

THE HATCH ACT—A REAPPRAISAL

MILTON J. ESMAN†

THE growth of government in the past quarter century has sprung from social needs which only the resources of government seemed competent to meet, from war and rumors of war and the legacy of war, from depression, from economic and social injustices, and from aspirations for a better life. These forces have affected every level of government. Though the expansion of Federal activities has been most spectacular, state and local services too have increased enormously. Government is likely to remain big, and to grow.

Big government breeds its special problems. One of them is its hierarchy of officials and employees—or bureaucracy, to use the common bugaboo. Today more than six million civilians work for government, more than one-tenth of the total labor force. More than two million work for the Federal Government, four million for state and local agencies—including school-teachers. If we add one and one-half million in the Armed Forces—before the Korea emergency—the figure is even more impressive. For every twenty-five citizens there is one civilian government employee. Public employees are thus a significant group in our society, if measured in numbers alone. Beyond that, the authority of the state, which they exercise, imparts to them a distinct importance. The public which supports them by its taxes, benefits from their services and submits to their regulations, exercises a continuous surveillance over their loyalty, integrity, efficiency and devotion. Though no caste or corps of “officials” with special rights and privileges has developed in America, Government employees have nevertheless been looked upon as a separate group and subjected to controls which seldom apply to their fellow citizens. The regulation of their political activity is worth examining.

Until recently, the spoils system was the main tradition of public employment in the United States. Under it public employment is a reward for party service. Public employees are required to contribute funds and to work for their party organization and expect to be replaced when their party or their sponsor goes out of office. The quality of administration which usually accompanies the spoils system is too familiar to need recounting. Yet even today while the political patronage system has been virtually eliminated in many agencies of the Federal Government and in many states and cities, there are many jurisdictions still untouched by civil service reform. The issues raised in this article apply only where the civil service system is in effect. They are irrelevant to those areas which are still governed by political patronage.

The civil service movement has been a sustained campaign to eliminate partisan political consideration from public employment, to select candidates

†Formerly of the United States Civil Service Commission, Washington, D. C.

in open competition according to "merit and fitness", to protect their careers from political influence, to professionalize and otherwise raise the standards of government employees. One of its main objectives has been to protect public employees from political exploitation, from pay deductions and kick-backs, from any obligation to perform partisan political service of any kind, and to make unlawful political coercion and political reprisals against civil servants. Where the civil service movement has been successful these principles have been written into law and enforced. Frequently these laws have not only protected civil servants from the exactions of party machines, but conversely have sought to protect both freedom of election and administrative efficiency from the effects of a political bureaucracy. This has usually resulted in restrictions on the rights of civil servants to run for office or to participate actively in political management or political campaigns. Thus a government pledged to "insure the blessings of liberty" to all has been constrained to deny the fundamental right of political activity to its own employees who comprise a substantial block of citizens. An official British report sets forth this problem:¹

"(i) In a democratic society it is desirable for all citizens to have a voice in the affairs of the State and for as many as possible to play an active part in public life.

"(ii) The public interest demands the maintenance of political impartiality in the Civil Service and a confidence in that impartiality as an essential part of the structure of Government. . . ."

The resolution of this dilemma will continue to perplex democratic statesmen. Those who emphasize civil rights acknowledge the need for some restraints on the political activity of civil servants. Those who emphasize the public interest in an impartial administration are careful to leave inviolate many of the political rights of government employees. Where must the line be drawn? Dozens of civil service agencies have toiled with this problem and arrived at their separate solutions. By far the largest and most important of them, often setting the pattern for other jurisdictions, is the Federal Government. Federal agencies have many decades of experience regulating the political activities of civil servants both by administrative law and by statute. The subject has been further illuminated by a recent debate in Congress over proposed revisions of the Hatch Act—amendments which first provoked a Presidential veto, but later were enacted in a form acceptable to the President. I propose to analyze and evaluate some of the important problems in public policy which are inherent in this type of regulation and discuss some of the

1. *Report on the Political Activities of Civil Servants*, 12 REPORTS FROM COMMISSIONERS, INSPECTORS, AND OTHERS 717, ¶ 37 (1949) (hereinafter cited as *Report*).

recent legislative developments. Technicalities of administration will be omitted since they are authoritatively treated elsewhere.²

HISTORY

The long history of efforts to limit political activity among Federal employees has been extensively described elsewhere.³ Although Thomas Jefferson in 1801 warned the handful of Federal employees of his day that it was "improper" for them to attempt to influence the results of elections and President Harrison forty years later directed a similar order, little was accomplished until the last quarter of the nineteenth century. Under the impact of the civil service reform movement which three years earlier had forced the Civil Service Act through a reluctant Congress, President Cleveland in 1886 issued a directive forbidding "obtrusive partisanship" among Federal employees and pointing out that "proper regard for the proprieties and requirements of official place will also prevent their assuming the active conduct of political campaigns."⁴

Twenty-one years later President Theodore Roosevelt, a former Civil Service Commissioner, issued an Executive Order which tightened the restrictions on political activity among classified civil servants:

"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."⁵

This order was incorporated into the civil service rules and remained in effect until 1939. Under it, the Civil Service Commission developed an extensive administrative experience in defining prohibited political activity and adjudicating individual cases. In 1939 the Hatch Act⁶ extended to all employees of the Federal Government the restrictions which previously had applied only

2. The Civil Service Commission published late in 1949 an annotated compendium of Hatch Act decisions prepared by James W. Irwin, Chief Hearing Examiner. (HATCH ACT DECISIONS (POLITICAL ACTIVITY CASES) OF THE UNITED STATES CIVIL SERVICE COMMISSION). This volume is recommended as a comprehensive review of the Commission's procedures and decisions in enforcing the Hatch Act. It is available at the Superintendent of Documents, Government Printing Office.

