IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 20

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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SUPPLEMENTAL BRIEF FOR APPELLANTS

Questions raised by the Court in oral argument and some statements made in the supplementary brief for the Government require brief additional treatment.

1. *The meaning of the Act.* (a) The Court in oral argument expressed some interest whether the Congress in adopting Section 15 of the Act had before it the particular rules of the Civil Service Commission which it was incorporating by reference into the second sentence of Section 9(a). That it

did is clearly shown by the fact that the rules were included in the Congressional Record during the course of the Senate Debate (86 Cong. 2938-40. See also 86 Cong. Rec. 2943).

(b) The Government in Point 3 of its supplementary brief discusses whether the third sentence of Section 9(a) giving Federal employees the right to express their opinions on all political subjects and candidates overrides certain of the rules of the Commission insofar as they may be inconsistent. This discussion involves fringe matters having no relation to the issue before this Court. It is of no concern to this litigation that Federal employees may now engage in campaigns concerning the regulation or suppression of liquor traffic, and that the regulations concerning betting or wagering upon the results of primary or general elections which were included in the regulations may not have statutory force by virtue of the second sentence of Section 9(a).[1]

However, it is clear beyond question that Section 15 incorporates into Section 9(a) the specific prohibitions which are attacked by your appellants. Thus, it is clear, and the Government has not contended otherwise in oral argument or in its supplemental brief, that under Section 15 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

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[1] The Government also mentions Section 18 of the Act which provides an exemption from the Act for local elections and questions not identified with a national or state political party. This section, however, casts no light on the question before the Court, for it is an exception which does not deal with the issue of the rights of federal employees to engage in political activity in elections where national and state candidates and national and state issues are involved. And that is the sole issue before this Court.

The attempt of the Government to suggest that the Civil Service Commission has rule-making power which is of relevance in the present connection flies in the face not only of the express language of the statute but of the legislative history of the Act. For an earlier draft of the bill, S. 3046, 76th Cong., 3rd Sess., proposed to give the Civil Service Commission power to make and amend rules defining political activity. See S. Rep. 1236, 76th Cong., 3rd Sess. However, substantial objection was raised to giving the Commission discretion. See, *e. g.*, 86 Cong. Rec. 2352, 2426, and the resulting bill eliminated all discretion in the Commission on this subject.

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). If they become members of a political organization, they may not attempt to influence other members by actions or utterances (R. 81). They may not initiate or circulate petitions or canvass for the signatures of others (R. 85). They may not march in a political parade or organize or be an officer or a leader of such parade (R. 84).

In other words, the Act clearly and unequivocally incorporates a direct prohibition of every one of the fundamental exercises of the rights of freedom of speech and of the press which the appellants in this case desire to engage in. Indeed, the President of the Civil Service Commission on September 17, 1946, had no difficulty in explaining the precise scope of the rules incorporated by Section 15. On that date in a speech in St. Paul, Minnesota, before the Convention of the American Federation of Government Employees, he stated:

> "Since the passage of the Civil Service Act of 1883, and in accordance with a rule promulgated by the President under its provisions, the Civil Service Commission has had the duty of checking on and punishing political activity on the part of Federal employees in the executive service. In accordance with that duty, the Commission has published, on (sic) national election years, a list of political activities which were forbidden and which subjected the violators to a penalty—the extent of the penalty, as before stated, being left to the Commission prior to the Hatch Act. On the date that the Act "froze" determinations of what constituted violations, and eliminated Commission discretion as to penalties, there was listed:
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> "Serving on or for any political committee, party, or other similar organization.
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> "Serving as officer of a political club, as member or officer of any of its committees, addressing such a club or being active in organizing it.
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> "Serving in connection with preparation for, organizing, or conducting a political meeting or rally, addressing such a meeting, or taking any other active part therein except as a spectator.

"Canvassing a district or soliciting political support for any party, faction, or candidate.

"Manifesting offensive activity at the polls, at primary or regular elections, soliciting votes, assisting voters to mark ballots, or helping to get out the voters on registration or election days.

"Acting as recorder, checker, watcher, or challenger of any party or faction.

