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95-2 FEDERAL EMPLOYEES' POLITICAL ACTIVITIES ACT

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HEARINGS

BEFORE THE

COMMITTEE ON CIVIL SERVICE

OF THE

COMMITTEE ON

POST OFFICE AND CIVIL SERVICE

HOUSE OF REPRESENTATIVES

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

H.R. 10

A BILL TO RESTORE TO FEDERAL CIVILIAN AND POSTAL
SERVICE EMPLOYEES THEIR RIGHTS TO PARTICIPATE
VOLUNTARILY, AS PRIVATE CITIZENS, IN THE POLITICAL
PROCESSES OF THE NATION, TO PROTECT SUCH EMPLOY-
EES FROM IMPROPER POLITICAL SOLICITATIONS, AND
FOR OTHER PURPOSES

FEBRUARY 23 AND 24, 1977

Serial No. 95-2

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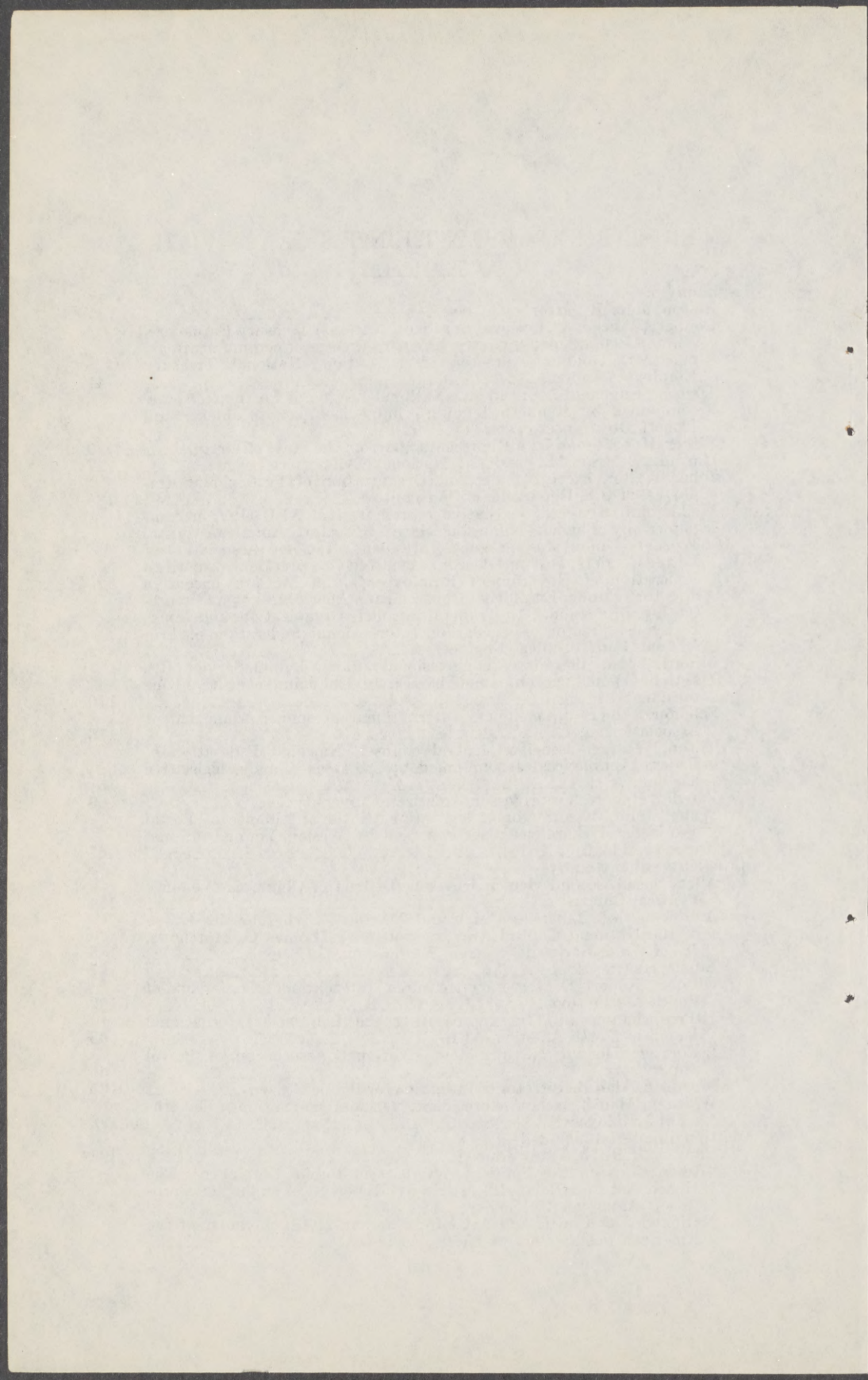
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(Lloyd A. Johnson, Subcommittee Staff Director, Room 406, Cannon Building—Ext. 59124)

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FEDERAL EMPLOYEES' POLITICAL ACTIVITIES ACT OF 1977

WEDNESDAY, FEBRUARY 23, 1977

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
SUBCOMMITTEE ON CIVIL SERVICE,
Washington, D.C.

The subcommittee met at 10:05 a.m. in room 311 of the Cannon House Office Building, Hon. William Clay (chairman of the subcommittee) presiding.

OPENING STATEMENT OF CHAIRMAN WILLIAM CLAY

Mr. CLAY. The subcommittee will come to order.

This morning the Subcommittee on Civil Service begins its first of 2 days of public hearings on H.R. 10, the Federal Employees' Political Activities Act of 1977.

H.R. 10 is identical to H.R. 8617, which passed both Houses of Congress last year but was stopped short of enactment into law due to a veto by President Ford. H.R. 10 modifies and updates the Hatch Act by permitting Federal civilian and postal employees the right to participate voluntarily in political activities so long as they do not interfere with the integrity of good government or the impartial administration of the functions of government.

In the last Congress, I was privileged to chair the Subcommittee on Employee Political Rights and Intergovernmental Programs, which conducted the most thorough and extensive hearings ever held by the Congress on the far-reaching and repressive effects of the Hatch Act. The subcommittee held 11 days of hearings in Washington and various cities around the country receiving testimony from over 100 witnesses.

As a result of these hearings we found that existing law governing the political activities of Federal employees is contradictory, harsh, overly restrictive and unfair in its administration. It has not been brought into conformity with the realities of the 1970's since its enactment into law in 1939.

The Hatch Act was precipitously enacted in 1939 with no public hearings and very limited debate. It was an overreaction by the Congress to abuses, not of voluntary political activity, but to coercion and kickbacks by employees and recipients in Federal relief programs.

Previous studies by the Congress had revealed not even the suggestion of any wrong-doing in Federal employees participating in political activity voluntarily and on their own time. The Hatch Act, well intended as it was, was enacted in a period during which the Congress was deeply concerned about the growth in the power and influence wielded by then President Franklin Roosevelt.

But the times and conditions have changed since 1939 and H.R. 10 has taken notice of these realities. First, in 1939, Federal programs to provide direct aid to the poor were being expanded, while today they are being contracted. Second, in 1939, only 32 percent of the Federal work force of 950,000 was under the merit system, in contrast to almost 70 percent of the current work force of 2.8 million. Third, the need for skilled personnel has increased to the point where the patronage system no longer flourishes as it did in the 1930's. Finally, the growing strength and influence of the Civil Service Commission has led to the institutionalization of the merit system.

I find it difficult to believe that the authors of the Hatch Act ever intended that 2.8 million Federal employees would be denied the same opportunity to fully participate in the political process that is available to all other citizens of this Nation.

In modifying the Hatch Act it is important that our value system of merit, impartiality, and integrity be retained. Thus, six principles have been the centerpiece of our thinking in drafting H.R. 10.

First, Federal employees ought to be extended all the rights and benefits of citizenship as any other person within the framework of prudence and possibility. Second, those rights and benefits ought to be made known to the recipients. Third, the administration of our laws must be impartial—free from any partisan considerations in the interpretation of these laws. Fourth, the public in general must perceive the administration of laws as impartial. Fifth, the Federal civil service system must not be used as a patronage system to serve the political interests of any political party. And sixth, Government employees must not be subjected to undesirable pressures to participate in political activities because of fear of coercion.

H.R. 10 differentiates between voluntary and involuntary political activities. It protects the public interest while providing Federal employees with greater freedom to participate in the political process.

I will mention at this point the 11 major provisions of the bill, H.R. 10:

One: States that Federal employees are encouraged to exercise their right of voluntary political participation;

Two: Prohibits the use of official authority, influence, or coercion with the right to vote, not to vote or to otherwise engage in political activity;

Three: Prohibits use of funds to influence votes; solicitation of political contributions by superior officials; and making political contributions in Government rooms or building;

Four: Prohibits political activity while on duty, in Federal buildings, or in uniform;

Five: Prohibits the extortion of money for political purposes from employees;

Six: Retains existing prohibitions against political activities for employees in sensitive positions within the Department of Justice, Internal Revenue Service, and Central Intelligence Agency;

Seven: Requires that employees who seek elective office do so on their own time. Employees shall, upon request, be granted accrued annual leave to seek elective office;

Eight: Authorizes the Civil Service Commission to conduct educational, enforcement and investigatory functions. Limits investigation of prohibited activities to 90 days;

Nine: Establishes an independent board whose function is to adjudicate alleged violations of law and provides for judicial review of adverse decisions;

Ten: Subjects violators of law to removal, suspension, or lesser penalties at the discretion of the board. Requires 30 day suspension without pay for any employee found guilty of violating prohibition against use of official authority or influence; and

Eleven: Requires that the Civil Service Commission conduct a program for informing employees of their rights of political participation and report annually to the Congress on its implementation.

As of this date, I am pleased to report that 70 of my colleagues have joined with me in sponsoring H.R. 10. While adding to and strengthening those meritorious features of the Hatch Act by providing employees and the public with greater protection against any recurrence of the spoils system, it updates those parts of the Hatch Act which are no longer applicable. It does this by permitting those voluntary off-duty political activities which do not conclusively interfere with the impartial administration of effective public service.

The first witnesses this morning will be a panel composed of several affiliates of the AFL-CIO, led by Ken Meiklejohn, legislative representative of that illustrious organization.

But before we get to the witnesses, I would like to ask, Mr. Taylor, if you have an opening statement.

Mr. TAYLOR. Mr. Chairman, I think that you have well enunciated the intent of this bill and the concerns with which we will be addressing ourselves as we consider this legislation.

I don't believe I have any further comments to make other than that which you have so eloquently described in your opening statement.

I look forward to hearing the witnesses that are here and I thank them for coming.

Thank you.

Mr. CLAY. Thank you.

We have a new member of the committee this year, Mr. Heftel.

Do you have an opening statement?

Mr. HEFTEL. I think I have been adequately preempted by your presentation. Thank you.

Mr. CLAY. Mr. Meiklejohn, you may proceed as you see fit.

STATEMENTS OF KENNETH MEIKLEJOHN, LEGISLATIVE REPRESENTATIVE, AFL-CIO, ACCOMPANIED BY PATRICK NILAN, LEGISLATIVE DIRECTOR, AMERICAN POSTAL WORKERS UNION; JOSEPH VACCA, PRESIDENT, NATIONAL ASSOCIATION OF LETTER CARRIERS; JOSEPH GLEASON, EXECUTIVE VICE PRESIDENT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES; JOHN McCART, EXECUTIVE DIRECTOR, PUBLIC EMPLOYEE DEPARTMENT; ALLAN MOSKOWITZ, REPRESENTING THE PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION; AND JAMES E. LYONS, DIRECTOR OF LEGISLATION, INTERNATIONAL FEDERATION OF PROFESSIONAL & TECHNICAL ENGINEERS

Mr. MEIKLEJOHN. Mr. Chairman, on behalf of the American Federation of Labor & Congress of Industrial Organizations, I should like to express to you our appreciation for providing an opportunity so early in this 1st session of the 95th Congress for consideration and action on H.R. 10, the Federal Employees' Political Activities Act of 1977. This bill should have become law during the last Congress and was only prevented from enactment by former President Gerald Ford's veto last year of similar legislation, H.R. 8617.

You are to be congratulated, Mr. Chairman, and members of this subcommittee, for proceeding so expeditiously to remedy what has long been a serious injustice in the form of denial of one of our most fundamental rights, that of participation in the political process, to the nearly 3 million Americans who work for the Federal Government.

Mr. Chairman, it is not my intention, nor is there any need for me to discuss in detail the reasons why the AFL-CIO supports the earliest possible enactment of H.R. 10. Those will be dealt with by the representatives of AFL-CIO unions having members employed in the Federal service who will follow me in testifying before you this morning.

At this point, Mr. Chairman, I would like to introduce them to you, if I may.

Mr. CLAY. Yes. Go ahead.

Mr. MEIKLEJOHN. Mr. Patrick Nilan is on my left, the director of the American Postal Workers' Union.

Mr. Joseph Vacca, president of the National Association of Letter Carriers.

Mr. Joseph Gleason, the executive vice president of the American Federation of Government Employees.

Mr. John McCart, the executive director of the Public Employees Department of the AFL-CIO.

Mr. Allan Moskowitz, representing the Air Traffic Controllers Organization.

And Mr. James E. Lyons, director of legislation of the International Federation of Professional & Technical Engineers.

All of these unions are affiliates of the AFL-CIO. They will follow me with such remarks as they wish to add in supplementation of my testimony. And I very strongly urge that you listen to them because they are the ones who are working with us in this legislation and the

legislation involving Government employees far more closely than we at the headquarters of the AFL-CIO.

The fact that we appear in panel form, I do not want to have interpreted as indicating that the AFL-CIO, which speaks for all of American labor, is not giving this legislation a high priority in our legislative program. On the contrary, enactment of H.R. 10 is a high priority objective of the AFL-CIO, an achievable objective, we believe, which we strongly support for enactment in this session of Congress.

The right of voluntary political participation, Mr. Chairman, is one of the basic rights of every American citizen, constituting, as it does, the very keystone of our system of self-government. This right is as basic for those who work as employees of the Federal Government as it is for the average citizen.

The need to restore to Federal and Postal Service employees their rights to participate voluntarily as private citizens in the political process of the Nation has long been apparent. The Hatch Act in its present form, as administered and interpreted by the Civil Service Commission, stultifies the political process and denies several million citizens their full citizenship rights. H.R. 10 would effectively remedy this situation by making clear that—

It is the policy of the Congress that employees should be encouraged to fully exercise, to the extent not expressly prohibited by law, their rights of voluntary participation in the political processes of our Nation.

The bill would give Federal Government employees the right to participate in partisan political organizations and election campaigns, including the right to run for office at the national, State and local levels. That these rights have long been denied to employees of the Federal Government and the Postal Service clearly has resulted in their being treated for practical purposes as second-class citizens. Enactment of H.R. 10 is necessary to eliminate a longstanding injustice to which Federal Government and Postal Service employees have been arbitrarily subjected.

H.R. 10 is carefully drafted so as to preserve and strengthen the protections of existing law against improper partisan political pressure. The bill specifically prohibits the use of official authority to interfere with Federal or Postal Service employees' right to vote or engage in political activity; prohibits political activity on the job, in a Federal building, or in uniform; prohibits the use by a Federal or Postal Service employee of official authority for political purposes; prohibits solicitation of political contributions from any such employee by a supervisory official or in a Federal Government room or building; prohibits extortion of money for political purposes from Federal employees; and in the case of employees in sensitive positions in the Internal Revenue Service, the Department of Justice, and the Central Intelligence Agency continues to prohibit them from engaging in political activities.

The bill provides for a three-member Board of Political Activities of Federal employees to adjudicate alleged violations of the law. The Civil Service Commission's responsibilities would include investigations of alleged violations and development of an educational pro-

gram to inform Federal employees as to their rights and responsibilities under the law.

Violations would subject an employee found guilty of violating the prohibition against use of official authority to interfere with an employee's political rights to a mandatory 30-day minimum suspension from duty without pay; unlawful solicitation of political contributions would result in removal, suspension or other penalty determined by the Board.

Mr. Chairman, the legislation which is now embodied in H.R. 10 has been the subject of lengthy and intensive study and hearings in the past. Your subcommittee and the full Post Office and Civil Service Committee reported such legislation unanimously in the last Congress, and the House of Representatives itself passed it by an overwhelming 288-119 vote. In the Senate the bill was debated for 3 days and passed with a substantial plurality. Had it not been for former President Ford's veto of the bill, it obviously would have been written into the law last year.

This year, we believe, we face no requirement that a two-thirds vote to override a Presidential veto will be necessary to enact the bill into law. The time has come—and the opportunity is present now—to remove the disabilities to which Federal and Postal Service employees are still subject in playing their part as citizens. The time has come, too, to specify and clarify just what forms of activity in the political arena are to be prohibited for Federal and Postal Service employees.

We believe H.R.10 is a sound, well-balanced piece of legislation. We urge a prompt favorable report on the bill by this subcommittee and by the full Post Office and Civil Service Committee. We look forward to its early passage by the House of Representatives and the Congress.

And now I would like to call on Mr. Patrick Nilan for his comments.

Mr. NILAN. Thank you, Mr. Chairman and members of the committee for the opportunity to again come before the Congress and urge the 95th Congress and our new President to grant postal and Federal workers their complete political freedom after 36 years of having had it denied.

We want to express our appreciation to not only the chairman of the committee for sponsoring H.R. 10, but also approximately 65 co-sponsors of this very important legislation.

I am delighted to appear here this morning with a panel of our AFL-CIO postal and Federal employee representatives, and of course with our good friend Ken Meiklejohn who is representing President Meany and the AFL-CIO.

Naturally we like to spend some time getting on the record and making certain that there is no difference of opinion as to where we stand. But in view of the fact that last year the hearings conducted by this committee and by the chairman were so deep and involved and we at that time presented a very lengthy statement, I would just like to simply say at this time that we have updated our statement. We have submitted it for the record, and we appreciate the committee including it in the official record.

With that, Mr. Chairman, we hope the Congress will speedily enact H.R. 10. Thank you very much.

Mr. CLAY. Thank you.

[The prepared statement follows:]

PREPARED STATEMENT OF PATRICK J. NILAN, LEGISLATIVE DIRECTOR, AMERICAN
POSTAL WORKERS UNION (AFL-CIO)

Mr. Chairman and members of the committee, I am very pleased to appear before the Committee this morning in support of H.R. 10 proposing to grant "Political Freedom" to postal and federal workers by amending the Hatch Act. We are grateful to you, Mr. Chairman for the introduction of H.R. 10 and also scheduling these hearings.

We speak in behalf of more than 350,000 postal employees for whom we are the Exclusive National Representative for labor-management relations and collective bargaining with the U.S. Postal Service. Our membership is employed in post offices in all 50 states, the District of Columbia, Puerto Rico, Virgin Islands and Guam. We are an industrial union representing clerks, maintenance and motor vehicle employees, special delivery messengers, and employees at USPS mail depositories, postal data centers and the mail equipment shop.

First, Mr. Chairman, we believe that after more than thirty-six years of flagrant and arbitrary prohibitions against political action and involvement by postal and federal workers in this great country of ours that such loyal employees are mature enough, intelligent enough and long suffering enough to have this unconscionable Hatch Act removed from their backs, once and for all.

Postal workers in addition to the H.R. 10 and remaining Hatch Act built-in protections against reprisals, harassment and coercion for political involvement have an excellent National Contract grievance procedure to protect them against any such negating influence. Postal workers and their unions are ready, willing and able to participate fully in all respects of American political life and have absolutely no fear or even concern that this involvement could in any way compromise their employment or opportunities for advancement within the U.S. Postal Service.

H.R. 10 and companion bills would not only retain existing protective shield against management or other reprisals for political action but would further strengthen penalties and punitive action against anyone who may consider any such ill advised coercion or harassment. The Clay Bill would provide the following political rights to postal and government workers and restore these rights denied them for thirty-six years to participate as private citizens in the political life of our Nation.

First: It permits employees to contribute voluntarily to candidates for public office.

Second: it permits employees to express their views and to participate in political management of campaigns, as private citizens, without the involvement of their official authority or influence.

Third: it specifically defines the meaning of political management and campaigns, to include: Candidacy for service in political conventions; Participation in political meetings, caucuses, and primaries; Preparing for, organizing or conducting a political meeting or rally; Membership in political clubs; Distributing campaign literature and distributing or wearing campaign badges and buttons; Having a publishing, editorial, or managerial connection with political publications; Participating in a political parade; Circulating nomination petitions; and Candidacy for any public office.

FEDERAL EMPLOYEES DEMAND FIRST-CLASS CITIZENSHIP

Mr. Chairman, once again, attention is focused upon a law which is almost universally condemned. Except for the Civil Service Commission, everyone knowledgeable on the subject recognizes that the Hatch Act constitutes an outstanding example of legislative overkill. To correct some alleged evils, many of the most fundamental constitutional rights of all postal and federal employees are denied to them.

To say that the Hatch Act clearly constitutes an unreasonable restriction of the political activities of government employees is an understatement. As a matter of fact, once age, residence and registration qualifications have been met, any restriction on the right of any citizen to participate freely and voluntarily in all the processes of government, including elections, would appear to be unreasonable. Some considerable credence has recently given further impetus to this point of view by recent court decisions invalidating unreasonable residence and other requirements. Having met reasonable qualifications, there would appear to be no good reason for denying an employee of the Federal Government any of the rights

enjoyed by other citizens to participate in elections by taking part in whatever partisan political activity that he or she chooses.

The people represented by the American Postal Workers Union are informed, intelligent citizens who, given the opportunity, might reasonably be expected to show excellent judgment in selection of political candidates for office in this country and in participating in activities in support of them. Under the Hatch Act, these members do not have this opportunity. But, as our deceased former President, E. C. Hallbeck, was fond of pointing out, strangely enough, the town ner-do-well does.

Aside from the question of infringement upon a basic right of an employee to be politically active, the Hatch Act as it is presently interpreted by the Civil Service Commission, has created a climate of doubt and uncertainty that altogether too often resulted in Government employees failing to even exercise their right to a ballot. Seemingly, they reason that the best way to stay out of trouble is to stay completely free from elections. The suspicion arises that this same attitude on the part of others accounts for the fact that all elected public officials are not always what they should be.

Certainly, no one in this day and age would advocate a return to a "Spoils System." No one is advocating that Government employees should be subjected to the requirement that they make political contributions to any political party or candidate. It is not suggested that Government officials or employees should be permitted to use their official positions to promote the political ends of any party or candidate. Neither is it suggested that any post office or other Government agency should become a political stomping ground, or that any employee should be able to coerce, or be subject to coercion, on behalf of any party or candidate. All of these things either have been, or can be, covered by statute but it is not necessary to make political hybrids out of employees of the Federal government in order to prevent such occurrences.

Good government results from the largest possible participation in political life. It seems we have experienced a tendency over the years to drift away from such participation. As a matter of fact, barely half of the electorate even goes to the polls in the average election and a 55 percent vote in a presidential election is something to shout about. In contrast to this, participation in elections in nations of the British Commonwealth and Western Europe runs considerably higher.

A lot of other countries, such as Canada, when they first established Civil Service systems, had very broad bans on the political activity of Civil Service. But as the years have passed in most western countries, there has been a realization that it is no longer necessary to emasculate government employees politically in order to protect the Civil Service or the general public. This is true in Sweden, Canada, Germany, and Great Britain, just to cite a few. Great Britain, for example, enacted a law in 1953 under which blue collar employees and all of the lower grades of white collar Civil Service are exempted from any restraint on political activity. They can even run for the House of Commons. Of course, while running they have to take leave of absence—but the government is required to give it to them. If they are elected they then resign. If they are defeated they can go back to work as a postal clerk or to whatever other job they do.

What earthly reason is there for saying that a postal employee should be barred from political activity. There might be some reason for barring some of the higher grades, people who are in a position to effect and implement policy. But many of these are exempted from the Hatch Act at the present time.

Persons exempt from the Hatch Act are: 1. President and Vice President. 2. Employees of the President's office. 3. Heads and Assistant Heads of the Executive Department. 4. Appointed officers by the President. Hatch Act restrictions on political management and political campaigning are all inclusive and the only undisputed right of government employees is the right to vote.

Many difficulties arise in conducting normal day-to-day union business because of the Hatch Act. The American Postal Workers Union represents approximately 350,000 employees, all of whom have a direct interest, particularly in electing officials sympathetic to their causes. They would like very much to start a voluntary political fund in order to assist in accomplishing this end. However, can the local union officers who are also employees of the Postal Service solicit contributions from their members, even during a union meeting? Myself and other elected national officers of APWU are on leave of absence without pay from the Postal Service and have been for as many as 15 or more

years. Civil Service Interpretations (contained in their Pamphlet No. 20 on page 8) deem me still subject to the Hatch Act even though our legal counsel points out that this is an erroneous interpretation.

Perhaps the best statement in favor of lifting these restrictive measures was set out by the California Supreme Court in declaring a little Hatch Act of California unconstitutional.

"As the number of persons employed by government and governmental-assisted institutions continues to grow the necessity of preserving for them the maximum practicable right to participate in the political life of the republic grows with it."

"Restrictions on public employees, which, in some or all of their applications, advance no compelling public interest commensurate with the waiver of constitutional rights which they require imperil the continued operation of our institutions of representative government."

Mr. Chairman, we appreciate the active interest you have taken in this cause and we support your entire effort.

The National Convention of the American Postal Workers Union has repeatedly over the years, adopted resolutions similar to the one that follows:

"Whereas the Hatch Act makes a federal employee only a second-class citizen, be it therefore

Resolved, that our national officers seek legislation to amend those portions of the Hatch Act to guarantee us first-class citizenship."

For as long as I can remember, similar resolutions have been adopted by each convention of other employee unions without dissent.

The APWU's most recent convention had nearly 2,500 delegates. Other government unions had a similar number of delegates and yet, writers of the government column in the Washington Star recently indicated that they had not witnessed any real desire on the part of the rank-and-file to amend the Hatch Act. I would like to point out, Mr. Chairman, that those same writers sat in on those conventions as observers.

Before we conclude this presentation, M. Chairman, we would like to have three exhibits included as a part of this statement for the record. We believe these exhibits will be helpful to the Committee in your deliberations on a final version of H.R. 10 which hopefully will be favorably reported and enacted into law.

"Exhibit No. 1" contains two reprints of articles from the Washington Star newspapers of March 4, 1975 and March 16, 1975. The pros and cons regarding revision of the Hatch Act were published in these Washington Spotlight columns by Mr. Joseph Young, a staff writer for the STAR. The March 16 column reports our answer in opposition to present Hatch Act restrictions and Mr. Young's March 4 column opposes Hatch Act changes. We believe our statements effectively respond to those opposed to any liberalization of the existing statute.

