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ERRATUM, NOTE: On page 60 of appellants' main brief, the last sentence of the quotation from Mr. Justice Holmes' statement should read: "This condition seems to us reasonable, if that be a question open to revision here."

TABLE OF AUTHORITIES CITED

CASES

STATUTES

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*

REPLY BRIEF FOR APPELLANTS

I. THE DISTRICT COURT PROPERLY ENTERTAINED JURISDICTION OF THE ACTION SINCE IT PRESENTS A TIMELY CONTROVERSY.

The Government contends that the court below should have dismissed the actions for lack of jurisdiction on the grounds that they involve a subject matter which is not within the cognizance of a court of equity and that no case for a declaratory judgment is presented because the actions are premature (Govt. br. pp. 13-18). The court below held that a controversy ripe for adjudication was presented by the actions of the individual appellants, and found it unnecessary to pass on the standing of the plaintiff organization, United Federal Workers of America (R. 116-122). Appellants did not assign as error the court's failure to pass on the substantiality of interest of plaintiff United Federal Workers of America (R. 128-129). Accordingly, it is not an issue in this appeal. The Government took no cross appeal from the determination of the court below that a controversy was properly presented in the

actions of the individual appellants. However, the issue of jurisdiction is, of course, open to re-examination here. *U. S.* v. *Corrick,* 298 U. S. 435. Since this issue has been raised in this case, which brings in question the validity of an Act of Congress, it is of the utmost importance to dispel any doubts as to the jurisdiction of the court below. Application of every element of the requirement of a case or controversy to the facts in this case reveals that a matured controversy is presented, and that it is the very type of controversy in which remedy by way of declaratory judgment and injunction is appropriate.

The elements of a case or controversy are: existence of a legally recognizable or protectable interest in the plaintiff; existence of genuine adversity between plaintiff and defendant; and existence of present injury or impact creating a timely controversy, and not a premature anticipation of possible future injury. *Nashville C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249; *Aetna Insurance Co.* v. *Haworth,* 300 U. S. 227. These requirements are clearly satisfied in the present case.

A. Appellants Interests in Enjoying their Constitutional Rights of Freedom of Expression and continuing in the Federal Employment Unhampered by Unconstitutional Restraints are Legally Recognizable Interests.

The first condition for crossing the threshhold of a court of equity is that plaintff assert an interest which is entitled to legal protection. This condition is here satisfied, for the rights asserted by plaintiffs are ones which have been accorded protection by courts of equity. Two rights of plaintiffs are jeopardized by the statute challenged. The first is the right to engage in political activity as an expression of the constitutional rights of freedom of speech, press, and assembly. The second is the right to continue in government employment without being subjected to deprivations and threats imposed by unconstitutional statutes.

It is well settled that a court will entertain and consider the merits of a suit against a threatened invasion of the civil

rights of a citizen where the threat is made by officials presently acting or threatening to act pursuant to an unconstitutional statute or where the right asserted may be invaded or entirely lost in consequence of the exercise of official authority. Thus in the case of *Perkins* v. *Elg.*, 307 U. S. 325, modifying and affirming 99 F. (2d) 408, it was held that the civil right of a citizen to be free from the threat of arrest and deportation based on an official assertion that the petitioner was not a citizen was an interest which could be judicially protected in injunction and declaratory judgment proceedings. Clearly rights of expression given explicit protection by the Bill of Rights are interests which may be preserved against unconstitutional infringements by judicial action. *Hague* v. *C.I.O.*, 307 U. S. 496, 519.

The second sentence of section 9 (a) presents appellants with these clear alternatives. If they exercise rights of expression in connection with political activity they must lose their jobs. If they desire to retain their jobs, they must lose their rights of expression. If the prohibition exceeds constitutional bounds, they are being punished with deprivation of office for exercise of constitutional rights, and their tenure is being conditioned by the requirement that they surrender these rights. Even in absence of invasion of rights expressly protected by the Constitution, the interest of a Federal employee in enjoying his tenure free from invalid interference is entitled to judicial protection. *Borak* v. *Biddle,* 141 F. (2d) 278 (App. D. C.), certiorari denied 323 U. S. 738; see also *Cummings* v. *Missouri,* 71 U. S. 277, 320, 321, 322.

