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## Does Prohibiting Government Employees from Taking Any Active Part in Political Management or in Political Campaigns Contravene First Amendment Guarantees.

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In a progressive jurisdiction a discovery rule in medical malpractice actions is inevitable simply because it should be. The only question is how best to arrive at that point. To make any abrupt change in a century-old statutory interpretation may present a hurdle more appropriately undertaken by the legislature than the judiciary. California has recently undertaken this step and enacted a specific statute of limitations for medical malpractice actions.<sup>60</sup> An analytical review of the experiential data available from California and other jurisdictions applying a general discovery rule should prove informative for identifying and, therefore, anticipating any probable sources of difficulty. Certainly the statutory and judicial experience gained from the Texas Workmen's Compensation Insurance Law should not continue to go unrecognized. It unquestionably has direct relevancy to say nothing of the wealth of easily accessible data which it makes available. The interpretive results obtained from these empirical data rather than some isolated court ruling or jurisdictional frequency distribution should provide the source material for defining statutory boundaries.<sup>61</sup>

Possibly a reexamination of statutory purpose may suffice. A limitations rule for a medical malpractice action which bears no relation to the discovery of when a cause of action even exists, serves no purpose other than an arbitrarily defined statute of repose.

*Glory Sturiale*

CONSTITUTIONAL LAW—HATCH ACT—DOES PROHIBITING GOVERNMENT EMPLOYEES FROM TAKING ANY ACTIVE PART IN POLITICAL MANAGEMENT OR IN POLITICAL CAMPAIGNS CONTRAVENE FIRST AMENDMENT GUARANTEES? 5 U.S.C. § 7324(a)(2) (1970).

Since the inception of the Civil Service Act in 1883, several Presidents have issued executive orders<sup>1</sup> limiting the activities of federal employees.

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60. The legislative history of this act, its effect on existing law, and the ever-lurking insurance consequences are discussed in Comment, *A Four Year Statute of Limitations for Medical Malpractice Cases: Will Plaintiff's Case Be Barred?*, 2 PAC. L.J. 663 (1971); CAL. CIV. PROC. ANN. § 340.5 (Deering 1972).

61. The New York Court of Appeals expressed a similar view: "We are more convinced, however, by the basic logic of the discovery rule than the numbers of jurisdictions which support that view. It is not only an equitable rule but also entirely consistent with the underlying purpose of the Statute of Limitations." *Flanagan v. Mount Eden Gen. Hosp.*, 301 N.Y.S.2d 23, 28 (1969).

1. The two most noteworthy are those of Presidents Cleveland and Roosevelt. President Cleveland issued the first executive order to the Commission. Memorandum to Department Heads, July 14, 1886, in RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 494 (1898); President Roosevelt's order incorporated the

Using the presidential rules as guidelines, the Civil Service Commission adjudicated cases until 1938, when the issue of federal employee participation in political activities reached a climax. In that year a senate committee, the Sheppard committee, was formed to investigate reported incidents of the use of federal funds for political purposes. The results of this study confirmed the allegations.<sup>2</sup> Immediately thereafter, Senator Carl Hatch introduced a bill to regulate such activity.<sup>3</sup> The bill was designed to perfect free elections by insuring that government employees would not be coerced at the ballot box by their superiors. The bill, though strongly attacked, was passed by Congress.<sup>4</sup>

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present language into the rules of the Civil Service Commission. "Persons who by the provisions of these rules are in the competitive classified service . . . shall take no active part in political management or in political campaigns." Exec. Order No. 642 (1907), *quoted in Esman, The Hatch Act—A Reappraisal*, 60 *YALE L.J.* 986, 988 (1951).

2. The committee found gross political irregularities in connection with the operation of Works Progress Administration, notably in Kentucky, Maryland, and Pennsylvania. S. REP. NO. 1, 76th Cong., 1st Sess., 84 *CONG. REC.* 3137 (1939).

3. S. 1871, 76th Cong., 1st Sess., 84 *CONG. REC.* 2935 (1939).

4. The statutory title to the Act is An Act to Prevent Pernicious Political Activity. Act of Aug. 2, 1939, ch. 410, 53 Stat. 1147. The controversial section reads: "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. . . ." Act of Aug. 2, 1939, ch. 410, § 9(a), 53 Stat. 1147, 1148. This section of the bill received much discussion. 84 *CONG. REC.* 9622 (1939) (remarks of Senator Hobbs):

Every single solitary pernicious activity is interdicted by the terms of this bill. Every abuse of power, bribery, coercion, threats, intimidation, solicitation of funds from relief workers, or from anybody on relief, every exercise of official authority or influence, all of those things you cry out against are interdicted by this bill already. But when you come to this section of the bill [9] you say that no matter how honestly a Federal officeholder in his supervisory or administrative capacity may conduct himself . . . he cannot participate in political management or political campaigns. . . . If you do this thing, you not only violate the Constitution, you not only violate every natural right of every citizen in the United States, but by doing this you divest him of citizenship and you have set up the process of disintegration, whereby the Government "of the people, by the people, and for the people" will have begun to perish from the earth.