3. See Kaplan, *Political Neutrality of the Civil Service*, 1 PUBLIC PERSONNEL REVIEW 10 (April 1940); Friedman & Klinger, *The Hatch Act: Regulation by Administrative Action of Political Activities of Governmental Employees*, 7 FED. B.J. 5 (1945); Howard, *Federal Restrictions upon Political Activity of Government Employees*, 35 AM. POL. SCI. REV. 470 (1941); Heady, *The Hatch Act Decisions*, 41 AM. POL. SCI. REV. 687 (1947).

4. Memorandum to Department Heads, July 14, 1886, in 8 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897 494 (1898).

5. Exec. Order No. 642 (June 3, 1907).

6. 53 STAT. 1147 (1939), as amended, 5 U.S.C.A. §§ 118i-118n, 18 U.S.C.A. §§ 594, 595, 598, 600, 601, 604, 605, 608 (1950).

to those in the classified civil service. Section 9(a) of the Hatch Act provides in part:

"It shall be unlawful for any person employed in the executive branch of the Federal Government,⁷ or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects."

Section 15 of the Act defines the activities outlawed in the passage just quoted as those previously denied by the Civil Service Commission to civil service employees. Thus the Commission's common law, developed over the years by the case method, was coöpted into statute. Section 9(a) is enforced by the Commission against civil service employees, who now comprise more than 90% of the Federal service, and by department heads against other employees. Prior to the 1950 amendments which will be discussed later, the mandatory penalty for violation was removal from office.⁸

The second Hatch Act⁹ which was debated at great length in the United States Senate extended the coverage of the original Hatch Act to state and local employees whose principal employment is in connection with a Federally financed activity. After an administrative hearing the Commission first determines the question of guilt. If the defendant is guilty, the Commission then decides whether the offense warrants removal. If removal is warranted, the Commission notifies the state or local employing agency. If the offending employee is not removed, the Federal agency which finances the employee's activity may be directed to withhold the equivalent of two years pay from loans or grants to the state or local employing agency. Enforcement of this Act has involved some difficult questions of coverage and a number of interesting political and constitutional issues.¹⁰

7. The following persons or classes are exempted from the operation of § 9(a): (1) the President and Vice President of the United States; (2) persons whose compensation is paid from the appropriation for the office of President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal laws. 53 STAT. 1148, 5 U.S.C.A. § 118i(a) (1950).

8. From August 2, 1939 through June 30, 1950, 1665 complaints were received under Section 9(a), resulting in 172 removals with 117 cases still on hand. 67TH ANNUAL REPORT OF THE UNITED STATES CIVIL SERVICE COMMISSION 79 (1950).

9. 54 STAT. 767 (1940).

10. These are exhaustively discussed by Friedman & Klinger, *supra* note 3, at 138-67.

The states rights issue which inevitably arose from this legislation was summarily dismissed by the Supreme Court.¹¹ At first violent prophecies were made that Federal regulation of the political activity of state employees would presage gradual extinction of the political rights of all who receive Federal funds for any purpose, farm subsidies, old age assistance, Federal contracts, to mention a few. Ten years have passed, and the fears have abated. Regulating the political activities of state and local employees is now considered to involve substantially the same issues and the same principles as apply at the Federal level. To simplify the scope of this article it will be limited to a discussion of the problem as it affects Federal employees.

In general, the Civil Service Commission has held that the following types of activity constitute an "active part in political management or in political campaigns":

1. Participation, except as a spectator, in political conventions.
2. Active participation, including speaking, in party primary meetings or caucuses.
3. Organizing, conducting, or addressing a public political meeting or participating in a political parade.
4. Holding the office of political committeeman.
5. Organizing, holding office in, or addressing a political club or committee thereof.
6. Soliciting, receiving, or otherwise handling political funds.
7. Distributing campaign literature.
8. Publishing or contributing to a partisan newspaper or publishing any letter or article for or against a party candidate or faction.
9. Any activity at the polls except voting.
10. Initiating or circulating nominating petitions.
11. Running for public office.
12. "[E]mployees are forbidden to become prominently identified with any political movement, party, or faction, or with the success or failure of any candidate. . . ."¹²

Under the terms of the Hatch Act as enforced by the Commission, Federal employees may:

1. Vote.

11. *Oklahoma v. Civil Service Commission*, 330 U.S. 127, 142 (1947).

12. U. S. CIVIL SERVICE COMMISSION, *POLITICAL ACTIVITY AND POLITICAL ASSESSMENTS OF FEDERAL OFFICE HOLDERS AND EMPLOYEES* 13 (1944).

2. Contribute to campaign funds (but not in a Federal building or to another Federal employee).
3. Join political organizations.
4. Attend political meetings.
5. Participate actively in civic associations or civic betterment groups.
6. Sign petitions.
7. Wear badges (but not at work).
8. Speak or write publicly on political subjects so long as they are not connected with political campaigns.