These interests are invaded not by specific exercises of administrative discretion claimed to be invalid, taken under a statute admittedly valid, but rather by the statute itself, which is invalid on its face. The Government's reliance on such cases as *White* v. *Berry,* 171 U. S. 366 (Govt. br., p. 15) is therefore misconceived. Whatever the scope of jurisdiction of a court of equity to pass on specific instances of exercise of administrative discretion under valid statutes, it is clearly within the province of equity jurisdiction to afford protection to legally recognized interests against invasion by unconstitutional enactments.

B. Genuine Adversity of Interest Exists between the Individual Appellants and the Civil Service Commission.

In the court below the Government contended that the actions seeking a determination of the invalidity of the second sentence of section 9 (a) presented no controversy with the Civil Service Commission, which enforces as to classified employees, not section 9 (a), but its own Rule I, Section 1.

The Government, however, now quite properly abandons this contention (Govt. br. pp. 13-14). For the prohibition of Rule I, Section 1 is substantially identical in terms with the second sentence of section 9 (a) and the very same acts are prohibited under both (R. 45). And the punishment of dismissal prescribed by section 9 (b) for violations of sections 9 (a) is mandatory for violations of Rule I, Section 1. 40 *Op. Atty. Gen.* No. 2 (Jan. 8, 1941); *Op. Compt. Gen.* B-51708 (Sept. 14, 1945). But prior to the enactment of Section 15 of the Hatch Act on July 15, 1940, which made the interpretations of the Civil Service Commission under its Rule I, Section 1 part of the content of section 9 (a), the Commission retained a discretion to impose penalties less than dismissal for infraction of the rule. The enactment of section 15, however, superseded this discretion with the mandatory requirement of dismissal of section 9 (b). 40 *Op. Atty. Gen.* No. 2 (Jan. 8, 1941).

The Civil Service Commission may, without action by the agency head, impose this penalty as to employees in the classified civil service by application of its Rule XV (Appellants' main br. p. 4). It therefore possesses the power to inflict the injury against which appellants seek relief. Failure to join as party defendants the heads of the employing departments who also possess authority to dismiss, is as the Government concedes (Govt. br. p. 14) not a jurisdictional defect. Rules 19, 20, 21 of the *Federal Rules of Civil Procedure*. Since, as will be shown below, the Commission threatens to apply the statutory penalty to appellants and all other classified employees generally, and has instituted proceedings to cause the dismissal of appellant Poole, adversity between appellants and the Civil Service Commission clearly exists.

C. The Statute Inflicts Present Injury on the Appellants and thus Creates a Timely, Matured Controversy.

Existence of a controversy ripe for adjudication requires not only the presence of an interest entitled to legal protection, but also the existence of, or present threat of, such substantial injury to the interest that judicial relief is presently required and is not prematurely sought. *Nashville C. & St. L. Ry. Co.* v. *Wallace*, 288 U. S. 249; *Aetna Insurance Co.* v. *Haworth*, 300 U. S. 227. This requirement is satisfied in the present case. The statute challenged carries a substantial penalty of deprivation from office, the infliction of which would cause substantial injury. Even when not inflicted in specific cases, the statutory prohibition and penalty have the present effect of deterring lawful conduct, and thus inflict the injury of deprivation of constitutional rights. Since the validity of the statute itself is challenged, no requirement of exhaustion of administrative remedies is applicable. These points will be fully developed.

1. Substantial Injury Is Inflicted by the Statutory Penalty.

The penalty imposed for commission of any of the acts prohibited by the second sentence of Section 9 (a) is immediate dismissal from office, prescribed by section 9 (b). Dismissal from office has been held to be a punishment, and dismissal worked by an unconstitutional statute to be injury against which a court will afford protection. *Cummings* v. *Missouri*, 71 U. S. 277, 320, 321, 322.