*Id.* at 9630 (remarks of Senator Hook): "You cannot make this bill constitutional while you are depriving people of their rights." *Id.* at 9634 (remarks of Senator Sabath): "Here you have a bill absolutely contrary to the spirit of the Bill of Rights and the fundamental liberties guaranteed under our Constitution."

The bill had many proponents. 84 *CONG. REC.* 9629 (1939) (remarks of Senator Healey):

[T]he first section makes it unlawful for any person to intimidate, threaten, or coerce any person in the manner they vote. We also have another section which prohibits the use of a person's political position to influence votes. Certainly, the objective, insofar as making persons in W.P.A. untouchable has been accomplished, and I think that this is the heart of this bill. . . .

[T]he principal purpose of this bill was to cure abuses and ills that were found to exist in the administration of W.P.A. . . .

*Id.* at 9633 (remarks of Senator Michener): "This nonpartisan investigating committee [Sheppard committee] recommended the Hatch Bill as a specific against political corruption as practiced in the 1938 election."

While the Act restricted the political activity of government employees, it did not attempt to define which activities were prohibited. Instead, it adopted those activities the Commission had prohibited in its decisions prior to the passage of the Act.<sup>5</sup> The basic purpose of the Act was evident; to make it “. . . unlawful for any person employed in any administrative position by the United States or by any department, independent agency, or other agency of the United States . . . to use his official authority for the purpose of interfering with, or affecting the election or nomination of any candidate . . . .”<sup>6</sup> However, the specific prohibitions were not clear.

The 1939 Act applied only to federal government employees. Since grants of monies to state agencies were distributed by state officials, the need was apparent to regulate political activity among state government employees as well. In 1940, Senator Hatch introduced a second bill to extend to certain state employees the provisions of the original Act.<sup>7</sup> The proposal was attacked, largely because it failed to define any proscribed activities which came under the heading “any active part in political management or in political campaigns.”<sup>8</sup> In the election year atmosphere, the need to

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5. Some of these prohibited activities were compiled in Civil Service Commission Form 1236 (Sept. 1939). These restrictions may presently be found in CIVIL SERVICE COMMISSION PAMPHLET 20 (1966). For a complete compilation of these decisions see CIVIL SERVICE COMMISSION, POLITICAL ACTIVITY REPORTER (1971). Questions concerning Hatch Act restrictions may be presented in writing to the Office of the General Counsel, United States Civil Service Commission, 1900 E. Street, N.W. Washington, D.C. 20415.

6. Act of Aug. 2, 1939, ch. 410, § 2, 53 Stat. 1147, 1148.

7. S. 3046, 76th Cong., 3d Sess., 86 CONG. REC. 62 (1940).

8. The bill included the wording of the original Act. “No such officer or employee shall take any active part in political management or in political campaigns. . . .” S. 3046, 76th Cong., 3d Sess., § 12(a) (1940). Likewise, the bill made no attempt to clarify the confusion as to which activities were prohibited. The bill merely stated that

[t]he 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 prohibiting 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.

S. 3046, 76th Cong., 3d Sess., 12(a) (1940). Since the bill did not attempt to define any proscribed activities, it was attacked from the floor. 86 CONG. REC. 2940 (1940) (remarks of Senator Minton): “It will not do much good to put into the RECORD the rules and regulations we are writing into the statute, if we do not know what they are. No one on the floors of the Senate, not even the Senator from New Mexico [Senator Hatch], now knows what these rules and regulations are.” *Id.* at 2958 (remarks of Senator Brown): “No citizen of my State should be bound by a Federal Statute which merely says he may not engage in political activity. He has a right to know what political activity is to be condemned . . . . Strangely, one of the bills most ardent supporters was Senator Alben Barkley, who had been an outspoken opponent of the original bill. The Senator argued that

Congress has never attempted in any of its civil-service laws to define what is

curb political irregularities at the state level was recognized, and the bill was passed.<sup>9</sup> But the cloud of doubt which existed after passage of the 1939 Act continues to linger as the source and focal point of litigation setting public policy against constitutional rights.<sup>10</sup>