VALIDITY OF RESTRICTIONS ON POLITICAL ACTIVITY OF FEDERAL EMPLOYEES

There is uniform agreement even among those who advocate rigid restrictions on the political activities of Federal employees that their right to vote, to join and contribute funds to political organizations, and to express political views should not and constitutionally cannot be abridged. On the other hand, those who oppose these restrictions concede that political activity must not be conducted on official time or on government property, that no display of partisanship should be permitted on the job, and that political activity must not be permitted to impair the efficient performance of government business. They also agree that government employees must conscientiously enforce the law and loyally cooperate with their official superiors regardless of personal or political feeling. Civil servants must also be "*protected from exploitation by party organizations.*"¹³ They should be free from political assessments or any obligation to solicit votes, circulate petitions or perform any other party service and those who seek to extract such services should be liable to criminal sanctions. Security of tenure and opportunities for career advancement should be unaffected by political considerations.

At the two extremes of this controversy there is substantial agreement. The issue in dispute is this: Shall Federal employees of their own free will, on their own time, and without jeopardizing their efficiency be permitted to run for office or take an active part in political campaigns or in political organizations?

Opponents of political restrictions rely on three principle points. (1) Such restrictions abridge the constitutional rights of government employees; (2) they dilute the quality of the Federal service; and (3) the ethical standards of public employees can be relied upon to protect the service from embarrassment without recourse to the comprehensive restrictions now in force.

13. Sayre, *Political Neutrality*, in MARX, PUBLIC MANAGEMENT IN THE NEW DEMOCRACY 213 (1940).

1. The constitutional argument which has troubled many was forcefully epitomized by Justice Black dissenting in the Supreme Court test of the Hatch Act.

"There is nothing about federal and state employees as a class which justifies depriving them or society of the benefits of their participation in public affairs. They, like other citizens, pay taxes and serve their country in peace and in war. The taxes they pay and the wars in which they fight are determined by the elected spokesmen of all the people. They come from the same homes, communities, schools, churches, and colleges as do the other citizens. I think the Constitution guarantees to them the same right that other groups of good citizens have to engage in activities which decide who their elected representatives shall be.

* * *

"The section of the Act here held valid reduces the constitutionally protected liberty of several million citizens to less than a shadow of its substance. It relegates millions of federal, state, and municipal employees to the role of mere spectators of events upon which hinge the safety and welfare of all the people, including public employees. It removes a sizable proportion of our electorate from full participation in affairs destined to mould the fortunes of the Nation. It makes honest participation in essential political activities an offense punishable by proscription from public employment. It endows a governmental board with the awesome power to censor the thoughts, expressions, and activities of law-abiding citizens in the field of free expression, from which no person should be barred by a government which boasts that it is a government of, for, and by the people—all the people. Laudable as its purposes may be, it seems to me to hack at the roots of a Government by the people themselves; and consequently I cannot agree to sustain its validity."¹⁴

2. It is claimed that the Hatch Act restrictions will devitalize the Federal service and impair the vigor of public life. "If the civil servant is to be denied the responsibilities and rights of citizenship, if he is to be denied active participation in the discussion of political issues, he will be in fact *reduced to a sub-citizen status*, a status which will be unattractive to the ablest members of the community."¹⁵ Presumably many of our ablest citizens might shun public careers if the price demanded of them is political "sterilization" and they are barred from some of the major rights of citizenship. Such enforced withdrawal of public employees from controversial public issues would damage public life. Government employees as a group are among the highest in

14. *United Federal Workers of America v. Mitchell*, 330 U.S. 75, 111, 115 (1947).

15. Sayre, *supra* note 13, at 210.

education, civic consciousness, and information on public affairs. They should therefore be encouraged to express themselves on public problems and assume an active role as participants and leaders, not merely as spectators, in community affairs.

3. British and American opponents of political restrictions join in the claim that the professional ethics of public employees could be relied upon to prevent abuses if they were permitted to be active in party politics. The likelihood of a few violators of these standards should not bar the whole body of government employees. The British employee organizations proposed the following rule (which incidentally was not accepted) :

“Civil servants are free to engage in party political activity and it is left to their discretion and good sense to do so with due regard to their rank, the functions of their Department and their duties in it, on the understanding that an officer who by grossly negligent or willful action or comment on a matter of party politics creates an intolerable position for his Department will be liable to disciplinary action.”¹⁶

This would be consistent with German practice under the Weimar republic. It has been suggested even that relaxing the detailed restrictions on public employees would stimulate the development of professional standards of self restraint. These self imposed restraints would adequately protect the service without compromising the civil rights of government employees.¹⁷ The cure for adult delinquency is an adult version of Boys Town.

Supporters of the Hatch Act philosophy have their barrage of arguments. Constitutionally they have all the better of it. Said the Supreme Court in upholding the Hatch Act:

“Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection.”¹⁸

The Court quotes favorably Justice Holmes' Massachusetts opinion in 1891 that “the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman”.¹⁹ The Hatch Act, then, is clearly constitutional.

On the merits of the policy which the Hatch Act enforces the more significant arguments are these:

16. *Report, supra* note 1, ¶ 29.

17. Marx, *Comparative Administrative Law: Political Activity of Civil Servants*, 29 VA. L. REV. 52 (1942).

18. *United Federal Workers v. Mitchell*, 330 U.S. 75, 99 (1947).

19. *McAuliffe v. New Bedford*, 155 Mass. 216, 220 (1891).