"Exhibit No. 2" is a reprint of a front page story in the July 31, 1972 Washington Star & Daily News entitled "Hatch Act Political Ban Ruled Illegal". Even though the Supreme Court subsequently overruled the three-judge federal panel and decided the Hatch Act was constitutional, the July 31, 1972 news report does explain the reasoning used by a majority of the Federal District Court panel in declaring the Act unconstitutional.

Finally Mr. Chairman, we are submitting "Exhibit No. 3" which we believe will be a great asset in your consideration of the pending legislation. This is, in our opinion an outstanding and in-depth documented analysis of the Hatch Act with emphasis on the statutory and judicial construction and history of the Act.

This excellent commentary entitled, "The Hatch Act, Political Restraint of Government Employees—A Time for Change" was prepared by a member of our own American Postal Workers Union, Mr. Frank E. Giordano of Highland, New York who is a college student. The thesis is very timely as it was submitted by Mr. Giordano less than a year ago on April 30, 1974.

Thank you Mr. Chairman and Members of the Committee for scheduling this hearing on H.R. 10 and permitting us to express the views of the American Postal Workers Union (AFL-CIO) in support of this legislation and long overdue revision of the Hatch Act.

THE HATCH ACT

POLITICAL RESTRAINT OF GOVERNMENT EMPLOYEES—A TIME FOR CHANGE!

(Submitted by Frank Giordano, Apr. 30, 1974)

THE ACT

The most controversial and disputed section of the Hatch Act, Section 9a, will be the subject of this paper. Other sections will be discussed. The major emphasis, however, will be the constitutionality of Section 9a.

The Act was promulgated in an attempt to reform the Civil Service. It states, "It shall be unlawful for any person employed in the executive branch of the federal government, or any agency or department thereof to use his official authority or influence for the purpose of interfering with an election or effecting the results thereof. No officer or employee in the executive branch of the federal government or any agency thereof shall take an active part in political management or in political campaigns."¹ This includes:

1. State or local agency: The executive branch of any state or municipality or other political sub-division or agency or department thereof.
2. Federal agency: Any executive department, independent establishment or other agencies of United States; except the federal reserve system.

This section of the Act is deceptively brief. Nevertheless, the number of people it touches is vast in number. All employees of federal agencies and state agencies subsidized by federal funds come under its jurisdiction.

Persons exempt from the Hatch Act are: 1. President and Vice President. 2. Employees of the President's office. 3. Heads and assistant heads of the executive department. 4. Appointed officers by the President.²

Hatch Act restrictions on political management and political campaigning are all inclusive and the only undisputed right of government employees is the right to vote.

Programs preventing government employees from political activism are supported by those who believe political neutrality will help to create a more efficient Civil Service. Government employees have been looked upon as a separate group and subjected to restrictions which rarely apply to the rest of the body politic.

The movement toward requiring neutrality on the part of government developed for several reasons, the most prominent of which was the "spoils system". The spoils system was a disturbing element in the American method of administering public employment. Public employment in exchange for work in party organization and campaigning was a common occurrence.³

Supporters of political neutrality also argue that it prevents: 1. Competition between the party and the department head for the employee's loyalty. 2. Employee demoralization which results from rewards based on politics rather than

¹ U.S. Statutes at Large, Vol. 54, Part I.

² American Political Science Journal, 1941, p. 447.

³ Esman, The Hatch Act—A Reappraisal, 60 Yale L.J. 998 (1951).

merit. 3. And it prevents the bureaucracy from becoming an internal political power bloc.⁴

The Hatch Political Activities Act was passed in 1939. Incorporated into the act were Civil Service restrictions passed under the Executive Order of 1882. Prior to and after 1882 several Executive Orders were passed focusing on political activity by government employees.⁵

The first constitutional challenge in reference to political neutrality of Civil Service employees came in *Exparte Curtis*.⁶

A shipyard employee was charged with violating the Act of 1887 c. 287 forbidding employees not appointed by the president or confirmed by the Senate from receiving or giving money for political purposes. The Supreme Court's decision upheld the right of Congress to regulate the political conduct of its employees. Justice Waite, author of the Court's opinion, charged that forcibly exacting contribution for political purposes would damage the overall operations of government. He stated that Congress is within bounds to prevent the possible destruction of government.⁷ It is Congress's duty said Justice Waite to maintain of citizens, in this particular case, insuring an efficient Civil Service. The Court felt that the Act; 1. Protected government employees from being forced to make political contributions. 2. Prevent inferior employees from making liberal contributions that would help to keep them on the rolls, thus downgrading the Civil Service.⁸

Close examination of the Court's decision reveals the Court's failure to deal with the respondent's charge that his constitutional rights were violated. The major thrust of the Court's decision was that Congress had the right to infringe on constitutional guarantees, if, the subsequent results protected the majority of citizens, in this particular case, insuring an efficient Civil Service.⁹ The Court stated it could not overrule a legislative act unless it was an excessive violation of constitutional freedoms. The difficult question to consider is what did the Court think was excessive. Moreover, one could clearly see that removing first amendment rights of government employees because campaign funds *may* be forcibly solicited is abusive.

In addition there has been no establishment of a clear and present danger. The doctrine set down by Curtis is later utilized in *United Public Workers v. Mitchell*.

The appellant in this case declared Section 9a of the Hatch Act unconstitutional, violating the appellant's first, ninth and tenth amendment rights. George Poole had his job in the United States Mint terminated because of his political activity.¹⁰ Alluding to *Exparte Curtis* the Court ruled that Congress had the power to protect a free society from the evils of political partisanship on the part of Civil Service employees.¹¹ The Court did accept, however, the charge that Poole's rights had been violated. Nevertheless, they continued, no rights are absolute and the protection of the people in general take precedence over individual rights.¹² The Mitchell opinion also focuses on the need for order outweighing the rights of Civil Service employees.¹³ Political contributions of energy to campaigns are disapproved by Congress and the president. Since they are responsible for the efficiency of the Civil Service and in their judgment restriction of political activity is in the best interest of democracy, the Court felt it could not object.¹⁴

In conclusion the Court argued that the sovereignty of the Federal government over the states supports Congress in the legislation of the Hatch Act. The federal government is sovereign because its powers are granted by the states and any infringement of constitutional rights is based on the power of the Union over the states to protect the national interests.¹⁵

⁴ Madama, *The Hatch Act—A Unconstitutional Restraint*, Albany L.J. 346 (19—).

⁵ Irwin, *Hatch Act decisions*, 20.

⁶ U.S. 106, 373.

⁷ U.S. 106, 374.

⁸ U.S. 106, 375.

⁹ Eleven other Mint employees claimed they desired to participate in political activity and demanded a declaratory judgment. The Court refused stating they could not grant a judgment until an employee was actually threatened with loss of his job.

¹¹ Cushman, *Leading Constitutional Decisions*, p. 99.

¹² Constitutionality of the Hatch Act," Albany Law Journal, p. 349.

¹³ U.S. 330, p. 98.

¹⁴ U.S. 330, p. 96.

¹⁵ *Oklahoma v. United States Civil Service Commission* was heard at the same time as *UPW v. Mitchell*. Here France Paris was a State employee, he was removed because of political activity. But, the State charged the Hatch Act was attempting to regulate the internal affairs of the State. The Supreme Court ruled that the Federal Government could do so by indirectly fixing the terms and conditions by which Federal money could be spent. U.S. 330.

The opinions stated by the Court in *Exparte Curtis* and *UPW v Mitchell* vigorously support Congress's right to maintain an effective Civil Service. They fail however, to seriously speak to the constitutional violations charged by the appellants. The dissenting opinions of Justice Bradley in *Curtis* and Justices Black and Douglas in *Mitchell* deal extensively with the procedural and substantive violations of the Constitution.

JUSTICE BRADLEY-EXPARTE CURTIS DISSENT

Justice Bradley understood that all available offices for candidate are open to all Americans and Congress cannot prohibit qualified candidates from seeking office. To prohibit by law active participation of citizens is according to Bradley a violation of their fundamental rights. Discouraging active participation by all citizens, he continued, because of a few is usurping the rights of citizens in a free society to express their own ideas.

Ideas and opinions are transmitted through the news media and in order to disseminate information, financial contributions are necessary. Taking away a man's right to associate with people in a political venture or contribute jointly with their associates is usurping this fundamental freedom.¹⁶

Bradley was cognizant of the possible evils in allowing partisan political participation. It was abundantly clear to him that violating the rights of a majority for a few was repugnant to the Constitution. Bradley stated that attempting to do good by evil means is unlawful.¹⁷

JUSTICE BLACK UNITED PUBLIC WORKERS V MITCHELL-DISSENT

Government employees are paid through the public treasury, therefore they are to be without the political process, a vital necessity in a democratic system. Mr. Justice Black expertly pointed out that the Hatch Act is vague and broad in its prohibitions, namely Section 15 which lends support to 9a.¹⁸ Section 15 includes into the Act Civil Service Commission rulings pertaining to the political activity of Civil Service employees.¹⁹

The Hatch Act allows public employees to express their opinions on all political candidates, unfortunately many of the decisions incorporated into the Act through Section 15 contradict that provision.²⁰ Publicly expressing political views at a party caucus or political gathering for a candidate, participating in a political parade, writing or publishing a letter signed or unsigned are prohibited.²¹

Prior to the passage of the Hatch Act Senator Brown challenged the validity of Section 15. The Senator doubted whether the vagueness and complexity of the act could be accepted into statute law. The Senate majority leader attempting to force legislation said that Senator Hatch had assured him that Sect 15 was not contrary to constitutional guarantees, thus the act was passed and along with it 3,000 cases ruled on by the Civil Service Commission establishing stare decisis.²²

Pamphlet 20 is the main source of information on the Act and is distributed to all Civil Service employees. The information enclosed summarizes Hatch Act prohibitions in 7 pages and can hardly be considered a valid document.²³ Moreover, the contents of Pamphlet 20 is the only information made available for the defense in cases charging Hatch Act violations.

The legislature deemed it necessary to impose restrictions on political activism. In addition, the Court admits certain constitutional guarantees of government employees are being violated. Therefore, it is incumbent upon these branches, if they are determined to keep government employees neutral to establish the least evil method. The Hatch Act as it stands is broadly vague and fails to hit the mark.

Implanting fear into government employees who will always doubt what is or is not a violation of the Act is a subtle form of censorship. The Civil Service Commission also holds employees responsible for actions taken by their families concerning political activity leaving the employee with the right to vote in silence.

¹⁶ U.S., 106, 376.

¹⁷ U.S., 106, 375.

¹⁸ U.S., 330, 99.

¹⁹ Political Activity of Federal Officers and Employees, Pamphlet 20.

²⁰ Rose, A Critical Look at The Hatch Act, Harvard L.R. (1961) 520.

²¹ Ibid., 521.

²² Harvard L.R. 517.

²³ Ibid., 516.

Justice Black argued that the purpose of government is to encourage participation in the political process. To disallow certain Americans from speaking out is repugnant to republican form of government. Censorship of millions of people not only harms the people themselves but the body politic in general. Federal and State employees are like other citizens in every other way, how can one justify taking away their rights to participate in a free society.²⁵ Mr. Justice Douglas dissented in part devoting much of this attention to Court decisions concerning first amendment rights.

JUSTICE DOUGLAS UPW V MITCHELL—DISSENTING IN PART

Justice Douglas argues that Poole was involved in manual labor as a roller in the U.S. Mint and it would be unlikely for an individual at that level of employment to affect political decisions.²⁶ Prohibiting all employees in the Civil Service from political activity based upon the possibility of improper behavior was unnecessary and extreme. Douglas's views are similar to the British system of Civil Service. In Britain manual laborers are allowed to campaign and run for office. Those employees in high administrative positions which require a certain amount of discretionary power are prohibited from active politics.²⁷

Justice Douglas believed that federal employees have the same rights as other citizens and should not be treated as second-class citizens. Government employees have the right to join together as free citizens for a common purpose; which is what any group in a society would do to advance their own ideas.

Justice Douglas noted that when controversy developed concerning individual liberty and community protection, the abridgement of constitutional rights would have to be justified by a clear and present danger.

In *Cantwell v. Connecticut* it stated that authorization of previous restraint upon individual rights of free speech and free press are not admissible under the Constitution.²⁸ In addition the state may not unduly suppress free communication of views under the guise of conserving desirable conditions. Since *Cantwell*, a Jehovah witness, going door to door preaching, did not pose a clear and present danger, the Court ruled that he could not be convicted of the offense.²⁹

The case of *Cantwell v. Ct.* was ignored by the Court when considering the constitutionality of the Hatch Act. In several cases following the Hatch Act decision the Court forced the State to show more reasons why they needed to inhibit freedom of speech. *Speiser v. Randall*.³¹ Moreover, in *Sheldon v. Tucker* the Court recognizing the government's purpose as being legitimate ruled that regardless of the desires of government, it cannot suppress personal liberties when an end can be more narrowly achieved.³²

In view of these past developments the constitutionality of the Hatch Act is vulnerable to attack. The government in the future will have the burden of proof to show a less drastic means in which to provide an efficient Civil Service.

Government violations of fourteenth amendment rights were not discussed in any of the cases concerning the Hatch Act. The Act limiting political activism of Federal employees establishes categories and affords different treatment to those employees within these categories. For example, not all employees are prevented from actively participating in politics. Certain classifications are acceptable of the class specified is that from which "the evil to be feared."³³ Hatch Act provisions are in conflict with the "evil to be feared" doctrine since employees involved in the highest operation of government are exempt from the act. These employees are more in a position to cause harm if they were inclined to do so.

CONCLUSION

Congress has a duty to protect the public from an inefficient bureaucracy and to insure that government employees serve the public rather than their own interests. Although this is an awesome responsibility it does not give Congress the freedom to abridge first amendment rights in the name of democracy.

²⁵ U.S. 330, 110.

²⁶ U.S. 330, 101.

²⁷ Yale Law Review, 1937.

²⁸ U.S. 310, 308.

²⁹ *Ibid.*, 311.

³¹ U.S. 357, 513, 527.

³² U.S. 364, 479.

³³ Albany L.R. 355.

Other alternatives are available that can accomplish the aims of the Hatch Act. If employees are advanced based on merit and efficiency, employee morale will be boosted. Non-partisan exams and competitive hiring reduce the threat of political favoritism.

While less evil alternative solutions curbing pernicious political activity are available, it is the duty of Congress to implement measures consonant with the American traditions of political activism.

Section 15 of the Hatch Act incorporating all previous Civil Service Commission decisions into the Act creates more evil than the good intended. The case of J. Cole can be used as an example of resultant evil from good intentions. Cole was a rural letter carrier and Jehovah Witness. He was fired because he subscribed to the Watchtower publication which advocated "anti-war" policies, a clear violation of first amendment rights.³⁴ In *Harper v. Board of Education* the Court declared that it had a higher duty to protect fundamental freedoms from violations of equal protection. "Classification which might invade or restrain fundamental freedoms must be closely scrutinized and carefully confined. It is beyond dispute that first amendment rights must be considered fundamental freedoms."³⁵

Good government results from the largest possible participation in political life. The Hatch Act usurps this fundamental liberty. Permitting government employees to become involved in the political process will help to create a healthier United States.

TABLE OF CASES

- Cantwell v. Connecticut*, U.S. 310
Ex parte Curtis, U.S. 106
Harper v. Board of Education, U.S. 383
Oklahoma v. United States Civil Service Commission, U.S. 330
Sheldon v. Tucker, U.S. 364
Speiser v. Randall, U.S. 357
United Public Workers v. Mitchell, U.S. 330

BIBLIOGRAPHY

- Cushman, Robert E. *Leading Constitutional Decisions*, Appleton-Century-Crofts, Inc., 1958.
 Heady, Ferrel. "American Government and Politics: The Hatch Act Decisions," *The American Political Science Review*, 1947.
 Howard, L. V. "Government and Politics: Federal Restrictions on the Political Activity of Government Employees," *The American Political Science Review*, 1941.
 Irwin, James W. "Hatch Act Decisions: Political Activity Cases of the U.S. Civil Service Commission," U.S. Government Printing Office, 1949.
 Laski, Harold J. "The British Civil Service," *Yale Law Review* 26, 1937.
 "Political Activity of Federal Officers and Employees," Pamphlet 20.
 Rose, Henry. "A Critical Look at the Hatch Act," *Harvard Law Review*, 1961, 1962.
U.S. Statutes at Large, Vol. 54, Part I.

[From the Washington Star of Mar. 16, 1975, Federal Spotlight]

OPONENT OF HATCH ACT SPEAKS OUT

(By Joseph Young)

In a recent column we expressed the view that pending legislation to overhaul the Hatch Act would have a disastrous effect on federal career employees and the merit system, jeopardizing jobs and careers.

The column drew a lot of reaction, both pro and con. While we haven't changed our views, we feel it is only fair to give equal space to those who favor giving freedom of political action to government workers.

Expressing the viewpoint of those favoring overhaul of the Hatch Act is a letter from Patrick J. Nilan, legislative director of the AFL-CIO American Postal Workers Union (APWU) and one of the ablest lobbyists in town.

Nilan writes: "As old friends and admirers we are astonished and saddened by your recent defense of the Hatch Act. The views you expressed repudiate the very concept of fundamental liberties on which our form of government is based. They also reflect a dismal judgment of federal employees generally.

"What's more you have tried to buttress your argument with personal observations that are demonstrably wrong.

"You say that in more than 25 years of covering the government beat, with the exception of one individual in Virginia, you have never encountered a government worker who wanted the Hatch Act meaningfully changed.

"Yet only last August, Joe, while covering the APWU national convention at Miami Beach, you personally saw 2,325 union delegates—government workers all—vote unanimously for repeal of the Hatch Act. Not a single voice was raised in its defense from the floor. Indeed, you have been a personal witness to similar unanimity at earlier conventions, ours and others.

"Surely you are familiar with the tough penalty provisions written into H.R. 3000 by its sponsor, Rep. William Clay, D-Mo. Political firings, forced fund-raising, even arm-twisting by the boss all are punishable by asserted degrees of chastisement ranging from a minimum 30-day suspension without pay to full federal prosecution in the courts.

"To suggest, as you do, that whenever a new administration takes over with a change in political parties that politically-active employees would 'face the ax' is to suggest that the rule of law does not exist and that the lessons of Watergate will have no future impact on the body politic. That kind of scare talk is pure rubbish.

"But there is an even more grievous element in your rationale: inherent throughout your column is the clear implication that the overwhelming majority of federal workers are politically gutless drudges, timid and enfeebled, condemned in your own words to lack-luster careers by a fear of their bosses, and eager to avoid exercising the most precious civil right ever devised by a free society—the right to participate in the action and passion of their times.

"The Hatch Act as it now stands not only abridges those rights, it flouts the deepest traditions of political activism in America. It is a form of repressive overkill. It has no compelling interest commensurate with the waiver of constitutional rights involved in its continuing application. As federal employees we resent our second-class status as citizens and we are not afraid to pursue our rights to political action or to exercise it regardless of what party may be in power.

"Joe, we still love you, but it strikes us as ironic that a union of federal employees should have to make these arguments to, of all people, a Washington journalist!"

[From the Washington Star, Mar. 4, 1975]

HATCH ACT CHANGES ARE A BAD IDEA

(By Joseph Young)

Their intentions undoubtedly are the best. But the three Washington-area members of Congress who have co-sponsored legislation to overhaul the Hatch Act to give federal employees wide freedom of political activities may be doing the employees a grave disservice.

With one exception, in our more than 25 years of covering the government beat, we have never encountered a government worker who wanted the Hatch Act meaningfully changed. The one exception was an employee who was active in politics in a southern Virginia community before he came to Washington to get a federal job.

Federal and postal employee union leaders are all in favor of overhauling the law restricting the political activities of government workers, but it's doubtful that most employees are.

The unions favor overhaul because it would increase their clout with Congress and the political party in power in the White House.

But it would mean the end of the merit system as we know it today.

The attacks on the merit system that occurred during the Nixon administration would be mere child's play compared to what would happen if the Hatch Act were radically changed.

Rep. William Clay, D-Mo., chairman of the House Civil Service subcommittee on the Hatch Act, has sponsored legislation that would drastically revise the law in order to permit government workers to participate actively in politics.

Among those co-sponsoring the bill are Democratic Reps. Herbert Harris and Joseph Fisher of Northern Virginia and Gladys Spellman of Prince Georges County.

They are trying to be as fair as possible on the legislation and have arranged special night hearings of the subcommittee on April 14 to hear from federal employees who live in Northern Virginia and April 15 for workers in nearby Maryland.

The bill, while giving employees wide freedom of political activity, also has provisions to protect them from being forced to engage in politics if they don't want to.

However, as Chairman Robert Hampton of the Civil Service Commission has pointed out, this is a contradiction in terms. If federal employees were given the right to freely engage in politics, they would be on shaky ground indeed if they refused their bosses' orders to engage in political activities.

Actually, as Hampton notes, these would not have to be overt orders, but merely subtle ones.

In other words, employees hoping for meaningful careers and promotions would know that they would have to play the political game to get ahead.

But even then their careers would be jeopardized. For whenever a new administration took over with a change in political parties, these employees would face the ax.

As for those employees who refused to get involved in politics, their jobs probably would be safe enough, but they would have to resign themselves to run-of-the-mill jobs and lackluster careers.

So no one would win but the politicians, who would use government workers to help perpetuate themselves in office.

Government workers should make their views known to their representatives in Congress, who will be glad to hear them.

[From the Evening Star and the Washington Daily News, July 31, 1972]

HATCH ACT POLITICAL BAN RULED ILLEGAL

(By Barry Kalb)

A three-judge federal panel today ruled, 2-1, that the Civil Service Commission has been acting unconstitutionally in forbidding federal employees from engaging in certain types of political activity.

The judges concluded that provisions of the Hatch Act prohibiting federal employees from taking "an active part in political management or in political campaigns," are "impermissibly vague and over-broad," and ordered the commission to stop enforcing these provisions.

However, implementation of today's ruling, which potentially affects millions of federal employees over the country, was stayed pending an expected appeal to the Supreme Court.

The Justice Department had no immediate comment on whether such an appeal would be made, although it seems likely. The high court is currently in recess and would have to hold a special session if it decides to tackle such a sweeping question before the upcoming national elections.

The Hatch Act generally prohibits federal and postal employees from actively engaging in partisan politics. This prohibition includes serving as officers of any political organization or being candidates for most offices, serving as precinct captains or in any other political capacity.

Employees are also prevented from working actively for any political candidate, distributing campaign literature or making speeches on behalf of candidates.

Today's ruling did not state specifically what types of activity should be allowed. It left open the question of whether federal employees can run for elective office.

Presumably, if the ruling is upheld by the Supreme Court, Congress would have to enact new legislation stating permissible areas of political activity.

The suit was filed by the National Association of Letter Carriers, a union of postal employees with about 200,000 members, several county Democratic and Republican central committees in the Washington area, plus five individuals, all of whom stated that they were affected by the provisions of the act.

The U.S. Civil Service Commission and its three commissioners, chairman Robert E. Hampton, James E. Johnson and Ludwig J. Andolsek, were all named as defendants.

When the suit challenging the act was filed in March 1971, it asked that state employees covered by the Hatch Act also be included in any final decision.

FEDERAL EMPLOYEES AFFECTED

But today's decision, written by U.S. District Court Judge Gerhard A. Gesell, with District Court Judge Barrington D. Parker concurring and U.S. Court of Appeals Judge George E. MacKinnon dissenting, set aside the question of state employees and affects only federal employees.

Gesell, while upholding the need for some kind of check on political activity by federal civil servants, stated that the prohibitions in the Hatch Act provisions in question "are worded in generalities that lack precision."

"There is no standard," Gesell wrote. "No one can read the act and ascertain what it prohibits."

He called the issue "a classic case of a statute which in its application has 'chilling effect' unacceptable under the First Amendment."

He said the Civil Service Commission "has acted responsibly in attempting to apply the provisions of the act fairly, but that its efforts were thwarted because the commission 'was given no authority under the act to accommodate rigidly incorporated prior rulings to the rapidly evolving court interpretations of the First Amendment.'"

Gesell concluded that because of the statute's vagueness, federal employees could never be sure when they were violating its provisions, and stated:

"Ours is not a form of government that will prosper if citizens, particularly federal government servants, must live by the mottos 'Better be safe than sorry, and 'Don't stick your neck out.'"

Gesell suggested, but did not order, that the solution to the problem would be for Congress to state "with utmost clarity" which areas of political activity are impermissible.

ACT NOT VAGUE

MacKinnon, in a 26-page dissent, said he felt that the act was not overly vague and that "the reasonable federal employee is provided an ascertainable standard of conduct that does not impermissibly infringe on his First Amendment freedoms."

He said he would merely order the commission to clarify its rulings on the subject.

Parker reserved the right to file a separate concurring opinion in the case, although his office said it is not known at this time whether he will do so.

The suit was one part of a two-pronged attack on the Hatch Act by employee groups. Unions also have been seeking legislation in Congress to give government workers more political freedom, but no bills have emerged from committee in this session—partly because of concern on the part of some legislators about voter reaction, and partly because the lawmakers wanted to see what the court would do.

Mr. MEIKLEJOHN. Now, Mr. Chairman, Mr. Joseph Vacca, president of the National Association of Letter Carriers.

Mr. VACCA. Mr. Chairman and members of the committee, I am President J. Joseph Vacca, representing 230,000 letter carriers belonging to the National Association of Letter Carriers, AFL-CIO. Accompanying me today are, Executive Vice President Tony R. Huerta, Vice President Francis Conners, and Legislative Assistant Jerome R. Waldie.

Postal employees, as well as all other Federal employees, owe a debt of gratitude to Congressman William Clay, the prime author of Hatch Act reform and to the members of the House Post Office and Civil Service Committee for their tremendous efforts on behalf of this historical legislation in the preceding 94th Congress. Your leadership resulted in the Congress of the United States passing H.R. 8617 by substantial majorities. That we were deprived of the fruits of your labors by a Presidential veto was regrettable but in no way reflective of a lack of effort on the part of the Congress and the principals involved.

We are hopeful, Mr. Chairman, even expectant, that President Carter will reflect a deeper understanding of the importance of political freedom to Americans than did his predecessor.

I do not intend to dwell upon the provisions of H.R. 10. Our testimony in the previous session on the identical bill expressed our views on specific language in the legislation.