To secure an injunction to prevent the infliction of substantial injury by the application of a penalty under an unlawful statute, it is not requisite that the penalty be the infliction of a criminal sanction. It suffices that the penalty is the loss of a valuable privilege or interest. In *Columbia Broadcasting System* v. *U. S.*, 316 U. S. 407, the plaintiff network organization sought to enjoin the Network Regulations promulgated by the Federal Communications Commission on the ground that the threat embodied in these regulations of refusal to renew the radio station licenses of affiliated stations who retained contracts with networks, containing features

found by the Federal Communications Commission to be contrary to the public interest, deterred the affiliates from retaining such contracts, and caused them to cancel the contracts, thus creating immediate financial loss to the network organization and threatening its future disruption. It was held by this Court that the injury threatened to the network organization, flowing from the conduct of the affiliates induced by fear of the sanction of denial of the station license in the future was sufficient to give the network organizations standing to seek equitable relief, by way of injunction against the application of the regulations alleged to be invalid.

2. *The existence of the Prohibitions of the Statute and the Penalty for Violation Inflicts Present Injury to all Appellants, Against Which a Court of Equity May Grant Relief.*

The Government concedes (Govt. br. p. 14, note 6) that the actual institution against appellant Poole of enforcement proceedings which can have but one outcome causes the legal rights asserted by him to be "threatened with imminent invasion by appellees," as in *Railway Mail Association* v. *Corsi*, No. 691, October Term, 1944. It contends, however, that the actions of the other individual appellants are premature in absence of their performance of the acts prohibited and institution of specific proceedings for dismissal against them. This contention is, however, without merit, and results from confusing the present situation with one in which the precise meaning and application of a general statute cannot be determined prior to its interpretation and application in specific cases.

Unlike the statute involved in *Alabama State Federation of Labor* v. *McAdory*, No. 588, October Term 1944, the acts specifically forbidden and the persons to whom the prohibition of the second sentence of section 9 (a) applies, are definite and unambiguous. If any of appellants should write to a newspaper and endorse a candidate for office as one who supports the legislative program of U.F.W.A., and as one whom the U.F.W.A. seeks to have elected to office, the application of the statute would not be contingent upon any administra-

tive interpretation as to whether this is an act covered by the statute. Similarly, the other acts which appellants desire to do in exercise of their rights of expression are quite definite, and the application of the statute to them quite clear.

Nor does any possiblity exist of holding the specific applications of the second sentence of section 9 (a) separable, as was the case in *Watson* v. *Buck,* 313 U. S. 387. That case is indeed authority for the proposition that the second sentence of section 9 (a) is itself separable from the other provisions of the Hatch Act. For Section 11 of the Hatch Act, 18 U.S.C., sec. 61 k, the separability clause, provides that if any provision of the statute or applications to any person or circumstance is held invalid, the remainder of the statute shall not be affected thereby. The scope and purpose of the second sentence of Section 9 (a) are clearly distinct from the remainder of the Act (Appellants' main brief, pp. 32-34).

However, since the second sentence of Section 9 (a) on its face infringes rights of expression and is designed to do so, the presence of these unconstitutional restraints invalidates the entire prohibition of the section. For the purpose of the prohibition is unitary, as its history demonstrates (Appellants' main brief, pp. 34-35). A piecemeal and patchwork re-interpretation of the scope of the prohibition would enhance the injury inflicted by the statute. It would also involve a substitution of the judgment of this Court for that of Congress as to what the scope of a new prohibition should be, in the light of any determination of this Court of the invalidity of the present one. The observation of the Court in *Hague* v. *C.I.O.,* 307 U. S. 496, 518 is wholly applicable here. The Court there said:

> As the ordinance is void the respondents are entitled to a decree so declaring and an injunction against its enforcement by the petitioners . . . The courts cannot rewrite the ordinance, as the decree in effect does.

The Civil Service Commission presently threatens to enforce the clear prohibitions of the section against appellants and all other employees in the classified civil service. It is well settled that under these circumstances a controversy ripe

for determination by equity and declaratory judgment proceedings exists. *Railway Mail Association* v. *Corsi,* No. 691, October Term, 1944, and cases cited at p. 4 of the slip opinion; *Columbia Broadcasting System* v. *U. S.,* 316 U. S. 407; *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365; *Terrace* v. *Thompson,* 263 U. S. 197.