(A) The party in power might crack the whip over Federal employees and force them to work for the party and its candidates. A machine of this size would be virtually impossible to defeat in an election. One party thus might perpetuate itself in power through the forced labor of Federal employees and the system of free elections which is vital to democratic government would be totally subverted. Laws which merely forbid the coercion of Federal employees are not enough to eliminate this danger. Federal employees must be neutralized politically by a prohibition against their active participation in politics. Such restrictions give them a firmer legal basis to resist the subtle pressure of their official superiors and their political allies. This was the most telling argument in favor of the original Hatch Act²⁰ and helped to carry the second Hatch Act through the Senate in the bitter, prolonged debates of 1940. Where the spoils system has been rampant, employees have welcomed restrictions on their own political activity as an enhancement of their dignity and a liberation from the badgering of party bosses. Thus the major employee unions in the United States have not strongly opposed the political neutralization of their members. In contrast the British employee groups have vigorously attacked similar restrictions.

(B) The spectre of "bureaucracy" as a political force has disquieted many conservative citizens and convinced them that Federal employees must be neutralized politically lest they organize themselves into an aggressive power bloc. The rapid growth of the Federal service, an uneasy pervasive suspicion toward big government and its enlarged civil service, the examples of politically influential bureaucracies in many foreign governments have alarmed many who are already "anti-government" in their orientation. They readily conclude that the public interest requires the political neutralization of our vast civil service before it becomes a dangerous, self-seeking, political force which might undermine responsible government and assume an independent role in public affairs.

(C) Career employees must serve with equal devotion successive department heads of differing views and opposing political commitments. If the career system is to survive, a department head upon assuming office must be assured of the loyalty of the career officials he inherits. Otherwise in self-defense he will feel compelled to circumvent the career system in order to find subordinates whom he can trust. Personal adjustments between a new department head and the permanent staff, not to mention differences in policy and orientation, can be tense enough even under favorable conditions. The introduction of violent political differences would be fatal to this delicate adjustment. Certainly a department head could not trust a subordinate who

20. This was emphasized by Senator Taft in the 1950 debates: "[T]he danger, as I see it, in which we are interested is that the Federal government may use the vast power of its 2,000,000 employees in political elections. The act was originally enacted to meet that danger." 96 Cong. Rec. 9093 (June 21, 1950).

had worked hard for the opposition and stood to benefit personally and politically by embarrassing the administration in office.

Thus the continuity of administration and expertise in the management of public affairs, values inherent in the career system, depend on political neutrality.²¹ To state it another way, political neutrality among career civil servants is a necessary corollary to efficient and responsible administration. It can greatly simplify the relationship of department heads and their permanent staffs, though it cannot eliminate all the differences that may divide them.

(D) The civil service as an institution would be hopelessly demoralized if the bars against political activity were raised. As the Masterman Committee in Great Britain observed:

“There is finally to be considered the harmful effect upon the Service itself if the political allegiance of individual civil servants became generally known to their superior officers and colleagues. If a Minister began to consider whether A, on account of his party views, might be more capable of carrying out his policy than B, the usefulness of B would be limited and the opportunities of A would be unfairly improved. This would become known, and a tendency to trim the sails to the prevailing wind would be one consequence. Another would be a cynicism about the reasons for promotion very damaging to morale. If it be thought that we have exaggerated this risk, we would point to the experience of those countries which are suffering from the consequences of taking a course different from our own. The danger is, we believe, a real one. It may result from only small beginnings, but, once begun, it produces a snowball effect, which is difficult, if not impossible, to check. Once a doubt is cast upon the loyalty of certain individuals or upon the equity of the promotion-machinery, an atmosphere of distrust may rapidly pervade an office and affect the arrangement of the work and damage the efficiency of the organisation.”²²

It is not fanciful to imagine the effect upon an administrative official of a subordinate who as ward chairman or state committeeman could demand political favors from elective officials. Who would be the real power in such an office situation? How many officials would try to build their administrative careers by outside political activity? The civil service would be shot through with politics, promotions and other rewards would inevitably go to those who worked most effectively for the party in office, and the morale of the service as a professional group would be gravely undermined. As the late Harold Laski observed of the British service, “the knowledge that this (political)

21. On this point Herman Finer has some interesting observations in *THE THEORY AND PRACTICE OF MODERN GOVERNMENT* 884-85 (1949).

22. *Report, supra* note 1, ¶ 43.

road is debarred to them is vital not only to the *esprit de corps* of the service but also to the freedom from political influence on its habits."²³

In my opinion this last argument is decisive. Even the British service with its long and honorable tradition of party neutrality could not risk the consequences of political involvement among its members. In our setting, where the spoils system still thrives in many states and cities and the neutrality of the Federal service has not been fully established, a general relaxation of restrictions on political activity would almost certainly escort the spoils system into many of our public offices. Even today, residues of this phenomenon are not unheard of. The quality of public administration, which has been steadily improving, would certainly suffer. I have an uneasy feeling about restricting the civil rights of any group of citizens but I cannot successfully reconcile an impartial and efficient career service with partisan political activity by government employees. The influence of their political activity even outside working hours would inevitably spill over into official relationships with demoralizing effect upon the service. The current statutory and administrative limitations on this subject represent, therefore, a sane and wholesome reaction to a very real danger.

