type of spoils system (p. 90).

[45] Every sound reason against imposing a sweeping prohibition on political activity of Federal employees generally was reflected in the reasons given as the basis for the enactment of Section 21 of the Hatch

wholesale disqualification of any group from the full rights of citizenship is likely to have an unfavorable effect upon all citizens. Federal employees will be regarded by others as wards of the government who have surrendered their civil rights for security and paternal care of the sovereign, designed to protect them from evils to which other citizens may be safely exposed.

Act, 18, U.S.C. sec. 61 (u), 56 Stat. 986, exempting employees of publicly supported educational or research institutions from the coverage of Section 9(a). Senator Brown in urging enactment of Section 21, stated:

> I state two reasons for my advocacy of this bill. First, I think it is wrong to take out of political life one of the most beneficial elements in it, the teaching profession. They are high-minded people; they are students of the science of politics and government, and the people of my State and all other States are entitled to the benefit of their opinions and their active participation in politics. (S. Rept. No. 1348, 77th Cong., 2nd Sess. (1942) p. 2.)

Prof. Donald Du Shane of the National Educational Association, was quoted by the Senate Committee in its report on the section as follows:

> "Why teachers should be excluded:
>
> 1. Teachers belong to a profession which disapproves of, and does not engage in, pernicious political practices and they should continue to be good citizens without the Hatch Act.
>
> 2. This act is discriminatory in that it applies to some teachers and not to others.
>
> 3. The Hatch Act interferes with the freedom of teachers to discuss political issues freely and without Federal political control or censorship. In order to train our youth for understanding and participation in American political life it is of vital importance that the teachers' freedom to teach the truth shall not be interfered with.
>
> 4. *If teachers are to train effectively our youth for citizenship they must have full rights of citizenship themselves.*
>
> 5. American public schools are dependent upon the understanding and loyalty of our citizens for their financial support and their development and improvement. Very often questions involving the welfare of the schools are issues in political elections. Frequently candidates who are enemies of education run for political office. The integrity, and often the very existence of schools, depends upon the political activity of members of the teaching profession. It is part of their professional obligation to keep the needs and problems of the schools before the voters of their communities and States.
>
> 6. Under the Federal Constitution the management and control of education is a State function. A comparison between American schools and those of totalitarian countries would seem to indicate the wisdom of local and State control of education. *The partial disfranchisement and the muzzling of local and State teachers by the Federal Government is as unnecessary and unjustifiable as it is dangerous and alarming.*" (S. Rept. No. 1348, 77th Cong., 2nd Sess. (1942), pp. 2–3.) (Italics added.)

It is also likely to have an adverse affect on the neutralized Federal employees themselves. For enjoying no substantial rights to engage in political affairs they may well become complacent of infliction of similar deprivations on other classes of citizens. "The will to freedom, like the will to power is a habit, and it perishes of atrophy." [46]

The First Amendment embodies a judgment that Congress shall not be free to decide for itself that achieving purity of administration in the public service is worth a substantial curtailment of rights of expression of government employees. The pursuit of some types of perfection is precluded by the Constitution when their attainment requires suppressing rights of free expression. The observation of Mr. Justice Bradley, dissenting, in *Ex Parte Curtis* 106 U. S. 371, in concluding a discussion completely applicable to the prohibition of Section 9(a), is especially pertinent here. He stated that (106 U. S. at 378):

> We are not unfrequently in danger of becoming purists, instead of wise reformers, in particular directions; and hastily pass inconsiderate laws which overreach the mark they are aimed at, or conflict with rights and privileges that a sober mind would regard as indisputable. It seems to me that the present law, taken in all its breadth, is one of this kind.

III. THE GOVERNMENT AS EMPLOYER IS LIMITED BY THE BILL OF RIGHTS AND ENJOYS NO ABSOLUTE POWER TO ATTACH ANY CONDITION WHATSOEVER TO FEDERAL EMPLOYMENT.