"Assisting in counting the vote, or engaging in any other activity at the polls except marking and depositing the employee's own ballot.

"Serving in any position of election officer.

"Publishing or being connected editorially or managerially with any political newspaper or writing for publication or publishing any letter or article, signed or unsigned, in favor of or against any political party, candidate, faction, or measure.

"Becoming a candidate for nomination or election to office, Federal, State, or local, which is to be filled in an election in which party candidates are involved.

"Distributing campaign literature or material.

"Circulating political petitions, including nominating petitions; but the signing of such petitions is not considered a violation."

And this accords with the specific exposition of the "WARNING" notice circulated by the Commission throughout the Government (See R. 114A).

The prohibitions are being constantly enforced. Thus it was only on the 22nd of July of this year that the Civil Service Commission entered an order imposing disciplinary action upon a Federal employee for delivering a speech over the radio during the course of a political campaign.[2] The speech was under the auspices of a Democratic State Committee. For this act and this act alone it was held that the employee had violated Section 9(a) of the Hatch Act. *In the matter of J. Ernest Kerr*, Civil Service Commission Federal Docket No. 1161, July 22, 1946.[3] Mr. Mitchell's speech *supra* cited

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[2] The speech was one prepared by a friend and when the friend was called away, the employee explained that fact and that he was delivering the speech in his friend's place. He then read what his friend would have said had he been there.

[3] Copies of the opinion have been filed with the Clerk.

instances of dismissal of employees for such activity as circulation of soldier ballot cards containing a political advertisement, obtaining a few signatures on a nominating petition for a candidate for justice of the peace, and solicitation of registration of voters (see pp. 6 and 7 of speech, copies of which are being filed with the court). It is precisely this type of activity in which appellants wish to engage and for which there is no question that the Act would require their dismissal.

* * *

The speech cited above also contains an interesting insight into the practical operation of the ban on political activity. The head of the agency administering that prohibition stated:

> "Allow me, also, to call your attention particularly to the fact that it is the lower salaried employees who are made to suffer on account of the present law. Men of state importance have been caught violating the law and removal from state office has resulted; but, apparently the big fellows in the Federal service are more careful, or better informed, than the ordinary Federal employee. A few postmasters have been removed, but even these have been from smaller offices. The law excepts from its provisions heads and assistant heads of executive departments; 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 relation with foreign powers or in the nation-wide administration of Federal laws. Federal employees, such as regional or state directors, customs or internal revenue collectors, and other like office holders, are subject to the penalties of the law, but there have been few, if any, complaints which have come to the Commission about persons of that rank. If there had been a basis for complaint, it is not at all likely that such office holders would have escaped."

2. *Separability.* The question was raised during the course of the argument whether this Court was under an obligation to consider every provision of the Civil Service Rules incorporated into Section 9(a) by Section 15 and to go down those

provisions one by one declaring which were constitutional and which were not. The Hatch Act contains a separability clause in the usual form. (See Section 11 of the original Act.) By reason of the operation of this separability clause it is clear that Congress intended the rest of the Act to stand even though the second sentence of Section 9(a) should be held unconstitutional. However, this does not mean that Section 15 incorporating a whole set of rules of the Civil Service Commission dealing with political activity is a Congressional declaration that each of the various rules is to stand though others may fall. Indeed, it is clear that Congress adopted the rules as a unit and intended that they should stand or fall as a unit. If, as we have urged, a substantial part of that code is an invalid infringement of the rights of freedom of speech and of the press, we believe that the Court may not rewrite the regulation, approving the valid provisions and excising the invalid. For this would trespass on the legislative province. Rather, the function of this Court is to say that Section 15 incorporates a code of regulations into Section 9(a) which is invalid in substantial part because it disregards the constitutional rights of Federal employees. In that event the entire code must be stricken down and sent back to Congress for redrafting in the light of the principles laid down by this Court. Congress will have the judgment of this Court that Federal employees are not wards of the State but that their constitutional rights of freedom of speech and the press must be respected.

It will then be the province of the legislature, having in mind those constitutional rights, to pass such legislation if any as it may see fit to protect the legitimate purposes of a clean politics law, without at the same time suppressing the fundamental rights of Federal employees. Indeed, a piecemeal and patchwork reinterpretation 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."

