1973

Hope for the Functionally Politically Impotent Government Employee--A Hatch Act Reappraisal

James T. Gilbert
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Constitutional Law Commons, First Amendment Commons, and the Labor and Employment Law Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol61/iss4/10

This Comment is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
HOPE FOR THE FUNCTIONALLY POLITICALLY IMPOTENT GOVERNMENT EMPLOYEE—A HATCH ACT REAPPRAISAL

The idea of a more or less politically neutral government bureaucracy was probably first espoused in Plato’s *Republic*. Plato envisioned that his rulers and administrators would live in Spartan simplicity and govern for the good of the Commonwealth, and that the absence of private property would remove the temptation for the rulers to sacrifice the welfare of the state to purely personal interests. A bureaucracy which is denied economic power thus has no interest in influencing others for personal advantage.¹

Although Plato’s solution seems somewhat extreme, it nevertheless indicates early recognition of the problem of the inconsistent roles of citizen and civil servant. The problem is succinctly enunciated in an official British Government Report as being a conflict between the desirability that all citizens have the opportunity to take an active role in political life, and the public interest need for the maintenance of “political impartiality” in the civil service.² These two objectives have proved to be very nearly mutually exclusive, and the pursuit of one makes the other much more difficult to achieve.

In the United States, the principles in contention seem to be “those which are clearly outlined in the first amendment against those which are inherent in an impartial civil service.”³ The question is how to make the rights of citizens and civil servants commensurate.⁴ The problem is clear whereas the solution remains clouded in obscurity.

There have been many attempts to regulate political activity among federal employees.⁵ However, the Hatch Act⁶ was the first comprehensive statutory scheme enacted by Congress to deal with the problem, and today, along with comparable state laws, it effectively limits

---

the political activity of over 12 million public employees. The fundamental policy embodied in the Hatch Act is that government employees may not use official authority for political influence or become actively involved in "political management or in political campaigns," which is defined to mean the acts prohibited by the Civil Service Commission rules prior to July 19, 1940. The Act does, however, make it clear that the employee's right to vote as he wishes and to express his opinion on political matters and candidates shall not be abridged; and certain employees at the policy-making level are excluded from the prohibitions of the section. The important components to note are the comprehensiveness of the Act and the attempted definition of "an active part in political management or in political campaigns" through prior rulings of the Civil Service Commission. Under the Hatch Act and Rule IV of the United States Civil Service Commission, a federal employee may not: 1) campaign for a political party or candidate; 2) transport voters other than members of his family to the polls; 3) distribute campaign material; 4) march in a political parade; 5) promote political dinners; 6) take an active part in conventions; 7) initiate petitions or solicit signatures for petitions on behalf of a partisan candidate; 8) distribute campaign literature, badges, or buttons; 9) be connected editorially or managerially with any newspaper generally known as partisan; or 10) be a candidate for nomination or election to a national, state, county, or municipal office.

These prohibitions are seemingly so comprehensive that it is easier to designate the political activity not proscribed by the Act. Government employees may vote, reveal opinions not designed to influence the outcome of a political campaign, wear badges while not at work, publicly express opinions on political subjects not directly related to political campaigns, and sign petitions. The scope of the restrictions placed on the political activity of government employees has been strongly attacked by many commentators; it has been argued that the Hatch Act deprives government employees of their rights and fore-

7 Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 221 (92d ed. 1971). The total number employed by governmental units is 12,597,000. The federal government employs 2,705,000 (excluding those serving in the military), while state and local governments employ 9,891,000.
9 Id. at (b).
10 Id. at (d).
11 See also 54 Stat. 747, 771 (1940) (Section 15 of Hatch Acts).
closes their ability to take action to protect what rights they do have. It is generally accepted that the Act makes civil servants nearly impotent politically, since their freedom to speak out on public issues is so severely circumscribed. Mr. Justice Black trenchantly stated in regard to the Act that:

They [public employees] may vote in silence; they may carefully and quietly express a political view at their peril; and they may become "spectators" [this is the Commission's word] at campaign gatherings, though it may be highly dangerous for them to "second a motion" or let it be known that they agree or disagree with a speaker.

It has been further pointed out that aside from the damage to individual rights, such restrictions actually tend to dilute the quality of federal service because the restrictions create conditions which might be repugnant to many qualified persons.