Eight years after the passage of the Act, the United States Supreme Court in *United Public Workers of America v. Mitchell*,<sup>11</sup> upheld Congress' right to impose restrictions on federal employee rights,<sup>12</sup> but made no attempt to clarify the meaning of "pernicious political activity."<sup>13</sup> A companion case<sup>14</sup> held that the provision in the Act including state employees was likewise constitutional, but again the Court made no attempt to discern proscribed activities. Rather, it contented itself, as before, with restating Con-

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pernicious political activity, for the situations are so variable, the facts are so different. Rarely, if ever, are the facts in two cases precisely alike. So I do not know how far Congress could go, or how wise it would be for Congress to define what is pernicious political activity. . . . This is such a flexible term, depending on the facts of each case, that I believe Congress by undertaking to include certain things, might not include many other things which ought to be included, simply because of the inability to think of all of them at once.

86 CONG. REC. 2952 (1940) (remarks of Senator Barkley).

9. Act of July 19, 1940, ch. 640, 54 Stat. 767. Senator George expressed the concern shared by many regarding the need for passage of the bill:

Within the past 7 and a fraction years . . . there has been the most rapid concentration of power in the Federal Government that has taken place at any given period of time in our whole history. In order to relieve many of the conditions we found in 1933 to be intolerable . . . we found it necessary to appropriate the largest sums of money that have ever been appropriated by our government in peacetime.

[T]o make effective the provisions adopted for the safeguarding of the enormous sums of money which we are appropriating to the several States and for the use of the general Government, we must say that certain political activities must cease within these organizations . . . . [T]he purpose of the proposed legislation . . . is to preserve freedom of elections. . . . [E]lections must remain free, that they must not be controlled by the Federal Government, or by State officials who are administering Federal funds.

86 CONG. REC. 2954-55 (1940).

10. Section 15 of the Act of 1940 merely incorporated activities proscribed by the Commission in the cases it adjudicated between 1883 and 1940. Since these proscribed activities were not codified, employees could not determine which activities were prohibited. Act of July 19, 1940, ch. 640, § 15, 54 Stat. 767. For a compilation of these cases, see CIVIL SERVICE COMMISSION, POLITICAL ACTIVITY REPORTER (1971).

11. 330 U.S. 75, 67 S. Ct. 556, 91 L. Ed. 754 (1947).

12. "The teaching of experience has evidently led Congress to enact the Hatch Act provisions. To declare that the present supposed evils of political activity are beyond the power of Congress to redress would leave the nation impotent to deal with what many sincere men believe is a material threat to the democratic system." *Id.* at 99, 67 S. Ct. at 569, 91 L. Ed. at 772.

13. Justice Reed, speaking for the majority, stated: "We need to examine no further at this time into the validity of the definition of political activity . . ." *Id.* at 103-4, 67 S. Ct. at 571, 91 L. Ed. at 775. However, Justice Black, dissenting, said: "[W]hat federal employees can or cannot do, consistently with the various civil service regulations, rules, warnings, etc., is a matter of so great uncertainty that no person can even make an intelligent guess." *Id.* at 110, 67 S. Ct. at 574, 91 L. Ed. at 778.

14. *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127, 67 S. Ct. 544, 91 L. Ed. 794 (1947).

gress' right to legislate to keep political activity separate from public employment.<sup>15</sup> The Court in *Mitchell* did state that classified employees could participate in nonpartisan political activity, reasoning that the Act "leaves untouched full participation by employees in political decisions at the ballot box and forbids only the partisan activity of . . . personnel deemed offensive to efficiency."<sup>16</sup> Unfortunately, subsequent cases left undisturbed this "shotgun approach" taken by the Act.<sup>17</sup>

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15. "The end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship." *Id.* at 143, 67 S. Ct. at 553, 91 L. Ed. at 806.

16. *United Public Workers of Am. v. Mitchell*, 330 U.S. 75, 99, 67 S. Ct. 556, 569, 91 L. Ed. 754, 772 (1947).