SCOPE OF THE RESTRICTIONS

Assuming that political neutrality is essential to good government must the same restrictions apply to all employees? In Britain where the tradition of neutrality is more deeply rooted than here, they have long distinguished between "civil servants" as traditionally conceived and industrial employees of the government. The latter are permitted to engage freely in political activity—off the job—since they neither make policy, nor assist those who make policy, nor serve the public in direct contact. The Masterman Committee, despite its strict views on this subject, advocated the extension of this freedom to "minor and manipulative employees."²⁴ This point was the basis of Justice Douglas' dissenting opinion in the Hatch Act case:

"But Poole, being an industrial worker, is as remote from contact with the public or from policy making or from the functioning of the administrative process as a charwoman. The fact that he is in the classified civil service is not, I think, relevant to the question of the degree to which his political activities may be curtailed. He is in a position not essentially different from one who works in the machine shop of a railroad or steamship which the Government runs, or who rolls aluminum in a manufacturing plant which the Government owns and operates. Can all of those categories of industrial employees constitutionally be insulated from American political life? If at some future time it should come to pass in this country, as it has in England,

23. Laski, *The British Civil Service*, 26 YALE REVIEW 333, 340 (1937).

24. *Report, supra*, note 1, ¶93. Their recommendations would extend full political privileges to an additional 200,000 employees.

that a broad policy of state ownership of basic industries is inaugurated, does this decision mean that all of the hundreds of thousands of industrial workers affected could be debarred from the normal political activity which is one of our valued traditions?"²⁵

The application of this doctrine has been little debated in this country. Proponents of political neutrality have assumed that employees must be treated equally, that no group should be penalized or favored over others, that it would be administratively impossible to draw the line, that the spoils system may crop up just as virulently among industrial as among administrative and clerical employees. Opponents have been too busy attacking the principle of political neutrality to draw fine distinctions. It is likely, however, that this distinction will draw increasing attention in the future. What will happen to the political rights of industrial employees if more industrial operations should be taken over by the government? Would these employees, losing the economic right to strike, lose also the right to express themselves actively by political means? Granted the advantages of neutralizing administrative, executive, public contact employees and their auxiliaries, the old line civil servants, does the public interest require the extension of this principle to industrial and other service employees and the resultant limitation on their civil rights?

This is a neat problem. As Justice Douglas conceded, "the evils of the spoils system do not of course end with the administrative group of civil servants. History shows that the political regimentation of government industrial workers produces its own crop of abuses. Those in top policy posts or others in supervisory positions might seek to knit the industrial workers in civil service into a political machine. . . ." Industrial employees may not yet be safe enough from political rape to allow removal of the chastity belt which the Hatch Act provides. Yet the constitutional rights of large groups of citizens should not be abridged unless an essential public purpose is served and then only to the very minimum required. To quote Justice Douglas again:

"To sacrifice the political rights of the industrial workers goes far beyond any demonstrated or demonstrable need. Those rights are too basic and fundamental in our democratic political society to be sacrificed or qualified for anything short of a clear and present danger to the civil service system. No such showing has been made in the case of these industrial workers, which justifies their political sterilization as distinguished from selective measures aimed at the coercive practices on which the spoils system feeds."²⁶

The present restrictions on political activity, necessary though they be for many groups of employees, may be limiting unnecessarily important

25. *United Federal Workers of America v. Mitchell*, 330 U.S. 75, 122 (1947).

26. *Id.* at 126.

political rights of large numbers of industrial and service employees without commensurate benefit or protection to the public.

PARTICIPATION IN CIVIC AFFAIRS

Though Federal employees may not take an active part in political management or political campaigns, they may express themselves publicly on political issues so long as this expression does not involve active participation in a political campaign. Moreover

“Civil service employees may hold office in organizations established for social betterment. It is pointed out, however, that in certain circumstances activities of such organizations may take on a character of partisan political activity. Employees who become members or officers of organizations of this type must take the responsibility for seeing that the activities in which they engage do not become political in character.”²⁷

The Federal employee who is interested in public issues must be ever on guard to determine that an organization in which he holds office or an issue on which he expresses himself publicly has not shifted from the non-political to the partisan political sphere. Many societies which begin as non-partisan social betterment organizations one day find their programs deeply involved in partisan politics. World Federalism, for example, and the abolition of the Electoral College today are not partisan issues; tomorrow they may become so. The Commission once decided that holding office in the Anti-Saloon League was prohibited partisan activity.

The burden thus rests on the Federal employee to make this distinction and to deactivate himself in time. A Federal employee who has been active in an organization may suddenly find himself in peril as his organization becomes more successful and its program becomes the football of opposing political parties. To avoid this strain, (and any possible involvement in the loyalty program) many Federal employees eschew all activity in any organization or in behalf of any issue that seems even mildly controversial.²⁸ This civic inertia serves no useful purpose. It does not protect the political neutrality of the public service yet it corrodes the enthusiasm of government employees, penalizes good citizenship, and removes from active work in many worthwhile civic

27. U. S. CIVIL SERVICE COMMISSION, *op. cit.*, *supra* note 12, at 11.

28. A political scientist of moderate views observes: “The meaning of some of the provisions of the law is so vague that most employees hesitate to avail themselves of even those political privileges (except actual voting) which seem to be open to them lest they be judged to have overstepped the mark. . . .” GRAVES, *PUBLIC ADMINISTRATION IN A DEMOCRATIC SOCIETY* 201 (1950).

organizations prospective membership and leadership. Neither the community, nor the Federal employee should be required to pay that price.²⁹

Drawing the line between civic activity and partisan political campaigning can become a fine matter in specific cases. Yet unless the Hatch Act is to have absurd and even dangerous effects, a liberal enforcement policy is indicated.