I do want to emphasize our general position on this vital legislation.

The NALC believes H.R. 10 is legislation that literally seeks to enlarge constitutional access to political expression. We believe so strongly that the existing Hatch Act interferes with individual Constitutional rights to freedom of speech that we sought a Supreme Court decision on the constitutionality of that act. Though we prevailed in the district court in our contention that the act was unconstitutional, the Supreme Court by a split decision of 6 to 3, in 1973, reversed the district court.

We continue to believe the Supreme Court erred in finding the Hatch Act restrictions on political expression to be constitutional.

There are few liberties in a free society as precious as is the liberty to fully utilize the political process to express agreement or disagreement with the policies of those who govern.

When that liberty is curtailed by government, I have always believed a necessity of demonstrating an overwhelming threat to society must be shown. Thus, the prohibition against shouting "fire" in a crowded theatre, to use the Supreme Court analogy, is not an unconstitutional prohibition on freedom of speech.

But there most assuredly is no equivalent threat to society from political action by Federal and postal employees.

I further suggest to you that political freedom in our democratic society is deserving of as high—if not higher—protection as is speech in other context. Most repression in the area of free speech is found in political expression. That repression is always from a fearful government. That danger is precisely what freedom of speech is designed to prevent.

Those who favor governmental restriction of freedom of political expression for Government employees, allege they do so to protect em-

ployees from political harassment by their superiors. I concede, for the sake of argument, that political suppression of individual employees occurred in the past and occurs today. But I emphasize, that particular denial of freedom to engage or not to engage in political activity was a denial imposed by one individual over another.

The denial to engage in political expression contained in the Hatch Act, is coercion imposed, not by an individual, but by the Government.

It is possible to tell an individual who seeks to force political expression or activity from one, to go fly a kite. It may not often occur, but the majesty of the law does not prevent one from so guaranteeing his or her political freedom.

It is not possible to tell the Government to go fly a kite when an individual is denied his desire to engage in political expression. The coercion by Government is far more oppressive and offensive than the coercion by a private individual.

The danger to a free society in the principles of the Hatch Act seems self-evident.

If the Government can define those Americans that it will permit to participate in the political process, the Government can control the outcome of the political process.

The history of America is sadly replete with such abuses. When the Government excluded blacks from participating in political expression, the Government successfully brought about the "desired" result, establishing the black American as a second-class citizen. The cruelty and the danger of thus permitting the Government to define those who would participate politically was tolerated much too long. Finally, the Congress, by virtue of the Voting Civil Rights Act, remedied this tragedy.

We seek similar recognition. We, too, have been denied our right to fully participate in the political process for far too long.

Congress can end this sad history by again passing Hatch Act reform.

I do not suggest by this plea for political freedom that individual denial of political freedom by our employee superiors should be condoned or ignored. H.R. 10 addresses that necessity by continuing in effect proper safeguards against political oppression by individuals in the Federal and Postal Service.

But it removes the greatest—and most dangerous oppressor—the Government from the role of denying those who so desire the full opportunity of political expression.

SUMMARY

Mr. Chairman, I wish to commend you and the members of the committee for your dedicated effort to release the Federal and postal employees from political bondage. We intend to support H.R. 10 in the same vigorous manner in which we supported H.R. 8617 until its passage.

At this time I am very happy to join with my colleagues in the AFL-CIO in this testimony, where we have introduced a statement of our own which I will not read at this time for time is involved.

I would like to go on record though for the National Association of Letter Carriers of opposing the proposed legislation by Congress, of

Mr. Fisher of the 10th District which we feel would make us less than half free.

With that, Mr. Chairman, I will relinquish my time to the other colleagues of the AFL-CIO.

Mr. CLAY. Thank you.

Mr. MEIKLEJOHN. Mr. Chairman, now I would like to call on Mr. Joseph Gleason, executive vice president of the American Federation of Government Employees.

Mr. GLEASON. Thank you.

Mr. Chairman, on behalf of the three-quarters of a million Federal employees represented by the American Federation of Government Employees I too, want to express the support of our organization for H.R. 10.

We believe that H.R. 10 will be one of the small handful of the most important pieces of legislation that will eventually come out of this very promising 95th Congress. It will make full citizens of Federal employees—indeed, it might well have been called the “Federal Employees Political Emancipation Act of 1977,” or “the Federal Employees Civil Rights Act of 1977,” or even the “Federal Employees Full Citizenship Act of 1977.” We are grateful that another “equal rights amendment” to the U.S. Constitution is not required.

There is not much new that anyone can say about the Hatch Act. Therefore, my statement will be very short. I felt it would be most helpful if I used the time you have given me to recap in very summary form the general AFGE perspective; what we think the bill really does; the main arguments for and against the bill; and the AFGE position on the bill.

AFGE has traditionally been committed to open, honest, and efficient government; government which stays close to and responsive to the people it serves, rather than becoming remote from or callous about their daily problems. AFGE also has traditionally been a strong supporter of the merit principle in making appointments and promotions in the Federal civil service. Finally, AFGE has traditionally asserted the right and obligation of Federal employees to possess and exercise the full powers and duties of citizenship.

This, then was the general perspective from which we looked at H.R. 10 to see what it would do. What H.R. 10 basically does, in our opinion, is three things:

It gives Federal employees the right to participate voluntarily in political activities. (It still, however, prohibits certain political activities which might raise a question as to government integrity.)

It greatly strengthens the protection of Federal employees against being coerced to participate in political activities.

It provides a badly needed effective system for administering and enforcing these freedoms, prohibitions, and protections.

We think these are all good things—from the perspective of responsive government, the vitality of the merit principle, and full citizenship of Federal employees.

For too many years, Federal employees have been encouraged and forced to think of themselves as “different”, sometimes superior to their fellow citizens, sometimes inferior, but rarely just about the same as anybody else. They were, for example, denied true collective bargaining rights. They were warned to stay away from current

political issues. They were not to blow-the-whistle on waste or wrongdoing in their own government. Above all, they were not to be regarded as plain, ordinary, hard-working, taxpaying, family-rearing citizens, but as faceless, bloodless "bureaucrats".

The net effect was to cut them off from fellow citizens who were active in labor union matters, active on political issues, active in government and other reform efforts, and so on.

We believe that H.R. 10 is a clear and heartening signal that times are changing and the Federal worker may soon be accepted as being not that much different from other citizens.

Therefore, we believe that the main arguments for enactment of H.R. 10 are those which emphasize: (1) the constitutional rights of Federal employees to freedom of speech and association; (2) the legal and moral rights of such employees to full participation, as citizens, in their own self-government through the prescribed political process; and (3) the general public interest in not excluding 2.8 million responsible citizens from real participation in the democratic electoral process.

The Democratic Party recognized the merit of these arguments in its 1976 platform. President Carter endorsed that platform. In 1972, the Republican Chairman of the U.S. Civil Service Commission testified that the Hatch Act should be amended to give Federal employees more political freedom.

The question is: "Why, then, are these precious rights still denied to Federal employees?"

When former President Ford vetoed H.R. 8617, the principal reason he gave in his veto message of April 12, 1976, was that freeing Federal employees from the Hatch Act prohibitions against voluntary political activities would endanger an employee's freedom from political coercion.

(It is noteworthy that President Ford's emphasis was on his concern about coerced political activities; he was relatively much less worried about voluntary political activities.)

His logic seemed to be: "More freedom is less freedom." This is worthy of George Orwell. Or, indeed, of the commander in Vietnam who is supposed to have told a reporter that: "We had to destroy that village in order to save it."

In any event, the answer to concern about coerced political activities is surely clear and sufficient when one looks at the very strong provisions in H.R. 10 itself which are specifically designed to protect employees against political coercion. These include criminal penalties for using one's official position to influence an election and prohibitions against political activities while on duty and against a superior soliciting a subordinate for political contributions.

In addition, the whole context in which the Government now operates has changed since 1939 because of—

The recently passed "Sunshine Act";

The new Freedom of Information Act;

The new Federal Elections Campaign Act and its strict reporting requirements;

The strengthening of the Congressional oversight function, and the ability of the Congress to correct any abuses of the new freedom of Federal employees to participate in political activities;

The increasing encouragement and protection of "whistle-blowers";

A vigorous alert U.S. Civil Service Commission; and

An interested, investigative free press.

These actions, taken collectively, establish a whole new climate of open government. This is the best protection we have against improper undercover activities in government, whether political coercion, bribery and graft, conflicts-of-interest, personal favoritism, catering to special interests, racial discrimination, or whatever.

I will close by saying I am certain the Members of this Congress are on the side of liberty. Let us never fear the people, nor deny any of them the full exercise of their political rights and responsibilities. Let us rather fear the damage done when such rights are denied.

The American Federation of Government Employees has never endorsed, and will probably never endorse, a bill more wholeheartedly and more proudly than we endorse H.R. 10.

Mr. MEIKLEJOHN. Mr. Chairman, I would like now to call on Mr. John McCart, the Executive Director of the Public Employee Department of the AFL-CIO.

Mr. McCART. This is the third time in just a little over a year that we have appeared before a congressional committee in support of amendments to the Hatch Act. We appreciate the opportunity to appear again on behalf of the several million public employees generally concerned and the approximately 3 million Federal and Postal Service employees primarily concerned with this legislation. Our department, composed of members affiliated from 29 national AFL-CIO unions, has written to every Senator and Representative in the 95th Congress advising them that this legislation you are considering is among our few very top priorities.

I am accompanied today by officials of a number of unions all or most of whose members are employed by the Federal Government or the Postal Service. Some of these officials will add their own statements. For the record I am John A. McCart, Executive Director of the AFL-CIO Public Employee Department.

We agree with the judgment of the 94th Congress, which you recall adopted identical legislation by strong majorities, in both House and Senate, only to see its will stymied by President Ford's veto.

Specifically and simply, the Hatch Act has, since 1939, become encrusted with interpretations, misinterpretations, rulings, and mythology. The results are twofold. Despite the problems, many of the protections afforded Federal and postal employees against undue political pressures remain viable and effective. The net result, however, has become overwhelmingly negative, discouraging and in effect preventing the exercise of citizenship rights by the affected employees.

An example of the confusing instructions given to Federal employees is in the Civil Service Commission's General Counsel Publication No. 36, dated September 1975. It begins quoting *Oklahoma v. Civil Service Commission* as follows: " * * * The end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for public needs to abstain from active political partisanship." This is the first thing that strikes the eye and its message at least is clear.

Despite the efforts to convey what the Hatch Act is supposed to allow and prohibit, there is a pervasive and chronic uncertainty among Federal and postal employees as to just what is permitted and what is not. This results in hundreds of thousands of these employees simply "sitting out" the democratic process, and playing no part at all in it.

There is of course, a history extending back well beyond 1939. The basic Civil Service Act of 1883 explicitly prohibits pressures on Federal workers for financial contributions or other assistance for political purposes. This was elaborated in the 1939 Hatch Act but was basically an extension of the principles stated by Congress in 1883.

While the purpose of these actions was to protect a merit system in the Federal Government, free from partisan pressures, the practical effect was to engender the belief that politics have no place in civil service and that Government employees can vote and not much else. Many feel that the safest course is to take no part in the political life of the community rather than to risk violation of the law.

We believe that this negative and injunctive approach should be reversed. Federal employees, as citizens, should be encouraged to participate in political work—partisan or nonpartisan—to the maximum extent consistent with retention of the merit system and protection of the public interest.

H.R. 10 does this and threatens neither the fundamental principles of the Civil Service Act nor the Hatch Act. The proposed changes in the latter statute will encourage Federal and postal employees to accept their citizens' responsibilities without doing violence to the merit principle.

H.R. 10, happily, substantially reenacts the protections that individuals, and the public interest, require against improper political pressures of all kinds. Indeed H.R. 10 goes further than the 1939 act in at least two important respects. First it establishes a board on political activities of Federal employees, which will be a particularly helpful innovation since, independent of the Civil Service Commission, it will end the role of the Commission as prosecutor, judge and jury in alleged violations (sections 7322, 7327). The three-person nonpartisan board will "hear and decide [the] cases," which the Civil Service Commission has investigated and reported (section 7328).

Another improvement is the requirement that the Civil Service Commission must normally complete action within 90 days after it initiates action in any alleged violation. This expeditious handling is important to the accused, to the accuser and to the public interest.

We believe that both of these requirements will substantially strengthen those guarantees against partisan abuse, without which we would have no part in supporting the pending bill.

However, in addition to strengthening protection—from pressure—for the employees, this legislation will make clear to the covered employees that they enjoy the full citizenship rights to which they are entitled. This is important to these employees and to America in many ways.

For one thing it will help increase participation in the electoral process. In the last election in 1974 approximately 40 percent of eligible Americans voted. Even in the 1976 presidential election only 81 million, or 54.4 percent of those eligible to register, in fact, cast

ballots. Thus this bill may well encourage a concerned, informed, responsible group of citizens to vote—and just as important—to join in the full political process, the caucuses, the primaries and related activities.

For this reason at convention after convention, from local to State, to national union meetings, to the AFL-CIO itself, delegates elected by private and public sector workers have voted unanimously to revise the Hatch Act.

In 1974 Congress enacted a series of amendments to the Federal Election Campaign Act. Section 401 of that statute—Public Law 93-443—removes all of the previous restrictions on political activity by State and local government employees, whose jobs are financed in whole or in part by Federal funds. The one exception is that they are still prohibited from competing as candidates for partisan political office.

With the exception of the continued inability of these workers to vie as partisan candidates, we believe the decision reflected in section 401 was wise. It should now be applied to Federal and postal employees but allowing candidacy.

Some have raised a question as to whether public employees should have the right to become candidates, even while on leave as required by H.R. 10, to run for partisan political office. Our answer is that Federal and postal employees should, as nearly as possible, enjoy the same political rights as their fellow citizens. This is one of the basic rights they should not be denied.

Because of the intensive study, and substantial hearings previously held in the 94th Congress on this legislation, there is no justification for delays in its enactment. The 1976 Democratic convention included in its platform a clear call for amendment of the Hatch Act. We are delighted that President Carter takes the same position.

Since enactment of the Civil Service Act in 1883, our Nation has experienced several crises, including the tragic political events earlier in this decade. Throughout these crucial turning points in our history, Federal and postal employees have continued to execute their responsibilities to extend service to the public in an exemplary fashion. The civil service system has withstood severe strains in these periods, but the integrity of its workers has remained intact.

We maintain that this performance lends credence to our contention that revision of the Hatch Act poses no threat to civil service principles.

Continuation of the Hatch Act in its present form will simply assure denial of fundamental citizens' rights to millions of Americans.

SUMMARY STATEMENT

We strongly advocate enactment of H.R. 10. One of the serious disadvantages of the present statute is that postal and Federal workers are actively discouraged from participating in political functions.

In the last election of 1974, 40 percent of the eligible voters exercised their franchise. And in the 1976 Presidential election 54.4 percent of registered voters participated. This indicates a strong need to encourage rather than discourage Federal and postal employees from engaging in the political process.

The Civil Service Act has been a statute for more than 90 years. The Hatch Act itself was originally enacted in 1939. Since enactment of those laws, there have been very severe crises that our Nation has experienced.

Throughout all of these crucial periods, postal and Federal workers have continued to go about their appointed tasks and to maintain the stability of our Government functions.

We do not believe that this legislation poses any threat whatsoever to the civil service program. On the contrary, with the provisions currently appearing in H.R. 10 we believe that civil service will be strengthened. We urge the subcommittee, the full committee, and the Congress to act promptly on the pending bill.

Mr. CLAY. Thank you.

Mr. MEIKLEJOHN. Next, Mr. Chairman, I would like to call on Mr. Allan Moskowitz, representing the Professional Air Traffic Controllers Organization.

Mr. MOSKOWITZ. I am very grateful for this opportunity to testify before your subcommittee. I would like to apologize for the president's absence. He is out of town, and he sends his regards.

Mr. Chairman, members of the subcommittee, PATCO appreciates the opportunity to testify before this subcommittee on H.R. 10, the Federal Employees Political Activities Act of 1977.

This bill would reform the political limitations imposed on Federal employees by the Hatch Act and restore those basic political rights which are the essence of American citizenship.

For over 35 years, the Hatch Act has purposefully deprived Federal employees the right of full political participation. While I don't think it necessary to repeat the history and reasoning behind the law, it is very relevant to note that the Federal employee-employer relationship has changed through the years to the point where those political machinations of the past are virtually impossible today. Federal employees no longer need the suffocating blanket provisions of the Hatch Act to protect them from political pressures; they are able to protect themselves in many ways through labor unions. H.R. 10 can provide the rest.

The Hatch Act not only forces the employee to forgo basic rights, but also denies the employee the opportunity to take effective political action to retain these rights. Without the broader freedom of speech and the freedom of association, does the Government employee really have the requisites of freedom? Besides the right to vote and the ability to be a reluctant member of the silent majority, what political freedom does the Federal employee have?

Mr. Robert E. Hampton, former Chairman of the Civil Service Commission, in his testimony before this subcommittee in 1975, expressed one of the chief opposition arguments to this legislation when he stated that "* * * not one employee's vote goes uncast because of the Hatch Act, nor one idea unexpressed." Is the mere right to vote the extent of democratic political activity? Citizens of the Soviet bloc have this right; would Mr. Hampton have deemed them politically free?

As to the expression of ideas, Mr. Hampton was correct if the employee talks to himself, his family or one or two friends. But if the employee dares to express his ideas to a larger gathering, he may be

guilty of political association and thus in violation of the act. Rather than attempting to define the legally drawn line between the two situations, the employee may very well just abstain from meaningful political participation.

This abstention not only harms the individual; it is injurious to the health of the Nation. Democracy can only function properly where there is participation; the higher the proportion of citizens actively participating in the political process, the healthier society will be as a result of the diversity of opinion expressed and the participatory energies harnessed. The ancient Greeks were well aware of this; there, full political participation was not merely a right, but was rather a duty, the price paid for citizenship and membership in that society. History teaches that nothing is more dangerous to democracy than large "silent majorities," silent either through apathy or restriction. There are 2½ million Federal employees, politically aware and concerned. Considering the paucity in numbers in the recent years' elections, society desperately needs the energies, time, and active participation in our political processes that this large group, long dormant, could contribute. To purposely continue the bar on full Federal employee political activity would not only cheat these employees of their full citizenship, but would also deny our Nation the potential vitality inherent in their numbers.

I might interject that the act's emphasis on individual action, while barring participation in most collective forms, has the effect of politically isolating the employee, rendering him virtually ineffective in a Nation of 200 million people where organization and number are essential to influence and the equivalent of power.

Going beyond the right to vote and the free expression of ideas, there is the issue of candidacy for public office. Isn't this a basic right and dream; that any American citizen could theoretically run for President, let alone city council? Not if you are a Federal employee, answers the Hatch Act. When each separate infringement of political freedom is united to form the bulwark of the Hatch Act, the image of the Federal employee that comes to mind is not the stereotype of completely "bound and gagged" but rather the reality of weak-limbed and whispering.

The political inhibitions involved in the Hatch Act are too numerous to discuss in their entirety, but one deserves to be highlighted.

The most wasteful and arbitrary demarcation of the act is the one which bars partisan activity yet endorses independent or nonpartisan political action. First, in the contemporary sphere of affairs, what issue or election can truly be called nonpartisan? Even if partisan flags are not officially unfurled, each party takes a stance and works toward its desired end. Second, by limiting the Federal employee to nonpartisan elections, he is excluded from participation in the great majority of elections and barred from shaping the great issues of his day. This amounts to unreasonable discrimination.

Furthermore, if the employee resides in a geographical area deemed to be heavily populated by Federal employees, such as the suburbs of the District of Columbia, he may legally be a candidate in a local partisan election. But, he must be an independent candidate. But, his independent candidacy may be legally endorsed by any or all of the partisan political parties. While I can admit the logic of this procedure

in terms of the basic framework of the Hatch Act, it still remains a sham and allows, or forces, the employee to do indirectly what he is unable to do directly.

Despite the change wrought in the political activities allowed to State and local employees by the Federal Elections Campaign Act Amendments of 1974, the Hatch Act's coverage still extends in some measure to those in State and local government whose principal employment is in connection with an activity financed in whole or in part by Federal loans or grants. As Federal grants in aid increase, touching more and more people, the thought occurs that someday, everyone could, to some degree, be covered by the act. Who would run for office?

Admittedly, that projected dilemma is whimsical at best, but the gist of the argument is viable. If one starts from the assumption that Government employees have in principle the same political rights as any other group, one automatically becomes cautious about restrictions, weighing each one carefully in terms of the Constitution, the advantages to be gained for the public interest, the effect on the civil service. This viewpoint protects one against blanket prohibitions or the blind acceptance of past practices. And it is this viewpoint which the Hatch Act lacks.

In conclusion, I would like to congratulate Chairman Clay for this progressive piece of legislation and to thank him and his staff for their dedication, perseverance and hard work in the pursuit of Hatch Act reform these past few years. The path from bill to law has been difficult but your determination has never ceased; all postal and Federal employees owe you a debt of gratitude.

Once again, I would like to thank this subcommittee for allowing the views of the Professional Air Traffic Controllers Organization to be heard on these issues and this legislation.

Mr. CLAY. Thank you.

Mr. MEIKLEJOHN. And finally, Mr. James E. Lyons, director of legislation of the International Federation of Professional and Technical Engineers.

Mr. LYNS. Mr. Chairman and members of the subcommittee, we appreciate the opportunity to appear with this panel composed of the Public Employee Department of the AFL-CIO and AFL-CIO unions representing Federal employees.

We completely concur in and endorse the view expressed by the Public Employee Department, urging enactment of H.R. 10.

Our 41st convention by resolution urged liberalization and reform of the Hatch Act in line with H.R. 10.

During the last Congress, our international union and local unions—Federal, public, and private—exerted great efforts in support of passage of H.R. 8617.

In closing, let me simply note that it has been our experience that not only do Federal employees represented by our union favor the reforms embodied in H.R. 10, they consider such reforms a major priority.

As I travel around the country, and attend the many meetings of our locals, it has been my personal experience that the Federal employees we represent don't simply consider this an important piece of

legislation and a major piece of legislation, they consider it a priority. It is one that I am constantly asked about and one that I am constantly urged to do what I can to get passage of.

Thank you very much.

Mr. MEIKLEJOHN. Finally, Mr. Chairman, I want to express our appreciation, myself for the AFL-CIO and all of the organizations here, for the opportunity to come and present our views here on this very important legislation this morning. We will be glad to answer any questions that you may have.

Mr. CLAY. Before we proceed with our questioning I would like to acknowledge and welcome to the hearings this morning a group of government students and their teachers from George C. Marshall High School in Falls Church, Va.

Is this group of students from your district, Mr. Harris?

Mr. HARRIS. I am always reluctant to say someone is not in my district, Mr. Chairman. I do believe they are in the adjoining district.

Do you know where it is?

Mr. CLAY. No. But we will find out.

Mr. Meiklejohn, opponents of this bill and especially those opponents in the media, both electronic and print, are stating that labor unions are pushing for enactment of Hatch Act reform for their own benefit and that Federal employees are not in favor of this legislation. Would you care to comment on that?

Mr. MEIKLEJOHN. Well, Mr. Chairman, our experience, our observation has been that they are in favor of this legislation. We favor it because our members are in favor of this legislation.

Furthermore, Mr. Chairman, there is nothing in this legislation which would force any employee to do anything he doesn't want to do except those provisions of the legislation which forbid him from doing certain things that the Congress believes or would indicate, if the bill is enacted, would be undesirable procedures. This bill does not require anybody to engage in political activity. It merely permits him to do so if he wishes to do so and under very carefully devised safeguards.

Mr. CLAY. I would like to refer that question to the other members who are sitting at the table, and specifically ask if the unions at their conventions have recommended ratification and whether or not those recommendations have been voted up or down.

Mr. Vacca?

Mr. VACCA. Our conventions for 38 years have asked for amendment to the Hatch Act, so that we would have the political freedoms that all the other citizens of the United States have.

In answer to your question with reference to the media, and the newspaper editorials, I believe that was your question—

Mr. CLAY. Yes.

Mr. VACCA. We are just asking for the same rights, of freedom of speech and the press.

Our union magazines cannot carry items in either support of an individual for office or against an individual for office. We are asking only the same freedom of speech that they have.

Mr. CLAY. Thank you.

Would anyone else care to comment?

Mr. NILAN. I would like to comment, if I may.

I have been elected as a national officer in my union for 18 years. And I have been a very aggressive proponent of amendments to the Hatch Act. It would be my opinion that if the membership of my union disagreed with this position I wouldn't have been around for 18 years. This situation applies to union officers as well as Members of Congress.

And also in regard to brother Joe Vacca, I have been going to our conventions since 1948 and all of those conventions have unanimously, I recall not a single objection at any convention to the endorsement of amendment to the Hatch Act, including our most recent convention in August of last year when 3,000 delegates vigorously shouted for endorsement of this proposal. I mention this because a lot of our proposals are not unanimously adopted by our conventions.

We have diverse opinions. But this is one that has unanimity.

And again I cannot believe that the critics in the media and otherwise who are attacking amendments to the Hatch Act are consistent in their views in view of our experience. Our membership has unanimously spoken out in support of amendment to the Hatch Act.

Mr. CLAY. Thank you.

Mr. GLEASON. Mr. Chairman, I think the comments made by my colleagues in the Postal Service would also apply to our organization. For many years, this has been part of the legislative program of our union.

I think this type of question, though, is the "wife-beating" type of thing, you know. Referring to union leaders' purposes or gains is absurd because the leadership is only what the union people make it. And what the people at the AFGE national convention tell us, is what we must carry out today.

I think the key to this was stated earlier here, in the sense that it allows people to do again something that has been taken away from them. It does not compel them. And if only 100 Federal employees began to participate in political activity, it still would have served its purpose.

Thank you.

Mr. McCART. Mr. Chairman, I have been associated with the public service element of the labor movement for more than 30 years. I attended the first union convention in 1946. My own union. And that convention endorsed revision of the Hatch Act, and unless the opponents of this legislation are willing to insist that union conventions do not, in fact, represent the will of their members it seems to me that one must accept the notion that the union members and the public service, the AFL-CIO movement are overwhelmingly in support of the legislation.

I might add that that overwhelming support has been emphasized particularly since Congress approve the Election Reform Act of 1974. That statute lifted the Hatch Act restrictions on State and local government workers whose positions are funded through Federal money.

Finally, last Saturday the executive board of our department convened, the twin unions associated with the department represented, and the executive board unanimously reaffirmed its commitment to H.R. 10 and to revision of the Hatch Act.