3. No Requirement of Exhaustion of Administrative Remedies Is Applicable in the Present Case.

The general purpose of the doctrine of exhaustion of administrative remedies is to foreclose resort to the courts until administrative action has been complete and whatever injury the administrative determination may entail is in fact inflicted. If resort to the courts for the review of every preliminary administrative determination were permitted, the courts would be clogged with incessant clamor for review of orders setting matters down for hearing *(U. S.* v. *Illinois Central R. R. Co.,* 244 U. S. 82; *Federal Power Commission* v. *Metropolitan Edison Co.,* 304 U. S. 375), and other types of determination which do not themselves inflict injury but are simply preludes to other administrative determination which may or may not ultimately injure the party who seeks his premature relief. See *Rochester Telephone Co.* v. *U. S.,* 307 U. S. 125, 130.

In general, such preliminary determinations as setting down a matter for hearing, rulings on evidence, *et cetera,* are incidents of administrative hearings entailing determination of controverted issues of fact. Thus it may be the case that the administrative tribunal, after hearing all the evidence, may determine that the matter is not within its jurisdiction or that the facts demonstrate that there is no violation of the statute or regulation. Thus even if preliminary determinations are adverse to the party, the ultimate administrative determination may be favorable to him and relieve him from fear of any injury. And in such situations he is generally free of any criminal or other liability until the administrative order is issued and in some cases he does not even risk such injury until the administrative order is judicially enforced in appropriate statutory proceedings (e.g. N.L.R.A. 29 U.S.C. section

151 *et seq.)*. It is in this type of situation that the doctrine of exhaustion of administrative remedies has its roots and in which it is an inexorable prerequisite to seeking judicial relief. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41.

However, where a statute or administrative regulation itself has the effect of deterring lawful conduct by threatening a penal or administrative sanction for engaging in it, and where no adequate administrative process exists which may delay or avert the penalty threatened, the requirement of exhaustion of administrative proceedings is inapplicable. See *Columbia Broadcasting System* v. *U. S.*, 316 U. S. 407; *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365; *Waite* v. *Macy*, 246 U. S. 606.

When, therefore, the substantive provisions of the statute or regulation are themselves invalid and the administrative agency has no authority in administrative proceedings to avert the impact of the statute where a set of facts is within its terms, resort to the administrative body is unnecessary as a condition precedent to seeking judicial relief. In the case of *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, the company sought to enjoin the holding of hearings by the National Labor Relations Board on the ground that the company was not subject to the jurisdiction of that act since it was not engaged in interstate commerce. The court in holding that the administrative proceedings could not be enjoined, pointed out that among the facts to be determined in the hearing was whether the company was engaged in interstate commerce and the resolution of this issue would depend on the facts shown by the record compiled in the proceedings. Mr. Justice Brandeis in his opinion stated:

> "There is no claim by the corporation that the statutory provisions and the rules of procedure prescribed for such hearings are illegal; or that the corporation was not accorded ample opportunity to answer the complaint of the Board; or that opportunity to introduce evidence on the allegations made will be denied. The claim is that the provisions of the Act are not applicable to the Corporation's business at the Fore River Plant . . ." (303 U. S. 41 at 47.)

There exists no possibility of an exercise of administrative discretion in the interpretation of the statute and its application to the acts which appellants desire to engage in. For

the terms of the statute are clear, as is their application to these acts, and the infliction of the penalty is certain. Under these circumstances, the completion of an administrative proceeding before the Commission is certain not to prevent or diminish the present injury inflicted by the existence of the statute and its deterrence of conduct enjoying express constitutional protection. Where the outcome is so certain, and the infirmity so plain on the face of the statute, a futile exhaustion of administrative remedies is not required.

D. Suit for a Money Judgment in the Court of Claims Does Not Afford an Adequate Remedy to Appellants

The Government suggests that the appropriate remedy available to appellants for a determination of their rights is suit in the Court of Claims for salary after dismissal for actual commission of prohibited acts, and cites *Lovett, et al.*, v. *United States*, Ct. Cls., cases Nos. 46026, 46027 and 46028, decided November 5, 1945. But these very cases demonstrate the utter inadequacy of suit for a money judgment in the Court of Claims to protect civil rights of federal employees against invasion by unconstitutional enactments. Although a majority of the Court of Claims held the statute unconstitutional, it could afford no more relief than a money judgment, payment of which is contingent on further Congressional appropriation. Meanwhile, the claimants have suffered every substantial injury the enactment was designed to inflict. In the present case, appellants do not seek a money judgment; they are being paid regularly through the ordinary and less cumbersome processes of payroll disbursements. They desire to continue in their employ and to exercise their constitutional rights of expression free of invalid restraints and the penalties inflicted for their violation. As the *Lovett* case, *supra*, demonstrates, the Court of Claims cannot provide a remedy to afford any protection to these rights presently invaded.