A. The Argument Based on Security of Tenure Improperly Assumes an Unlimited Power of Dismissal.

The theory most heavily relied on by the Government and the court below was that the substantial limitation of federal

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[46] Laski, *Liberty in the Modern State* (Penguin Ed., 1937), 169. Sayre, *supra* note 26, at p. 217, states:

> "The career merit system cannot be built upon a base of subcitizens, nor should restraints upon political activities of public employees, except for certain categories, differ from restraints which apply to all citizens."

employees' rights of expression on political subjects is designed to protect the tenure of government workers and thereby promote efficiency of service. It does so by removing occasions for the infliction of reprisals by a superior officer based on the inferior's refusal to render political service or on his activity in behalf of a political candidate, party, or measure which is objectionable to the superior. In the absence of any statute, the argument continues, appointing officers possess unlimited powers of removal, and could dismiss on any ground whatsoever, including engaging in political activities and expression of opinions on political personalities. The conclusion is suggested that if in absence of statute appointing officers could dismiss on this ground, Congress by statute could do so, and certainly could pare down the officers' power to do so, and limit it to specified types of political expression or activity.

Thus, although the government below did not baldly argue that the federal government as employer has plenary powers unbounded by the Bill of Rights or that since federal employment is a privilege it may be conditioned as the government sees fit, it invited a tacit acceptance of these conclusions. It reached the same result by arguing that in absence of any express statutory limitation, federal appointing officers possessed unlimited powers to dismiss. The implication which it seeks to have drawn from the existence of this supposed power in federal officers is that *a fortiori* Congress possesses the same power. And short of fully exercising that power, it may surely impose any conditions whatsoever for continued employment with the government. Therefore, when once it is assumed that federal officers possess an utterly unlimited power of removal, the government's conclusions in this case seem to follow, whether stated in terms of an unlimited power to impose conditions or the reasonableness of the end sought. The gravity of the conclusions makes imperative the most careful examination of the assumptions.

If indeed the government as employer does enjoy a boundless power to impose conditions on federal employment uninhibited by the Bill of Rights, no condition however discriminatory or obnoxious to the guarantees of freedom of expres-

sion or religion could be successfully challenged. For in that event, the government need not show that the limitations on free expression imposed by the Hatch Act are reasonably necessary to preserve the merit system, to prevent coercion of inferior officers or members of the public, or to avert any other substantial evil which the government may suppress. It need only show that the limitations concern incidents of federal employment.

No case holds that an appointing officer acting under authority derived from a federal statute may arbitrarily use his authority to abridge freedom of expression or freedom of religion by refusing to hire or by dismissing on these grounds. There are cases which hold that in absence of limiting statute, an appointing officer possesses the power to dismiss, and that the tenure of the appointed officer is then at the will of the appointing officer. *In re Hennen,* 13 Pet. 230. It is also well established that with respect to inferior offices created by Congress, that body may limit the power to dismiss of the appointing officer. *U. S.* v. *Perkins,* 116 U. S. 483; *Myers* v. *U. S.*, 272 U. S. 52, 127, 161. Congress may also limit the President's power to dismiss officers appointed by him with the consent of the Senate where the officers perform quasi-judicial functions. *Humphrey's Executor* v. *U. S.,* 295 U. S. 602.

However, the existence of a power to remove at pleasure, where Congress has not limited it, simply establishes that the Constitution does not affirmatively require the setting up of a merit system. It does not at all establish that Congress itself, or an appointing officer deriving statutory authority from Congress, may enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.

The case of *U. S. ex rel Taylor* v. *Taft,* 24 App. D. C. 95, has been relied on for the proposition that in absence of statute appointing officers enjoy an unlimited power to dismiss, which may be exercised where an inferior employee has expressed opinions on political subjects and distasteful to the superior. That case does not survive analysis, has been in effect over-

ruled by the same Court, and should therefore be written off the books. In that case a clerk in the classified civil service employed in the War Department was dismissed without a statement of cause after she acknowledged that she was the author of a newspaper article signed in her name which was derogatory to the President. The Civil Service Rules then provided that no removal shall be made except for just cause served in writing on the employee, and after an opportunity to answer. The Civil Service Act provided that no employee in the public service shall be removed for failure to make political contributions or render political services. The court denied the clerk relief on the grounds that Congress never intended to limit the power of removal except for failure to contribute money or services to a political party, and that "the entire policy of civil service has been to restrict the power of appointment, not removal, because once the right to appoint is restricted within certain defined classifications, the reasons for political removals has ceased." (24 App. D. C. 98.)