Mr. CLAY. Thank you.

Mr. MOSKOWITZ. Our membership has resoundingly asked for modernization of the Hatch Act. If I am not mistaken in the last session, you had hearings on this very topic around the country. And I know we had some line controllers testify in favor of modernizing the Hatch Act.

Mr. CLAY. Mr. Lyons?

Mr. LYONS. As I indicated in my opening statement, Mr. Chairman, when I talk about liberalization of the Hatch Act, the rank and file members endorsed it and have, in fact, given standing ovations when I talk about the prospects of that legislation being passed.

Mr. CLAY. Mr. Gleason, I believe that your union represents the largest constituency of Federal employees in the country. And I would conclude that you have a vested interest in protecting the integrity of the merit system.

Some of the critics of H.R. 10 are stating that permitting Federal employees to participate in the political life our Nation would compromise the integrity of the merit system.

Would you care to comment on that?

Mr. GLEASON. Well, first, I think I would have to know what we are talking about. Compromising the integrity of the service? My own judgment is that, no, this will not be the case, as a general answer. I am inclined to remember that, very recently, we have had some problems in the Federal Government generally. And the problem was not with the career Federal employees. But it was with the employees who were outside of the career service.

If you can give me something more definitive to respond to, I will.

But right now, I can just generally say I see no problem in terms of compromising the integrity of the Federal career service.

Mr. CLAY. I see no problems either. I am glad to hear we are in complete agreement.

Mr. HARRIS?

Mr. HARRIS. Thank you, Mr. Chairman.

I appreciate your testimony on this legislation. I would like to ask Mr. Meiklejohn if I am right. I have a feeling you have had some experience at the local level trying to get people active in community and political work. I would just ask you a simple question, have you found it a problem, trying to get people active in political and civic work, or have you had to "trap" and use other methods to try to get people active in political activity and community work?

Mr. MEIKLEJOHN. I think there is no question that that is a real problem. I think one of the aspects of the present law, particularly in the area around Washington—I am not in a position to speak as to the other parts of the country, because I work here in Washington—is that the Hatch Act in its present form results in all kinds of various forms of subterfuge, and disruption of some kind. I guess you could say it disrupts family life to some extent. It is not true, of course, that Government families don't engage in political activity in their localities. They do.

But, of course, they don't do it directly at present. They do it indirectly. It would be the wife or children being engaged in it, doing political activity, while the father stays home. But essentially the problem is, this is a difficult situation for many families where the family as a whole is interested in playing a role in the community life.

There should not be penalty on a Government employee for engaging in partisan political activity at the local level or at the national level. I am certainly thoroughly in agreement that any amendment or any provision that would restrict the rights of Government employees to participate in State and local elections but not in Federal elections would be very undesirable.

Mr. HARRIS. As far as political parties are concerned, do you think it best to have a primary method or convention method?

Mr. MEIKLEJOHN. I am in favor of the primary method because I think it provides a greater participation at the local level.

Mr. HARRIS. As the Hatch Act operates in our area, do you think it discourages the primary method?

Mr. MEIKLEJOHN. Yes.

Mr. HARRIS. Thank you, Mr. Chairman. That is all the questions I have.

Mr. CLAY. Mr. Taylor?

Mr. TAYLOR. Thank you, Mr. Chairman.

I would like to express my appreciation to the panel for your comments and for your input. And I think certainly we have a great deal of sympathy for what you are trying to accomplish for your membership.

I think there are some areas of concern that this committee must address itself to, as well as the entire House. That is the principle of properly safeguarding the rights of employees from being harassed into doing something that they might not want to do.

I know this legislation has certain safeguards written into it. But how does any Government employee possibly prove that he has been coerced or pressured into taking part in partisan activities?

I am also concerned about what happens to this employee as far as assignments, promotions and so forth that might occur when he unsuccessfully proves that his superiors did try to pressure him into involuntary political activities.

Mr. NILAN. Congressman Taylor, I would like to speak on behalf of the postal workers.

We are particularly fortunate in the Postal Service because we not only would have the protection of H.R. 10 if enacted, but under our national labor contract with the Postal Service, we also would use the grievance procedures to process complaints of alleged violations of the Hatch Act. Any violation of law is a grieving item. We have really two protections as far as the postal workers are concerned against coercion.

If an employee, for example, advises the local president, of some supervisor trying to get political contributions or political support, we can go both ways at the same time, violation of the labor contract, handled through the union, and also violation of the law and the improved statutory protections.

So we are particularly fortunate, and we have no qualms about protecting the membership of our organizations in the Postal Service against any type of coercion or undue influence by anybody.

Mr. TAYLOR. That's good. But do you think that perhaps once this person files such a grievance against one of his superiors that maybe retribution might be taken against this employee for making the allegation that he had been coerced?

Mr. NILAN. It won't happen while we are in business. Not in my organization.

Mr. VACCA. Mr. Chairman, if I may reply to that, please.

Mr. CLAY. Sure

Mr. VACCA. There is always a sacrifice for freedoms. I think that in theory that the Hatch Act means the protection of people against harassment, coercion, for practicing their freedom that this land is supposed to have given to us over the last years is an insult. I think it's an insult to our forefathers who have fought and died for freedom of speech and freedom of the press. And if the theory is correct, that we legislate laws that deny people their rights to protect them against coercion and harassment, then perhaps we ought to put the good people in jail and let the bad people out.

Mr. TAYLOR. You know we do. This is the only country where we lock the jury up at night and send the prisoner home sometimes.

[Laughter.]

Mr. MEIKLEJOHN. I think as far as this bill is concerned, the protections that an employee has against activity by his supervisor which would be damaging to him are carefully worked out. The enforcement procedures in the bill are far more effective than in the past. And where an employee is being proceeded against by a supervisor I believe the Commission and the Board would have ample authority to deal with that kind of a question and make it very difficult for that to happen.

Mr. TAYLOR. I brought this up because it is a point that has been brought to my attention by some Government employees. They have a concern for this. I mean especially Postal employees. I don't think too many Federal employees are in my district other than Postal employees. And I think they also want a revision in the Hatch Act. They feel they have been unduly restricted, many of them do. And this is a concern that some of your people have expressed to me.

There is one other thing, Mr. Chairman, if I might. I notice a part of this bill is that these Federal employees cannot engage in political activity while on duty, in uniform, and so on. The thing I am wondering is, under this law if lists of voters were made available to Government employees, could they be used in their political activities? In other words, they have access through their regular duties, lists of people that they can come in contact with. I am thinking especially of the Postal Service. Presumably a letter carrier has a list of everyone on his route. And in some of our welfare programs many of the workers have lists of the recipients of some of the programs that they administer.

What I am wondering is, would it be legal, would it be ethical, would it be right for them to utilize these lists that are made available to them in the course of their duties as a Federal employee to carry out their political activities?

Mr. VACCA. Well, Mr. Chairman, I don't believe letter carriers are the only ones that would get a list. Lists are available to all persons who want to be involved in the political process of this country. And I don't believe that any—I don't believe it would be in violation of the laws.

Mr. TAYLOR. I am thinking specifically in terms of the latter instance I pointed out, where a director of an OEO program, those who pass

out the sacks of flour, for example, they have a list of the people who are getting them. Do you think it might be right for them to utilize that list after work to contact the people who actually look to them for decisions as to whether or not they might be going to receive some program that's administered by this particular Government employee?

Mr. VACCA. Well, I won't speak to the people who pass out the flour. We are governed by other laws, Mr. Taylor, that would stop us from utilizing lists for any purpose, a conflict of interest. I can only speak to that.

However, no matter what occupation you are in, there is a dealing with people. And you have names and addresses. And I am sure those names and addresses are used in the political process.

Mr. MEIKLEJOHN. Mr. Chairman, Mr. McCart wants to comment on this.

Mr. CLAY. The gentleman's time has expired. We are going to have to adhere to the 5-minute rule.

Mr. Heftel?

Mr. HEFTTEL. Thank you, Mr. Chairman.

I wonder if we are isolating again the Federal employee as though only the Federal employee would be an example which you are using. For instance, we now have medicaid and medicare. Doctors have lists of people who utilize medicaid and medicare. Do we then pass a law which says, "If a doctor received medicaid or medicare funds to treat his patients, that doctor is then precluded from participating in the political process." I think that the logic that has been used as to why they should or should not permit Federal employees to engage in political activities is probably as applicable to another 50 or 60 categories of people, organizations, there may be 500; it doesn't matter what the number is. I think though that the theory is discriminatory because you can supply the theory going through our entire society, and that's the way it has to be as a practical matter, in what we are endeavoring to achieve.

As government becomes more a part of everyone's lives, I think that the theory about Federal abuse by Federal employees loses merit with the passage of time. And so I would seriously question that which would be abused, that that which is abused would be something that is inherent in the Federal employee and his/her role any differently than all of those people in our society who one way or another are recipients of Federal funds and who can engage in political activity.

Mr. CLAY. Thank you.

Mr. DERWINSKI. Thank you, Mr. Chairman.

I first want to commend you for gathering this distinguished panel. It is certainly the most impressive group I have ever seen before this committee.

Mr. Vacca, you noted in your statement, sir, that you are hopeful, even expectant of President Carter, but I gather from all of this and the absence of any administration witnesses that you have not been told yet what the Carter administration's position is. Is anyone going to speak for the administration during our hearing, or are you authorized to speak for the administration?

Mr. MEIKLEJOHN. We are here representing the American labor movement in Federal Service.

Mr. NILAN. Our national convention in August 1976 did receive a communication from then Governor Carter, then candidate Carter, in which he expressed support for and interest in granting Federal employees the same political rights as those in the private sector in response to a request for his position on it. But that is all; that's the only information we have in regard to what his position might be in regard to this legislation.

Mr. VACCA. Would you like my comments, Congressman Derwinski?

Mr. DERWINSKI. Yes, sir.

Mr. VACCA. Thank you.

The Democratic Party made this a part of their platform during their convention. And they are supporting it. I am sure the administration is democratic.

Mr. DERWINSKI. But you gentlemen are nonpartisan.

[Laughter.]

Mr. DERWINSKI. Mr. Nilan, you made one statement that I would like to doublecheck. I am quoting from page 3 of your testimony, "Except for the Civil Service Commission, everyone knowledgeable on the subject recognizes that the Hatch Act constitutes an outstanding example of legislative overkill." Wouldn't that be a slight verbal overkill on your part?

Mr. NILAN. Frankly, no, Mr. Derwinski, unless you are opposed to it. I believe that looking at postal and Federal workers, and that's the basis on which I make this statement, I know of no one within the Postal work force who has any objections to the legislation and everyone of them would like to be free of the political Hatch Act restrictions. I know of no one. So that's why I referred to "everyone."

Mr. DERWINSKI. My recollection is that the only official polling that we ever heard from was Mr. Gude and Mr. Fisher who polled their districts and found a majority opposed to restriction of the Hatch Act. Did any of you within your organizations conduct a secret poll of your members to determine their position on the Hatch Act?

Mr. NILAN. In response to that I had hoped to have exactly such a factual and documentary report available for the hearing this morning. I was going to mention that before I conclude.

We have had such a poll on a local basis. We have not had a chance to put all of the figures together. But we will have that available for the record.

[The information follows:]

A NATIONWIDE POLL ON HATCH ACT REFORM AMONG 28,181 MEMBERS OF THE
AMERICAN POSTAL WORKERS UNION AFL-CIO

A unique nationwide poll of postal employees in both urban and rural areas from coast to coast provides quite overwhelming evidence that they want to be rid of the political shackles of the Hatch Act.

The poll conducted by the American Postal Workers Union, AFL-CIO, provides the only documentation on such a large scale, so far as we can tell, of how federal workers feel about efforts in Congress to modify the restrictions on political action imposed by the Hatch Act for the past 37 years.

The results run emphatically counter to arguments by some Members of Congress that federal workers generally oppose the idea of liberalizing the law to permit their participation in the political process.

In fact, the poll dramatically confirms the *unanimous* action of nearly 3,000 delegates to the last national convention of the American Postal Workers Union listing Hatch Act reform as one of three "paramount" legislative objectives in 1977.

MAJOR FINDINGS

The findings reveal that 95 of every hundred postal employees not only believe they should have the right to participate in political activity but that no citizen, regardless of his category or career, should be denied this right.

More emphatically than on any other aspect of the issue postal employees also favored over-riding last years' presidential veto of Hatch Act reform.

Participants felt in addition that some congressmen oppose Hatch Act liberalization out of fear their seats would be endangered by politically-active federal employees but on this question a minority of postal workers showed a substantial and significant dissent.

The poll involved a random total of 66 locals with a total membership of over 28,000 men and women in 30 states from Connecticut to California (and beyond), a sampling of about nine percent of the total union membership—more than triple the size of the average sample on which professional pollsters base their findings.

The APWU poll was undertaken early last year by the union's Legislative Department on the basis of the then pending H.R. 8617 sponsored by Rep. William Clay of Missouri. The returns and tabulations could not be completed, however, before the failure of Congress to over-ride former President Ford's veto of Hatch Act reform on April 29.

The viewpoints are as valid today as when they were originally expressed last Spring inasmuch as the current pending legislation, H.R. 10, is identical with the provisions of H.R. 8617.

As it developed, the APWU poll yielded its findings from two tines of the same fork: 39 of the locals provided individual breakdowns of the voting by their memberships totalling over 10,600; the remaining 27 locals with a membership of over 17,500 chose to report only the outcome "yes" or "no" without actual figures.

Local polling officials had previously been instructed by APWU National Legislative Director Patrick J. Nilan that "to the maximum extent possible, the confidentiality of members responding should be protected."

It was suggested further that participants express their preference in a secret ballot at union meetings or with a secret ballot in a "straw vote" procedure. These procedures were generally followed.

The first question asked was: "Do you believe that federal employees should have the right to participate in political activity so long as the integrity of the merit system is protected by law?" Yes or No?

All 66 locals voted yes. The vote among the locals reporting actual figures was 94.9 percent yes, 5.1 percent no.

The second question: "Do you believe that any group of American citizens should be barred from taking part in U.S. politics by reason of their job categories or the kind of careers they pursue?"

All 66 locals voted no. Among the 39 locals listing figures, the result was 94.8 percent no, 5.2 percent yes.

The third question: "Do you suspect that some Congressional opponents of liberalizing the Hatch Act may be fearful that the extension of political rights to federal employees will endanger their own position in Congress?"

While the affirmative responses again prevailed overwhelmingly, this question elicited the only significant break in the unanimity of the membership. Fifty-eight locals did note yes but eight other locals dissented. Three were locals which did not break down the voting totals. Among the five others that did provide breakdowns, the "yes" vote represented 81.8 percent while the "no" vote added up to 18.2 percent. Members of Congress may find some comfort in the evidence that the one issue on which unionized postal workers revealed and conspicuous alteration of attitude dealt with the question of political courage in the House and Senate.

The fourth and final question: "If President Ford should veto a revised Hatch Act bill such as H.R. 8617 would you want your representatives in Congress to over-ride?"

In view of the fact that the vote to over-ride the Ford veto failed in the House by only 26 votes, it may be of interest that the yes vote on this question—again unanimous among the 66 locals—also produced the largest single majority among the locals which revealed their tallies. The percentage was 95.6 percent yes, 4.4 percent no.

The participating locals on a state by state basis are listed below with asterisks denoting those locals which provided a breakdown of polling figures:

Alaska : Anchorage*.
 Arizona : Phoenix, Scottsdale, Tucson*.
 Arkansas : Hot Springs*, Little Rock.
 California : Chula Vista, Hayward*, Oakland, Riverside, San Pedro*, Whittier.
 Florida : Central Florida Area Local, Fort Myers, Panama City*, St. Petersburg, West Palm Beach.
 Georgia : Atlanta*, Savannah*.
 Guam : Tamuning.
 Colorado : Fort Collins*.
 Connecticut : Bridgeport*.
 Hawaii : Honolulu*.
 Illinois : Arlington Heights*, Evanston, Kankakee*, Rock Island, Rockford*.
 Indiana : Lafayette*.
 Kentucky : Louisville.
 Massachusetts : Chicopee*, Haverhill, Worcester*.
 Michigan : Flint*, Grand Rapids*, Holland*, Kalamazoo*, Lansing, Muskegon*.
 Minnesota : Minneapolis, St. Paul*.
 Mississippi : Gulfport*.
 Nebraska : Lincoln*.
 New Hampshire : Manchester.
 New Jersey : Clifton*, Lakewood*, Red Bank*.
 New York : Brooklyn, Flushing, Schenectady*.
 North Carolina : Hickory.
 North Dakota : Fargo*, Minot.
 Ohio : Canton*, Marion*.
 Oklahoma : Oklahoma City.
 Pennsylvania : Erie*, Scranton*, Warren*.
 Rhode Island : Pawtucket*.
 South Carolina : Columbia.
 Texas : Houston.
 West Virginia : Fairmont*.
 Wisconsin : Appleton*, La Crosse, Madison*.

Mr. GLEASON. I would like to respond on behalf of my organization.

Mr. DERWINSKI. Yes, sir.

Mr. GLEASON. Perhaps the panel didn't clearly enunciate this earlier. But I thought we had made it clear that the message on the Hatch Act was delivered from rank-and-file delegates at conventions of these unions. And probably, indeed, one of the last real vestiges of the town-hall form of government is American labor unionism.

The other point is in terms of the overkill. I think, perhaps, we ought to look at the inhibiting factors of the present Hatch Act and go around, as we have, and look at some Federal installations and take polls and find out how few people are even registered to vote, because in many instances they believe that it's violative of the Hatch Act even to register and vote. So, if there is any overkill, it has been the Hatch Act's provisions which have scared Federal employees.

Mr. DERWINSKI. It seems to me that if that has been the case, we should have been advised. But I have one question of Mr. Meiklejohn. You very accurately state, sir, you make the note that in the case of employees in sensitive positions such as Internal Revenue, Department of Justice, CIA, they would continue to be prohibited from engaging in political activity. This very provision in the bill seems to be an admission of the inherent abuses of turning this bureaucracy loose for political purposes.

Mr. MEIKLEJOHN. Let me address myself to that point because that is included in the bill. It was included in the bill last year. We are not advocating that it be taken out of the bill; but neither are we advocating that it be put in the bill.

Mr. DERWINSKI. I have just one last question, Mr. Chairman. Would it be in order for me to ask a question of Mr. Jerome Waldie, legislative assistant to Mr. Vacca. He is here in the room.

Mr. CLAY. If he would like to respond.

Mr. DERWINSKI. I was just wondering, Mr. Waldie, since we are speaking of grassroots support of this bill, do you have any knowledge of the position of Governor Brown in California on this bill?

Mr. WALDIE. He is very strong in support of it.

Mr. DERWINSKI. Good. I am glad to hear that.

Mr. WALDIE. He has been in favor of every effort that would expand the electorate over its present position. But since you have given me the platform, may I make another comment, Mr. Chairman.

Mr. CLAY. Go right ahead, Mr. Waldie. Would you like a microphone?

Mr. WALDIE. If I may.

Mr. CLAY. You are restrained by the 5-minute rule also.

[Laughter.]

Mr. WALDIE. I just want to make this one comment about the bill; and it stems from my basis as perhaps a civil liberties freak. I think what you are dealing here with is a historical evolutionary process. You are reversing the one instance in American history where the expansion of the franchise and the ability of Americans to participate in the decisionmaking process of this country was contracted, and the trend in this country is to give confidence to the people in participating in the decisionmaking process of the country and the only method by which that is done in a free society is the political process.

The Hatch Act reversed that trend. It really is the most contrary action in terms of expansion of the thought that the people of this country are capable of making the decisions of the country. And I suggest to you that though there is oppression from individual to individual that this bill addresses, the greatest oppression of the Hatch Act and the most dangerous is the oppression of the Government against the individual that decided to participate in the political process.

The individual that does not desire to engage and is forced to by another individual at least has the recourse of telling him to shove it, that he is not going to do it. But he has no capacity to say that when the Government tells you that you cannot participate in the political process. The danger of the Hatch Act is the principle that you permit the Government to carve out a franchise that would be permitted to participate in that process. That's very dangerous. The moment Government decides who can vote and who can participate in the political process you have given that authority to the Government that is contrary to a free society.

I thank you, Mr. Chairman.

Mr. DERWINSKI. You used the term "Government." What if you were to rephrase that and say, "What about the danger of an 'administration' manipulating Civil Service and the officials by political pressure?" That's the real fear.

Mr. WALDIE. I think that is a danger. But a greater danger is a flat prohibition by an administration of an American's right to participate in the political process. There is a threat, yes; if an adminis-

tration forces participation in the political process; but denying participation is a greater threat.

Mr. DERWINSKI. But the Hatch Act does not deny participation.

Mr. WALDIE. It certainly does. You are denied to participate by law. It's not an individual that denies that participation. It's the Government that tells Bill Smith, a postal worker, that he cannot fully participate in the political process. That's repression of the worst kind in a free society—Government repression.

Mr. DERWINSKI. But there are permissible activities stated under law. It is not a denial.

Mr. CLAY. The gentleman's time has expired.

Mr. DERWINSKI. Thank you.

Mr. CLAY. Mr. Solarz.

Mr. SOLARZ. Thank you, Mr. Chairman. I want to pay tribute to you, Mr. Chairman, for the leadership you have shown on behalf of this legislation over the course of the last 2 years. I think this is a very carefully and creatively constructed piece of legislation which was designed to deal with virtually all of the potential problems that repeal of the Hatch Act might create. I think we have, as a consequence, a bill which is exquisitely designed, on the one hand, to make it possible for almost 3 million Federal employees to fully participate in the political process and at the same time to prevent those abuses which in the absence of a number of provisions of this bill might otherwise have taken place. And here I want simply to take note of one or two of the objections that have been raised so far to this legislation by our colleagues on the other side of the aisle.

It seems to me that there are two potential problems which could be created by the adoption of this legislation. The first is the extent to which it might be possible for the entire machinery of the Federal Government to be co-opted for political purposes, and a giant Federal political machine created as it were which would tip the balance of political power in favor of whatever party it happened to control.

The second problem is the extent to which individual Federal employees might be obligated against their will, coerced, as it were, into engaging in political activity which they didn't choose to. Insofar as the first problem is concerned I would suggest as a classic example, given the prohibitions in this legislation against the coercion of Federal employees for political purposes, it is utterly, completely and totally inconceivable that this could occur on a systematic basis. I think any reasonable person has to concede that it's possible that here and there, given 2.7 million civilian employees, it is possible somebody might suddenly be required to do something which they would prefer not to do. No legislation can completely prevent abuses of the law. But it is literally inconceivable that the President could direct the head of each department of the Government to turn out the Federal apparatus on behalf of the candidates of his party because that would be so quickly detected and would result in the invocation of these penalties and we need not have those.

Insofar as the protection of individual employees are concerned, it is possible there may be abuses which go undetected here and there. I should think that the protections which have been carefully written into this bill will by and large provide an adequate amount of protection for Federal employees, if a recourse is available to them to bring

violations to the attention of the Civil Service Commission and the Special board which has been created. And I don't think we need fear that a number of them will be coerced into this activity.

I would like to direct a question to each of the members of the panel which seems to me to go to the heart of the one remaining controversial question in this legislation above and beyond the fundamental principle of the legislation itself which people are either for or against, and that is the exclusion which is contained in the legislation for so-called sensitive employees, or the Internal Revenue Service, the CIA, and the Justice Department, from the permission to participate in the political process which this bill would extend to all other Federal employees.

I would like to get the judgment of the gentlemen with respect, first, to the adequacy of the definition of sensitive which is contained in this legislation and then, of course, in the executive order to which the legislation refers. And second, whether, assuming such a definition is adequate, whether in fact you think that such employees ought to be prohibited from participating in the political process or whether we should extend to the so-called "sensitive" employees in these three Departments the same rights which the bill purports to make available to all other Federal civilian employees.

Mr. MEIKLEJOHN. Mr. Solarz, I endeavored to answer that in answer to a previous question by Mr. Derwinski.

I think as far as the AFL-CIO is concerned, this bill does include the same provision that was included in the bill approved by Congress in the conference report last year, and which went from the Congress to the White House. On the basis that that represents a considered judgment of the Congress, we are raising no question about that provision.

Mr. SOLARZ. Mr. Meiklejohn, the bill came out of the conference committee last year, and it represented a compromise. That isn't to suggest that every provision in that legislation was necessarily embodied in this legislation. This is a new Congress. And we are considering the bill from scratch, unlike the report which could not be amended here, we have in effect a blank slate before us. And what I am asking you is, Now that we are starting the process anew, do you think it could make sense for the committee to remove the exclusions which were contained in the committee bill or do you believe that that was a provision which should be included?

Mr. MEIKLEJOHN. As far as I am concerned I think it would be desirable to proceed with this bill in the form in which it is now before the subcommittee and the committee. This is on the basis that it represents the considered judgment of Congress, it has had the judgment of Congress rendered on it. But I would like to call on the other members of the panel for their comments.

Mr. SOLARZ. Let me just say this, there is a lot of give and take in the shaping of legislation. And what ends up in the bill is a result of the balance of forces which exist at the time the bill is drawn up. The balance of forces have changes. It's a new Congress, it's a new ballgame, it's a new President. And I don't think we ought to be locked into every provision of the bill which was vetoed by the President last year. I think on balance it is a terrific bill. I think 99 percent of the provisions make sense in and of themselves, not simply as a result of a compro-

mise which was achieved in some hard bargaining. But on this particular provision I do have questions.

Mr. MEIKLEJOHN. Good or bad, on the basis of experience there is some advantage in going forward with what has been approved before.

Mr. CLAY. Mr. Solarz, the next witness, I think, is probably more proficient on this subject. And I think that that question perhaps ought to be posed to him.

Mr. SOLARZ. Mr. Chairman, I understand Mr. Connery is testifying next. But I do have to leave. And since he speaks to the Treasury employees, and I think his testimony is very valuable. I have read it, I think it goes right to the point. I think it would be useful to get the view of some of his colleagues who represent somewhat different interests in the Federal Establishment.

Mr. NILAN. I asked a similar question on the Senate side last year when we were discussing the right to strike, which my union and the postal unions share a great deal of support for, and that was whether I thought that all people that worked for a living should have the right to strike. And I had to respond very strongly, yes. We are not in a position to ask for a right for ourselves and deny it to others. And so I said absolutely. We believe every working person should have the right to strike. I am saying the same thing now. I would not want to deprive any Postal or Federal worker of the right to participate in political activity.