Suit in the Court of Claims is an adequate remedy only where a money judgment is sought and the measure of recovery is clearly defined, as for instance by a specified term of office. See *Humphrey* v. *U. S.*, 295 U. S. 602. It may also be an adequate remedy where an employee seeks to recover the difference between the amount of salary actually paid

and that prescribed by statute. See *U. S.* v. *Langston,* 118 U. S. 389 (1886); *Collins* v. *U. S.* 15 Ct. Cls. 22 (1879). Similarly, resort to the Court of Claims may afford adequate relief where plaintiff has worked or otherwise been unlawfully deprived of compensation for a well-defined period and he seeks in a Court of Claims action to recover the amount of such compensation. See *U. S.* v. *Wickersham,* 201 U. S. 390.

However, where a member of the classified civil service enjoying an indefinite tenure on good behavior is discharged even unlawfully, and is paid up to the date of discharge, there exists no measure of damage. This factor among others has induced the courts to hold that upon discharge the right of an officer to salary ceases even where the officer has been wrongfully discharged. *Keim* v. *U. S.,* 177 U. S. 290; *Eberlein* v. *U. S.,* 257 U. S. 82; *O'Neil* v. *U. S.,* 56 Ct. Claims 89 (1921).

In the *O'Neil* case it was held that an officer upon removal ceases to be in the service of the United States. The court further stated: "His only remedy is to proceed without delay in a court with competent jurisdiction to try his right to the office" (p. 95).

Even if there were not these serious doubts as to existence of a claim for salary where the employee enjoying an indefinite tenure is discharged and paid up to date of discharge, it is evident that a suit for salary in the Court of Claims, litigated while the claimant is divested of his employment is no adequate remedy for the protection of basic constitutional rights.

II. THIS COURT HAS JURISDICTION OF THE PRESENT APPEAL.

The order for judgment of the District Court was filed on September 26, 1944 (R. 126-127). The petition for appeal, dated October 25, 1944, was allowed on October 26, 1944, and the order allowing the appeal was filed on that day (R. 130).[1]

[1] The Government's references to so-called orders not appearing in the record prior to the order of October 26, 1944, are misleading. Prior to the decision of this Court in *Commissioner* v. *Bedford,* October Term, 1944, No. 710, decided May 21, 1945, confusion existed as to whether or not the opinion of a court constituted the "judgment" which set the time for appeal running. In taking their appeal from the formal order of judgment of the statutory court, counsel for appellants have followed the course which was later approved in the *Bedford* case. See also *People's Bank* v. *Federal Reserve Bank of San Francisco,* 149 F. (2d) 850 (C.C.A. 9).

Successive orders of the court below extended the time for docketing the record in this Court to January 15, 1945 (R. 133).[2]

As the brief of appellees in opposition to the Government's suggestion that the appeal be dismissed shows, it is well established that failure to docket a case in time is not fatal to the jurisdiction of this Court on the appeal if the record is docketed prior to appellee's docketing the case and moving to dismiss.[3]

The Act of August 24, 1937, 28 U. S. C. section 380 (a) is clearly designed to afford the Government notice of proceedings in which the validity of an act of Congress is called into

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[2] The Government (Br. p. 2) refers to an order of Justice Letts bearing a date, October 25, 1944. But it does not state that the order referred to was filed on November 17, 1944, as appears from the record (R. 130), and not at a date prior to the allowance of the appeal on October 26, 1944 (R. 130).

[3] The Government (Govt. br. p. 4, note 2) adverts to matters outside the record relating to circumstances under which counsel for appellants docketed the record, and suggests a want of good faith in counsel for appellants' action in docketing the record. But this incomplete statement does not reveal all the facts, which dispel any such suggestion. For prior to January 15, 1944, within the time specified by the order of Judge Groner (R. 133), a counsel for appellants presented the record for docketing in the office of the Clerk of this Court. An employee of the office for some reason, perhaps failure to note the order of Judge Groner (R. 133), expressed an opinion that the record could not be docketed. Instead of docketing in any event, as he could have, even if late, the counsel deferred docketing the record and conferred with a counsel for the Government who also suggested that lateness in docketing was fatal to the appeal.