The Hatch Act has also been criticized for overbreadth, ambiguity, and uncertainty. The recent Commission of Political Activity of Government Personnel has concluded that the Hatch Act is "confusing, ambiguous, restrictive, negative in character, and possibly unconstitutional." The Commission further decided that the only activity which should be limited is that which could "threaten the integrity, efficiency, and impartiality of public service." rather than the all-inclusive approach attempted in the Hatch Act. Moreover, the constitutionality of the Hatch Act has been seriously questioned because of lack of a compelling governmental interest and lack of specificity of restrictions.

Regulations restricting political activities of public employees were formerly rationalized under the so-called doctrine of privilege; public employment could not be demanded as a right. Therefore, when the citizen accepted public employment he thereby voluntarily accepted as well the concomitant conditions, and although the conditions of employment may have interfered with his constitutional rights, those rights were not violated because the restrictions [the interferences with his constitutional rights] were voluntarily accepted. The doc-

18 Jones, supra note 3, at 253.
20 Rosenbloom, supra note 4, at 840.
trine is exemplified by Justice Holmes' often quoted statement that "petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."\(^{21}\)

This doctrine has been replaced in recent years by the doctrine of substantial interest, which simply stipulates that there are certain substantive rights which may not be abridged without a showing of actual necessity.\(^ {22}\) This doctrine, in contrast to the doctrine of privilege, brings the rights of the civil servant closer to those of the citizen in general.\(^ {23}\) United States v. Lovett\(^ {24}\) indicated the degree to which the doctrine of privilege had been eroded when the Supreme Court indicated that while there may be no constitutional right to public employment, no one may be prevented from engaging in such employment by the government without a judicial trial.\(^ {25}\)

The Hatch Act received its principal constitutional construction in United Public Workers of America v. Mitchell.\(^ {26}\) In this landmark case, the Supreme Court considered an action to enjoin the enforcement of the Hatch Act proscription of actively working in a partisan political campaign and to cause the section of the Act to be declared unconstitutional.\(^ {27}\) In a 4-3 decision, the Court upheld the constitutionality of the Act's prohibition of political activity as to the particular plaintiff. Mr. Justice Reed's majority opinion holds that

... Congress may regulate the political conduct of government employees "within reasonable limits;" even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the general existing conception of governmental power.\(^ {28}\)


\(^{22}\) Rosenbloom, supra note 4, at 840. See also Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1429 (1968).

\(^{23}\) Rosenbloom, supra note 4, at 840.

\(^{24}\) 378 U.S. 303 (1946).

\(^{25}\) See Rosenbloom, supra note 4, at 841. See also Graham v. Richardson, 403 U.S. 365, 374 (1967). "... [T]his Court has now rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'"

\(^{26}\) 330 U.S. 75 (1947).

\(^{27}\) The petitioner, Mr. Poole, was an employee at the U.S. Mint in Philadelphia, and was a civil service employee subject to the restrictions of the Hatch Act. In addition, Mr. Poole was a Ward Executive Committeeman for the Democratic Party. He worked at the polls and paid party workers for their services on election day. After being dismissed for acts in contravention of section 9(2) of the Hatch Act, he brought an action contesting the dismissal on the ground that the first amendment guaranteed that the people, including public employees, could exercise these political rights. Id. at 83, 91 n.23, 92 n.24.

\(^{28}\) Id. at 102.
However, the Court in *Mitchell* apparently did not trouble itself to define the "reasonable limits" beyond which Congress may not regulate political activity of public employees; that is, the appropriate scope of the Hatch Act itself wasn't determined except by implication. The Court, rather, narrowed its consideration to the facts of the case before it. The decision seems to ignore the realism of the broad application of the restrictions in favor of the illusory situation and seeming inconvenience of the single isolated instance.

The dissent in *Mitchell*, however, presented a more reasonable and realistic approach. Mr. Justice Black pointed out that public employees are at their peril in expressing political opinions because of the vagueness of the rules. He applied the standard criteria that laws restricting first amendment rights should be "... narrowly drawn to meet the evil aimed at and to affect only the minimum number of people imperatively necessary to prevent a grave and imminent danger to the public." Applying this test, Justice Black concluded "... that the provision here attacked is too broad, ambiguous, and uncertain in its consequences to be made the basis of removing deserving employees from their jobs."