When we presented testimony last year on the original bill we did not request or suggest that anybody, whether it's in the CIA or the Department of Justice or Internal Revenue be denied political rights. The position of our union is consistent. We are asking for political freedom for all Postal and Federal workers wherever they may be and it is up to the Congress to decide whether they want to go the full route or not. But I don't think we can deny it for some and grant it to others.

Mr. GEEASON. Congressman Solarz, as far as the bill rising or falling on this particular provision, I surely would not want to see the legislation die because of that particular provision. But, in a broader picture, it is our opinion, certainly, that you can get the greatest amount of freedom possible for our people. And, certainly, no group of employees ought to be excluded.

I recall a similar question behind asked of me during the field hearings a year or 2 ago. And my position then was that we ought to extend the freedom to everybody. And, if there are abuses, certainly the Congress can act to correct any abuses that may result.

Mr. SOLARZ. Thank you.

Mr. VACCA. I concur with my colleagues, and I would be inconsistent if I didn't say that I believe that all Americans should have the same equal rights.

And as stated it was a compromise position during the last session of Congress.

Certainly I would hope that we would be able to get those rights for them during this session of Congress.

Mr. SOLARZ. I yield to the distinguished gentleman from Hawaii.

Mr. HEFTTEL. I wonder if the prohibition against those, against the Justice Department, IRS and the CIA, is trying to address a problem which is better solved by stipulating that political activity is prohib-

ited where it relates to the use of information which comes to the employee, as a result of performing that particular job, and it may not limit itself to IRS, CIA, and Justice Department.

So that if you have access to the files of an individual through IRS, you can't use that information, and it does not matter how you came across the information. Perhaps that may be what should be considered in this regard.

Mr. SOLARZ. The gentleman has made a very useful point. But I would call your attention to page 5, subsection b, of the bill which provides that nothing in this section shall be construed to authorize the use by any employee of any information coming to him in the course of his employment or official duties for any purpose where otherwise prohibited by law.

It may be that this could be tightened up. But I think it is designed to deal with precisely that problem.

Mr. HEFTEL. Thank you.

Mr. CLAY. The gentleman's time has expired.

One last question. Mr. Vacca, in your statement you say that you were opposed to the Fisher bill. Would you briefly tell us why?

Mr. VACCA. Well, I cannot understand what differences of coercion there are at the State and local levels as in the Federal level. And I think that is what he is speaking to, protection of the people at the Federal level.

Mr. CLAY. What you are saying is that you can't understand why he would want to prohibit Federal employees from participating in a Federal election, but permitting them to participate in State and local elections.

Mr. VACCA. That is correct. And I am opposed to that.

Mr. CLAY. Thank you.

And we certainly want to thank you gentlemen for your testimony.

Mr. MEIKLEJOHN. Thank you, Mr. Chairman.

Mr. CLAY. Our next witness is Mr. Vincent Connery, National President of the National Treasury Employees Union.

You may proceed as you see fit, Mr. Connery.

**STATEMENT OF VINCENT L. CONNERY, NATIONAL PRESIDENT,
NATIONAL TREASURY EMPLOYEES UNION, ACCOMPANIED
BY JERRY KLEPNER, DIRECTOR OF COMMUNICATIONS, AND
MICHAEL GOLDMAN, DIRECTOR OF LEGISLATION, NATIONAL
TREASURY EMPLOYEES UNION**

Mr. CONNERY. Thank you, Mr. Chairman. I am accompanied here this morning by Jerry Klepner on my right, the director of communications, and on my left, Michael Goldman, director of legislation.

My name is Vincent L. Connery. I am president of the National Treasury Employees Union. Our union is the exclusive representative of nearly 90,000 employees in the Treasury Department and Federal Energy Administration, including over 70,000 employees in the Internal Revenue Service.

For many years NTEU has been the predominate union in the IRS. Today NTEU represents over 95 percent of all IRS employees nationwide. Our union has been elected the exclusive representative of IRS

workers in 57 of 58 districts, every region, and 11 of the 12 data processing centers.

We wish to commend the chairman and the staff of this subcommittee for their diligent efforts over the past few years to restore to Federal employees the same political rights enjoyed by other Americans. Since 1939 Federal employees have been denied many of the basic freedoms upon which this country was founded, because of the restrictive provisions of the Hatch Act.

We firmly believe that the time is long overdue for a substantial revision of this law and that Federal workers once again should be granted the right to fully participate in the democratic processes of our country.

In its hearings on Hatch Act reform, this subcommittee has heard weeks of testimony emphasizing the fundamental justice of extending full political rights to Federal employees, while at the same time strengthening their protection against political coercion. We see no need to add to that existing body of argument, except to restate our strong support for Hatch Act reform as contained in H.R. 10.

Under the current law Federal employees are needlessly prohibited from exercising their right as American citizens to participate in every phase of the electoral process. This discrimination has been keenly felt by those who traditionally have been among the most knowledgeable, conscientious, and best informed citizens and voters in the Nation.

H.R. 10 would end this disparate treatment by bringing Federal workers out from the shadow of second-class citizenship imposed by the Hatch Act.

At the same time, the sponsors of H.R. 10 wisely recognize the unique nature of Government employment by retaining and strengthening the protections for Federal employees against political coercion and other abuses.

H.R. 10 strikes a necessary balance between full political participation and the need to protect Federal employees from those who would resurrect the days of cronyism.

Although we feel that the enactment of H.R. 10 would accomplish these twin goals, there is one portion of the bill that causes us grave concern. Sections 7324(b) and 7325(d)(1) would exclude employees in "sensitive positions" in the Internal Revenue Service, Federal Bureau of Investigation, and Central Intelligence Agency from enjoying the same political freedom that would be extended to all other Federal employees.

As the exclusive representative of over 95 percent of the IRS employees in the Nation, NTEU opposes the continued exclusion, in whole or in part of IRS workers from full participation in the political process. Though H.R. 10 may not intend to prohibit all IRS employees from engaging in political activity, it may, because of the vague and discriminatory nature of these provisions, do just that.

H.R. 10 does not contain a clear definition of a "sensitive" position, but relies instead on an outdated clause of an Executive order issued in 1953. Executive Order 10450 states:

The head of any department or agency shall designate, or cause to be designated, any position within his department or agency, the occupant of which would bring about, by virtue of the nature of the position, a material adverse effect on the national security, as a sensitive position.

It strikes us as highly inconsistent that a bill which seeks to revise and clarify an unclear, archaic law should itself base an important provision on a vague relic of an unhappy time. This definition was part of an Executive order issued during the height of the McCarthy era when the term "national security" was the catch phrase used by a fanatical few to undermine and destroy the reputations and careers of many innocent people.

Executive Order 10450 was never intended to serve as a guideline for determining the political freedom of Federal employees; its entire purpose was to identify individuals who, by virtue of their position in the Federal Government, could have "a material adverse effect on the national security." To take the order's definition of "sensitive position" completely out of context and impose it on Hatch Act reform legislation we believe is both inappropriate and unwise.

Furthermore, the broad nature of the definition renders it practically useless. The term "sensitive position" is so nebulous that it could be interpreted to include only high-level officials in the IRS, or, on the other hand, many rank and file employees in the district offices and service centers.

Last year during Senate consideration of Hatch Act reform, Commissioner Donald Alexander expressed his belief that the present restrictions should be retained for all IRS employees. While we do not believe that this is the intent of the sponsors of H.R. 10, such an exclusion would still be possible because of the ambiguity found in the definition of "sensitive position," and the sweeping power accorded the Commissioner. By simply defining most, if not all, IRS positions as sensitive, the Commissioner could make certain that the Hatch Act restrictions would continue to apply to the vast majority of IRS workers.

We do not know what position a new Commissioner will take on this question. But whatever his decision, the power to implement the widespread exclusion would remain grounded in statute. We do not believe that the IRS Commissioner should have such broad discretion in determining the political rights of IRS employees; these basic rights should be clearly protected in H.R. 10 itself.

While the bill does provide a mechanism for legislative oversight, the procedure is cumbersome and circuitous, requiring a majority vote in each House before a position can be removed from the exclusion list formulated by the IRS Commissioner. It would be a nearly impossible task for Congress to review each individual who is excluded by the Commissioner and reach a consensus agreement on what is a "sensitive" position, when that term is so open to conflicting interpretation.

Furthermore, we are convinced that, if anyone is to be excluded from Hatch Act reform, the initiative should remain with Congress and not the executive branch of our Government.

Simply stated, the exclusion of IRS workers from Hatch Act reform is based on numerous misconceptions that have no real substance. For example, proponents of such a provision argue that it is necessary to prevent the injection of political motives into promotions, job security, and the like.

Of course, it is imperative that the merit system be preserved by the IRS, just as in any agency or department. The danger of political

patronage becoming dominant in the IRS, however, is no greater than elsewhere in the Federal Government.

If Hatch Act reform, as outlined in H.R. 10, is right and justifiable for other Federal employees—and we certainly agree that it is—then it is no less so for IRS employees.

In addition, through collective bargaining, Federal employee unions have fought to protect the merit system, much more so than the Civil Service Commission. Our current contracts with the IRS, for example, guarantee employees a greater degree of fairness and objectivity in promotions and job security than the Commission has insured in its 94 years of existence.

Some would deny to IRS employees the political rights that H.R. 10 grants to their coworkers in other agencies, simply because they have access to information of a highly confidential nature.

There is no question that citizens must be protected from unauthorized disclosure—for any reason—of their private tax data. The men and women entrusted with this information must be—and are—of high caliber. We fail to see, however, how continuing the present political restrictions for these employees will help the IRS attain either goal.

Precisely because IRS employees deal with such personal information, the standards of conduct under which they work and the penalties for violations are more stringent than most. As we pointed out last year, section 7213 of the Internal Revenue Code mandated imprisonment for 1 year and a fine of \$1,000 plus immediate dismissal from the job for any employee who violates the confidentiality of any taxpayer's return.

Since that time, the Tax Reform Act of 1976 has added even more severe penalties for violations of a taxpayer's right to privacy. Under the new law, the unauthorized disclosure of tax information has been raised to a felony punished by a \$5,000 fine or 5 years in prison or both.

These are strong deterrents, indeed, but in addition, H.R. 10 sets penalties ranging from 30 days suspension to 3 years imprisonment and a \$5,000 fine for violations of its provisions.

Therefore, an IRS employee who, for example, threatened to disclose a taxpayer's return, unless he contributed to a political candidate, would not only be liable to the full weight of the existing laws, but also to the punishments outlined in H.R. 10.

Despite all of these sanctions, there remain those individuals who would continue to press for legislative overkill by denying IRS employees the right to participate fully in the political process. Last year, Commissioner Alexander even went so far as to proclaim the necessity of so doing because the present laws concerning unauthorized disclosure were difficult to enforce.

Surely the Commissioner did not mean to cast aspersions upon his vaunted inspection service, whose zealousness in enforcing even the most obscure rule of conduct is legendary among IRS employees. However, if they find it difficult to enforce existing laws against disclosure, then we can only deduce that they are—and will be—equally unable to enforce the existing restrictions on political activity. As witness after witness told this subcommittee last year, the Hatch Act is among the most difficult of all laws to monitor.

Another factor commonly cited by those who seek to exclude IRS employees from political activity, is the enforcement authority that many IRS workers possess. According to their arguments, those who have the power to seize the assets of a business, or assess liabilities against an errant taxpayer, should be restrained from becoming politically active.

Again, we submit that this argument is rooted in sand. Federal employees in many agencies hold positions where their authority is comparable to that of IRS personnel, with no less an impact on the well-being of individuals and business.

To cite but a few examples: an examiner at the Securities and Exchange Commission makes determinations that could have a dramatic effect upon corporations and their shareholders. If he or she decides to suspend trading on a company's shares, the impact on that business can be devastating; likewise, when a patent examiner denies an application for a patent, the inventor could be financially ruined.

In a similar vein, certain employees of the Federal Trade Commission and Food and Drug Administration have the power to take products off the market or severely limit a company's advertising. Inspectors for the Environmental Protection Agency and the Occupational Safety and Health Administration have the authority to shut down a business for failure to comply with Federal regulations.

The examples are endless, but the point is clear. Many Federal employees wield power over individuals and business that must be used wisely and with scrupulous impartiality. Yet the sponsors of H.R. 10 have seen fit to grant them full political freedom. We again ask why IRS employees should be singled out to continue to bear the burdens imposed by the present Hatch Act.

We believe that the real reason behind the move to limit the political participation of IRS employees is the backlash caused by the revelations during the days of Watergate concerning the Nixon administration's attempted use of the IRS for its own political purposes.

We would like to underscore, however, one crucial fact. It was the rank and file IRS employees who continued the important work of the Service, despite the shadows cast over it by the administration. To continue to exclude these employees from full political participation is an overreaction and needless punishment of this group for the wrongdoing of their so-called superiors.

Time and again, IRS employees have proven themselves to be among the most dedicated, conscientious, and ethical in the Federal Government.

In conclusion, we reiterate our support for the aims and methods of reforming the Hatch Act as outlined in H.R. 10.

We strongly urge, however, that the references to IRS employees in sections 7324 and 7325 be deleted. Until this is done, the bill will, in our eyes, contain a serious deficiency, and the stated goal of H.R. 10's sponsors, to restore to Federal employees their full political rights, will remain incomplete.

On behalf of the National Treasury Employees Union, I thank the chairman for the opportunity to express our views before the subcommittee.

If there are any questions, I would be happy to answer them at this time.

Mr. CLAY. Thank you, Mr. Connery.

Did either of the other gentlemen have statements?

Mr. CONNERY. No.

Mr. CLAY. On page 5 you refer to the congressional oversight procedures as cumbersome.

Can you explain your reason for reaching this conclusion?

Mr. CONNERY. Yes, Mr. Chairman. As we read and understand section 732(b) of H.R. 10, the Commissioner of the IRS would submit to Congress the regulation containing the list of those individuals who would be permitted to participate in the political process.

Thereafter, Congress would have the authority by concurrent resolution of both Houses to disapprove the Commissioner's regulations.

However, it would appear to us that before Congress could either approve or disapprove the Commissioner's regulations, it would have to review the positions of all the individuals who were declared by the Commissioner to be in "sensitive" positions, in order to decide if the regulation which the Commissioner had promulgated met the definition of the statute.

To say that this process would be extremely time consuming and burdensome for Congress would be to state the obvious.

Mr. CLAY. In other words, this provision sets up a possible abuse of the law which might in reality negate the whole Congressional intent. Is that what you are saying?

Mr. CONNERY. Absolutely.

In other words, we believe that as the law is currently drafted, whatever the Commissioner said would go. And it would be extremely difficult to change it.

Mr. CLAY. And in your statement you alluded to the fact that under the Tax Reform Act of 1976 there are certain deterrents against unauthorized disclosure of tax information.

Are there any other deterrents which would protect against abuses of authority that you have knowledge of?

Mr. CONNERY. There certainly are, Mr. Chairman. For example, taking a situation where it would be alleged that an individual in IRS sought to provide false information on an authorized tax audit of a political candidate for the purpose of harassment, there are two deterrents that exist.

First, there is an internal procedure at IRS requiring that the group manager approve the request to initiate any audit. Thus the individual agent would have to make a request of the group managers seeking permission to commence the audit.

In other words, there would have to be a conspiracy.

Second, there are criminal penalties contained in section 101 of the United States Code for knowingly and wilfully providing false information in matters of official interest.

The individual so doing would be subject to up to \$10,000 in fines or up to 5 years' imprisonment, or both.

And I certainly believe that such conduct would violate the IRS rules of conduct and subject the individual to discharge from employment.

In addition to these penalties one of the oldest provisions of the Internal Revenue Code has made such conduct a misdemeanor, providing for imprisonment of up to 1 year and a fine of \$1,000. That has been on the books for many, many, many years.

Second, the Tax Reform Act of 1976 upgraded the penalties, by making it a felony, punishable by 5 years' imprisonment and \$5,000 in fines.

Now I believe that several of the members have recognized that these severe sanctions already exist, and in addition, H.R. 10 adds even more.

We all agree, and everyone, I am sure, would concede that you cannot legislate total lawfulness. However, I must emphasize that there is no one that can show any substantive abuse by any IRS employee of these things over the years.

There may have been scattered instances, an instance or two here and there. But over the years, I think the IRS employees have had an outstanding record of living up to their obligations.

Mr. CLAY. Thank you.

Mr. Taylor?

Mr. TAYLOR. Mr. Chairman, I have no questions. I would like to express my appreciation to Mr. Connery for his testimony. I think it is very good.

Mr. CLAY. Thank you.

Mr. CONNERY. Thank you, Mr. Chairman.

Mr. CLAY. Our next witness will be Mr. Eugene Dalton, president of the National League of Postmasters.

STATEMENT OF EUGENE B. DALTON, PRESIDENT, NATIONAL LEAGUE OF POSTMASTERS, ACCOMPANIED BY KENNETH JENNINGS, IMMEDIATE PAST PRESIDENT, AND ROBERT DOWD

Mr. DALTON. Thank you very much, Mr. Chairman.

And first of all, I would like to introduce the gentlemen who are at the table with me.

On my right, our immediate past president, Kenneth Jennings from Tennessee. He is a postmaster.

And the other gentlemen is Robert Dowd from Michigan, who is also a postmaster.

As the record already states, I am Eugene B. Dalton, president of the National League of Postmasters.

It is indeed an honor afforded our organization to have the opportunity to appear before your distinguished committee for the purpose of correcting some of the inequities we as Federal employees face today. You are to be commended for your outstanding integrity and forethought in revising and updating this legislation.

When the Honorable Senator from New Mexico originally constructed the Hatch Act in 1939, it did much to correct the financial hardships that were brought about by coercion of Federal employees mandating them to make political contributions and engage in political activity that could cost them their job.

It was a piece of legislation that was much needed and correctly instituted for the time period of its enactment.

With the wisdom of his congressional colleagues, further revision was made in 1940.

From 1940 until the present time we have continued to operate under a law which actually made second-class citizens out of Federal employees.

Upon entering employment in the Federal Government, especially in the Postal Service, the greatest fear an employee has is that he, in some way, might violate one of the many sections of the Hatch Act.

In regard to members of our organization, a constant fear remains with them to the point where they are fearful of holding conversations with a candidate seeking office.

Many times when postal employees wished to make contributions to a candidate they were afraid of not making a duplicate contribution to all other candidates for fear of reprisal from those who were not successful in being elected.

Even when postmasters are not on the job, they are reluctant to conduct themselves as upstanding citizens of a community by not attending political rallies, having a voice in elections of members of the school boards, or discussing decisions which might adversely affect their own communities.

As if this in itself were not bad enough, along comes postal reorganization and former Postmaster General Winton Blount and his gag rule.

Each member of this committee knows that a time existed when postal employees were not even permitted to answer correspondence from their elected representatives. This was corrected at a later date after much damage had been done to communications between a Congressman and his constituents. Postal employees are fearful to even permit members of their families to participate in seeking office on a local level for fear of violating the Hatch Act.

A typical example of the dangers in getting involved in any kind of participation was illustrated vividly by one of our own members.

A postmaster whose name I will not divulge was formerly employed by a newspaper. During a congressional election, his former employer asked his assistance in preparing a layout for a candidate in the weekly newspaper. This postmaster, at night and on his own time, gave assistance to the editor of the newspaper with no compensation from the paper or the candidate involved.

The news leaked out that he had assisted with the layout. This postmaster had charges brought against him for violation of the Hatch Act.

To the credit of the people at the Civil Service Commission, when the complete story was related to them, the charges were dismissed. I trust this gives the committee an illustration of the perils employees in the Federal sector find themselves working under today.

For too long, Federal employees have been required to live in the dark ages and I commend you, Mr. Chairman, for making the supreme effort and sacrifice of restoring the self-respect of these people.

With the changes and amendments you have made in H.R. 10, it not only affords them protection for coercion by big politicians who mandate contributions from those who cannot really afford them.

It also permits some outstanding citizens who are Federal employees to actively seek public office on their own time in their local communities.

Many small communities will benefit much from the experience these people have gained in the Federal sector in rendering judgments that involve decisions that affect the common good. No longer will our children suffer from not being able to speak out on issues affecting their livelihood.

The three-member board, as proposed, is an excellent provision, preventing a person who is suspected of a violation from having to abide by the decision of only one person.

Even if the three-member board rules against the person, he still has the privilege of judicial review.

Speaking for the 20,000 members of our organization, we can find nothing adverse in H.R. 10, only improvements.

At this point, Mr. Chairman, I would like to state for the record that I appreciate our predecessors who were here from the labor unions this morning, and the question was asked of them in regards to what would happen as far as merit increases and other things, if they participated actively in the campaign, I am happy that they have the protection of their union, of their contracts and other things.

We as postmasters do not have this honor of having a contract or having this protection.

But our members also have mandated us from conventions in the past for some revision in the Hatch Act.

So, in answer to the question, we would like to state on behalf of the postmasters that we fully concur with H.R. 10, as it is written at this time.

I will be happy to answer any questions, or either of my colleagues, that the committee might have.

And in conclusion, let me say I appreciate the opportunity for giving us a chance to come before you this morning.

Mr. CLAY. Thank you.

Last year when we were conducting these hearings, we heard from many top-ranking Federal employees, that they were not familiar with the political activities that were going on. And certainly as a result of that they were afraid to engage in any political activities.

And I think that your statement this morning has pretty well documented many cases of that to be true.

What is your position? What is your feeling about the Civil Service Commission and its ability to properly protect present Federal employees against coercion?

Mr. DALTON. We have found the Commission to be very fair in the decisions it has rendered to us.

But I was most happy to see the provision in your bill where a three-member board would now hear this, versus one.

Many times where there was only a one person that had the case before him, and they had already heard the side of an elected official who was bringing the charges against an employee, conceivably this person could be biased in the opinion that he rendered.

So we are especially thankful for your provision of the three-member board in this.

We feel it will work much better.

Mr. CLAY. Mr. Heftel?

Mr. HEFTEL. No questions, Mr. Chairman.

Mr. CLAY. Mr. Taylor?

Mr. TAYLOR. Mr. Dalton, I want to thank you very much for your testimony. I think it is good.

I was wondering, Mr. Dalton, if perhaps many of our Federal employees, especially postal employees, have not really recognized the rights that they have had under the Hatch Act. I have before me a list of permissible activities. And I think it is a true misunderstanding

that many postal employees do have the fear that you enunciate, that they are afraid to do things that actually they have had the opportunity and could do.

They can speak out. They can express their opinions. They certainly can vote. And it appears to me that if a person doesn't have the interest in Government to vote, they probably wouldn't have an interest in participating anyway.

But I am concerned, and I know this is true because I have talked to postal employees and they have a fear that I believe is unjustified.

I know there have been some abuses of Federal employees. In my district one time we had a postmaster who was discharged because he went to a nonpolitical meeting in the city and spoke, where they were electing officials on a nonpolitical basis.

He was discharged from his position as postmaster. I still believe that the action taken was wrong.

How far can a postal employee go in participating in local government, school boards and things like that?

Are they prohibited by law now from doing that?

Mr. DALTON. If you might permit me to go back and take it one step at a time.

This great fear, I think, was brought about by the false alarm given by the inspector or the inspection service at the time when a postmaster was placed in an office.

We were lectured very sternly at that time, "Do not participate in political activities."

I do not feel that many of them read the Hatch Act and interpreted it to give them the freedoms that they really have. They didn't even take advantage of some that they had for fear that was instilled within them at the time that they were installed.

In regards to our other questions, there have been many times, and I keep using the phrase "postmaster," because that is what we are mostly familiar with, many of us had ambitions to run for mayor of a town on a nonpartisan basis. First of all, even on a nonpartisan basis, he must secure the approval of the Postal Service before he can run for an office such as that.

It has to be established that this does not interfere with his duties in any way, of course.

And they have to be assured that it is nonpartisan in any way for this office that he is seeking.

We do have rules that we are under besides the Hatch Act, as far as that is concerned.

But we feel that with the revision of the Hatch Act that many of the other rules that we have been penalized under, such as the gag rule, will also be lifted at that time.

Certainly, a postal employee does have the right to serve on a school board, but as we come back to this fear that was instilled within them from the time they were installed within their office, and they have been reluctant to speak out, even when it involved the benefits to their own children in regards to decisions being made by school boards and other things, because someone always holds this treat over them. Well, he cannot engage because he will be in violation of the Hatch Act.

This has been instilled through the news media and other things to where it has just thrown this scare on many of them.

Many of them are like myself who walk where angels fear to tread and take the consequences.

I attended the national convention this year. I did not participate actively for any candidate. I went just as an observer to see what went on at the national conventions.

I did absolutely nothing for or against any candidate who was there.

But many people would not take this jeopardy upon themselves to act in this capacity.

Mr. TAYLOR. I would just like to say this, that I certainly concur with your, with your statement about the gag rule that was imposed.

And I think it was one of the most outrageous things that I have ever seen, when a postmaster can't even convey to a Member of Congress a problem that he sees within the Postal Service. This is getting into another subject, but I believe many of the problems that we have in the Postal Service are because we don't have the local input of the professional people in the Postal Service. Being unable to convey their expertise to a Member of Congress, I feel was a terrible thing.

I am very happy it has been lifted. Postmasters actually were fearful to even speak to a Member of Congress, who represents them the same as he represents everyone else.

I certainly concur with your statement regarding that.

Mr. DALTON. Thank you very much.

And in that regard, not only on the gag rule, but if we received an inquiry at that time from a Congressman not even in regards to betterment of the Postal Service, but any inquiry, we had to send it forth to headquarters to be answered.

We were not even allowed to answer any questions that pertained to statistics, data or anything else.

Mr. TAYLOR. I thank you very much. I appreciate your testimony.

Mr. DALTON. Thank you.

Mr. CLAY. We certainly appreciate your testimony.

Mr. DALTON. Thank you.

Mr. CLAY. Our next witness is George Tilton, representing the National Federation of Federal Employees.

**STATEMENT OF GEORGE TILTON, ASSOCIATE GENERAL COUNSEL,
NATIONAL FEDERATION OF FEDERAL EMPLOYEES, ACCOMPANIED
BY MAUREEN CLANCY, LEGISLATIVE LIAISON**

Mr. TILTON. Thank you, Mr. Chairman.

With me is Maureen Clancy, our legislative liaison.

With your permission, I will not read our prepared testimony, but merely ask that it be included in the record, and I will briefly summarize what our position is.

Mr. CLAY. Without objection, so ordered.

Mr. TILTON. Thank you, Mr. Chairman.