LOCAL POLITICAL ACTIVITY

Before the passage of the Hatch Act in 1939 the Civil Service Commission under Executive Order³⁰ authority had authorized civil service employees in Maryland and Virginia communities near Washington to run for local office. This exception to the general prohibition against political activity recognized the heavy concentration of Federal employees in these communities and the difficulty of conducting local affairs without their participation. The Hatch Act of 1939 contained no language authorizing this practice, and for a year Federal employees in these communities were barred from local political activity. The amendments of 1940³¹ restored the Commission's previous discretion.

The Commission has authorized Federal employees in a number of communities in the Washington area to participate actively in local politics, but only on a non-partisan basis. This policy reflects the realities of American party politics where for the most part local party units are the cells of state and even of national party organizations. As a candidate or active worker in local partisan campaigns, a Federal employee would be hard-pressed not to identify himself with the state and national organization of his party. This would effectively evade the intent of the Hatch Act, especially in states operating under the party plan where local office seekers must pledge themselves to

29. The Masterman Committee's observations on this subject are pertinent:

"Though we are convinced that it is imperative that civil servants above the line should not take part in party political controversies, we should be loath to recommend the curtailment of the free expression of opinion by any citizen on matters which can be regarded as only incidentally or partially party-political in nature; these are numerous now that the activities of the government impinge upon the life of the citizen, directly or indirectly, at almost every point. We would instance the case of a national beauty spot threatened by some Government proposal to construct, for example, a factory or a bombing range. Many such matters have no party political connection. We should think it wrong for a member of the Department concerned to comment publicly on a proposal of this kind. On the other hand, we should not think it wrong for a member of another Department to express his views in print or on a public platform, even though they were in opposition to the Government's proposal—provided that the matter was one of public interest, that the civil servant wrote or spoke in his private capacity, and that he observed a becoming moderation."

Report on the Political Activities of Civil Servants, 12 REPORTS FROM COMMISSIONERS, INSPECTORS, AND OTHERS 717, ¶71 (1949).

30. Exec. Order No. 1472 (Feb. 14, 1912).

31. 54 STAT. 771 (1940), 5 U.S.C.A. § 118m (1950).

support the whole party ticket, including candidates for state and national office.

Politically, some solution was needed, and one came to pass. In Arlington County, Virginia, a group of Federal employees organized a non-partisan movement. After a series of strenuous battles at the polls and in the courts they unseated the long entrenched Democratic Party which is affiliated with the state organization and took control of the administrative machinery of Arlington County. When a bill amending the enforcement provisions of the Hatch Act was sent by the House of Representatives to the Senate, the Committee on Rules and Administration of the latter body, without public hearing, attached a rider to the bill. Its purpose was to eliminate the Commission's requirement of non-partisan participation in local elections. This revised language passed through several mutations in conference. A battle was fought behind the scenes in the Capitol and in the Washington newspapers between the non-partisans and the party regulars in Arlington, the "good government" groups supporting the non-partisans. Advocates of the amendment argued that non-partisanship was undermining the two party system and was unjust to Federal employees who desire to participate as party regulars. As the bill finally passed Congress, the Civil Service Commission retained control over the participation of Federal employees in local elections in the communities surrounding Washington and in other municipalities where the majority of the voters are Federal employees, "Provided, That no regulations promulgated under this section permitting any person to take part in political management or political campaigns shall impose any restriction on his doing so through the medium of any political organization or political party of his own choosing. . . ." ³²

This meant that the Commission could adhere to its traditional doctrine of non-partisanship and bar Federal employees in these communities from all political activity, but if the Commission agreed to their participation they could be active either as party men or as non-partisans. The Commission could no longer bestow the apple without the worm. Dissatisfaction with this amendment was an important reason for the Presidential veto which followed:

"If, as the measure intends, the political privileges of the Federal employees are now to be extended to the field of local partisan politics, there is no valid reason to confine the extension to geographic locations or to areas where the number of Government employees is predominant. If Federal employees are to be allowed to participate completely and actively in the selection of local officials, a move which I endorse, their participation should be permitted on a nation-wide basis.

"I feel the obligation to point out that this particular provision, as now worded, might not accomplish what it purports to do. In certain states

32. H.R. REP. No. 2004, 81st Cong., 2d Sess. 2 (1950).

or localities having so-called party plans, the provision would not represent any extension of rights now held. Where a party plan is in force, a Federal worker could not seek local office on a partisan ticket without supporting all other party candidates, whether for local, state, or national office. If he did support them actively, he would automatically be in violation of the Hatch Act. If he failed to give active support, he could be penalized by removal from the ballot. Thus, it would appear that in such a case the Federal worker gets nothing more than the rights which he already has. To protect the Federal worker in such circumstances against undue pressures to indulge in partisan activities, the Civil Service Commission should be authorized to deny the right to participate in local partisan politics wherever the party plan exists."³³

The President thus opposed both the present terms of the Hatch Act and the proposed amendment, but advocated instead that Federal employees throughout the country enjoy equally the right to participate in local politics so long as their local activity involves no obligation to support state or national candidates. This proposal departs sharply from the doctrine which has governed this subject for many years, which presupposes the inseparability of local, state, and national politics and the practical impossibility of divorcing partisan activity at one level from commitments in the others. Could a Federal employee take a local bride without marrying her state and national in-laws?