Thereafter another counsel for the appellants participated in the conference of January 31, 1945. Mr. Fahy, the then Solicitor-General, who is at present out of the country, was among those who attended. He had been advised, and assumed, as did counsel for appellants that lateness in docketing was fatal to the appeal. The discussion proceeded on this assumption, and no undertaking was made by appellants' counsel that he would forbear from docketing the record. Indeed, Mr. Fahy expressed regret that so important an appeal should fail for a technical defect. And the suggestions that the Government should docket and dismiss, or in the alternative, the appellants' counsel should stipulate a dismissal, were simply directed to facilitate the disposition of what was supposed to be an appeal which had already failed. When counsel for appellants learned on re-examination of the authorities that lateness in docketing did not oust this Court of jurisdiction, he retraced his steps and docketed the record. This comedy of errors, enacted outside the record, should certainly play no part in the disposition of the issue of law presented. Although appellants may have faltered and fumbled on their way to this Court, the appeal has not failed and fallen by the wayside.

question. It also provides the safeguard of a three-judge court and a direct appeal to this Court where an injunction against the enforcement of a statute is granted or denied, as does Section 380 of Title 28, U. S. C. The major purpose of this safeguard is to prevent improvident granting of injunctions interfering with the enforcement of statutes. Except for the stay of further proceedings against appellant Poole, pending disposition of this appeal (Appellants' main brief, p. 8, note 1), no injunction against the enforcement of the second sentence of Section 9 (a) has been issued. The Civil Service Commission is free to enforce the prohibition pending the appeal. Therefore, the delay in docketing the appeal works no injury which Section 380 (a) of Title 28 U. S. C. was designed to avoid.

III. THE GOVERNMENT HAS FAILED TO ESTABLISH THAT THE PROHIBITION OF THE SECOND SENTENCE OF SECTION 9 (a) DOES NOT INFRINGE RIGHTS OF EXPRESSION PROTECTED BY THE FIRST AMENDMENT.

The Government urges (Br. pp. 39, 49) that the importance of the subject matter of Government employment necessitates application of the usual presumption of validity to the prohibition of the second sentence of Section 9 (a). But, as pointed out in our main brief (pp. 12-20) the importance of free expression and the vital place it occupies in our scheme of government necessitates the opposite view. For it is the rights of free expression which are given explicit protection by the Constitution, and not the power of the Government to impose any condition whatsoever in regulating the conditions of employment of federal workers.

The Government also urges the difficulty of drawing a line as a justification for the sweeping coverage of the statute as to the Act's prohibitions and the persons forbidden to engage in them (Govt. br. pp. 24, 40, 43). Obviously some line can be drawn which does fall short of an almost total extinction of rights of expression of almost all federal employees. Where some line can be drawn the difficulty of doing a careful job does not excuse the effort and justify a sweeping prohibition

encompassing both what may be validly prohibited and what may not. As this Court pointed out in the case of *10 East 40th Street Building* v. *Callus,* No. 820 October Term 1944 (p. 5 of Slip Opinion):

> "We cannot escape the duty of drawing lines. And when lines have to be drawn they are bound to appear arbitrary when judged solely by bordering cases. To speak of drawing lines in adjudication is to express figuratively the task of keeping in mind the considerations relevant to a problem and the duty of coming down on the side of the considerations having controling weight. Lines are not the worse for being narrow if they are drawn on rational considerations."

The consideration to which Congress must give deference in drawing a line is preservation of the rights given explicit constitutional protection. Therefore, resolution of doubt must be in favor of protection of these rights of expression, and not their curtailment.

As demonstrated in our main Brief (pp. 41-45), the history of limitation on political activity of Government employees does not have "a geneology of substance extending back to the very beginnings of the nation." That history is rather a patchwork of varying policies operating in quite different contexts. If there is any "geneology of substance" in this field it is the history of legislative effort to preserve rights of expression of federal employees against curtailment by exercise of arbitrary powers of dismissal. (Appellants' main br. pp. 24-27.)

Respectfully submitted,

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