17. *Mancuso v. Taft*, 341 F. Supp. 574, 582 (D.R.I. 1972). Using the cases adjudicated by the Civil Service as the basis for prohibited activities, the courts found filing for political office prohibited. *Northern Va. Regional Park Authority v. United States Civil Serv. Comm'n*, 307 F. Supp. 888 (E.D. Va. 1970), *aff'd*, 437 F.2d 1346 (4th Cir.), *cert. denied*, 403 U.S. 936 (1971); *Wisconsin State Employees Ass'n v. Wisconsin Natural Resources Bd.*, 298 F. Supp. 339 (W.D. Wis. 1969); *Fishkin v. United States Civil Serv. Comm'n*, 309 F. Supp. 40 (N.D. Cal. 1969), *appeal dismissed*, 396 U.S. 278 (1970); *Smyth v. United States Civil Serv. Comm'n*, 291 F. Supp. 568 (E.D. Wis. 1968); *In re Ramshaw*, 266 F. Supp. 73 (D. Idaho 1967); *In re Higginbotham*, 221 F. Supp. 839 (W.D. Pa. 1963), *aff'd*, 340 F.2d 165 (3d Cir.), *cert. denied*, 382 U.S. 853 (1965); *Johnson v. State Civil Serv. Dep't*, 157 N.W.2d 747 (Minn. 1966); *Ivancie v. Thornton*, 443 P.2d 612 (Ore. 1968), *cert. denied*, 393 U.S. 1018 (1969). Membership on a political committee is also prohibited. *Palmer v. United States Civil Serv. Comm'n*, 297 F.2d 450 (7th Cir.), *cert. denied*, 369 U.S. 849 (1962); *Osheim v. United States Civil Serv. Comm'n*, 299 F. Supp. 317 (E.D. Wis. 1969); *Democratic State Cent. Comm. v. Andolsek*, 249 F. Supp. 1009 (D. Md. 1966); *Engelhardt v. United States Civil Serv. Comm'n*, 197 F. Supp. 806 (M.D. Ala. 1961), *aff'd*, 304 F.2d 882 (5th Cir. 1962) (per curiam). *But see Brooks v. Nacrelli*, 331 F. Supp. 1350 (E.D. Pa. 1971); *Gray v. City of Toledo*, 323 F. Supp. 1281 (N.D. Ohio 1971); *Rosenfield v. Malcolm*, 55 Cal. Rptr. 505 (1967). Soliciting votes for any partisan political candidate is also prohibited. *Jarvis v. United States Civil Serv. Comm'n*, 382 F.2d 339 (6th Cir. 1967); *Utah v. United States*, 286 F.2d 30 (10th Cir.), *cert. denied*, 366 U.S. 918 (1961); *Wages v. United States Civil Serv. Comm'n*, 170 F.2d 182 (6th Cir. 1948); *Gray v. Macy*, 239 F. Supp. 658 (D. Ore. 1965), *rev'd on other grounds*, 358 F.2d 742 (9th Cir. 1966); *City of Miami v. Sterbenz*, 203 So. 2d 4 (Fla. 1967); *State v. Stuler*, 122 So. 2d 1 (Fla. 1960). Circulating a petition has been proscribed. *In re Walker*, 168 N.E.2d 535 (Ohio 1960). *Contra*, *Heidtman v. City of Shaker Heights*, 126 N.E.2d 138 (Ohio 1955). It is interesting to note that the court has held writing a letter to the editorial department of a newspaper for possible publication is not a proscribed activity. In *Wilson v. United States Civil Serv. Comm'n*, 136 F. Supp. 104 (D.D.C. 1955), a government employee wrote a letter criticizing Governor Shivers of Texas and sent it to the *Houston Post*. The letter stated "I respect Republicans as such. I respect Democrats as such . . . . No one respects a renegade. Let's send Allen Shivers home." Upon its publication, his employment was terminated. Ordering him reinstated, the court said that where "there is an isolated, unsolicited, unpaid for, expression of opinion which might never have been published, and nothing more appears, a premeditated effort to engage in, or active participation in, a political campaign is not established. . . . An isolated letter which might appear as a contribution to an organized campaign cannot fairly be considered active participation in a political campaign." *Id.* at 106. Persons whose principal employment is not with the classified service are

The first state case to deviate from the Supreme Court was *Fort v. Civil Service Commission*.<sup>18</sup> Fort was a county employee who was also chairman of the county committee to reelect Governor Brown. This position brought him into conflict with prohibitions in section 41 of the county charter.<sup>19</sup> The court recognized that “[n]o one can reasonably deny the need to limit some political activities such as the use of official influence to coerce political action, the solicitation of political contributions from fellow employees, and the pursuit of political purposes during those hours that the employee should be discharging the duties of his position.”<sup>20</sup> The court went on to hold the provision unconstitutional because it was “not narrowly drawn but [was] framed in sweeping and uncertain terms that except only the right to vote and to express opinions ‘privately.’”<sup>21</sup> In an attempt to establish some criteria by which to adjudicate acts similar to the Hatch Act, the court remarked, “It must appear that restrictions imposed by a governmental entity are not broader than are required to preserve the efficiency and integrity of its public service.”<sup>22</sup>

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exempted from the Act. *Matturri v. United States Civil Serv. Comm'n*, 229 F.2d 435 (3d Cir. 1956); *Anderson v. United States Civil Serv. Comm'n*, 119 F. Supp. 567 (D. Mont. 1954).