Mr. Justice Douglas, dissenting in part, remarked that if the petitioner had been an administrative worker, perhaps the Hatch Act could have been sustained as to him. However, since he was so remote from policy-making or contact with the public, such restrictions were unnecessary in this particular case, i.e., the restrictions here considered were unnecessarily inclusive. He agreed with the basic purpose of the Hatch Act—to provide a competent bureaucracy to serve whatever administration is in power. But he also indicated that

---

29 *Id.* at 108 (Black, J., dissenting).
30 *Id.* at 110 (Black, J., dissenting).
31 *Id.*

The right to vote and privately to express an opinion on political matters, important though they be, are but parts of the broad freedoms which our Constitution has provided as the bulwarks of our free political institutions. Popular government, to be effective, must permit and encourage political activity by all the people. Legislation which muzzles several million citizens threatens popular government not only because it injures the individuals muzzled but also because of its harmful effect on the body politic in depriving it of the political participation and interest of such a large segment of our citizens. ... I think the Constitution prohibits legislation which prevents millions of citizens from contributing their arguments, complaints and suggestions to the political debates which are the essence of our democracy; prevents them from engaging in organized activity to urge others to vote, and take an interest in political affairs; bars them from performing the interested citizen's duty of insuring that his and his fellow citizens' votes are counted. Such drastic limitations on the right of all the people to express political opinions and take political action would be inconsistent with the First Amendment's guaranty of freedom of speech, press, assembly and petition. *Id.* at 110-11.
the Act is too broad, stating that “specific evils . . . require specific treatment”32 and noted that Cantwell v. Connecticut33 requires that statutes be narrowly drawn where constitutional rights are abridged.34

Although Mitchell has never been expressly overruled, its continued vitality is extremely doubtful in light of subsequent decisions of the Supreme Court,35 raising the possibility that it has been overruled by implication. Shapiro v. Thompson36 held that the equal protection clause required proof of a compelling governmental interest when a classification, even though it has a reasonable basis, penalizes the exercise of a fundamental constitutional right. In Mitchell there was no showing of such a compelling governmental interest that would justify the limitation on the political rights of government employees resulting from the Hatch Act.

Perhaps more germane are the doctrines of overbreadth and vagueness. The concept of the overbreadth doctrine is that if the impact of a statute is to deter the exercise (or place a penalty on the exercise) of rights substantially protected by the Constitution, even if the statute is regulating conduct which is the legitimate subject matter of regulation, then the statute reaches that over which the government does not have the power to regulate and is void. Stated differently, if the statute has a “chilling effect” on the exercise of constitutionally protected rights, it is void for overbreadth.37 The void for vagueness doctrine, on the other hand, is basically a due process concept. Fundamental fairness requires that one cannot be expected to conform to a law which gives no objectively determinable standard of conduct. If reasonable men cannot distinguish what is or is not required under the statute, it is invalid because of vagueness.38 A law with no objectively determinable standard of conduct fails to put one on notice of what is required or prohibited and gives rise to the danger that those who apply the law may end up writing the law arbitrarily when they determine what the law is (i.e., an usurpation of the legislative function).

32 Id. at 123 (Douglas, J., dissenting).
33 310 U.S. 296 (1940).
34 330 U.S. at 124 (Douglas, J., dissenting). “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.” Id. at 126.
In Keyishian v. Board of Regents, the Court invalidated certain statutes and administrative rules utilized by the state of New York to prevent employment of "subversives" in public schools. The regulations and statutes provided that if a teacher was guilty of treasonable or seditious words or acts, or advocated the overthrow of the government by force, violence, or unlawful means, or published any document urging unlawful overthrow of the government while embracing such doctrine, or joined any group advocating such overthrow, the teacher would be summarily discharged. These provisions were invalidated because of vagueness and overbreadth. The Supreme Court emphasized that first amendment political rights may not be lightly tampered with.

Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms... or standards of permissible statutory vagueness are strict in the area of free expression.... Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. ... When one must guess what conduct or utterance may lose him his position, one necessarily will "steer far wider of the unlawful zone..." For the "threat of sanctions may deter... almost as potently as the actual application of sanctions!"... The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.

In Pickering v. Board of Education, the Court held that the removal of a teacher for publishing a letter in a local newspaper which was critical of the Board of Education violated the teacher's first amendment rights. The state had failed to show "specific incompatibility" between the role of a teacher and that of a citizen exercising first amendment rights of free expression.