3. The Court in argument considered the question of whether Federal employment was a privilege upon which could be grafted conditions not otherwise valid. Aside from the doubtful validity of the premise as a matter of law (see our main brief pp. 50-53), the argument contains the seeds of a threat to the liberties of the entire population. The whole gamut has not been run on limiting the rights of those who receive Federal funds. Yet there is before the court now in a companion case, proof that the tendency toward such limitation exists and that it has been extended in a substantial manner, *cf. State of Oklahoma* v. *Civil Service Commission,* No. 84, this Term. For the Hatch Act's prohibitions against political activity extend not only to the three million Federal employees but to the many millions employed in highway, social security and other branches of State Governments partly supported by Federal funds. The extension of the prohibitions to employees of private persons engaged in supplying goods or services under contract with the Government, and from there to pensioners and recipients of social security is but a gradual and logical extension.

Constitutional questions require a long view. This Court recently had occasion to note the prescience of Mr. Justice Bradley in foreseeing the dislocations in Federal and State relationships with respect to taxing authority created by the majority opinion in *Collector* v. *Day,* 11 Wall. 113. See *State of New York* v. *United States,* ——— U. S. ———, 66 Sup. Ct. 310, 312. With equal foresight in his dissenting opinion in *Ex Parte Curtis,* 106 U. S. 371, 377, Mr. Justice Bradley anticipated the extinction of civil rights of Federal employees which would result from pressing efforts to curtail their political activity beyond the limits of freedom of expres-

sion enjoyed by all others. His words, even now being "vindicated by time and experience," are as follows:

> "The freedom of speech and of the press, and that of assembling together to consult upon and discuss matters of public interest, and to join in petitioning for a redress of grievances, are expressly secured by the Constitution. The spirit of this clause covers and embraces the right of every citizen to engage in such discussions, and to promote the views of himself and his associates freely, without being trammelled by inconvenient restrictions. Such restrictions, in my judgment, are imposed by the law in question. Every person accepting any, the most insignificant, employment under the government must withdraw himself from all societies and associations having for the object the promotion of political information or opinions. For if one officer may continue his connection, others may do the same, and thus it can hardly fail to happen that some of them will give and some receive funds mutually contributed for the purposes of the association. Congress might just as well, so far as the power is concerned, impose, as a condition of taking any employment under the government, entire silence on political subjects, and a prohibition of all conversation thereon between government employees. Nay, it might as well prohibit the discussion of religious questions, or the mutual contribution of funds for missionary or other religious purposes. In former times, when the slavery question was agitated, this would have been a very convenient law to repress all discussion of the subject on either side of Mason and Dixon's line. At the present time any efficient connection with an association in favor of a prohibitory liquor law, or of a protective tariff, or of greenback currency, or even for the repression of political assessments, would render any government official obnoxious to the penalties of the law under consideration. For all these questions have become political in their character, and any contributions in aid of the cause would be contributions for political purposes. The whole thing seems to me absurd. Neither men's mouths nor their purses can be constitutionally tied up in that way. The truth is, that public opinion is oftentimes like a pendulum, swinging backward and forward to extreme lengths. 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." [4]

Respectfully submitted,

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October 1946

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[4] Other observations in the same dissenting opinion are worthy of note in connection with the issues presented by the instant litigation. Thus at one point Justice Bradley stated:

> "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."

And at another part he urged forcefully the position taken here by your appellants:

> "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. 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 and others. That would be all right. That would clearly be within the province of legislation. It is urged that the law in question is intended, so far as it goes, to effect this very thing. Probably it is. But the end does not always sanctify the means. What I contend is that in adopting this particular mode of restraining an acknowledged evil, Congress has overstepped its legitimate powers, and interfered with the substantial rights of the citizen. It is not lawful to do evil that good may come. There are plenty of ways in which wrong may be suppressed without resorting to wrongful measures to do it. No doubt it would often greatly tend to prevent the spread of a contagious and deadly epidemic, if those first taken should be immediately sacrificed to the public good. But such a mode of preventing the evil would hardly be regarded as legitimate in a Christian country."