18. 38 Cal. Rptr. 625 (1964).

19. The pertinent section of the charter reads: “No person holding a position in the classified civil service shall take any part in political management or affairs in any political campaign or election, or in any campaign to adopt or reject any initiative or referendum measure other than to cast his vote or to privately express his opinion.” Alameda County Charter § 41 (1962), *quoted in Fort v. Civil Serv. Comm'n*, 38 Cal. Rptr. 625, 626 (1964).

20. *Fort v. Civil Serv. Comm'n*, 38 Cal. Rptr. 625, 629 (1964).

21. *Id.* at 629. The basis of the court's decision to hold the provision unconstitutional was its overbreadth. “[O]verbreadth” is a term used to describe a situation where a statute proscribes not only what may constitutionally be proscribed, but also forbids conduct which is protected, *e.g.*, by the First Amendment's safeguards of freedom of speech and press.” *Overstock Book Co. v. Barry*, 305 F. Supp. 842, 851 (E.D. N.Y. 1969). The court based its holding on prior Supreme Court rulings on overbreadth, most notably *NAACP v. Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963). The Court in *Button* held unconstitutional a Virginia statute making it a criminal offense for attorneys to solicit business because the statute did not define “soliciting.” The Court reasoned that “[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.” *Id.* at 433, 83 S. Ct. at 338, 9 L. Ed. at 418. The court in *Fort* also cited *Shelton v. Tucker*, 364 U.S. 479, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960). The Court in *Shelton* stated that in the area of First Amendment freedoms that even if the goals sought are legitimate, they “cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.” *Id.* at 488, 81 S. Ct. at 252, 5 L. Ed. 2d at 237; *accord*, *Keyishian v. Board of Regents*, 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967); *Elfbrandt v. Russell*, 384 U.S. 11, 86 S. Ct. 1238, 16 L. Ed. 2d 321 (1966); *Torcaso v. Watkins*, 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982 (1961). *See generally Note, The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

22. *Fort v. Civil Serv. Comm'n*, 38 Cal. Rptr. 625, 629 (1964); *accord*, *Bagley v. Washington Township Hosp. Dist.*, 55 Cal. Rptr. 401 (1966); *Kinnear v. City &*

Perhaps no single state case more clearly illustrates the constitutional question involved than *Bagley v. Washington Township Hospital District*.<sup>23</sup> The California Supreme Court in reversing a hospital employee's dismissal for participating in political activity, set forth guidelines under which government agencies could require a waiver of constitutional rights as a condition of public employment. The court said that the agency must demonstrate "(1) that the political restraints rationally relate to the enhancement of the public service, (2) that the benefits which the public gains by the restraints outweigh the resulting impairment of constitutional rights, and (3) that no alternatives less subversive of constitutional rights are available."<sup>24</sup>

The first indication of a change in attitude by federal courts came in *Wisconsin State Employees Association v. Wisconsin Natural Resources Board*.<sup>25</sup> There the court recognized the significance of the state decisions, but stated that "[i]n any event, this court has the duty to follow a governing decision of the Supreme Court unless that decision has been clearly eroded by subsequent decisions which dictate a contrary result."<sup>26</sup>

Recently, the federal district court of the District of Columbia decided *National Association of Letter Carriers v. United States Civil Service Commission*.<sup>27</sup> That court held the Hatch Act provision, prohibiting government employees from taking any active part in political management or in political campaigns, unconstitutional.<sup>28</sup> The court stated: "The defect lies

County of San Francisco, 38 Cal. Rptr. 631 (1964); *DeStephano v. Wilson*, 233 A.2d 682 (N.J. Super. 1967); *Minielly v. State*, 411 P.2d 69 (Ore. 1966). See generally, Shartsis, *The Federal Hatch Act and Related State Court Trends—A Time for Change?*, 25 BUS. LAW. 1381 (1970).

23. 55 Cal. Rptr. 401 (1966). The plaintiff confined her activities on behalf of a recall campaign to her off-duty hours, and in seeking to influence interested citizens to vote for the recall, she did not advise them of her public employment. When she notified her employer of her intent to continue in the recall movement, her employment was terminated.