Mr. Chairman, it is a pleasure to appear before this committee on behalf of H.R. 10.

We feel that the bill is a good bill. There are a few areas that we believe perhaps need tightening up.

But I would like to briefly discuss the Hatch Act. Although it was

perhaps appropriate at one time it is clear to us now that the Hatch Act is a bill whose usefulness has greatly passed, and it needs substantial revision.

We, of course, do not suggest that appropriate safeguards should not be taken. They should.

But we feel that H.R. 10, basically, preserves the safeguards that need to be preserved.

Now, there are three areas where we think the bill should be, perhaps, changed and could be improved upon.

The first area is section 7326. This deals with leave for employees.

The present section permits an employee to take leave for political purposes. We think it might be more appropriate and desirable to, perhaps, compel the employee to take leave under at least some circumstances, perhaps for a partisan office.

Of course, the same would not apply to a nonpartisan office.

In our testimony we suggested, perhaps the employee should be compelled to take up to 60 days leave. We said leave without pay. But there could be other combinations.

This is an area we think the committee should seriously consider and look at.

A second section is 7328.

This second deals with investigations by the Civil Service Commission.

Frankly, we do not have that degree of confidence in the Civil Service Commission which would permit us to support this provision.

We have not found the Commission that responsive or, frankly, that competent. We regard them as part of the problem, and we fail to see how, if they are part of the problem, they can be part of the solution.

We would recommend, therefore, that the Board that is created within the bill be expanded and that the investigative powers also be delegated to the Board, or if not to the Board, to some other body, almost anyone except the Civil Service Commission.

Our third area of concern deals with section 7324, which concerns the sensitive position area.

Frankly, we think that section is overly broad. And we bring this to your attention, the previous witnesses have testified about it, not because we represent the employees that are affected, but because we don't think that it is desirable to exclude employees under a criterion of this sort.

We have had some related experiences in this area. Mr. Connery testified that it would be up to the head of the agency to make the determination as to who was sensitive and who was not.

In a related area, we represent employees from the Department of Agriculture Office of Audit and Investigation, or I should say more accurately, we used to represent the employees from the Department of Agriculture Office of Audit and Investigation.

We do not do so any longer, because the head of the agency, the Secretary of Agriculture, Mr. Butz at that time, made a determination that we could not represent this particular group of Agriculture employees because they were engaged in the internal security of the agency.

Well, it is true to a limited extent, the point, however, is that he made that determination. There was no legislative guidance.

We had a history of representing those employees for over 10 years and suddenly by executive fiat, we no longer represented them.

We fear that the same thing would happen here.

What is a sensitive position? What does it mean? There is no definition for it. There is no criteria established in the law. We think it is overly broad, and we would strongly recommend to this committee that at least you should provide some criteria for what a sensitive position is. We would prefer to see the bill so drafted as to make it clear what exactly a sensitive position is and what it is not.

We don't feel it should be left to the head of every agency to determine.

That will conclude my remarks, Mr. Chairman.

I would be pleased to respond to any questions you might have.

Mr. CLAY. Thank you. I would just like to state for the record that your statement today impresses me as being a drastic departure from the position taken last year by your organization, and I welcome the support, if we can accommodate some of your reservations.

Mr. TILTON. We have changed our position, as you noted, for many of the reasons I just cited.

The Hatch Act, we have decided, was a good bill for its time. But that time is not now. We have looked at it. We think in our society as we find it today, the Hatch Act should be changed along the lines that the chairman proposes in H.R. 10.

What was appropriate in 1930 is not necessarily appropriate today.

And that is why we have modified our position, Mr. Chairman.

Mr. CLAY. In your prepared statement on page 3 you say, section 7326 provides accrued annual leave for Federal employee candidates for elected office.

You suggest that these Government workers be required to take leave without pay for a period of 60 days prior to a general election.

Mr. TILTON. Well, this was one approach we used as I mentioned in my comments. We feel it would be more appropriate for an employee to take some form of leave, especially in a partisan political office.

Obviously if it is a nonpartisan office the same logic might not hold true. This might not be the only combination possible.

Perhaps a person took accrued annual leave, that would also satisfy our concern about that. But we feel there should be some separation between the individual employee's job and his campaign activities.

Mr. CLAY. You are saying that he ought to be compelled to separate from his place of employment in order to run for public office?

Mr. TILTON. For a limited time this is what we would prefer. Of course we don't want to penalize Federal employees and make it so difficult that they cannot run for office. That is not the purpose of our suggestion.

We believe, however, that it would be desirable to have some separation of some sort, especially in a highly partisan office. We think it would be more appropriate.

Mr. CLAY. Don't you think that by including a provision like this you would have the adverse effect of denying the right to seek public office to a great number of people who perhaps might want to run, but financially cannot afford to be off from work for 60 days?

Mr. TILTON. As I said this is not the only combination. We would be willing to accept something like this, for example, if a person was compelled to take accrued annual leave, we would even support something which would allow or compel the agency to advance the person annual leave.

Certainly we do not want to discourage a person from running from office if that is what the person wants to do. But we think there should be some separation if at all possible.

Mr. CLAY. But you know the bill as it is now written gives the option. The person may use accrued annual leave if it is necessary.

Mr. TILTON. Yes. We would prefer that there be an element of compulsion in there, at least for a limited period of time.

We suggested 60 days. That was an idea which we thought would provide a fair degree of insulation for the agency and for the employee, if the committee would go along with some sort of separation, it wouldn't necessarily have to be 60 days, we think it is a good idea, however.

Mr. CLAY. On page 4 when you talk about the three-member board, and you say the authority for investigation is given to the Civil Service Commission—

Mr. TILTON. Yes. That is correct.

Mr. CLAY. And you would prefer that the board be properly staffed so it could conduct the investigations.

I think the general feeling of those of us who participated in the hearings last year and hearing all of the testimony was that the two functions should be separated, that the Civil Service Commission should conduct the investigations.

Mr. TILTON. Frankly, Mr. Chairman, I understand that feeling. It is always difficult when you have an agency that has both the investigative and adjudicative powers all tied together. But it is not unusual.

We have many governmental agencies of that nature. And they have worked rather well. I believe the SEC, for example, has both investigative and adjudicative power.

But investigative power has been placed in the Civil Service Commission. And that is the heart of our problem with it.

We don't feel it should be with the Civil Service Commission. We don't feel that their track record warrants it. We would be willing to see the investigative function go anywhere except to the Commission.

Mr. CLAY. Well, of course, that would incur additional costs, wouldn't it?

Mr. TILTON. It would incur additional costs. But I would point out that the Commission at this time already has a certain budget for that, in our testimony I believe we suggested some \$217,000. This money could just as easily be transferred to the new board or to some other agency for that purpose.

Mr. CLAY. That is part of the problem that we have with this legislation. We don't have any authority to spend money.

Mr. TILTON. I appreciate that, Mr. Chairman.

Mr. CLAY. And have to go through the appropriations route of it, and I am afraid that this bill would get tied down over in that committee like it was in Government Operations for the last 30 or 40 years.

[Laughter.]

Mr. CLAY. And we drafted a piece of legislation that didn't have to leave this committee except for going to the floor of the House.

Mr. TILTON. We don't want it to be bogged down. But that is a real concern we have. And at the very minimum, Mr. Chairman, we would recommend as an alternative that the committee call someone down from the Commission and get from them some kind of a commitment that there will be vigorous and impartial investigations.

As I said, we just do not have—

Mr. CLAY. We are going to have that because I have the oversight responsibility for the Civil Service Commission. So long as I am here they are going to vigorously pursue these ends.

Mr. TILTON. Very well. As I say, we just do not have the required degree of confidence in the Commission that would permit us to endorse that particular provision.

Mr. CLAY. Thank you.

Mr. Heftel?

Mr. HEFTEL. Thank you.

Do you feel that a candidate for public office, for instance, a postmaster or a postal employee in the field, could actually run for office and not exploit the position to his advantage and, therefore, would have to take a period of leave prior to commencing political activity?

Mr. TILTON. It would depend on the position. I think by the nature of Federal employment there would be some positions where it would be virtually impossible for the person, whether he wanted to or not, to fail to exploit it.

Let's take a high-level position in the Department of Agriculture, in an agricultural State, certainly the fact that this person is employed in a high-level position will, whether he wants to or not, exercise influence on the voters because he is a person that could possibly have great influence and control over farm policies and farm income in an agricultural State.

This isn't to say the person would do it deliberately. But I would think that the voter could perceive it that way. And this is one of the reasons why we thought it would be more appropriate if there would be some separation, some limited separation that the employee would have to take.

Now, if you have a letter carrier it is unlikely that a letter carrier who is running for office—clearly I don't see how a letter carrier is going to have any real influence with the electorate merely because he is a letter carrier, or a person who works for the Forest Service, cutting trails or something of that nature.

I think it would depend on the position.

Mr. HEFTEL. Do you think the degree of sensitivity, since is so hard to define, would be better satisfied by simply saying that any Federal employee seeking elective office must separate 90 days before announcement of candidacy for any office?

Mr. TILTON. Well, that of course would be very easy to administer. I would not want to go so far as 90 days. That is a pretty long time. And before announcement, that puts a real burden on this person also, if you consider primaries and when a person must announce for office.

Again the person may not win the primary. So I would think that the, that the dividing line would be a person who is actually a candidate or who is actually going to stand for election on election day.

Otherwise, I think the burden would become a little bit too much.

Mr. HEFTEL. You do know if someone elects to seek an office in the primary process, that the primary has a specific date.

Mr. TILTON. Yes.

Mr. HEFTEL. And, therefore, you would develop, whether it is 90 or 60 days, a period of time before the date of the primary as a minimum.

Mr. TILTON. That would—

Mr. HEFTEL. So that if you are going to use the date on which the person announces for office, perhaps you could reduce the amount of time prior to announcement for office, or you could use a longer period of time using, for reference, the date of the primary as an example.

If you elect to seek office in a primary you must separate either on the day you announce or some number of days before the primary.

Mr. TILTON. My concern with that, frankly, would be that we would be making it so stringent that the average Federal employee simply could not afford to run for office.

As I said, we don't want to prohibit a Federal employee from running by making it financially ruinous. We want the employees to have a limited separation that will—

Mr. HEFTEL. What would you consider a reasonable separation as an example, if you only use the reference date of the primary rather than before you announce for office? For what period of time prior to a primary should a person no longer actively pursue their Federal position?

Mr. TILTON. I would say 60 days would be the absolute maximum that the person should be required to do that, and since it is a primary, perhaps even less; 30 days might well be adequate. I think this would be especially true if we are to require the person to, again separate when he stands for, actually stands for election.

Mr. HEFTEL. Would you use the alternative then of 60 days or 30 days prior to the date that the person announces for office?

Mr. TILTON. Well, I think my preference would be to pick a relatively short period of time, such as 30 days prior to the primary election date, and then perhaps another 30 days prior to the general election which would be a total of 60 days.

Mr. HEFTEL. If you had been nominated in the primary, I think there is an assumption that you can't return to your position during the period of time from the nomination in the primary to the general.

I think there is a conflict there, that you would have to prohibit participation or activity in the job itself, because you have got a conflict.

You are actively campaigning for office, between primary and general.

Mr. TILTON. The difficulty I would have with that is that depending on the date of the primary election an individual employee could be out of work for quite a long time.

Mr. HEFTEL. There is no way that you would ever have objectivity between the day you are the nominee and the general election. You have an absolute conflict if you allow that.

So I would think that if you are going to have any type of system to avoid conflict, I don't care whether you are in Federal employment or otherwise, in any sensitive area, would you not have to then remove yourself from that position if elected in the primary for the

period from the primary to the general because your identity only naturally is as the candidate of that selected party or group, if it is non-partisan, from the primary to the general.

Mr. TILTON. No, sir. I don't believe that you would have to do that necessarily. I see the logic of what you are saying, but nonetheless, it appears to me that to require a Federal employee to take that much time off is to impose a substantially greater burden on that person than is imposed on any other citizen in the United States.

And I don't believe that it is necessary to go that far. I believe that we can trust the good sense of the American electorate, and I hope the good sense of the Federal employees not to abuse the system.

Mr. HEFTEL. Thank you.

Mr. CLAY. Mr. Taylor?

Mr. TAYLOR. Thank you very much.

Mr. Tilton, I notice that you say in your statement that your position has changed on this since it was considered last year, on this particular piece of legislation.

You further state that what was appropriate in 1939 is not appropriate in 1977. Why is it that what was appropriate in 1976 is not appropriate in 1977?

Mr. TILTON. Well, Mr. Taylor, there always has to be a cutoff point. There always has to be a point where you reexamine your positions and your alternatives.

The fact that it is now 1977 instead of 1976 is, I think one of those historical accidents, that you reexamine your position at a time and you find out what the people you represent want, and the date itself has no real significance to me, as to when we decided that it would be more appropriate to change the Hatch Act.

I see no real significance in that type of a cutoff, between 1976 and 1977.

Mr. TAYLOR. I see. You do say in your statement, Mr. Tilton, that your members have communicated to you concerns about political arm-twisting supervisors. You further state that you share their trepidations. And you think that the bill's penalties for illegal solicitations of political contributions by supervisors should be increased.

Do you envision under the provisions of this bill that there are not adequate safeguards for Federal employees in being coerced by supervisors, and would you recommend stronger safeguards being incorporated into this bill?

Mr. TILTON. We believe that the system of safeguards is probably adequate.

We would, however, be prepared to support increased penalties if the Congress felt that was necessary. We have no objection to increasing penalties.

Mr. TAYLOR. OK. You mentioned that at one time your union did represent many agricultural employees, but you do not now represent them.

Getting back to your comments relative to the use of the position, seeking political office, let me ask you what your opinion would be if a county executive director in an ASCS office who is in contact with everybody in the county, they come to this to get their allocations for limestone, for their acreage allotments and all of the things that they have almost exclusive determination for—

Mr. TILTON. Mr. Taylor, I come from an agricultural State, and I am familiar with what that person does and what his contacts are.

Mr. TAYLOR. Now then this person decided he was going to seek political office, having the knowledge of all these people, which is different than a postal employee, and these people knowing that he has been the guy who has handed out the goodies to them, so to speak, their allotments and so forth: and also knowing that if he is not successful he is going to be right back on the same job again.

Do you think that maybe he has some advantage over the candidate who has not been in that position?

Mr. TILTON. He may have, but I think to carry your assumption out you have to assume that the electorate may be a little bit corrupt also.

And I am not prepared to go that far. Once the voter is in the polling place there is no way that that county supervisor is going to know what he did or why. And I have great confidence in the American electorate, to disregard those types of pressures and those possibilities.

Mr. TAYLOR. I would agree with you that they are going to vote like they want to when they get in there, regardless or whether they are a farmer, laborer, or whatever.

But in terms of some pressure he might be able to bring upon them to make contributions—not making this accusation. I am just making the inquiry as to what you foresee there.

There is some possibility for undue pressure being exerted.

Mr. TILTON. There is a possibility there, yes. But there is a possibility in every major American corporation in this country.

So I don't think it is any different. And my feeling would be that the Federal employee who did that would be very, very unwise, because somebody somewhere could blow the whistle on him. And I suspect that the average farmer would react very, very strongly to that.

And I have an idea that he would probably lose votes instead of gaining votes. So although I concede that there is the possibility of abuse, I don't think it is a great possibility, frankly.

Mr. TAYLOR. I would tend to agree with you in that observation.

Mr. Chairman, one further question. I have one further comment. One time, years ago, in our State there was a candidate who was in public office, who a week before election at State expense did send a letter to every old age patient in the State of Missouri. This was the guy whose name was on the pension check.

It was a political letter which started out, "Dear patient." This was ill-advised, in my opinion. I just wonder if you can foresee in this legislation the possibility of recurrences of that on the national level.

Mr. TILTON. I believe that would be illegal. And I would certainly say it is unethical.

Mr. TAYLOR. But effective?

Mr. TILTON. Oh, definitely. There would, however, be no question that a Federal employee should not be putting private letters in official mail that is going out.

And I believe that that would be illegal under section—I believe it is section—I can refer to it in a moment here, under section 7323. I believe what you are suggesting would be prohibited by H.R. 10.

Mr. TAYLOR. What section?

Mr. TILTON. 7323. And that is 7323-B which says,

Nothing in this section shall be construed to authorize the use by any employee of any information coming to him in the course of his employment or official duties for any purpose where otherwise prohibited by law.

And I believe that that section would prohibit any Federal employee from doing that.

Mr. TAYLOR. Thank you. I am glad you pointed that out. I asked that of the other witnesses, and they didn't seem to have that information.

Mr. TILTON. I think there would be no problem with anything that you have suggested. It would be illegal.

Mr. TAYLOR. Thank you, Mr. Tilton.

Mr. TILTON. I should clarify one thing. When I mentioned the agricultural area, the exact area I was talking about was the Office of Audit and Investigation, where we represented employees for over a 10-year period. In the Executive order there is a provision which permits the head of any agency to exclude employees from union activity, and he is the sole judge of this, based on criteria that is also a very vague one involving the internal security of the agency.

It is not much different from saying sensitive. And my point in bringing that up is, is that vague criteria—like this will sooner or later call for an arbitrary decision, on someone's part. And I don't think that we ought to have this vagueness in any piece of legislation.

I think the Congress ought to make it clear what they mean. Now, I just can't see any justification for using that type of language.

Let's say what we mean and everybody will know, and that includes the head of the agency; he also will know what it means.

I don't think that the head of the agency ought to be making that decision. The Congress is about to change a longstanding policy and a longstanding law, and I can see no justification for reserving one portion of this change to the head of an agency.

Mr. TAYLOR. Thank you.

Mr. CLAY. Thank you for your excellent testimony, Mr. Tilton.

[The prepared statement follows:]

PREPARED STATEMENT OF GEORGE TILTON, ASSOCIATE GENERAL COUNSEL,
NATIONAL FEDERATION OF FEDERAL EMPLOYEES

Mr. Chairman and Members of the Subcommittee, I am George Tilton, Associate General Counsel of the National Federation of Federal Employees, America's oldest and largest independent union of Federal career employees. Accompanying me is Maureen Clancy, the Federation's Legislative Liaison.

I would like to thank the Chairman and the members of the Subcommittee for this opportunity to present the views of the NFFE on the Federal Employees Political Activities Act of 1977. I would also like to express our appreciation for the work of the Chairman, Rep. William Clay of Missouri, on this important bill.

Mr. Clay has championed the rights of Federal workers where many other public figures have chosen to denigrate these dedicated employees.

The NFFE has great interest in bills pertaining to the Hatch Act. We were strong supporters of the original Act. We have been consistent and vocal defenders of the merit system against "spoils" incursions and such odious plots as the so-called "Malek Manual." Thus, it is highly appropriate that we comment on H.R. 10.

At virtually every NFFE national convention since the 1940's, delegates have expressed strong support for legal protections against political strong-arming of Federal workers. Along with these resolutions, NFFE members also communicated to us their desire for greater participation in politics. Past conventions directed the union's national leaders to recommend an expansion of privileges to Federal employees permitting active service as delegates to party conventions,

provided that this did not conflict with official duties and did not lead to political harassment. Previous NFFE conventions voted to support legislation encouraging civil service employees to take part in community affairs, including the granting of administrative leave for participation on boards and committees.

Mr. Chairman, we have studied H.R. 10 and have found many provisions in it that are worthy of merit. The NFFE, of course, strongly favors H.R. 10's prohibition of employees using their official status to coerce others into political activity. The bill's provision that does not permit "politicking," including the solicitation or handling of campaign contributions, at Federal installations and by Federal employees while in official uniform or on Government time, is necessary to prevent real or apparent conflicts of interest. Forbidding supervisors to solicit or accept campaign donations from subordinates is important so that no pressure, real, implied or potential, is exerted against the civil servant. Specifically including "personal services" in the definition of political contributions appears to us a sound idea. Hopefully then the hapless employee would not be half-heartedly ringing doorbells on behalf of a candidate supported by his or her superior. Does an individual who wants to advance his career dare to say no to a request from the boss for campaign work? We would prefer that the request be illegal, as H.R. 10 provides.

The subsections referring to the status of Internal Revenue Service, Department of Justice, and Central Intelligence Agency employees are overly broad and confusing. Section 7324(b)(2)(B) allows agencies to determine which positions, and hence, which workers, are "un-Hatched." We see no compelling justification for including all Internal Revenue Service employees in this category.

We note that the White House staff is exempt from the "politicking on duty" prohibitions. We understand that it would be highly impractical to apply such restrictions to the President or the Vice-President. However, we would not want to see the White House turned into a campaign headquarters for the incumbent. Forbidding such staff from performing political chores on Government time or in Federal buildings would help to eliminate the actual or apparent use of taxpayers money for partisan purposes. In order to retain the respect of the American people to the office of the President, it is essential that a clear separation exists, as much as possible, between the Chief Executive's official and political responsibilities. Thus, we favor including all employees paid from the appropriation for the White House Office and from funds for the Vice-President under the provisions of Section 7325.

Section 7326 provides accrued annual leave for Federal employee candidates for elective office. We would suggest that these Government workers be required to take leave without pay for a period of 60 days prior to a general election. This would help prevent identification by the public of a candidate's political stands with his or her official responsibilities. An exemption could be made for employees running for part-time State or local offices.

In the area of enforcement, we have a major difference with H.R. 10. Once partisan political activities become permissible for Federal employees, enforcement of the relevant laws becomes even more crucial. We note that H.R. 10 creates a three-member Board to adjudicate violations. The authority for investigations is given to the Civil Service Commission. We prefer that the Board be properly staffed so it could conduct the investigations.

Mr. Chairman, we are compelled to make such a recommendation because we know that most Federal employees have no faith in the Commission. They view it as a management tool which has participated in some of the flagrant abuses of past Administrations. The CSC is not an efficient and aggressive agency with a good track record. On the contrary, it has moved with all the speed of a tired turtle to correct scandalous merit system abuses throughout the Government. We submit that the CSC is part of the problem and therefore cannot be part of the solution.

We realize that the additional responsibilities given to the Board would cost money and change the nature of this body. According to figures NFFE has obtained from the Commission, the CSC had \$224,000 allocated for its political activities section for fiscal year 1977. These funds could be transferred to the Board. If additional monies were still needed, we believe Congress would be penny wise and pound foolish not to approve reasonable amounts. A politicized civil service would indeed be an expensive burden for our nation to bear.

Mr. Chairman, we want strong protections for employees from political coercion. We believe that the adjudicatory process proposed in H.R. 10 is reason-

able. However, workers dissatisfied with the Board's decision and maintaining that political shenanigans have occurred, should have the right to appeal to the courts. This right should be clearly stated in this law.

Additionally, where the Board decides that strong-arming has occurred, it should refer these cases to the Attorney General for prosecution under title 18. This referral should be made for all employees not just political appointees, and should be clearly stated in the law. We stress that it's the independent Board and not the CSC or the employing agency that should take this action.

NFFE members have communicated to us concerns about political arm-twisting by supervisors. We share their trepidations, based on our 60 years experience. We think that the bill's penalties for the illegal solicitation of political contributions by supervisors should be increased. Management officials who demonstrate their unfitness for Federal service by such violations should be removed from their jobs. Such a mandatory penalty would serve as a deterrent as well as ridding agencies of supervisors who use their authority to the detriment of the Federal service.

"The Federal Employees Political Activities Act of 1977," with the changes I have suggested, would serve to give Federal employees greater political freedom, while maintaining important protections.

This concludes my statement. I will be happy to answer any questions the Subcommittee might have.

Mr. CLAY. Our next witness will be John White, representing the National Alliance of Postal & Federal Employees.

STATEMENT OF JOHN W. WHITE, DIRECTOR OF LEGISLATION, NATIONAL ALLIANCE OF POSTAL & FEDERAL EMPLOYEES, ACCOMPANIED BY WESLEY YOUNG, NATIONAL VICE PRESIDENT

Mr. CLAY. Mr. White, your statement in its entirety will be included in the record. You may proceed as you see fit. You may read it or you may summarize it. But before you do, I would like to express my appreciation for your patience and your agreeing to let several other out-of-town witnesses who had planes to catch, testify before you. We certainly want to thank you for that.

Mr. WHITE. Thank you, Mr. Chairman.

With me this morning is Mr. Wesley Young, our national vice president, who comes from Chicago, Ill.

With your permission, Mr. Chairman, I shall read my statement, which is short.

Mr. CLAY. Go right ahead.

Mr. WHITE. Mr. Chairman and members of the committee, I am John W. White, director of legislation for the National Alliance of Postal & Federal Employees, an independent, national industrial labor union whose membership is made up of individuals who work for the U.S. Postal Service and other Federal agencies, and whose plan of action has been fashioned to meet the needs of blacks, females, and other minorities, when their individual rights and freedoms have been threatened or diminished by "the system."

The opportunity to appear and to testify before you today is deeply appreciated by our members throughout the Nation.

Mr. Chairman, you are highly commended for your role as the architect of a bill which is fundamental in its application and historic in its significance.

Your statesmanlike efforts and hard work have caused this critically needed legislation to move toward almost certain enactment in this 95th Congress.

Your deep concern with the denial of full participation in the political process by employees of the Postal Service and the Federal Government is praiseworthy.

The skill and persistence which you have displayed in advancing H.R. 10 in this Congress and its predecessor in the 94th Congress are laudable. Those members of the committee who worked with you to remove, in some measure, the political shackles from the necks of postal and Federal employees during the 94th Congress are warmly admired. They are now urged to continue their support.

New members are implored to join the struggle for change. Members who oppose H.R. 10 are still held in high esteem, but they are respectfully requested to reconsider their position on this issue.

Mr. Chairman, continuing observation shows that your subcommittee staff is doing an outstanding job in providing the supportive services which your exacting duties require.

They deserve a pat on the back.

During the fourth century, B.C., Plato, the renowned philosopher said, "The true creator is necessity, who is the mother of invention."

It was necessity which gave birth to this union 64 years ago at the foot of Lookout Mountain in Tennessee. The infant was nurtured in a harsh environment of racial hostility at a time when black postal employees were being forced from their jobs and black job applicants were barred from future employment opportunity in the post office.

The situation in which blacks found themselves was the result of collusion between a white postmaster general and lily-white postal unions. The aim of the conspiracy was to make the postal service an all-white male Federal agency from which blacks and females would be barred.

During the past six decades we have continuously struggled against those forces which would deny, diminish, or restrict the constitutional, human, economic, political, and other basic rights of the individual human beings.

We now feel compelled to continue the fight. Therefore, because of our heritage, our experience and our goals, we completely support the concept which is found in the Political Activities Act of 1977.