The same court has recently held that a department head cannot arbitrarily dismiss an employee in violation of established regulations and that a court is empowered to grant relief against such arbitrary action. *Borak* v. *Biddle,* 141 F. (2d) 278 (U. S. App. D. C.), certiorari denied 323 U. S. 738. And the history of the Civil Service Act and the merit system effectively refutes the notion that the Act was not intended to limit arbitrary powers of removal. See the review of that history by Mr. Justice Brandeis in *Myers* v. *U. S.,* 272 U. S. 52, 279-295.

B. Cases Holding That There Is No "Property Right" in a Public Office Do Not Establish That the Government Has an Unlimited Power as to Its Employees.

Another line of argument utilized to secure acceptance of the conclusion that Congress may condition federal employment as it pleases without regard to the limitations of the Bill of Rights is based on a series of cases gathered under the deceptive catchword that there is no property right in a public office. For these cases do not at all deal with the question

whether the government, federal or state, in regulating the incidents of public employment may without infringing the First Amendment or the equal protection and due process clauses of the Fourteenth, pass such a statute as one providing that no Negro or Jew may be eligible for any public office or that any government employee who engages in organizing religious revival meetings shall be dismissed. Nor do they deal with the question whether a government employee adversely affected by such a statute may secure equitable or other judicial relief to vindicate his rights under the Constitution. These cases are rather concerned with two quite different questions. One is whether a court of equity is the proper forum for inquiring into particular cases of exercise of administrative discretion in appointment and removal or whether some other forum is more appropriate. The second is the extent to which federal courts will inquire into exercise by state legislatures of the authority to change the incidents of a public office or to abolish it altogether.

One group of cases does hold that a court of equity is not the appropriate forum to review the exercise of administrative discretion by the executive branch of the government in the exercise in particular cases of the powers of appointment and dismissal. *In re Sawyer,* 124 U. S. 200; *White* v. *Berry,* 171 U. S. 366; cf. *Walton* v. *House of Representatives,* 265 U. S. 487.

In the case of *In re Sawyer,* 124 U. S. 200, a state officer sought the intervention of a federal court of equity to restrain proceedings for his removal. The majority of the court, in an opinion written by Mr. Justice Gray, held that traditionally a court of equity entertained no jurisdiction over the appointment and removal of public officers, that the jurisdiction to determine title to a public office belongs exclusively to the courts of law, and is exercised by such procedure as certiorari, mandamus, prohibition, or quo warranto.

Chief Justice Waite in dissenting said (p. 223):

> "I am not prepared to decide that an officer of a municipal government cannot under any circumstances, apply to a court of chancery to restrain the municipal

> authorities from proceeding to remove him from his office without authority of law. There may be cases in my opinion, when the tardy remedies of quo warranto, certiorari, and other like writs will be entirely inadequate. I can easily conceive of circumstances under which a removal, even for a short period, would be productive of irremedial mischief."

Justice Harlan in dissenting with the Chief Justice recognized the jurisdiction of federal courts to entertain suit for injunction where the plaintiff alleges a deprivation of rights secured to him by the Constitution (124 U. S. at p. 224).

The positions thus taken in the case of *In re Sawyer, supra,* are enlightening as to the significance of the holding in *White* v. *Berry,* 171 U. S. 366. In that case plaintiff, a Treasury employee, sought equitable relief on the ground that he was dismissed by defendant, a Collector of Internal Revenue, because he was a Democrat. Defendant stated that plaintiff was not removed from office, but was relieved from duty at a certain distillery, that this was in pursuance to a department policy of rotating assignments to prevent collusion. Writing for the court, Mr. Justice Harlan held that a court of equity would not interfere with the exercise of administrative discretion in the appointment and assignment and removal of federal officers, and that officers claiming wrongful removal must seek their relief by other remedies in actions at law such as mandamus or quo warranto. He was careful to state that this did not mean that a federal officer was utterly remediless against injury inflicted by an unconstitutional enactment. For he repeated with approval the statement of Chief Justice Waite in the *Sawyer* case quoted above, and added that the exercise of administrative discretion in appointment and removal did not fall within the class of cases in which a court of equity would afford injunctive relief to a federal officer.