24. *Id.* at 403.

25. 298 F. Supp. 339 (W.D. Wis. 1969). The plaintiff, Kaukl, was employed by the Wisconsin Department of Natural Resources, and he filed as a candidate for sheriff. His employment was terminated pursuant to WIS. STAT. ANN. § 16.30 (1965), and the Hatch Act.

26. *Id.* at 350.

27. 346 F. Supp. 578 (D.D.C. 1972), *prob. juris. noted*, 41 U.S.L.W. 3330 (U.S. Dec. 12, 1972) (No. 72-634). The National Association of Letter Carriers and six federal employees brought a class action suit on behalf of all federal employees seeking a declaratory judgment that 5 U.S.C. § 7324(a)(2) (1970) (the provision of the Hatch Act which prohibits federal employees from taking any active part in political management or in political campaigns) is unconstitutional.

28. "An employee in an Executive agency or an individual employed by the government of the District of Columbia may not— . . . (2) take an active part in political management or in political campaigns." 5 U.S.C. § 7324(a)(2) (1970). The court ruled the provision unconstitutional because of its overbreadth, arguing that "[i]f the Congress undertakes to circumscribe speech, it cannot pass an act which, like this one, talks in riddles, prohibiting in one breath what it may be argued to have allowed



not in the basic underlying purpose to limit certain partisan political activities by federal employees but rather in its drafting. Prohibitions are worded in generalities that lack precision."<sup>29</sup> The court recognized the significance of *Mitchell*, but stated that "even if *Mitchell's* holding is considered binding . . . it is inconsistent with subsequent decisions delineating First Amendment freedoms."<sup>30</sup>

The final disposition of the case has not been rendered.<sup>31</sup> Until it is, over 2,700,000 federal employees wait in political limbo,<sup>32</sup> uncertain of their future role in the country's political process. This represents a threefold increase since the inception of the original Act. This increase has been paralleled by an increase in political awareness by the general public. Sadly, the Hatch Act has not been kept abreast of changing conditions. Possibly taking note of Justice Reed's statement in *Mitchell* concerning the expansion in the ranks of government personnel,<sup>33</sup> the court in *National Association of Letter Carriers* stated that "[t]he decisions, coupled with *changes in the size and complexity of public service*, place *Mitchell* among other decisions *outmoded by passage of time*."<sup>34</sup> In view of the large number of personnel employed by state and federal government agencies, certain restrictions are necessary. Rather than the broad guidelines now in force, however, restrictions to regulate political activities should "carry some well defined limitations upon participation in partisan political matters . . ."<sup>35</sup> This would enable the employee to more fully participate in political activity, and at the same time protect the smooth functioning of government agencies.

The necessity for providing a framework within which employees may operate without fearing disciplinary repercussions is apparent. Although

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in another, leaving the citizen unguided but at hazard for his job." *National Ass'n of Letter Carriers v. United States Civil Serv. Comm'n*, 346 F. Supp. 578, 585 (D.D.C. 1972).

29. *National Ass'n of Letter Carriers v. United States Civil Serv. Comm'n*, 346 F. Supp. 578, 582 (D.D.C. 1972).

30. *Id.* at 585. Of subsequent decisions relied upon, *Keyishian v. Board of Regents*, 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967), is prominent. See Comment, *The Hatch Act—A Constitutional Restraint of Freedom?*, 33 ALBANY L. REV. 345 (1969).

31. *National Ass'n of Letter Carriers v. United States Civil Serv. Comm'n*, 346 F. Supp. 578 (D.D.C. 1972), *prob. juris. noted*, 41 U.S.L.W. 3330 (U.S. Dec. 12, 1972) (No. 72-634).

32. *United States Civil Serv. Comm'n, Federal Civilian Manpower Statistics* (Nov. 1972).

33. "We do not know whether the number of federal employees will expand or contract; whether the need for regulation of their political activities will increase or diminish. The use of the constitutional power of regulation is for Congress, not for the courts." *United Public Workers of Am. v. Mitchell*, 330 U.S. 75, 102, 67 S. Ct. 556, 571, 91 L. Ed. 754, 774 (1947).

34. 346 F. Supp. 578, 585 (D.D.C. 1972) (emphasis added).