Primarily, this act would give every American the right to run for dog catcher on a partisan basis in a small hamlet, or to run for the President of the United States.

We believe that the time has come to legalize this right for postal and Federal employees.

Our experience shows that a black person is born with the handicap of second-class citizenship. If he later becomes a postal or Federal employee, he becomes a third-class citizen, because of the Hatch Act.

If the person is a black female, it becomes a matter of fourth-class citizenship.

This burden is too great to bear and must be removed.

In the unending quest for first-class citizenship for all Americans, the restrictive, confusing, and oppressive features of the Hatch Act must be eliminated.

In our opinion, a minimal step in this direction would be enactment of H.R. 10 during this session of Congress.

A study of H.R. 10 has been and its language appears adequate to insure that the political rights of postal and Federal employees are recognized.

It also contains provisions which are designed to protect employees against unscrupulous politicians. It will be the joint responsibility of the Commission and the American people to prevent individuals from becoming pawns in an unsavory situation.

We believe that H.R. 10 is workable.

Mr. Chairman, our comments have been brief, because of an intent to reduce the time-consuming element of repetition.

We are very grateful to the committee for allowing us to appear today.

Mr. Chairman, I shall attempt to answer any questions.

Mr. CLAY. Mr. Young, do you have a statement?

Mr. YOUNG. No.

Mr. CLAY. Mr. White, we are all familiar with the historic struggle of your organization and, of course, we want to commend you and your organization for that struggle.

I would like to ask you, since your organization has experienced the ravages of minority group oppression, do you feel convinced that H.R. 10 provides sufficient protection against coercion, especially against coercion of minority employees?

Mr. WHITE. Yes, Mr. Chairman, we have studied H.R. 10; and at a former time some reservations were held about such a bill.

But now we are convinced that H.R. 10 does provide adequate protection for individuals, including minorities.

We also feel, Mr. Chairman, that whatever risk may be involved in misapplication of the intent of this legislation, that we as members of a minority group are willing to accept all risks which are involved in the fight for total freedom in America.

And we are prepared to accept those.

Our experience in the fight to expand and to have enacted into law the Voting Rights Act makes us feel that a logical addition to this right will be the right of postal and Federal employees to completely participate in the political process.

And, Mr. Chairman, if you pardon the personal reference here, you possibly would not be here now if it were not for some laws that were passed that enabled people to vote, who had been denied the opportunity.

When you look around on the Hill and see only 16 Members of the House who are black, it is a part of the incomplete fight that must be made totally by all of us.

And when we look on the side of the Senate, where there is not a single female, this is all a part of it.

And I believe, Mr. Chairman, that regardless of the risks that are inherent in any fight, the struggle must continue. Mr. Chairman, I remember as a youngster in Mississippi, which was a long time ago, I learned that when you got into a fistfight, because you felt it was worth fighting about an issue you engaged in the fight, but you did not know who was going to win.

You didn't know what the outcome was going to be. But you did know that it was worth fighting for.

And that is how we feel, Mr. Chairman.

Mr. CLAY. Mr. Young, did you want to add something to that?

Mr. YOUNG. Brother Clay, the black postal and Federal worker in most instances is the most influential and visible leader in the black community.

Therefore, the great danger is that you are denying the black community of its most influential and talented leadership by these prohibitions to participate in the political process.

And there is a great danger there.

The other is that the black community now sees the political system as the only vehicle for making the system to respond to their needs.

So if you are outside of the political process you are outside of power.

Moving further, that some fears here that have been expressed by other leaders, that we have never experienced preselection, all of the other benefits that they have had, we have not yet experienced.

As Brother Johnny said, I think the benefit of participating in the political process by black postal and Federal employees far exceeds the risks involved.

Mr. CLAY: Thank you.

Mr. White, what is your position in terms of legislation permitting Federal employees to seek public office only for State and local positions?

Mr. WHITE. Mr. Chairman, I would disagree with that position. I feel that they should be able to run for any office and not be restricted to lower level participation.

Mr. Chairman, while I am talking, a couple of questions did come up this morning to which I listened.

One was the question: Should employees be excluded from those agencies which are considered sensitive?

I feel that there should be no restriction on participation in terms of their right to run for office and to do the other things that are contained in this act, but we will need some means of policing them to see that excesses do not take place.

And on the other question on which there was some discussion this morning, on the issue of accrued leave, we felt that accrued leave, as outlined in the bill, should become available on demand of the employee. But that he should not be restricted to accrued leave. Leave without pay should be made available on demand. Accrued leave to meet the needs of this individual's campaign, and if the individual has sufficient resources to fall back on, leave without pay, having exhausted his annual leave or his accrued leave, that such leave would give this employee a greater degree of freedom and participation.

Mr. CLAY. Mr. White, in regard to that last point, that was the desire of this committee last year and a desire of the House of Representatives to make either accrued leave or leave without pay available upon demand of the employee.

But we were unsuccessful in convincing the Senate and conference committee that we should go that route.

Perhaps we will be more successful this year.

We certainly want to thank you and Mr. Young for your excellent statements.

And that concludes the hearing for this morning.

The Chair has received statements from the Laborers International Union, the National Association of Postal Supervisors, and Mr. Henry D. Eulau. These statements will be inserted in their entirety in the record.

The hearing is recessed until tomorrow morning at 10 a.m.

[Whereupon at 12:45 p.m., the hearing was adjourned, to be reconvened at 10:00 a.m., on Thursday, February 24, 1977.]

[The following statements were received for inclusion in the record:]

STATEMENT OF JAMES J. LAPENTA, JR., LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, AFL-CIO

Mr. Chairman and Members of the Subcommittee, the Laborers' International Union of North America, AFL-CIO, under its General President, Angelo Fosco, represents over 650,000 workers. Of this membership, 100,000 are in the U.S. Postal Service in the Mail Handlers' Division of our Union; and the Federal-Public Employee Division of our Union represents employees of other Federal agencies and many State and local government employees covered by the Hatch Act.

The concepts of the Hatch Act have been carried over into State and local government employment so there is a constant fear, in all segments of public employment, of violation of the political restrictions and a corresponding neglect of political activities so essential to the survival of our democracy.

Minor amendments to the 38 year old Hatch Act were adopted to be effective in January, 1975. These changes came about as amendments to the National Campaign Reform Bill. This amendment, affecting the nonFederal Government work force of approximately 12 million employees, has a direct effect upon State and local government employees' political participation. At the same time, large blocks of State and local employees continue working in programs that are financed in whole or in part by Federal funds without any of the protection against political discharges and patronage abuses that the Hatch Act was designed to protect.

The amendments proposed to the Hatch Act by H.R. 10 would liberalize the existing provisions so that the prohibitions against "participating in political activities" would be removed, which would be a major step in bringing the Hatch Act into the "1970's". The Laborers' International Union and its Mail Handlers' Division, representing the mail handlers' craft in the Postal Service, strongly endorses the liberalization of the Hatch Act.

The Hatch Act was born in a completely different atmosphere from the one that currently exists in the Federal, State and local fields. Theoretically—public employees were protected from being forced to participate in political activities; make contributions to political candidates in order to keep jobs; get promotions; or secure the favor of management officials by the Hatch Act provisions. The Hatch Act was designed primarily to take politics out of office-holding or employment considerations. Restrictions were placed on the solicitation of funds, although it was conceded that employees could make voluntary contributions to regularly constituted political organizations or candidates for office. Employees were also restricted in activities involving the sale of dinner tickets of a political party or in the distribution of pledge cards soliciting subscriptions to dinners.

The Hatch Act has withstood the constitutional challenges, and has continued as the guideline on prohibited political activity for Federal employees, and for those State and local government employees who are in programs which receive Federal Grants-In-Aid. Many of the States have seen fit to follow the pattern of the Federal Government by adopting "State Hatch Acts." Some of these laws have been even more restrictive in terms of political activity than the Federal Hatch Act.

Since the 1930's there has been a rapid growth of public employee unions, not only at the federal level, but at state and local government levels as well. It is the position of the Laborers' International Union that the protection afforded to public employees since the 1930's is now the legitimate function of the recognized trade unions in the federal, state and local government fields. As collective bargaining representatives, the exclusive unions should be able to protect their members from solicitations being made which violate the individual's interests, as well as the interests of the trade unions in representing public employees. The public employee unions should function in such a way that Hatch Act protection will no longer be necessary. Unions will prohibit political considerations in obtaining jobs, promotions or other favors to public employees that are not based on merit and seniority.

Based on what the Laborers' Union considers to be the new atmosphere in the federal field, we wholeheartedly support the amendments to the Hatch Act sponsored by Chairman Clay in H.R. 10. H.R. 10 would extend to all federal employees the rights and benefits of citizenship granted any other person under the U.S. Constitution; and would eliminate some of the existing evils in the Federal Civil Service System that have permitted patronage to serve the political interests of the party in power. H.R. 10 would change the Hatch Act from one of

oppression on political activity to one of an act which would enlighten the federal employees and encourage them to be first class citizens.

The Laborers' Union recognizes this as a first step which will permit federal employees to take an active part by participating in political activities so essential to the life of our democracy. When the public employee movement of federal, state and local government employees exceeds 13 million workers, it is inconceivable that this large block of informed citizens should be disenfranchised from active political participation by a Congressional act which has long outlived its usefulness.

STATEMENT OF DONALD N. LEDBETTER, PRESIDENT, NATIONAL ASSOCIATION OF
POSTAL SUPERVISORS

Mr. Chairman and members of the House Subcommittee on Civil Service, my name is Donald N. Ledbetter. I am the President of the National Association of Postal Supervisors, composed of more than 34,000 of the approximately 38,000 supervisors in the postal field service, with members in all fifty states, Guam, Puerto Rico and the Virgin Islands. Our members are employed in post offices, branches, stations, motor vehicle facilities, maintenance units, air mail facilities, bulk mail centers and in all other mail-handling installations in the field service.

I am here today to speak in support of H.R. 10, introduced by you, Mr. Chairman, together with a number of other members of Congress. As the President of the National Association of Postal Supervisors, I am particularly pleased that this legislation has been introduced. It has long been a goal of the Postal Supervisors to bring about changes in the Hatch Act that would allow employees of federal agencies greater political freedom. An expression of our Association on this issue was adopted as a resolution at several of our National Conventions. That resolution was stated as follows:

Whereas Postal employees political activity is now restricted, be it

Resolved, That NAPS take the necessary action to cause the revision of the Hatch Act in order to provide postal employees with the right of political freedom.

Mr. Chairman, I am satisfied that your bill does provide the freedom to engage in political activities which has been endorsed as a goal of the NAPS. Many of our members have desired to participate more fully in the political process than has been possible under the laws as they now exist. H.R. 10, if enacted into law, would grant to the large number of employees in the federal agencies the right to participate in politics to the extent they so choose. For that reason, I applaud the bill and I applaud you and the other members who have introduced this bill for your continuing concern for the well-being of federal employees.

While endorsing the freedom of federal employees to express themselves and work within the political process to the extent that they deem to be appropriate, I also want to urge that this Committee give careful consideration to ensuring that any such freedom is not abused. Although we believe that the Hatch Act is too restrictive and has unnecessarily prevented a large number of people from exercising their full rights of citizenship, I think we must also recognize that it was enacted into law in response to very real and troublesome abuses. I am concerned that a relaxation of the prohibitions upon political activities is accomplished in a manner that does not invite the reappearance of such abuses. I am just as concerned that no postal supervisors be pressured to take part in the political process to an extent greater than such supervisors may desire as I am about the current restrictions which prevent members from taking part in that process to the extent that they desire.

To avoid such a problem, it may be appropriate to add to the pending legislation some form of overview and oversight responsibility, perhaps by the Congress itself. The wrongful exertion of political pressure in order to obtain either campaign donations or campaign assistance can often be a very subtle process in which an employee may, rightly or wrongly, feel under an obligation to support a particular candidate. Such a perception does interfere with the freedom of that employee's conscience. I urge this Committee to concern itself with such possibilities so that this legislation, rightfully designed to give freedom to employees, does not become a means of depriving employees of the freedom to not support any candidate except to the extent that such employees, as a matter of their own conscience, choose to do so.

That concludes my statement, Mr. Chairman. Once again, let me express my appreciation for the concern which you have shown by the introduction of this legislation. I urge that it be enacted, subject to the reservations I have expressed above.

STATEMENT OF HENRY EULAU

Mr. Chairman, Members of the Subcommittee, Ladies, and Gentlemen; my name is Henry Eulau. I am employed by the Social Security Administration and I work at the Northeastern Program Center as a GS 4 clerk. I am not a Union official, but a rank and file member of Social Security Local 1760, American Federation of Government Employees.

I would like to take the opportunity to express my appreciation to you for your invitation to me to testify before your congressional committee.

The Hatch Act since its founding has been an oppressive act. It has done more harm than good even though its original intention may have been good. Its usefulness in today's open society has made it obsolete. It is in need of immediate revision.

My wife is an active participant in the field of politics. She is on the county committee representing the 42nd Election District of the 27th Assembly District in Queens County. While she is allowed to participate actively in the election process, I am denied the freedom to do so solely because I am an employee of the Federal civil service. I can't see why I must be left so to speak in the "dog house" stuck with babysitting at home while my wife as a county committee woman is allowed full freedom. It is indeed very frustrating for me not to enjoy this political freedom especially since it would take place when I'm off duty from my job and therefore would not present a conflict of interest in performing my duties on the job.

I support H.R. 10. I respectfully urge you to give the Federal Civil Servant this freedom off the job. Why should we continue to be given second class citizen status?

A long time ago, Moses said to Pharaoh, "Let my people go." I say to the Congress of the United States, Let my People go too. Give Federal employees their political freedom to participate actively in American politics and free them from the political bondage they have been in for too many years.

Last year, we celebrated this country's 200th year of independence. What a wonderful tribute to this country's own civil servants it would be, if Congress would give Federal employees a more active role in recognizing that Federal workers must be politically free too, and be made to feel that they are actively and politically a part of our 200th year birthday.

I also feel that in this new law should be a provision that no federal supervisor can force his or her own views on the fellow Federal worker, thereby protecting the integrity of the Federal civil servant from coercion.

Again, I want to take this opportunity to thank you for letting me air my views in front of you and ask you to restore first class citizenship to Federal employees by repeal of the Hatch Act.

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FEDERAL EMPLOYEES' POLITICAL ACTIVITIES ACT OF 1977

THURSDAY, FEBRUARY 24, 1977

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
SUBCOMMITTEE ON CIVIL SERVICE,
Washington, D.C.

The subcommittee met at 10:05 a.m., in room 311 of the Cannon House Office Building, Hon. William Clay (chairman of the subcommittee) presiding.

Mr. CLAY. The subcommittee will come to order.

Our first witness this morning is Mr. Robert Vaughn, law professor at American University.

STATEMENT OF ROBERT VAUGHN, ASSOCIATE PROFESSOR OF LAW, AMERICAN UNIVERSITY

Mr. VAUGHN. Good morning.

Mr. CLAY. Mr. Vaughn, your statement, including the attached article, will be inserted in the record. You may proceed as you wish.

Mr. VAUGHN. I would first like to thank the committee for the opportunity to appear, and I would like to thank Congressman Fisher for his kindness and courtesy in allowing me to testify first, in order to meet a class that I have later this morning.

My interest in the civil service stretches back to 1970. I directed a task force study, under the auspices of Ralph Nader, of the U.S. civil service system. Out of that study in 1972 issued two reports. One, "The Spoiled System: A Call for Civil Service Reform," examined issues regarding the U.S. civil service system, and a second report, "Behind the Promises," was a critique of the Government's equal employment opportunity program.

Both of those reports were subsequently published in book form, "The Spoiled System: A Call for Civil Service Reform."

Since my statement has been submitted for the record, I would basically like to just briefly summarize what the basis for my concerns about the Federal Employees Political Act were. The first concern relating to the effect of the removal of all restrictions upon the impartial administration of laws rests upon my study of the history of the development of the civil service system and my study of the activities of the Nixon administration regarding its attempts to undermine the integrity of the civil service.

It springs from a basic perception of the risk that is created in a politicized civil service, the risk to the impartial administration of the laws.

I believe that the history of the Civil Service Act itself indicates that one of the primary motivations of those who sought change in the civil service system was a desire to insure that laws were impartially administered and that the power of the Government was not used for partisan purposes.

I believe that with the increasing complexity and power of the Federal Establishment that that is a concern of increasing importance. We have an object lesson in President Nixon's two terms in office of the immense opportunities for abuse that exist and the tremendous risks that are run of allowing the civil service to be used for essentially partisan political purposes.

My concern with the Federal Employees' Political Activities Act was that that risk not be underestimated when comparing it against the important right that the public employees have to participate in the political process.

And it was my view that considering the other weaknesses in the civil service that the history of the Nixon administration has indicated exist cautions the utmost restraint in removing restrictions on the political activities of Federal employees.

The second area of concern that my statement indicates relates to the ability of the system to protect individual employees from coercion to engage in political activities, if all of the principal restrictions on political activities are removed.

The act itself sets up an enforcement mechanism which is designed, I think clearly from the legislative history of the act, to respond to that concern about the possible coercion of political activities of Federal employees.

My reservations about that enforcement scheme and about the ability of the act to protect employees from coercion rests in part on my experience with a study of equal employment opportunity programs. My experience there inclines me to believe that coercion against individual employees is one of the most difficult things to detect and prevent.

In my view, the enforcement mechanism which the act establishes considering historical risks that we know exist and considering what evidence we do have about potential risks that are created through coercion is inadequate to the task.

As my article states, the present Hatch Act restrictions are probably more restrictive than they need to be, and I believe that the right of Federal employees to participate in political activities is an important one, but I have the very substantial concerns which my own experience with the civil service system have created, and I appreciate the opportunity to share and discuss those concerns with you.

Mr. CLAY. Thank you.

Your last statement was that you considered the Hatch Act restrictions as more restrictive than they need to be?

Mr. VAUGHN. Yes.

Mr. CLAY. What would you recommend to this committee then?

Mr. VAUGHN. Well, I was afraid that that would be your question. [Laughter.]

Mr. VAUGHN. Law professors are used to criticizing courts. One reason we enjoy that is because we never have to make the decisions that they have to make. This is a similar situation. I have not thought through a particular recommendation. There are a couple of different

kinds of ideas that are floating around that suggest some possibilities to me. One of those is the idea that is suggested by Congressman Fisher in his alternative legislation.

The other idea that is floating around——

Mr. CLAY. May I interrupt you at this point?

Will you elaborate on what Congressman Fisher is recommending?

Mr. VAUGHN. As I understand his proposal, he would remove restrictions on Federal employees to participate in State and local politics but he would continue the restrictions which exist on Federal employees to participate in activities relating to Federal campaigns. Some of the concerns that I expressed exist under his proposal. The principal advantage of it that I see is that judging from the history of what occurred during the Nixon administration, that the attempts to use the political power of the Federal Government to coerce conduct by those outside the Federal Government was a particular threat and was a particular incentive when the Executive itself was involved in its own reelection or perpetuation of power. Those who purport to know say that parties and loyalty at the State and local level are somewhat more tenuous than they used to be, that you are likely to have a more diffused Federal body, where the ability to coerce political activity for State governments is probably not as great.

You still run the risk of creating a party perspective on individuals, but as I suggested, I don't think that is as great a risk as is created with Federal activities, activities in Federal elections.

Mr. CLAY. Don't you think this Congress would be subjected to severe criticism, if we passed a bill that says it is all right for Federal employees to seek public office against everybody, except Members of Congress?

Would that appear to be sort of self-serving?

Mr. VAUGHN. Well, Congressmen are like judges. Regardless of what you do, you are going to be subject to considerable criticism. So it strikes me that any kind of line that you draw is going to be a difficult one to draw. And I think you should be prepared for criticism regardless.

Mr. CLAY. I think that is the nature of the business that we are in.

Mr. VAUGHN. Yes.

Mr. CLAY. I don't think most of us would be here, if we didn't have tough skins.

Mr. VAUGHN. As I said, this is not a proposal that I have, that I have considered in detail.

But my own view of that argument is that, particularly if one has a thick skin, I wouldn't be particularly impressed by it.

Mr. CLAY. I didn't say thick heads. I said thick skins.

Let me ask you two quick questions. You have documented——

Mr. VAUGHN. Could I suggest the other idea that is floating around, as to an approach that may be thought about. And again it is an idea that I have not analyzed in detail. I noticed that the committee relied substantially on foreign experience from other countries in the previous hearings.

And some foreign countries have the experience where they narrowly define the governmental interest involved, the interest in impartial administration of the laws, apply that to as narrow, a category of employees which is felt to be necessary.

For example, employees are divided into three categories. Those who are generally called "Indians," or the lower level employees are normally free of all political restrictions. Middle level managers have some restrictions placed upon them. Those at the highest level within the civil service are subject to fairly rigorous restrictions on their political activities.

That poses some difficulties in our system, because of the layer that we have above our civil service policymakers, of political policymakers, who are themselves free to engage in political activities.

But that is another kind of idea that is floating around that fairly narrowly defines the governmental interest in the administration of the law and balances it against the interest of the employees in a free participation in the political process.

Mr. CLAY. Well, of course, I think that the basic problem here is, how do we afford all American citizens their constitutional rights and particularly the first amendment rights? And that is what we are wrestling with right now.

Mr. VAUGHN. As you suggest, I think it is a very difficult problem, because we are not only dealing with the first amendment rights of employees to participate freely in the political process, but also with the first amendment rights of Federal employees not to be coerced into political activities.

Mr. CLAY. And—

Mr. VAUGHN. And we are dealing with the first amendment rights of citizens who are subject to governmental power not to be coerced into involuntary political activity, because of the use of the power of the Government.

So I think that—

Mr. CLAY. Isn't that fear of coercion really based on the assumption that the majority of Federal employees are not law-abiding citizens, that they will not obey the law if this Congress enacts a law that says you do not coerce?

Mr. VAUGHN. I think that assumption is based upon the fact that goes back to Thomas A'Becket, who learned to his chagrin that the mere suggestion of a superior is taken as a command. In any large institution where you have a large number of superior/subordinate relationships, you have a number of informal sanctions available to punish individuals who don't do what is expected of them, and you can suggest what is expected of them, it seems to me that you have in that situation, a situation for substantial abuse.

My study of the equal employment opportunity program suggests to me that that kind of abuse is widespread and is a serious and difficult problem.

Mr. CLAY. Thank you.

Mr. Harris?

Mr. HARRIS. Thank you, Mr. Chairman.

I wasn't clear, what restrictions on the Federal employee in the Hatch Act now do you feel are necessary to protect employees? Is it the restriction against running for public office? Is that the one?

Mr. VAUGHN. I guess the reason it was so hard to follow that point was that I didn't really make that point. The reason I didn't make that point is that my criticism was in the context of Federal Employees Political Activities Act that was passed last time involving the removal of all of those restrictions.

It is a judgment and it is a judgment that has to be made which balances the restrictions against the risks that you perceive.

Mr. HARRIS. What are the restrictions that help?

Mr. VAUGHN. Well, it seems to me, as I suggested in my testimony, that when you have a system where Federal employees are intimately involved in the political process, involved in the election of the Federal executive and in other Federal officials, that you have created a situation where you run a very substantial risk that the ability of the executive to improperly manipulate the enforcement of the laws exists.

Mr. HARRIS. I don't know what you mean by "intimate involvement". I don't know of anything more intimate than pressing a lever for one candidate or the other. I don't know anything more intimate than telling my neighbor that I am for Nixon or I am for Ford or I am for Carter. And I don't think the Hatch Act stops you from doing that.

What the revision of the Hatch Act does eliminate is an awful lot of the deceit and the confusion that has been going on. When you start talking about the 2 years of Nixon, we had 2 years of Nixon under the Hatch Act. And there wasn't anything in the Hatch Act that stopped the Nixon activities or those manuals or the other attacks and the devices that were being used to try to destroy the civil service system.

And I don't think participation by the average citizen or the average governmental employee is going to weaken our system at all. To say that it is all right for our citizens to involve themselves in any type of political activity vis-a-vis State or local offices, but is somehow wrong for them to involve themselves in the political activities vis-a-vis Federal offices, that this brings down the system, I think fails to recognize what really has happened for the last 2 or 3 or 4 years. I think this is a real disservice to the Federal civil servant that says, that 10 percent or 15 percent or maybe less that says, "I would like to involve myself in my Government." I just can't understand the point that it is all right for them to do it at the State and local level, but don't let them get involved in our area, the Federal level.

Mr. VAUGHN. Let me comment on some of your points.

First of all, I think that the argument that the abuses which occurred in the Nixon administration took place under the Hatch Act is hardly an argument to suggest that we ought to repeal the restrictions.

One of the things that the Malek manual suggests is that the ingrained view of political neutrality did play a role in protecting the fair administration of the law under certain circumstances.

I believe there are other risks created by the removal of restrictions, and one of them is that, if you look at the arguments that President Nixon made, one of the most powerful ones was the accountability principle.

It seems to me that an executive is in a much stronger position to argue accountability when he can come into a new administration and be able to point to individuals who have engaged in substantial partisan political activities for the other party, the executive can make the argument, I think, very forcefully:

I have been elected by the people to carry out a specific program, here are people who are political activists who are in key positions in my administration who are trying to stop what I want to carry out.

I think that makes the argument more powerful, and I think it creates a risk of increasing the ability of the executive to manipulate the Civil Service.

Mr. HARRIS. Yet you can't tell me what restrictions in the Hatch Act provide these necessary protections?

What restrictions accomplish this?

Mr. CLAY. The Chair is going to request that you make your responses as brief as his question.

Mr. VAUGHN. I tried to. I can only rely on the answer that I gave earlier.

Mr. HARRIS. Which was that you don't know?

Mr. VAUGHN. I think we have to look at the restrictions as a totality, and we have to be careful of removing all of the restrictions at one time.

Mr. CLAY. The time of the gentleman has expired.

Mr. Lott?

Mr. LOTT. Thank you, Mr. Chairman.

Have you worked in the civil service?

Mr. VAUGHN. No; I have not.

I conducted a study of the U.S. Civil Service Commission between 1970 and 1972, and I have published a book on Principles of Civil Service law. I have been particularly interested in the Federal equal employment opportunity program and in the Federal conflict-of-interest problems.

I have been interested in particular problems in, personnel problems in Federal regulatory agencies, which is why I had the interest and the concerns that I do in these areas.

Mr. LOTT. This is why you were working with Ralph Nader in 1970 and 1972?

Mr. VAUGHN. Yes.

