In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 20

UNITED FEDERAL WORKERS OF AMERICA (C. I. O.), ET AL., APPELLANTS

v.

HARRY B. MITCHELL, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTARY BRIEF FOR THE APPELLEES

Prior to the Court's order of March 25, 1946, vacating the order of January 2, 1946, which set down the present case for reargument before the full bench, it had been the Government's intention to file a short supplementary brief upon reargument, dealing with certain questions which arose during the initial argument before the Court. In the belief that such a written discussion may still be helpful, it is herewith submitted by permission, in mimeographed form in order to avoid the delays of printing.

718030—46

I. THE LEGAL EFFECT OF APPELLEES' DETERMINATIONS IN POLITICAL ACTIVITY CASES INVOLVING FEDERAL EMPLOYEES

The question arose during oral argument whether the appellees as members of the Civil Service Commission can be said to have power to effect the dismissal of Federal employees for violation of the Hatch Act provision involved. This question breaks down into two questions: (1) Whether the Commission enforces this provision of the Hatch Act at all and (2) whether, if so, the Commission itself effects the dismissals which are occasioned by violations which it finds.

1. It has been conceded (Appellees' brief, n. 5 at p. 14) "that as to classified employees the Civil Service Commission does in practical effect enforce the challenged provision of § 9 (a) as well as the corresponding provision of Civil Service Rule I." This view is grounded upon the substantial identity of the Civil Service Rule which the Commission primarily enforces with the second sentence of Section 9 (a) of the Hatch Act, and upon the administrative practice, based upon an opinion of the Attorney General (40 Op. Atty. Gen. No. 2, at pp. 4–5), which has resulted in the application of the statutory "penalty" of removal, prescribed in Section 9 (b), as the mandatory and exclusive means of enforcing the Rule as well as the Act. Since the Act has both fixed the content of the Rule (see *infra,* p. 9) and im-

posed the requirement that violators be removed from office, and since employees who take an active part in political management and political campaigns violate "both the civil service rules and * * * the * * * Act" (40 Op. Atty. Gen. No. 2 at p. 5; see also par. 5 (b) of the Commission's regulations for enforcing the Rule, at R. 43), it seems correct to say that appellees enforce the Act by enforcing the Rule.

2. Whether appellees have power to bring about the dismissal of Federal employees violating the Act and the Rule turns upon the nature, intent, and consequence of their functions with respect to violators. Section 9 (b) of the Act (Appellees' brief, appendix, p. 53) requires that a violator "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." The responsibility for removing employees pursuant to this provision rests with the heads of the employing departments and agencies. 39 Op. Atty. Gen. at 447, 463–464; and see Appellees' brief, n. 5 at p. 14. The heads of the employing departments also take the final step of dismissing employees found by the Civil Service Commission to have violated Section 1 of Civil Service Rule I (and therefore also Section 9 (a) of the Hatch Act). Proceedings for the enforcement of Rule

I take place under Civil Service Rule XV (Appellees' brief, appendix, p. 59) which requires the Commission in proper cases to give "specific instructions as to * * * dismissal of the * * * employee affected" and, if these are not carried out, to take steps to stop the pay of the employee involved. See Appellees' brief, n. 5 at pp. 13–14. There can be no doubt that it is the purpose of Rule XV (and of the Hatch Act provision which has modified it by prescribing removal rather than lesser forms of discipline in political activity cases) to compel the dismissal of offending employees and not merely to stop their pay while leaving them in office.[1] Such is therefore the purpose and almost inevitable effect of the "specific instructions as to * * * dismissal" which the Commission issues under the Rule and which it states the appointing officer "must carry out at once" (*Federal Personnel Manual,* p. C2–6; see also R. 43).