35. *Id.* at 583.

the Hatch Act is presently codified,<sup>36</sup> and section 7324(a)(2) of the Act is incorporated into the rules of the Civil Service Commission,<sup>37</sup> uncertainty is still present. Also, the rules promulgated by the Commission interpreting the meaning and extent of the court decisions are found in the statutes.<sup>38</sup> While this may seem a more definitive guideline, a close reading of these code provisions reveals that they do little more to delineate proscribed and permitted activities than does the Act itself. Viewed as a whole, the codifications do not alleviate the problem, especially since the permitted activities are merely ones the courts have recognized.<sup>39</sup>

Since the scope of permitted activities is vague, it is easily understood why government employees fear any political activity. Many are career employees who have attained job security. To have their employment terminated for political activity would be a serious setback. Likewise, younger employees interested in advancement or a career could find their employment suddenly severed. Guarantees protecting the worker against unwarranted termination are found in the codes.<sup>40</sup> Although the Commission does

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36. 5 U.S.C. §§ 7321-27 (1970). The Act as applied to state employees is in 5 U.S.C. §§ 1501-08 (1970).

37. No person employed in the executive branch of the Federal Government, or any agency or department thereof, shall use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No person occupying a position in the competitive service shall take any active part in political management or in political campaigns, except as may be provided by or pursuant to statute. All such persons shall retain the right to vote as they may choose and to express their opinion on all political subjects and candidates. 5 C.F.R. § 4.1 (1972).

38. 5 C.F.R. §§ 733.101-402 (1972) (federal employees); 5 C.F.R. §§ 151.101-.138 (1972) (state employees).

39. "All employees are free to engage in political activity to the widest extent consistent with the restrictions imposed by law and this subpart." 5 C.F.R. § 733.111 (a) (1972) (emphasis added). Since the law is the Act, the restrictions "imposed" by law are comprised of cases adjudicated interpreting the Act. Thirteen activities are listed as permissible under this section: (1) Register and vote; (2) express an opinion as an individual privately and publicly on political subjects and candidates; (3) display a bumper sticker, political picture, badge, sticker or button; (4) participate in the activities of a civic, professional or other organization; (5) be a member of a political party and participate to the extent consistent with law; (6) attend a political convention or fund raising dinner; (7) sign a political petition as an individual; (8) make a political contribution; (9) take an active part in the election of an independent, or run for office as an independent; (10) take an active part in the election of a partisan candidate to the extent of the exception in 5 C.F.R. § 733.124 (1972); (11) be politically active in connection with a question which is not specifically identified with a political question; (12) serve as an election judge or clerk or in similar position to perform nonpartisan duties; and (13) otherwise participate fully in public affairs, except as prohibited by law, in a manner which does not compromise his efficiency or integrity as an employee or the neutrality, efficiency, or integrity of his agency. *Id.* § 733.111(a).

40. "An agency may not take an adverse action against an employee covered by this part except for such cause as will promote the efficiency of the service." *Id.* § 752.104. Such cause as will warrant dismissal includes the following: delinquency or misconduct; criminal, immoral or notoriously disgraceful conduct; inten-

provide an investigation when employment is terminated,<sup>41</sup> the language of the statute is so broad that indiscriminate firing is still possible.<sup>42</sup>

There are three principal reasons why the Act is unsuitable. It was intended to maintain free elections by insuring employees a job free from coercion at the ballot box. Because supervisory coercion is no longer prevalent,<sup>43</sup> this oft-stated purpose no longer presents a cogent argument for the Act's retention. Instead, it has become a millstone for employees, prohibiting them from pursuing their constitutional right to participate in the political process. The overbreadth of the Act has also unconstitutionally restricted the exercise of free speech. Restrictions concerning political activity are necessary, but the Act's "[b]road prophylactic rules in the area of free expression are suspect,"<sup>44</sup> for they not only cure the ills intended, but have a

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tional false statement in examination or appointment; refusal to furnish testimony as required; habitual use of intoxicating beverages to excess; reasonable doubt as to loyalty; any legal or other disqualification which makes the individual unfit for the service. *Id.* § 731.201. The last clause is the catchall clause, which will enable the service to terminate an employment should the employee's conduct be detrimental to the service.

41. After a review of the report listing the charges against the employee, the charges will be served on him at least 30 days before the date of the proposed adverse action. The employee may answer the charges within 15 days, and after the review of the answer the case will be remanded to the Commission for decision. If warranted by the facts, a motion for a continuance will be granted, at which time a hearing is set. Upon termination of the hearing, the Commission's decision will be given. If the Commission concluded that the employee engaged in prohibited political activity, the penalty is removal from the service, unless the Commission unanimously agrees that a less severe penalty is justified. Suspension without pay for 30 days is the minimum penalty. 5 C.F.R. §§ 733.131-.137 (1972); *see* 5 C.F.R. §§ 5.2-5.4 (1972).