The exception authorized for the Washington area and other municipalities where the majority of voters are Federal employees is an expedient to permit local government to function properly in these municipalities. But it is an exception. Restricting the limited Washington-area group to non-partisan activity precludes their identification with one of the major parties and protects the service against the dangers of employee political activity which have already been discussed. Expansion of the exception is unnecessary. The Hatch Act already permits political activity of the strictest non-partisan character anywhere in the United States where none of the candidates represent political parties and where partisan issues are completely absent.³⁴

The British again serve us an example. The Masterman Committee, recognizing the great benefit which local government in Britain has derived from

33. White House Press Release of June 30, 1950.

34. "Nothing in the second sentence of section 118i(a) or in the second sentence of section 118k(a) of this title shall be construed to prevent or prohibit any person subject to the provisions of the Act from engaging in any political activity (1) in connection with any election and the preceding campaign if none of the candidates is to be nominated or elected at such election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected, or (2) in connection with any question which is not specifically identified with any National or State political party." 5 U.S.C.A. § 118n (1950).

the participation of national civil servants, advocates the continuation of this practice. They are wary, however, of the increasing trend toward party as opposed to non-partisan government which has been traditional in local affairs. They suggest that the entire policy be reviewed in five years to determine whether partisanship has so far extended to local government that the neutrality of the service is being compromised by the right of government employees to participate in local political affairs.³⁵

ENFORCEMENT

Some provisions of the Hatch Act are criminal in effect and carry criminal penalties. Those regulating the political activity of Federal employees are civil in effect and are enforced by administrative authority.³⁶ The Commission's power to enforce the political activity prohibitions was given specific legal sanction by the Hatch Act of 1939.³⁷

Before the Hatch Act the Commission was free to impose whatever punishment the offense seemed to warrant from outright removal to brief suspension or even a reprimand. This discretion was eliminated in 1939 by the language of the Act:

"Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person."³⁸

Penalties against employees not in the competitive service are imposed by department heads. Those against civil service employees by the department heads or the Civil Service Commission. Under the 1939 provisions, violators were permanently foreclosed from the position they held at the time of removal and from any other position paid from the same appropriation. The Commission could bar them from other positions in the civil service for a period up to three years as the offense warranted.

The requirement of mandatory removal resulted in injustices.³⁹ It visited the same punishment on minor and even technical violators as on serious offenders, since the Commission had lost authority to adjust the penalty to the offense. For many years the Commission urged Congress for more flexibility in assessing penalties. The 1950 amendments finally achieved this purpose, though the relaxing language is hedged in with strong safeguards:

35. *Report, supra* note 1 ¶ 81-91.

36. Friedman & Klinger, *supra* note 3, at 6.

37. Last year, Senator Taft advocated criminal penalties. His suggestion failed to carry. 96 Cong. Rec. 9089 (June 21, 1950).

38. 53 STAT. 1148 (1939).

39. Senator Stennis cited several such cases in the Senate debates. 96 Cong. Rec. 9092-3 (June 21, 1950).

"Any person violating the provisions of this section shall be removed immediately 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: *Provided, however,* That if the United States Civil Service Commission finds by unanimous vote that the violation does not warrant removal, a lesser penalty shall be imposed by direction of the Commission: *Provided further,* That in no case shall the penalty be less than 90 days' suspension without pay."⁴⁰

Under the newly adopted procedure the Commission first votes on the question of guilt, a finding of which requires a majority of the Commission. Removal remains the automatic penalty unless the full Commission agrees that the offense warrants a lesser penalty and agrees further what the lesser penalty should be. In no case can it be less than ninety days suspension without pay. This ingenious arrangement was intended to allay fears that the Commission majority, after finding an employee guilty, might nullify its own decision for political reasons by imposing only a token penalty or none at all. Under this procedure, the minority member may insist on removal, unless he is convinced that a less stringent penalty will suffice. In fact, the Commission seldom has divided on party lines. Strict enforcement of the political activity restrictions has been a consistent tradition followed alike by majority and minority party members.

In the Senate debate the relaxation of the mandatory removal rule was not unanimously accepted. Senator Taft, for example, with severe misgivings attacked the proposed amendment as an "emasculatation of the most important provisions of the Hatch Act":

"[S]uppose there is a unanimous finding that the action of an individual warrants a lesser penalty than removal, and that the penalty is 30 days' suspension without pay. What kind of penalty is that? The

40. 64 STAT. 475, 5 U.S.C.A. § 118i(b) (1950). Congress in June 1950, after several months of deliberation had passed a similar provision. (See H.R. REP. No. 2604, 81st Cong., 2d Sess. (1950)). This bill contained an additional section requiring that "records containing testimony or other evidence relative to charges and allegations of a violation or violations of this Act in proceedings had pursuant to this Section shall be made available to either the Senate or the House of Representatives upon the request of any committee thereof." This provision opened old wounds in the long running dispute between the President and Congress on the status of confidential personnel and investigative files. Many heated words have been spent in this chronic vendetta, Congress demanding the right to inspect public records, the President insisting on the inviolability of information secured under the pledge of secrecy and the importance of protecting public officials against publication of the loose and unevaluated charges which necessarily appear in investigative reports. The President considered this provision as "encroachment on the long recognized prerogative of the Chief Executive to maintain in confidence those papers and documents which in the public interest he feels should be so maintained."

political party that has employed the individual to work for it, for whom he is working, will have no difficulty in paying his 30 days' pay or 60 days' pay. In other words, the whole effect of the proposed amendment of the Hatch Act is to kill the Hatch Act. That is why I am opposing the conference report."⁴¹

The Senate felt that the rigid rule previously in force had caused injustices which could be mitigated without weakening the Act. Similar discretion in the hands of the Commission in cases involving State employees had not led to abuse or lax administration.