The second group of cases cited for the catchword that there is no property right in a public office concerns the extent to which the federal courts will review action of the state legislature or state officers in administering statutes regulating selection and tenure of officers when it is claimed that action in a particular case results in denial of rights guaranteed by the

Fourteenth Amendment. This group of cases includes: *Wilson* v. *North Carolina,* 169 U. S. 586; *Taylor and Marshall* v. *Beckham* (No. 1), 178 U. S. 548; *Cave* v. *Newell,* 246 U. S. 650; *Snowden* v. *Hughes,* 321 U. S. 1.

In *Wilson* v. *North Carolina,* 169 U. S. 586, it was contended that a state statute, and action of the governor under it in suspending a railroad commissioner from office deprived that officer of rights guaranteed by the Fourteenth Amendment. The highest state court had held that the statute was valid and the governor's action was proper. This court held that under these circumstances no federal question was presented. The court stated (p. 593):

> "The procedure was in accordance with the constitution and laws of the State. It was taken under a valid statute creating a state office in a constitutional manner, as the state court has held. . . . The fact would have to be most rare and exceptional which would give rise in a case of this nature to a federal question."

And this Court went on to quote with approval its language in *Allen* v. *Georgia,* 166 U. S. 138, 140, that:

> "The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference." (Quoted at 169 U. S. 593.)

This Court concluded that (p. 596):

> "The jurisdiction of this court would only exist in case there had been, by reason of the statute and the proceedings under it, such a plain and substantial departure from the fundamental principles upon which our government is based that it could with truth and propriety be said that if the judgment were suffered to remain the party aggrieved would be deprived of his life, liberty or property in violation of the provisions of the Federal Constitution."

Similarly, in *Taylor and Marshall* v. *Beckham* (No. 1) 178 U. S. 548, the question presented was whether a determination by the General Assembly as to which candidates were properly elected in a contested election proceedings taken under a state statute, deprived the unsuccessful candidates of

any rights guaranteed by the Fourteenth Amendment. This Court in holding that no federal question was presented stated that (p. 574):

> "We do not understand this statute to be assailed as in any manner obnoxious to constitutional objection, but that plaintiffs in error complain of the action of the General Assembly under the statute and of the judgment of the state courts declining to disturb that action."

In stating that the right to hold office is not a property right, the Court was simply stating that the right to hold office is subject to the authority of the legislature to prescribe the mode of selection, the incidents, and the tenure of the office. The unsuccessful claimant to office therefore is deprived of no right of property when a decision adverse to him is made pursuant to statute (see 178 U. S. at p. 575). And the incumbent in absence of express constitutional provision possesses no vested right which precludes the legislature from changing the incidents of office or abolishing it. See *Crenshaw* v. *U. S.*, 134 U. S. 99, 104.

But these cases do not decide that where a statute on its face arbitrarily bars a class of citizens from office or attaches an arbitrary and unreasonable condition to public employment, such action would not result in a deprivation of constitutional rights. This is made clear by the case of *Snowden* v. *Hughes,* 321 U. S. 1. In that case it was contended that the failure of a state canvassing board to certify petitioner as a successful candidate for a state office deprived him of rights guaranteed by the Fourteenth Amendment. The Court in holding that no federal question was presented, pointed out (p. 7):

> "There is no contention that the statutes of the state are in any respect inconsistent with the guarantees of the Fourteenth Amendment. There is no allegation of any facts tending to show that in refusing to certify petitioner as a nominee, the board was making any intentional or purposeful discrimination between persons or classes."

In the light of these cases the proposition that there is no property right in an office amounts to no more than that in-

cumbency in office creates no vested rights which are paramount to the regulatory authority of the legislature to change the incidents of office and that non-discriminatory state action which deprives a claimant of an opportunity to hold office presents no federal question. Thus the notion that there is no property right in a public office does not at all support a conclusion that the government, state or federal, may condition public employment as it pleases, and that there would be no judicial redress available to applicants or officeholders adversely affected by arbitrary action. Indeed, Mr. Justice (then Chief Judge) Cardozo reached the contrary result in *People* v. *Crane*, 214 N. Y. 154, affirmed 239 U. S. 195.