Even in light of some apparent erosion of the Mitchell rationale, most federal court decisions regarding the Hatch Act or Hatch Act-type state legislation have expressed "... methodical adherence to the spirit of the Hatch Act as discussed in Mitchell, and have consistently supported Civil Service Commission actions under color of the Hatch Act..." Furthermore, few of the federal decisions have concerned

40 Id. at 589.
41 Id. at 603-04.
43 Id. at 570. See also Taylor v. New York Transit Authority, 433 F.2d 665 (2d Cir. 1970). Other cases with similar rationale include United States v. Robel, 389 U.S. 258 (1967); and Sweezy v. New Hampshire, 354 U.S. 234 (1957).
themselves with the appropriate scope of Hatch Act prohibitions but rather turn on whether or not a certain political act of the employee was within the scope of the Hatch Act, which is the Mitchell approach. The typical federal court attitude is exhibited in Wisconsin State Employees Association v. Wisconsin Natural Resources Board, holding, on the rationale of Mitchell, that a state could constitutionally require that state employees relinquish the right to run for partisan political office as a condition of public employment. Although acknowledging decisions to the contrary, the District Court for the Western District of Wisconsin stated that Mitchell had not been eroded and that the Mitchell decision had never been questioned by a federal court. Gray v. Macy indicated that Mitchell was in point regarding the discharge of a public employee by the Civil Service Commission for partisan political activities.

Other federal courts, although in the minority, have not been quite so dogmatic in their adherence to the Mitchell reasoning. A crack in the seemingly solid facade appeared in Wilson v. United States Civil Service Commission, in which the D.C. District Court held that the fact that a government employee published an unsolicited letter in a newspaper recommending the defeat of certain partisan candidates for state office did not show a violation of the Hatch Act prohibition of government employees' active participation in political activities, in the absence of a showing that the employee was effectively engaging or participating in a political campaign. In Meehan v. Macy, although the removal of a member of the police force of the Canal Zone for publishing material called "contemptuous," "intemperate," and "defamatory" was upheld, the D.C. Circuit Court of Appeals acknowledged that unless there was a showing that the exercise of a constitutional right was inconsistent with the public status of the employee, the limitation could not stand, and "... in some aspects, at
least, [his] constitutional rights are inviolable notwithstanding [his] status as a government employee."\textsuperscript{54}

\textbf{Hobbs v. Thompson}\textsuperscript{55} represents the first federal case to expressly acknowledge that \textit{Mitchell} has been eroded. The case involved a challenge to the constitutionality of a city charter and ordinance restricting electioneering activities of firemen.\textsuperscript{56} The Fifth Circuit Court of Appeals held that the challenged enactments were overly broad and vague, and therefore unconstitutional.\textsuperscript{57} The most significant part of the decision was the recognition that the \textit{Mitchell} rationale upholding a "broad prophylactic rule against political activity" was no longer vital law in light of subsequent Supreme Court decisions.\textsuperscript{58} In the recent decision of \textit{Mancuso v. Taft},\textsuperscript{59} the United States District Court for Rhode Island granted a summary judgment to a police officer who became a candidate for state representative in violation of the city charter and enjoined city officials from removing him from his position, declaring the charter provisions unconstitutional on grounds of vagueness and overbreadth, because the restriction was not limited to partisan political activity.\textsuperscript{60} The court, citing \textit{Hobbs}, stated that although \textit{Mitchell} had not been expressly overruled, subsequent decisions had vitiated its vitality.\textsuperscript{61}

State courts have generally not been so reluctant to challenge the

\footnotesize{\textsuperscript{54} Id. at 832. 
\textsuperscript{55} 448 F.2d 456 (5th Cir. 1971).
\textsuperscript{56} Section 79, Rule 2, of the Macon City Charter, and Section 2-127 of the city municipal ordinances provide that no employee of the city fire department: shall take an active part in any primary or election, and all [such] employees are hereby prohibited from contributing any money to any candidate, soliciting votes, or prominently identifying themselves in a political race with or against any candidate for office.
\textsuperscript{57} Id. at 457. In this instance, the firemen were protesting a directive ordering them to remove political bumper stickers from their automobiles.
\textsuperscript{58} Id. at 471.
\textsuperscript{59} Id. at 472.
\textsuperscript{60} 341 F. Supp. 574 (D.R.I. 1972).
\textsuperscript{61} Id. at 582. The relevant provisions of the City of Cranston Home Rule Charter 1409 read:
The following practices are prohibited . . . .
. . . .
c. Continuing in the classified service after becoming a candidate for nomination or election to any public office. . . . f. Making directly or indirectly . . . any contribution to the campaign funds of any political organization or candidate to public office or taking any part in the management of any political organization or in the conduct of any political campaign further than in the exercise of the rights of a citizen to express his opinion and to cast his vote.
. . . .
Any officer or employee of the city willfully violating any of the provisions of this section shall be removed from such office or employment.
Mitchell rationale. California has three major decisions limiting the broad scope of Hatch Act-type legislation. In \textit{Fort v. Civil Service Commission of the County of Alameda}, the California Supreme Court invalidated a section of a county charter because the restrictive provision was not drawn narrowly enough to deal specifically with enumerated abuses. The charter was examined to determine whether the restriction was valid as constituted, or whether in application it was so broad that it produced needless strictures on constitutional rights. The criteria the court developed for judging Hatch Act-type cases was that "[i]t 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." In this case, it was determined that "... in light of the principles applicable to freedom of speech and the related First Amendment rights, no sound basis has been shown for upholding a county provision having the breadth of the one before us."