For the foregoing reasons we think it is correct to state that the legal effect of the determinations of the Civil Service Commission which are pertinent here is to remove the employees in-

[1] Cf. the Government's similar contention with regard to the appropriation act provision involved in *United States* v. *Lovett et al.*, Nos. 809–811, this Term, certiorari granted March 25, 1946, which contains language less specific as to dismissal than Civil Service Rule XV. The Civil Service Rules are prescribed by the President pursuant to statute. See Appellees' brief, p. 23.

volved from office because of violations of the Act.

II. JURISDICTION TO GRANT THE RELIEF REQUESTED

The contention of appellees in this case, having regard to the nature of the appellees' functions which have just been outlined, that the court below lacked jurisdiction to grant the relief requested, is not affected by the decision of this Court in *American Federation of Labor et al.* v. *Watson,* No. 448, this Term, decided March 25, 1946. That decision (see slip opinion, pp. 7–8, and p. 3 of the dissenting opinion of Mr. Chief Justice Stone) strengthens the point which has here been conceded *arguendo* (Appellees' brief, p. 14), that the interest of at least appellant Poole is sufficiently threatened by appellees to warrant equitable intervention if the matter is of equitable cognizance; but appellees' contention that the subject matter is not of equitable cognizance remains untouched. Moreover in *Macauley* v. *Waterman S. S. Corp.,* No. 435, this Term, also decided March 25, 1946, this Court added another authority to the cases (Appellees' brief, pp. 17–18) which hold that declaratory judgment proceedings are not available to challenge threatened official action under circumstances which would make it improper to entertain a suit for preventive relief (see p. 3, n. 4 of *Macauley* slip opinion). Appellees' challenge to the jurisdiction therefore stands.

III. THE SCOPE OF THE PROHIBITION IMPOSED BY THE SECOND SENTENCE OF SECTION 9 (A) OF THE HATCH ACT AS AFFECTED BY THE ENACTMENT OF SECTION 15

During the oral argument a question arose with regard to the precise effect upon the basic prohibition of Section 9 (a) (enacted August 2, 1939, 53 Stat. 1147, 1148; Appellees' brief, appendix p. 52), produced by the subsequent adoption of Section 15 (Act of July 19, 1940, § 4, 54 Stat. 767, 771; Appellees' brief, appendix, pp. 53–54). Section 15 reads as follows:

> The provisions of this subchapter 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.

The enactment of Section 15 was accompanied by the adoption of an amendment to Section 9 (a) (§ 2 of the Act of July 19, 1940, 54 Stat. 767) which re-enacted the third sentence of that Section with an addition, making it read as follows:

> All such persons [i. e., officers and employees in the executive branch of the Federal Government] shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates.

It is clear from these two provisions that Congress at the same time (1) enacted into statute the previous determinations of the Civil Service Commission as to conduct constituting "active" participation "in political management or political campaigns" and (2) confirmed the right of Federal employees to full freedom of expression with regard to all political subjects and candidates. The Act of 1940 also added Section 18 (54 Stat. 772; Appellees' brief, pp. 35, 54) to the previous legislation, so as specifically to permit participation by Federal employees in elections and in campaigns not involving candidates or issues identified with national—or, as to issues, with state—political parties.[2]

The applicable Civil Service Rule (Section 1 of Rule I) read as follows on July 19, 1940 (R. 32, 74; Appellees' brief, p. 23):

---

[2] The Act of 1940 also ratified specifically, by the addition of Section 16 to the Hatch Act (54 Stat. 771; Appellees' brief, pp. 35, 54), the practice previously authorized by executive order (see R. 95–99) of permitting Federal employees to participate actively in local political management or political campaigns in designated communities in the immediate vicinity of the National Capital (or elsewhere, under the Act, if a majority of the voters are employed by the Government).

> * * * Persons who by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, shall take no active part in political management or in political campaigns.

Determinations of the Civil Service Commission as to conduct constituting prohibited political activity, made prior to July 19, 1940, are printed at pp. 80–87, 95–99 of the record (*cf.* Appellees' brief, p. 48). It seems clear that in so far as either the Civil Service Rule (by prohibiting other than private expressions of opinion) or the Commission in its specification of forbidden political activities went beyond the prohibition of active participation in political management or political campaigns, and in so far as the Act of 1940 explicity conferred upon Federal employees the right to engage in specified activities, the enactment of Section 15 did not preserve the previous prohibitions or incorporate them into the statute.