In that case, Section 14 of the New York State Labor Law prohibited employment of aliens in the construction of public works. Violation was made a misdemeanor. Crane, the defendant, contracted with the City of New York to construct sewer basins for it. He employed alien laborers. His defense to prosecution for violating Secton 14 of the labor law was that the statute was unconstitutional because it discriminated against *aliens*. In finding that aliens could be barred from employment with the government, on the ground that the latter may give preference to its citizens, who have an interest in the common property of the government which aliens do not have, Justice Cardozo pointed out that discrimination against *citizens* as employees of, or contractors with, the State would be unlawful:

> In thus holding that the power exists to exclude aliens from employment on the public works, we do not, however, commit ourselves to the view that the power exists to make arbitrary distinctions between citizens. We do not hold that the government may create a privileged caste among the members of the State. *(Smith* v. *Texas*, 233 U. S. 630, 638). We do not hold it may discriminate among its citizens on the ground of faith or color. *(Strauder* v. *West Virginia*, 100 U. S. 303; *Gibson* v. *Mississippi*, 162 U. S. 565; *Rogers* v. *Ala.*, 192 U. S. 226, 231.) A citizen may not be disqualified because of faith or color from service as a juror. *(Strauder* v. *West Virginia*, supra.) For like reasons we assume that he may not be disqualified because of faith or color from

serving the state in public office or employment. It is true that the individual, though a citizen, has no legal right in any particular instance to be selected as contractor by the government. It does not follow, however, that he may be declared disqualified from service, unless the proscription bears some relation to the advancement of the public welfare. *(Strauder* v. *West Virginia, supra,* at p. 305).[47]

C. The Government Possesses No Unlimited Power to Attach Conditions to Privileges Without Regard for the Constitution.

Although it has frequently been asserted the government may condition the grant of a privilege as it pleases, no cases decided by this Court, uphold any such sweeping claim. Examination of decided cases dealing with the conditioning of privileges conferred by the government reveals that the courts when they uphold the condition, do so on the basis that the condition is a reasonable one, not infringing on constitutional rights, within the power of the government to impose. Thus the restriction of employment with the government to citizens, and the exclusion of aliens from such employment has been upheld on the ground that this is a reasonable distinction, and involves no unreasonable discrimination. *People* v. *Crane,* 214 N. Y. 154; *Crane* v. *New York,* 239 U. S. 195; *Heim* v. *McCall,* 239 U. S. 175.[48]

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[47] This conclusion is reinforced by the holding of the Court in *Truax* v. *Raich,* 239 U. S. 33. In that case it was held that an employee at will of a private employer was entitled to secure the enjoining of the enforcement of a statute which threatened his employer with imprisonment if he employed more than 20 percent of alien employees in his establishment. Raich was an alien, and was therefore subject to the threat of dismissal from his employment. The Court held that the statute was unconstitutional as a denial of the equal protection of the laws to Raich, and of his liberty in violation of the due process clause of the Fourteenth Amendment. But Raich's right to work, and his employment at will are no more property rights than the right to work for the government. Yet an obvious discrimination against aliens in the field of employment generally, when the government has no special interest in or justification for barring aliens (Cf. *Crane* v. *New York,* 239 U. S. 195; *Clarke* v. *Deckenbach,* 274 U. S. 392), was held to involve an unconstitutional deprivation of liberty and a denial of the equal protection of the laws.

[48] The power of a state to forbid the existence of Greek letter fraternities in a state university, and expel students who join such fraternities

In *Hamilton* v. *Board of Regents,* 293 U. S. 245, the Supreme Court upheld the right of the State of California to impose as a condition to attendance in the state university, the requirement that all students shall take prescribed courses in military training. In his concurring opinion, Mr. Justice Cardozo carefully pointed out that the state and federal government enjoy the authority to compel all citizens to bear arms, and this authority does not infringe on religious liberties enjoying constitutional protection. For conscientious objectors are exempted from the requirement to bear arms as a matter of legislative grace, and not by virtue of the constitutional protection of freedom of religion. This was also the ground of decision in *In re Clyde Wilson Summers,* — U. S. —, 89 L. Ed. 1304 (decided June 11, 1945), where this Court upheld the authority of a state to exclude conscientious objectors from admission to the bar. See also *West Virginia* v. *Barnette,* 319 U. S. 624, 632.