In \textit{Kinnear v. City and County of San Francisco}, a companion case to \textit{Fort}, the California Supreme Court applied the \textit{Fort} test in invalidating a section of the San Francisco Charter. The court held the section void, on a Shapiro-type rationale, because San Francisco had not "shown a compelling need to restrict the fundamental rights involved on such a sweeping scale.""  

\textit{Bagley v. Washington Township Hospital District} illustrates the California method of determining the appropriate scope of the restriction of political activity. In this case, a nurse had participated in a

\begin{itemize}
  \item[62] Shartsis, supra note 44, at 1387. "... These state court decisions offer one interpretation of the erosion which has occurred beneath Mitchell. ..."
  \item[63] 38 Cal. Rptr. 625, 392 P.2d 385 (1964).
  \item[64] The relevant position of the regulation is § 41 of the Charter of Alameda County:
    
    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. Any employee violating the provisions of this section may be removed from office.
    
    \textit{Id. at 626}, 392 P.2d at 386.
  \item[65] \textit{Id. at 629}, 392 P.2d at 389.
  \item[66] \textit{Id.}
  \item[67] \textit{Id.}
  \item[69] Section 5 of the San Francisco Charter provides:
    
    Any appointive officer or employee of the city and county who shall become a candidate for election by the people to any public office shall automatically forfeit any such city and county office or position.
    
    \textit{Id. at 631}, 392 P.2d at 392.
  \item[70] \textit{Id. at 632}, 392 P.2d at 392.
  \item[71] 55 Cal. Rptr. 401, 421 P.2d 409 (1966).
\end{itemize}
campaign to recall an officer in the hospital district in which she worked, in violation of a Hospital District rule promulgated in a memorandum. The court expanded the Fort test to compel the legislative body to show that

[t]he utility of imposing conditions must manifestly outweigh any resulting impairment of constitutional rights. Furthermore, in imposing conditions upon the enjoyment of publicly-conferred benefits, as in the restriction of constitutional rights by more direct means, the state must establish the unavailability of less offensive alternatives and demonstrate that the conditions are drawn with narrow specificity, restricting the exercise of constitutional rights only to the extent necessary to maintain the integrity of the program which confers the benefits.\(^7\)

Here, the conclusion was reached that the activity in question could possibly be prohibited, but since the limitations were so broad and could embrace other matters which could not constitutionally be proscribed, and since the limitations were not drawn to meet the specific act in question, the limitations were invalid for overbreadth.\(^8\)

These California cases shifted the burden to the government to justify the need to restrict political activity by the public employee and expanded the scope of judicial consideration beyond the narrow facts-of-the-case view taken by most federal courts.

Other state decisions have followed similar routes in invalidating legislation restricting the political activity of public employees. The Oregon Supreme Court, in \textit{Minielly v. State},\(^4\) voided a state civil service regulation requiring resignation from public employment upon candidacy for popular office. The opinion noted that the Mitchell-type rationale had been eroded by intervening decisions of the Supreme Court and that "a revolution has occurred in the law relative to the state's power to limit federal First Amendment rights."\(^5\) Here, the view was taken that the state must show a compelling interest in order to restrict any first amendment rights.\(^6\) In \textit{DeStafano v. Wilson},\(^7\) a

\(^7\) Id. at 407, 421 P.2d at 415.
\(^8\) Id. at 408, 421 P.2d at 415. This reasoning also seems analogous to the doctrine of least drastic restraint. See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969) (Brennan, J., concurring).
\(^4\) 411 P.2d 77 (Ore. 1966). The relevant regulation is \textit{Ore. Rev. Stat.} \$ 241.520, providing that

\ldots [N]o person employed under civil service \ldots of any county \ldots shall be a candidate for popular election to any public office, unless such person immediately resigns from the position which he then holds under civil service.