Also enacted was a new section, 9(c), requiring the Commission to report annually to Congress "the names, addresses, and nature of employment of all persons with respect to whom action has been taken by the Commission under the terms of this section, with a statement of the facts upon which action was taken, and the penalty imposed."⁴² This new Act also permits the Commission, at the request of the individual concerned, to reopen the records of persons previously removed under the Hatch Act. If by unanimous vote it finds that the violation warranted a penalty less than removal, it may cancel its bar against reemployment, but at least 90 days must have elapsed since the removal took place.⁴³ This reprieve completes the 1950 amendments to the political activity section of the Hatch Act.

THE FUTURE

By legislative intent, administrative practice, and judicial assent, the policy of limiting political activity among Federal employees has been firmly established. The opposition has been scattered or has lost heart for further battle. Recent events suggest that efforts may be forthcoming to relax the curbs on local political activity. This will meet stiff opposition from those who believe that local politics is only a phase of the state and national political process. Congress might, however, explore more fully the British practice of excepting industrial and service workers from limitations on political activity.

If the career system in government employment has any validity, it requires the type of protection which the Hatch Act affords. Career employees may differ with their political superiors on policy matters, but these differences can usually be resolved by mutual adjustment or reassignment without impairing the career system. Political conflict could not be thus resolved.

41. 96 Cong. Rec. 9088-9 (June 21, 1950). The original bill (which was vetoed for other reasons) set a minimum penalty of 30 days for violations. In deference to the fears expressed by Senator Taft and others, the version following the veto—which was finally enacted—raised the minimum penalty from 30 to 90 days.

42. 64 STAT. 475, 5 U.S.C.A. § 118i(c) (1950).

43. 64 STAT. 475, 5 U.S.C.A. § 118i(b) (1950).

The American political system is rather tolerant on policy matters, and on platform issues the intensity of feeling among the professionals is often lukewarm. But election campaigns and the party organizations through which they are waged are the deadly serious business of politics. The issue in campaigns is political survival. It is inconceivable in our system that a successful office seeker, still bearing the scars of a furious campaign, would tolerate career employees who had actively worked against his election or in favor of his political opponents. It would be unreasonable to expect him to have any confidence in the loyalty or dependability of his erstwhile political enemies. The career system would crack under that strain.

Where the power of government is exercised by politicians who have a mandate from the people, while parties and office holders rotate periodically with election returns, a professional career service is indispensable to effective government. Political neutrality is an essential protection to the career system and to the political and administrative values which it embodies.

THE YALE LAW JOURNAL

VOLUME 60

JUNE 1951

NUMBER 6

EDITORIAL BOARD

STUART W. THAYER
Editor-in-Chief

WILLIAM R. PERLIK
Executive Editor

BERNARD H. GREENE
WILLIAM DILL ROGERS
Comment Editors

BURKE MARSHALL
*Article and
Book Review Editor*

DANIEL J. FREED
RICHARD N. GARDNER
ROBERT K. LIFTON
Note Editors

PATRICIA A. MCGOWAN
Case Editor

JOHN S. HOFFINGER
Managing Editor

TIMOTHY ATKESON
BOUDINOT P. ATTERBURY
WALLACE BARNES
CURTIS J. BERGER
THOMAS F. BERGIN
EDWARD B. BERGMAN
ROBERT ALAN BICKS
CLYDE BOWLES, JR.
JOEL L. CARR
JAMES C. COCHRANE
PAUL U. DANIEL
WALTER G. FARR, JR.
HAROLD D. FIELD, JR.
ROBERT A. FLETCHER
JAMES B. FRANKEL
HOWARD I. FRIEDMAN
STANLEY J. FRIEDMAN
JOSEPH GOLDSTEIN
RICHARD N. GOLDSTEIN
JUNIUS HOFFMAN
HARDIN HOLMES
HENRY L. KING

SAUL D. KRONOVET
ROBERT P. LYONS
CHARLES L. MANDELSTAM
HAROLD J. MCCOMAS
KURT W. MELCHIOR
ALAN Y. NAFTALIN
DOUGLAS S. PALMER
CHARLES A. REICH
JEROME H. REICH
FREDERICK M. ROWE
WARREN H. SALTZMAN
SHERMAN G. SASS
HENRY C. SHAYEWITZ
EDWARD F. SNYDER
HOWARD SOLOMON
PAUL S. TENEN
STEPHEN W. TULIN
GEORGE A. WEISS
HULEN D. WENDORF
JOAN ZELDES
RICHARD A. ZUNIGA

MARIE MCMAHON
Business Secretary

MICHAEL J. LICHTENSTEIN
Student Business Manager

CONTRIBUTORS TO THIS ISSUE

FREDERICK M. ROWE. B.B.A. 1949, CCNY. Member of the Class of 1952, Yale Law School.

RUDOLPH SCHLESINGER. Senior member of the Department for the Study of the Social and Economic Institutions of the U.S.S.R., University of Glasgow; Editor of *SOVIET STUDIES*.

MILTON J. ESMAN. A.B. 1939, Cornell University, Ph.D. 1942, Princeton University. Lecturer in Political Science, George Washington University. Formerly with the United States Civil Service Commission, Washington, D.C.