Nor indeed does the proposition that the government may attack any condition it pleases to government employment, even the surrender of rights enjoying constitutional protection, find support in the frequently repeated but rarely analyzed statement of Mr. Justice Holmes (then Chief Justice of the Massachusetts Supreme Court) in the case of *McAuliffe* v. *Mayor of New Bedford,* 155 Mass. 216, 29 N. E. 517, that "the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." For the ordinance involved in that case provided that: "No member of the department shall be allowed to solicit money or any aid, on any pretense, for any political purpose whatever." And it was limited to policemen, officers who concededly may enjoy extensive official authority over members of the public, and was not a general prohibition on all political activity involving only exercise of rights of expression of government employees, including those who enjoy no such authority. Mr. Justice Holmes made it clear, as the entire context of the extracted language reveals, that the government is limited to imposing *reasonable*

in violation of the statute, has been upheld on the ground that such a statute is a reasonable regulation designed to promote discipline on the campus. *Waugh* v. *Mississippi University,* 237 U. S. 589.

conditions to government employment, and that in his opinion the particular restriction was a reasonable one. Thus, the entire statement is:

> "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control. This condition seems to us unreasonable, if that be a question open to revision here."

It is evident that Mr. Justice Holmes was saying no more than that the employee surrenders his right or freedom to engage in any activity whatsoever which would prevent him from discharging his official duties during his hours of employment, or any activity at any time which may be reasonably judged inconsistent with his official status or authority. But this in part follows from the elementary physical fact that a man cannot be in two places at the same time or perform two different activities at the same time. When the policeman is out on the beat he is expected to patrol, and not to engage in exercise of his rights of free expression. But by the same token he is not to be in church worshipping. It cannot then be said that he has surrendered or bargained away his legal right to go to church during his own time as a private citizen. The suspension of these rights during his hours of duty, is thus not equivalent to a legal restraint which forbids these activities when he is physically free to engage in them, and when no injury to the state or other citizens would occur from his performance of these acts. It is therefore a gross fallacy to state that an employee bargains away basic civil rights when he accepts employment in the government, when it is only the case that he is bargaining away some of the time in which he might otherwise physically engage in the exercise of these rights, and that he is subjecting himself to all lawful statutes and regula-

tions which are designed to prevent abuse of the opportunities which employment with the government may afford him. And a total prohibition of his right to solicit funds when he enjoys a position of extensive authority over the public is such a reasonable regulation.

Mr. Justice Holmes recognized that the federal government could not constitutionally curtail all rights of government workers to engage in political activity in *U. S.* v. *Thayer,* 209 U. S. 39. That case involved a conviction under the statute prohibiting solicitation of government workers for political purposes on government property. The conviction of the defendant, who had written a letter soliciting funds for political purposes to a government worker, addressed to him at his office, was upheld under the statute. In commenting upon the purpose and scope of the statute, Mr. Justice Holmes stated (pp. 42-43):

> "The purpose is wider than that of a notice forbidding book peddling in a building. It is not, even primarily, to save employees from interruption or annoyance in their business. It is to check a political abuse which is not different in kind, whether practiced by letter or word of mouth. The limits of the act, presumably, were due to what was considered the reasonable and possibly the constitutional freedom of citizens, whether officeholders or not, when in private life, and it may be conjectured that it was upon this ground that an amendment of broader scope was rejected."

Mr. Justice Bradley, dissenting in the case of *Ex parte Curtis,* 106 U. S. 371, 376, made this clear in the following statement, unquestioned by the majority opinion:

> "The offices of the government do not belong to the Legislative Department to dispose of on any conditions it may choose to impose. The legislature creates most of the offices, it is true, and provides compensation for the discharge of their duties: but that is its duty to do, in order to establish a complete organization of the functions of government. When established, the offices are, or ought to be, open to all. They belong to the United States, and not to Congress; and every citizen having the proper qualifications has the right to accept office, and to be a

> candidate therefor. This is a fundamental right of which the legislature cannot deprive the citizen, nor clog its exercise with conditions that are repugnant to his other fundamental rights."