Under a familiar rule of statutory construction, the specific provisions of the third sentence of Section 9 (a) securing to Federal employees the right to express opinions and of Section 18 securing the right to participate actively in non-partisan elections and campaigns, prevail over the general provision of Section 15, enacted at the same time. Such has been the administrative

interpretation (40 Op. Atty. Gen., No. 2, p. 8; Appellees' brief, pp. 34–35); and the Civil Service Rule has accordingly been modified to conform substantially to Section 9 (a). (R. 39, 41, with which compare R. 74, 83; Appellees' brief, p. 23.) Similarly, any conflict between the previous prohibitions and Section 18 must be resolved in favor of the latter, notwithstanding Section 15. Thus, if the previous prohibition of certain activities in "primary and regular elections" (R. 83) were deemed to extend to referendum elections or elections to pass upon constitutional amendments, municipal ordinances, etc., that prohibition yields to Section 18; and so does the former prohibition of "activity in campaigns concerning the regulation or suppression of the liquor traffic" (R. 84). The latter prohibition has in fact disappeared, and the former has been clarified to bring it explicitly into accord with Section 18 (see R. 51).

Moreover, apart from the prevalence of the third sentence of Section 9 (a) and of Section 18 over Section 15, the latter section by its terms does not incorporate into Section 9 (a) any previous prohibitions which are not attributable to the proscription of acts constituting an "active part in political management or political campaigns". Thus, quite obviously, the former interdiction of "betting or wagering upon the results of primary and general elections" (R.

84) does not possess statutory force by virtue of Section 15; and the same may be said of the prohibition (R. 85) of initiating and circulating petitions addressed to state and local governments.[3]

Section 9 (a) of the Hatch Act since the amendments of 1940 as before, therefore, does not limit the acts and utterances of Federal employees in ways that are inconsistent with the rights which the Act specifically secures; and this interpretation accords with the legislative intent expressed on the floor of Congress during the consideration of the Act of 1940. See 86 Cong. Rec. 2623–2624, 2861, 2865, 2870–2871, 2872–2876, 2922–2924, 2928–2930, 2937–2940, 2942–2943, 2947–2954, 2957–2958, 2982–2983, 2985, 9371–9372.[4] It is of course necessary to draw the line between the public expression of "opinions on all political subjects and candidates", which the Act sanctions, and active participation in political campaigns, which it forbids. The one shades into the other, and in doubtful cases a decision must be made in the light of the particular circumstances; but the governing criteria, as we have previously in-

[3] Both prohibitions have been omitted from subsequent compilations of rules respecting forbidden activities. See R. 47–53 and, specifically, R. 51–52; see also the *Federal Personnel Manual*, pp. C2–8–C2–12.

[4] The most significant portions of the legislative history pertinent to this question are set forth in the opinion of the Attorney General referred to above, 40 Op. Atty. Gen. No. 2, at pp. 7–14.

sisted (Appellees' brief, pp. 18, 19–20, 23, 34–35), are to be found in the third as well as in the second sentence of Section 9 (a) and in Section 18 as well as Section 15. Compare *State of Oklahoma* v. *United States Civil Service Commission,* C. C. A. 10, January 18, 1946 (not yet reported).

Viewed in this light, the challenged provision of the Hatch Act emerges all the more clearly as a valid exercise of the legislative power with regard to governmental personnel.

Respectfully submitted,

J. HOWARD MCGRATH,
Solicitor General.
JOHN F. SONNETT,
Assistant Attorney General.
DAVID L. KREEGER,
Special Assistant to the Attorney General.
RALPH F. FUCHS.
ABRAHAM J. HARRIS.

MARCH 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946