\(^5\) 411 P.2d 77, 77 (Ore. 1966).
\(^6\) Id. at 83. See Shapiro v. Thompson 396 U.S. 618 (1969), and text accompanying note 36 supra.
\(^7\) 233 A.2d 682 (N.J. 1967).
municipal fire department rule restricting political activity was struck down, consistent with the *Fort* rationale, because it was not drawn with the requisite degree of specificity.

These cases which have considered subsequent Supreme Court decisions regarding the restriction of first amendment rights in construing limitations on the political activity of public employees are more or less analogous to the reasoning of Mr. Justice Black's dissent in *Mitchell*. Aside from presenting a more realistic appraisal of the relationship of the public employee to the government, this position strikes a more equitable balance between the conflicting goals of a politically neutral civil bureaucracy and the widest possible participation in democratic institutions. Very recently, another federal court has escaped from the dated doctrinal confines of *Mitchell*. In *National Association of Letter Carriers, AFL-CIO v. United States Civil Service Commission*, a three-judge federal panel, in a 2-1 decision, held that the federal Hatch Act's proscription against federal employees engaging in political activities is unconstitutionally vague and overly broad, and that it chills first amendment rights. Although two previous federal courts have rejected the *Mitchell* rationale, this decision marks the first time a federal court has done so when considering a challenge to the Hatch Act, and the first time a federal court has failed to uphold the Hatch Act by expressly declaring it unconstitutional.

The *Letter Carriers* case involved a class action on behalf of all federal employees seeking a declaratory judgment that the Hatch Act provision prohibiting most federal employees from taking "an active part in political management or in political campaigns" is unconstitutional. Judge Parker, although concurring, reserved the right to file a separate opinion.

In his opinion, Judge Gesell pointed out that, although *Mitchell* focused on the "merits of the objective of the Hatch Act," the

---

78 Rule 128 of the Fire Department, City of Hoboken, provides "No member shall take an active part in politics or political contests or engage in controversy concerning candidates or issues." Id. at 684.
79 Id. at 688. Other cases employing this type of reasoning in determining the constitutionality of similar restrictions include Huerta v. Flood, 447 P.2d 896 (Ariz. 1968); and Ivancie v. Thornton, 436 P.2d 612 (Ore. 1968).
81 Hobbs v. Thompson, 448 P.2d 456 (5th Cir. 1971), see text accompanying note 55 supra; and Mancuso v. Taft, 341 F. Supp. 574 (D.R.I. 1972), see text accompanying note 59 supra. Here the court declared the Act unconstitutional and enjoined its enforcement, but stayed the order pending determination by the Supreme Court.
82 Id. at 580.
Mitchell court specifically left unresolved the issue of the “manner in which Congress defined the conduct it purported to prohibit.”85 Considering the definition in 5 United States Code § 7324(a)86 measured by first amendment standards, Judge Gesell found the definition “ambiguous and unsatisfactory.”87 He noted that the definition incorporates by reference over 3,000 rulings made by the Civil Service Commission between 1886 and 1940, and these rulings, which were not before the Congress when enacted, are overbroad; they have a “. . . sweep and indefiniteness that no one would even attempt in these days to defend if analyzed against the strictures of the First Amendment.”88 But overbreadth is not the statutory definition’s only infirmity, it suffers from vagueness as well. Judge Gesell indicated that “[p]rohibitions are worded in generalities that lack precision. There is no standard. No one can read the Act and ascertain what it prohibits.”89 Thus doubly-yoked with impermissible limitations, the Hatch Act in its application has a “chilling effect” on the exercise of constitutionally protected rights, and is thus unacceptable when measured against constitutional guarantees.

The opinion recognized the need for some restriction on partisan political activity by federal employees, but insisted that

. . . Congress may not by reason of this desirable objective neutralize such a large segment of the populace from expressing any opinion on any “political” issue with the intent of somehow influencing someone else. In the end, everything may appear political, all speech may intend to influence, and conformity is imposed in the fashion of more regimented, less democratic governments.90

Significantly, all the basic questions, i.e., rational relationship, compelling interest, least restrictive means, and overbreadth and vagueness, involved in a decision of this nature, are considered. Judge Gesell concluded that although the aim of the Act may be legitimate and even laudable, it cannot stand if in its application it infringes impermissibly on protected constitutional rights.