The conclusion that the government in attaching conditions to the grant of a privilege which it may withhold is restricted to imposing reasonable limitations which do not offend constitutional guarantees is supported by cases dealing with the second-class mailing privilege.

In the case of *Pike* v. *Walker*, 73 App. D. C. 291, 121 F. (2d) 39, it was urged that since the second-class mailing privilege is a privilege which the government may grant or withhold, it may revoke the privilege without observance of constitutional guarantees. This argument, however, was rejected by the court, which stated in its opinion:

> "Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare. Not only this, but the postal system is a monopoly which the government enforces through penal statutes forbidding the carrying of letters by other means. It would be going a long way, therefore, to say that in the management of the Post Office, the people have no definite rights reserved by the First and Fifth Amendments of the Constitution." (73 App. D. C. p. 291, 121 F. (2d) 39).

The Court also quoted with approval the language of Mr. Justice Brandeis in his dissenting opinion in *U. S.* ex rel. *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, 430, in which he said that the power of Congress over the postal system "like all its other powers, is subject to the limitations of the Bill of Rights." On these grounds, the Court of Appeals for the District of Columbia made it amply clear that merely because the second-class mailing privilege was a privilege conferred by the government it could not be arbitrarily dispensed or withheld without regard to the limitations of the Bill of Rights. Thus the Court also said:

> "We think it is equally clear, and it is so stated in the Coyne case, that even Congress is without power to extend the benefits of the postal service to one class of person and deny them to another of the same class."

In the case of *Esquire, Inc.* v. *Walker* (U. S. App. D. C., June 4, 1945), petition for certiorari filed Sept. 4, 1945, which squarely raises the same issue, the Court of Appeals applied the conclusion which it reached in the *Pike* case and held that the Postmaster General could not so exercise his discretion in administering the second class mailing privilege as to enforce compliance with his literary standards, and thus abridge rights of free speech guaranteed by the First Amendment.[40]

It is therefore abundantly clear that the supposition that Congress may deal with Federal employees as it pleasas, with-

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[40] Nothing decided in the case of *Perkins* v. *Lukens Steel Company*, 310 U. S. 113, impairs the conclusion that the government in attaching conditions to privileges is limited by the Bill of Rights. In that case potential bidders for a government contract sought to enjoin the Secretary of Labor from continuing in effect an administrative determination made pursuant to the Public Contracts Act, defining the "locality" in which prevailing wages must be paid by holders of contracts for manufacture of steel for the government. The potential bidders contended that the determination made by the Secretary was unreasonable and arbitrary. This Court held that a potential bidder for a government contract possessed no legally protected interest which would entitle him to challenge in the courts the reasonableness of the Secretary's determination. It must be noted further that the attack was based on the contention that the Secretary had abused her administrative discretion under the statute, rather than that the statute itself was unconstitutional. Since the case was decided on the issue of the potential bidder's standing to sue, any remarks of the Court, in passing, on the unlimited power of the government as purchaser cannot be taken as over-ruling any of the holdings of the Court that the government in the exercise of its granted powers is limited by the Constitution. Nor indeed, as we have seen, was the issue presented that the governing statute, under which the Secretary acted, exceeded the permissible limits of the government's powers under the Constitution.

It appears from the opinion of the Court that it was saying no more than that the government in purchasing its supplies was to be permitted a wide area of latitude in the exercise of its administrative discretion. It can hardly be supposed that anything said in the *Lukens* case would be determinative of any issues arising from the enactment of a statute which discriminated between Democrat and Republican, Christian and Jew, or White and Negro, in the cancellation of government contracts already obtained, in effecting dismissal from government employment, or even in foreclosing the opportunity to obtain such contracts or employment.

out regard to the express prohibitions of the Bill of Rights is wholly lacking in substance.

CONCLUSION

The second sentence of section 9(a) of the Hatch Act, clearly, and on its face, abridges rights of expression of plaintiffs as well as almost all employees in the executive branch of the Federal government without substantial justification, and is therefore repugnant to the Constitution. Therefore, appellant respectfully submits that the judgment of the court below should be reversed.

Respectfully submitted,

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