42. In essence, notwithstanding the present qualifying language provision, the present language is somewhat broad . . . . It is broad in the sense that it could be construed to prohibit certain activities that may not be sufficiently detrimental to the neutrality, efficiency, or integrity of the civil service as to justify the infringement of individual political rights.

COMMISSION ON POLITICAL ACTIVITY OF GOVERNMENT PERSONNEL, HEARINGS, vol. 3, at 15 (1968) (Statement of John W. Macy, Jr., Chairman of the U.S. Civil Service Comm'n).

43. The economic tribulation experienced by our country in the 1930's resulted in legislative approval of several national programs designed to assist destitute citizens. Scandals related to some relief projects and internal party difficulties over patronage provided the background for Congressional action in 1939 and 1940 to prevent political abuse of citizens because of their dependence on government-sponsored benefits.

In retrospect, the Hatch Act was a product of its time. Given the circumstances leading to its enactment, the statute met a pressing need.

Conditions have changed substantially in the intervening 33 years. . . . [I]n light of the attitude of the public on politics, the political rights of civil employees, and the necessity for retaining effective, impartial service to all citizens, Congress should approve fundamental changes in the Hatch Act.

Statement of the Government Employees Council to the Senate Committee on Post Office and Civil Service, 92d Cong., 2d Sess. 226 (1972).

44. NAACP v. Button, 371 U.S. 415, 438, 83 S. Ct. 328, 340, 9 L. Ed. 2d 405, 415 (1963).

chilling effect on the exercise of fundamental rights. This overkill has served to reduce government employees to second class citizens. Finally, the tremendous increase in the number of government employees, coupled with changing attitudes concerning political awareness, have made the Act outmoded. In an era of political awareness, an Act which so seriously curtails the political freedom of one-tenth of the voting populace is insupportable.<sup>45</sup>

Government agencies could effectively function if operated strictly on merit.<sup>46</sup> This would insure the employee an atmosphere free from supervisory coercion. The employee would be free to pursue political activities separate from his employment as long as it did not adversely affect his job performance, or that of his co-worker. Should this occur, the employee could then be informed of possible repercussions should the situation continue.

In the alternative, Congress should restructure the Act to provide a clear framework within which both the government agency and the employee will be able to function freely. It is impossible to include every type activity detrimental to efficient agency operation into one specific law. A revision to bring the Act into focus with the realities of today is, however, possible. In the past year, three bills were introduced in Congress to accomplish this.<sup>47</sup> As yet, no positive legislation has been enacted. However, a restructuring of the Act will be necessary if the Supreme Court in *National Association of Letter Carriers* declares it unconstitutional. Restructuring is

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45. [T]he Hatch Act impinge[s] on the political and civil rights of about 10% of the voting population. When it is realized that about 2,750,000 federal employees, their spouses and children (presumably under the employees control), persons in the military services, or employed in a state or local government where part of the salary stems from the federal treasury or employed in poverty or other private organizations to which funds are allotted by the Federal Government are subject to the Act, the insidious scope of the Hatch Act begins to become manifest. The Hatch Act presents a clear and present danger to the democratic system of the republic.

Remarks of Harry Zucker, President of the Veterans Administration, A.F.L., also a Government Legal Rating Specialist, *Hearings Before the Committee on Post Office and Civil Service*, 92d Cong., 2d Sess. 246 (1972).

46. "The term 'Merit System' has a well-defined and well-understood meaning. It is defined . . . as: 'The system of appointing employees to office . . . and of promoting them for competency only; opposed, in U.S., to Spoils System.'" *Heck v. Hall*, 190 So. 280, 285 (Ala. 1939). *See also* *Kipher v. City of Lima*, 32 N.E.2d 488 (Ohio Ct. App. 1936). "[T]he very purpose and effect of the merit system is to take from the appointing officer the right of arbitrary removal, either directly or indirectly, of an appointee, which he would otherwise have." *Donaldson v. Sisk*, 113 P.2d 860, 865 (Ariz. 1941).

47. *Hearings on H.R. 668 Before a Committee on House Administration*, 93d Cong., 1st Sess. (1973); *Hearings on S. 3374 Before the Committee on Post Office and Civil Service*, 92d Cong., 2d Sess. (1972); *Hearings on S. 3417 Before the Committee on Post Office and Civil Service*, 92d Cong., 2d Sess. (1972).