Dissenting Judge MacKinnon signified his belief that the definition in question has been rendered flexible and sufficiently lucid by subsequent administrative and judicial interpretation,91 and is therefore

85 Id., citing United Public Workers v. Mitchell, 330 U.S. 75 (1947), where Mr. Justice Reed speaking for the majority said, “We need to examine no further at this time into the validity of the definition of political activity. . . .” 330 U.S. at 103-04 (footnote omitted).
86 See text accompanying note 8 supra.
87 346 F. Supp. at 580.
88 Id.
89 Id. at 582.
90 Id. at 583-84.
91 Id. at 592 (MacKinnon, J., dissenting).
neither overbroad nor vague. It is important to note, however, that although the dissent mechanically maintains that the issues in this case were decided by Mitchell, it does not blindly follow Mitchell's limited facts-of-the-case view, but considers the scope of the Act as applied in light of the first amendment doctrines of overbreadth and vagueness. That is to say that the dissent used the same analytical tools as the majority although reaching a contrary result. In doing so, Judge MacKinnon tacitly conceded the point that Congress' power to restrict political activity of federal employees is limited by traditional first amendment doctrine. The disagreement is over exactly where the limits are located. If his contention that Mitchell considered the Hatch Act with a similar analysis is correct, then federal courts have been misinterpreting Mitchell for twenty-five years.

The case is noteworthy, then, for more than one reason. First, it is the only time that a federal court has declared the Hatch Act unconstitutional. Second, and perhaps more important, it represents a radical departure from the traditional federal analytical viewpoint of this type of case. It appears that at last the Supreme Court will have an opportunity to directly pass on the validity of the Hatch Act in light of subsequent decisions regarding first amendment rights. Government employees have been political neuters long enough. Now is the time for the Court to abandon the outdated doctrine of Mitchell and consequently the sweeping strictures of the Hatch Act, by upholding the decision in this case.

ADDENDUM

The Supreme Court in a 6-3 decision handed down on June 25, 1973, reversed the holding of the District Court in an opinion which is remarkable for its labored attempt to accommodate the Hatch Act within the boundaries of the Constitution. In the majority opinion, Mr. Justice White expresses the view, with which there is practically unanimous agreement, that a need does exist for some governmental control of the "political activity" of its employees, and that Congress has the power to enact such regulations. The implicit assumption is that whatever restrictions Congress places on such activity must be within the scope of the Constitution, as indeed all legislation must. The opinion, although adhering to Mitchell in spirit, eschews Mitchell's

92 Id. at 587.
93 Id. at 589-99.
95 Id. at 5124.
narrow approach and considers the scope of the Act as a whole in regard to constitutional limitations.

The Court, however, virtually ignores the pellucid reasoning of the lower court in its attempt to uphold the statute, and adopts, without expressly saying so, dissenting Judge MacKinnon's view that subsequent interpretation has rendered the definition of "political activity" satisfactorily clear so that "the ordinary person exercising ordinary common sense can sufficiently understand and comply with [the prohibitions]."96 Indeed, Mr. Justice White analogizes the constructions given the term "political activity" by the Civil Service Commission to the development of the common law.97 Therefore, he reasons, the gloss imposed on the Act by these rulings clearly indicates precisely what is prohibited, and thus precludes constitutional challenge because of vagueness and overbreadth.98

Nowhere in the opinion does the Court consider the other relevant arguments posited against the Hatch Act, viz., rational relationship, compelling governmental interest, or least restrictive means. Specific constitutional interdictions must be evaluated in light of all relevant doctrines, and this the Court has failed to do. Again, the dissent takes the more reasonable approach. Mr. Justice Douglas acknowledges that some restriction is necessary, but concludes that "[t]he present Act cannot be appropriately narrowed to meet the need for narrowly drawn language not embracing First Amendment speech or writing, without substantial revision."99 What is needed, then, is a "new start" by Congress on the problem. Unfortunately, the Court's decision will do little to compel Congressional reevaluation.

James T. Gilbert

96 Id. at 5131.
97 Id. at 5125.
98 Id. at 5130.
99 Id. at 5137 (Douglas, J., dissenting).