Mr. LOTT. You have obviously done a lot of study on this. In your article, "The Hatch Act and Beyond," you intimate that you have serious reservations about the protections of the Hatch Act, until there has been some revisions in the merit system; that is, until it has been strengthened.

Could you briefly describe what you had in mind there?

Mr. VAUGHN. I believe the article briefly mentions two or three areas. First of all that the original thrust of the civil service reform placed essentially all of its eggs in one basket. All the eggs of reform went into the basket of competitive examination.

We have a fairly clear record now that competitive examination is not an adequate safeguard for the impartiality of the civil service and that it is not a very effective way of getting the most qualified or competent workers and that it also imposes very substantial costs on large segments of the public because of the discriminatory aspects of many of our present examinations.

There has to be a review of our examination procedures. There has to be a willingness to recognize that we have to create some new structures and mechanisms in order to protect the integrity of the civil service.

And it strikes me, without going into much detail, that the principle of reform of the civil service is a fairly basic principle which is presently recognized in the civil service regulations.

The need is to create some mechanism that makes that principle work, that in some way, people are responsible for what they do. That sug-

gests increased protection for employees who act out of conscience to oppose activities which they think are improper.

In addition, citizens should be able to initiate actions to seek to review the conduct of Federal civil servants which affect them.

It also strikes me that the enforcement structures that we now have have been substantially discredited. We need to give some thought to just how much flexibility we want in personnel management, whether we want some substantial personnel authority which is free of regulations and rules and what areas we want subject to substantial regulation and the kind of effective and independent enforcement mechanism we need to protect that.

Mr. LOTT. Let me ask you a couple more questions.

The sum of what you are saying is that you are afraid that if we remove the present restrictions on Federal employees we are going to be politicizing the merit system?

Mr. VAUGHN. I think we run a substantial risk of that.

Mr. LOTT. If some employee does bring charges against a superior, that he—the employee—is being pressured to get into political activity, if it is found that he—the superior—in fact was doing that, what then is going to be his attitude toward that employee who brought these charges?

I mean, ideally we like to think that this is a beautiful person, and he is not going to, you know, cause some difficulty with his employees. But in fact we are dealing with human nature.

Mr. VAUGHN. We have some studies on that point. Congressman Aspin, before he was elected to the Congress did a study on the reinstatement remedy provided by the National Labor Relations Board. He studied the New England region. He found that of those employees who were offered reinstatement about half of them refused to take the remedy. They thought that the situation would be even worse if they were reinstated and he found that 1 year after the employees had been reinstated that three-quarters of those were no longer with that company.

When he interviewed those employees, the general reason they gave was that life had become so unbearable after their reinstatement that they simply found it necessary to leave.

Mr. LOTT. Let me ask one further question.

I really feel like perhaps we need to give our Federal employees some additional opportunity to participate in the political process. But I am afraid that we are going too far with H.R. 10. Are you opposed to any of these changes or could you see maybe another approach, maybe just half of it that would be acceptable?

Mr. VAUGHN. As I suggested in my analysis, I have significant concerns about the difficulties which this creates. I am not in a position to suggest to you the exact form which the provision should take.

Mr. LOTT. That is all, Mr. Chairman.

Mr. CLAY. Thank you.

Mr. HEFTTEL?

Mr. HEFTTEL. Mr. Vaughn, have you ever experienced the elective process personally?

Mr. VAUGHN. You mean have I ever run for office?

Mr. HEFTTEL. Or participated in the campaign or campaigns?

Mr. VAUGHN. Yes.

Mr. HEFTTEL. Do you find that there are a number of entities in and out of the government, all of which can theoretically exert the pressure on what people do or don't do politically?

For example, the Governor of a State deciding who he wants nominated in a primary in a Federal election, using his office as Governor, his cabinet and his normal strength of employees through State government; the head of a labor union deciding he wants a specific candidate in either the primary or general.

If this is the way that we function—which is to basically allow political activity on the theory that in the final judgment it is the people who make the decision, do you really think that taking a single group, that happened to work for the Federal Government instead of organized labor or the government of their State or city—do you really think that that makes much difference?

Mr. VAUGHN. Well, I guess the answer is yes. And the reason is that there is no other organization like the Federal Government.

There is no other organization which is of the magnitude and exercises the powers and direction over the lives of individual citizens that the Federal Government does.

Mr. HEFTTEL. Now, are you suggesting that the supervisory personnel in the civil service system, under pressure from a President or would-be President are going to exert improper pressures upon the employees? Is that what you are concerned with?

Mr. VAUGHN. Not only upon the employees; the evidence we have from the Senate Select Committee on Presidential Campaign Activities suggests pressures also against citizens who are the subject of Federal regulation or who are applicants for Federal grants or subsidies or other types of Federal benefits.

Mr. HEFTTEL. But aren't you constantly just saying that people are subject to pressures, that authority can be used impartially and fairly or can be exploited and used improperly? But that this is not limited to the so-called Federal civil servant?

Mr. VAUGHN. Well, power can always be abused, and power in a society like ours resides in several different places.

A vast bulk of governmental power lies in the Federal Government and it seems to me that we ought to give some careful thought to the structures which we set up that incline that that power be used rather than abused.

Mr. HEFTTEL. But do you believe that the Democratic process giving the individual the right to participate in the elective process, to vote in the elective process, will prevail? That shows the system will go on for all of the inequities because we have on balance greater faith in the people than lack of faith, greater faith in the system than lack of faith, and that to deny the right, to whatever group for whatever reason, is just saying we don't have this sufficient degree of confidence and that we are afraid, and yet if you have the wrong people the exploitation that you used in the Nixon example, this is a product of people, not the system.

You are going to improve it by the quality of people, not denying a group of people the right to participate.

I personally perceive what happens in all of the forces of organized labor leadership, coercion, all of the forces of State government, State civil servants, all of them are under pressures. And the whole machine as you describe it that goes to work, to coerce people, and I have seen it totally fail.

So you nominate a candidate because the people have made a decision.

Mr. CLAY. Your time has expired.

Mr. HEFTEL. Thank you.

Mr. CLAY. Mr. Taylor?

Mr. TAYLOR. Thank you, Mr. Chairman.

Mr. Vaughn, do you believe that if the supervisor was an active political figure, say a county chairman who voted for one political party or the other, that the people who would be working directly underneath him might feel that they were being subtly coerced and that they might have some fear that if they didn't do the thing that they felt he wanted them to do, that they might be subject to penalty?

Mr. VAUGHN. In the study that was done on the Hatch Act restrictions by the Commission on Political Activities, one of the things they found in their survey was that a majority of the employees believed that if the restrictions on political activities were removed that things like promotions, job assignments, et cetera, would be affected by political considerations.

That study suggests a fairly receptive audience to very subtle suggestions as to what is considered to be the appropriate kind of behavior that will be rewarded, and the kind of inappropriate behavior that will be punished in one way or another.

Mr. TAYLOR. Do you have any information, statistics or polls, that would indicate what the rank and file—how the rank and file of the Federal employees feel about revision of the Hatch Act?

Mr. VAUGHN. The only thing I could refer you to would be the studies that have been done by the Commission on Political Activities.

Mr. TAYLOR. What is that?

Mr. VAUGHN. As I remember it, a fair number of employees who were surveyed there were not in favor of the revisions.

Mr. TAYLOR. We heard testimony yesterday from representatives of organized labor, that at their conventions they had unanimously endorsed the revisions of the Hatch Act year after year, and that there was virtually no members or no employees in the Federal Government that do not favor revision of the Hatch Act.

Frankly, the mail that I get from my district leads me to believe the opposite. But maybe I am referring to a different area.

Mr. VAUGHN. I am really not in a position to be able to advise you on that.

Mr. TAYLOR. Mr. Waldie, as I recall yesterday—I believe he said that the Federal employees were being denied the right to participate in the voting process. And I don't know of any occasion where an employee has been denied the right to vote.

But I believe that was Mr. Waldie's statement yesterday. So I feel very much like that individual, that maybe this needs to be done.

But if Federal employees had been adequately informed as to what rights they now have under the Hatch Act, they can participate, they can speak out.

We have some things that Federal employees can do now with the Hatch Act. They can express their views, they can vote, they can make political contributions if they so desire. And I am concerned that we may be in a position where they have to make political contributions because of coercion.

We have a bill that seeks to prohibit them from being coerced. But in your judgment, do you believe that the protective language in this bill adequately protects the Federal employees from coercion?

Mr. VAUGHN. No. I have serious reservations about the enforcement structure and its adequacy.

Mr. TAYLOR. Thank you, Mr. Chairman.

Mr. CLAY. Thank you.

Mr. Solarz?

Mr. SOLARZ. Thank you, Mr. Chairman.

Mr. Vaughn, I gather that you are concerned about the extent to which Federal employees might be coerced into participating in political campaigns against their will.

Can you tell us whether or not, to your knowledge, there are any protections or prohibitions which are currently embodied in the law of the land which are designed to protect employees in the private sector from being coerced into political activity,

Mr. VAUGHN. I am not aware of any.

Mr. SOLARZ. Neither am I. And that leads me to ask another question.

Is there any reason, to the extent that this is a problem, to provide employees—let me put it somewhat differently. To the extent that the kind of protections, prohibitions to which you have referred don't exist in the private sector, it would seem to me that the enactment of this legislation would provide a substantial measure of additional protection of employees in the public sector, that is now available to employees in the private sector.

In the private sector, if you were to work in a factory and the owner of the factory attempted to secure your participation in a campaign which you didn't care to participate in, I gather there isn't much you could do about it.

But under this legislation, if the administrator of the agency in which you work for the Federal Government attempted to do that, there are all sorts of penalties which might be invoked against him.

So it seems to me that given the kinds of concerns that you have expressed, the 2.7 million employees who work for the Federal Government would be much better off than the 80 million Americans who work in the private sector.

Mr. VAUGHN. It strikes me that there are lots of protections which are provided for Federal employees that we ought to give thought to whether or not employees in the private sector ought to be protected, also.

Mr. SOLARZ. Do you think these protections should be extended to employees in the private sector?

Mr. VAUGHN. It seems to me that employees in the private sector in the exercise of their constitutional right of free speech should be protected from coercion to engage in political activities.

The difficulties are the inadequacies of mechanisms to insure that those rights are adequately protected. But I think the problem you raise is a very serious one.

Mr. SOLARZ. Well, I must tell you that I find those expressions of concern about the problems that confront employees in the public sector if this legislation is passed somewhat locally in light of the fact that they will have a greater measure of protection than those working in the private sector.

Let me ask you another question.

It seems to me that in terms of the possibilities of abuse which I think any fair-minded person would have to acknowledge exist to some extent, fundamentally you are talking about two different scenarios.

One is a situation in which you would have an occasional violation of the prohibitions contained in the law. And the other is a situation where you would have, in effect, a kind of massive subversion of the prohibitions contained in the law.

I would submit that it is literally inconceivable that the President of the United States, who is the Chief Executive officer of the country, would attempt in the fact of this legislation to systematically attempt to turn the Federal bureaucracy into a political machine designed to enhance the political prospects of his administration.

It would be so readily exposed, the penalties would be so severe, the political consequences of detection would be so great, that it seems to me it is inconceivable that it would ever be attempted.

So I would submit that the only real problem is the extent to which there would be an occasional abuse in which an individual administrator took it upon himself to coerce somebody into unwanted political activity.

Now, don't you think on balance when one weighs the equities involved, that when one compares the occasional abuse in which an isolated individual is obligated to participate in a campaign, despite the prohibitions in the law, against his will, compared to the flat-out prohibition on all Federal employees from actively participating in campaigns right now when so many of them would like to participate, that we would be far better off balancing the equities with this legislation?

Mr. VAUGHN. I think you are right.

It is a balancing test. And I suppose the difference between our perceptions is that I have, maybe because of my own experience, much more concern about whether or not the first scenario that you outlined can, in fact, occur.

Mr. SOLARZ. Don't you think that if the legislation were enacted and there were some prosecutions designed to establish a determination of the Commission to enforce the law that it would have a deterrent effect on the willingness of the Federal managers to engage in the kinds of activity that have been prohibited?

Mr. VAUGHN. Of course, you have a part-time commission. You have a commission itself made up of Federal employees. You have a commission that does not share many of the prerequisites of an independent commission.

Mr. SOLARZ. Let me just say in closing, because I don't want to take up more time than I have been allowed, it seems to me most unlikely that there will be a substantial number of managers who are prepared to risk their careers, their reimbursement, their salaries, their promotions, their status and everything else by violating the law which

clearly lays out the prohibitions and penalties for that kind of behavior.

Mr. CLAY. Your time is expired.

Mr. COLLINS?

Mr. COLLINS. Thank you, Mr. Chairman.

We find in our own districts different reactions. But in my district, the Federal employees have appreciated the fact that the Career Service has been completely nonpolitical in the past.

I have been up here six terms, and I couldn't tell you how any civil service employee, career person, in my district stands today in their politics.

Now, you made a study of this. And I want to ask you this, how does a merit system—how can a merit system be maintained if employees are involved in politics, fundraising? How can we maintain it? Is it possible?

Have you ever heard of a system where they have had an effective civil service system and yet let personnel get involved as they are proposing in this legislation?

Mr. VAUGHN. Well, I believe that in the committee's hearings and the committee's report last time, one of the points that was made in favor of the Federal Employees' Political Activities Act was the experience in other democratic countries that allowed substantially more freedom for—

Mr. COLLINS. Which countries?

Mr. VAUGHN. If I remember the record correctly, there were several countries cited, several Scandinavian countries, Australia.

Mr. COLLINS. Is that the kind of country that seems to go for this kind of program, socialistic countries like Sweden and Australia?

Mr. VAUGHN. I don't know.

But I think the point, as Congressman Beard pointed out on the floor during debate, that those are countries which have very strong and independent enforcement agencies within their civil service.

And it is very difficult, I think, to look at the foreign experience to decide precisely what ought to be the kind of restriction that we develop in this country.

Mr. CLAY. Just for the record, we use the examples of Great Britain, France, West Germany, Australia, Canada.

Mr. VAUGHN. I think the point was that among large parliamentary or democratic countries in the world, ours had among the most rigid restrictions that existed on political activities of public employees.

I believe that is very difficult to look to that foreign experience for the precise character of the restrictions. What that experience indicates is the importance that is placed upon, in all democratic countries, of an impartial civil service in order to maintain a multiparty system of government.

Mr. COLLINS. In your experience and study of this type of thing, have you had an opportunity to study any specific situations among these countries, where they have no Hatch Act and they are just able to participate actively?

Mr. VAUGHN. No.

There is some writing dealing with the Australian civil service. Professor Scarrow has written a book on that civil service, where high level civil servants are able to run for elective office.

He suggests that that has caused tension and difficulty. But other than that, I have not.

Mr. COLLINS. Do you know of Federal employees who would like to run for Congress or some other elective positions?

Mr. VAUGHN. They have not come to me with those concerns, those desires.

Mr. COLLINS. Thank you.

[The prepared statement of Robert Vaughn follows:]

PREPARED STATEMENT OF ROBERT VAUGHN

Mr. Chairman, members of the committee, I appreciate the opportunity to present my views on proposed revisions in the Hatch Act. I am an associate professor of law at American University. Since 1970 I have researched and written regarding civil service issues including two books, "The Spoiled System: A Call For Civil Service Reform" and "Principles of Civil Service Law."

Although I believe that revision in the Hatch Act is appropriate, I have substantial reservations regarding the form which that revision had taken. First, I am concerned that the Federal Employees Political Activities Act underestimated the risks that a removal of most limitations would have. The basis for my concern rests upon a review of the history of civil service reform and of the activities of the Nixon Administration and is based upon my perception of the risks that the proposed revision would create for the impartial administration of the laws. Second, I am concerned that the Federal Employees Political Activities Act failed to provide a mechanism that could adequately protect federal employees from coercion to participate in political activities. I have articulated these concerns in a recent article analyzing the Federal Employees Political Activities Act published in the George Washington Law Review. That article is included as a portion of my testimony.

Restrictions on the Political Activities of Public Employees: The Hatch Act and Beyond*

ROBERT G. VAUGHN**

Both Congress and the Executive have imposed restraints upon the political activities of Federal employees. Since the earliest days of the Republic, the judiciary consistently has upheld such restraints as within the legislative power to promote the efficiency of the federal civil service.¹ Nevertheless, debate about the appropriateness of these restrictions continues. This article examines the current limitations on the political activities of public employees and analyzes the legisla-

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1. In *Ex parte Curtis*, 106 U.S. 371 (1882), a prohibition on political contributions was challenged as an unconstitutional deprivation of an employee's right to participate as other citizens in political affairs. In sustaining the statute prohibiting political contributions, the United States Supreme Court reasoned that the prohibition was within the legislative power of the Congress to promote the efficiency of the federal civil service. *Id.* at 373. The Court held that the purpose of protecting employees from demands for political support was sufficient to sustain the legislation, adding that the legislation served other purposes including encouraging decent men to serve in public office, preventing increased public expenditures which indirectly paid the cost of such assessments, and preserving the impartial administration of government. *Id.* at 374-75. A dissenting opinion emphasized that Congress had no right to restrict political activity as a condition of employment. *Id.* at 376. See *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 543 (1973); *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947). In 1930, the Court upheld legislation prohibiting monetary contributions in *United States v. Wurzbach*, 280 U.S. 396 (1930).

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tion recently proposed to alter these restrictions² in light of the experience of other countries, the history of civil service reform in the United States, and the revelations regarding attempts by the Nixon administration to undermine the career service.

In 1801, Thomas Jefferson issued a circular articulating the principle of political neutrality for federal employees:

[T]he President of the United States has seen with dissatisfaction officers of the general government taking on various occasions active parts in the elections of public functionaries, whether of the general or state governments The right of any officer to give his vote at elections as a qualified citizen is not meant to be restrained, nor, however given, shall it have any effect to his prejudice; but it is expected that he will not attempt to influence the votes of others, nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it.³

Jefferson's exhortation was ineffective and he removed a number of employees from office for engaging in political activity, particularly activity against his administration. The spoils system, a practice of staffing federal service positions on a patronage basis, created a climate inhospitable to attempts to limit the political activity of public employees. Subsequent attempts by President Grant in 1873 and President Hayes in 1877 to establish political neutrality by executive order proved similarly unsuccessful.⁴

Civil service reformers, focusing upon appointment and selection procedures, attempted to limit the ability of professional politicians to control the civil service for partisan purposes. Although the product of the reformers' efforts, the Pendleton Act,⁵ emphasized that the appointment process should be controlled by the principle of merit, the statute also contained limitations on political activity. The last five sections of the Act prohibited political assessments, solicitations, subscriptions, or contributions from or by any employee of the United States.⁶ The penalties for violating the Act's anti-assessment provisions included three years imprisonment and a fine of 5,000 dollars.⁷

In the climate created by civil service reform, President Theodore Roosevelt, a former Civil Service Commissioner, issued an executive

2. Federal Employees Political Activity Act of 1976, H.R. 8617, 94th Cong., 2d Sess. (1976).

3. See D. ROSENBLUM, *FEDERAL SERVICE AND THE CONSTITUTION: THE DEVELOPMENT OF A PUBLIC EMPLOYMENT RELATIONSHIP* 39-40 (1971).

4. *Id.* at 95-96.

5. Civil Service Act of 1883, ch. 27, 22 Stat. 403 (codified in scattered sections of 5 U.S.C.). The Civil Service was established by the Act of March 3, 1871, ch. 114, § 9, 16 Stat. 514. 5 U.S.C. § 3301 (1970).

6. Civil Service Act of 1883, ch. 27, §§ 11-15, 22 Stat. 406-07.

7. *Id.* § 15.

order that further restricted the political activities of employees of the classified civil service by forbidding these employees from taking an active part in political management or in political campaigns.⁸ This order, almost immediately incorporated into the Civil Service regulations, remained in effect until the passage of the Hatch Act in 1939. The Civil Service Commission developed considerable expertise in administering the executive order and adjudicating alleged violations.⁹

The federal bureaucracy grew in both size and influence between 1883, when the Pendleton Act was enacted, and 1939, when the Hatch Act was enacted. Federal positions had multiplied, particularly in the agencies established during the depression. Many agency positions were outside the classified service and outside the reach of the civil service political neutrality rule. Congress feared the development of a partisan political machine run with federal employees. That fear, combined with hostility toward the administration and the bureaucracy, stimulated Congress in 1939 to adopt legislation introduced by Senator Hatch that incorporated the civil service neutrality rule and expanded coverage of political restrictions to both classified and nonclassified employees.¹⁰ In 1940, after considerable debate, Congress extended Hatch Act coverage to state and local employees who are principally employed in connection with a federally financed activity.¹¹

The Hatch Act

The Hatch Act prohibits a federal employee from using his authority or influence to interfere with or affect an election and from taking an active part in political management or in political campaigns.¹² The Act defines the phrase "an active part in political management or in political campaigns" as those acts of political management or campaigning forbidden of competitive or classified service employees by civil service rules prior to June 19, 1940. In effect, this definition incorporates approximately 3,000 pre-1940 rulings of the Civil Service Commission.¹³ Commission determinations involving federal

8. Roosevelt's executive order read in part:

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 political subjects, shall take no active part in political management or in political campaigns.

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

9. See Esman, *The Hatch Act—A Reappraisal*, 60 *YALE L.J.* 936, 938 (1951). For a current version of the rules, see 5 C.F.R. § 4.1 (1976).

10. See D. ROSENBLOOM, *supra* note 3, at 105-108.

11. Act of July 19, 1940, ch. 640, 54 Stat. 767, 5 U.S.C. §§ 1501-08 (1970), as amended, (Supp. IV, 1974); see Friedman & Klinger, *The Hatch Act: Regulation by Administrative Action of Political Activities of Governmental Employees* (pts. 1-2), 7 *FED. B.J.* 5, 138 (1945).

12. 5 U.S.C. § 7324 (1970).

13. See Rose, *A Critical Look at the Hatch Act*, 75 *HARV. L. REV.* 510, 510-13 (1962) (indicating that at the time of the enactment of the Hatch Act, Congress was unaware of the specific content of those civil service rulings). See 1 *POLITICAL ACTIVITY REPORTER*, Civil Service Commission, for a summary of the kinds of political activities determined to violate civil service rules in the years 1886-1940.

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employees indicate that political activity not expressly exempted by the Hatch Act and within the scope of prior Civil Service Commission rulings is prohibited.¹⁴

The Commission's decisions suggest a recognition of the concept of individual responsibility. Although an employee may not participate in politics by indirection such as using an agent,¹⁵ he is not responsible for the political activities of a spouse without proof of direction,¹⁶ and he is not liable for the prohibited political activity of a labor union merely because he is a member.¹⁷

The penalty for a violation of the Hatch Act by either a classified or nonclassified employee is removal from office. The Civil Service Commission, however, may determine by unanimous vote that a violation does not warrant removal and impose a minimum penalty of suspension without pay for 30 days.¹⁸ The Civil Service Commission is responsible for investigating and determining allegations of unlawful activity by employees within the competitive service.¹⁹ The em-

14. See Hobart, 179 Ct. Cl. 931 (1967). Under Civil Service Commission regulations, prohibited activities include, but are not limited to: serving as an officer of a political party, a member of a national, state, or local committee of a political party, an officer or member of a committee of a partisan political club, or a candidate for any of these positions; organizing or reorganizing a political party organization or political club; directly or indirectly soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions or other funds for a partisan political purpose; organizing, selling tickets to, promoting, or actively participating in a fund raising activity of a partisan candidate, political party, or political club; taking an active part in managing a political campaign of a partisan candidate for public office or political party office; becoming a partisan candidate for, or campaigning for an elected public office; soliciting votes in support of or in opposition to a partisan candidate office or political party office; acting as recorder, watcher, challenger, or similar officer at the polls on behalf of a political party or partisan candidate; driving voters to the polls on behalf of a political party or partisan candidate; endorsing or opposing a partisan candidate for political office or political party office in a political advertisement, a broadcast, campaign literature, or similar material; serving as a delegate, alternate, or proxy to a political party convention; addressing a convention, caucus, rally, or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office; and initiating or circulating a partisan nominating petition. 5 C.F.R. § 733.122 (1976).

15. Kerr, 1 P.A.R. 179 (1946).

16. Martin, 1 P.A.R. 245 (1946).

17. Cf. Hardman, 1 P.A.R. 335 (1948).

18. 5 U.S.C. § 7325 (1970).

19. On information that a competitive service employee has engaged in prohibited political activity, the Commission conducts an investigation and, if warranted, the General Counsel may lodge specific charges. See 5 C.F.R. § 733.131 (1976).

The General Counsel must serve charges on the employee at least 30 days before the proposed date of the adverse action and the employee has the right to counsel at each stage of the proceedings. He remains on active duty until the Commission makes a final decision. See *id.* § 733.132.

An employee may answer personally and in writing with supporting affidavits within 15 days from the day the charges are received. After review of the answer or after the time for answer has expired, the General Counsel may close the matter or refer the case to an examiner for a hearing. *Id.* § 733.133.

ploying agency has this responsibility for employees within the excepted service,²⁰ although an employee has the right to appeal any adverse finding to the Commission.²¹

The Act exempts from its prohibition against taking an active part in political management or in political campaigns an employee paid from the appropriations for the Office of the President, the head or assistant head of an executive or military department, an employee appointed by the President with the consent of the Senate who determines foreign or nationwide federal domestic policies, the mayor of the District of Columbia, the members of the council of the District of Columbia, and the recorder of deeds in the District of Columbia.²²

In addition, certain nonpartisan activities are permitted in connection with an election and campaign if none of the candidates to be nominated or elected are representatives of a party whose candidates for presidential electors received votes in the last election.²³ An employee may also participate in an election or campaign that concerns a question which is not specifically identified with a national or state political party.²⁴ Questions concerning constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character are deemed to be questions not specifically identified with a national or state political party.²⁵

Political activities are permitted also for employees residing in certain municipalities. The Civil Service Commission is authorized to prescribe regulations allowing employees to take an active part in political management and political campaigns in municipal and other political subdivisions in which they reside when the municipality or political subdivision is in Maryland or Virginia and in the immediate vicinity of the District of Columbia, the municipality is one in which the majority of voters are employed by the federal government, or special or unusual circumstances exist in the municipality or political subdivision indicating that it is in the domestic interest of employees and individuals to permit political participation.²⁶ Commission regulations list the municipalities to which the exceptions are applied.²⁷

The Hatch Act expressly preserves the right of federal employees to

Unless a hearing is waived, an examiner will conduct a recorded hearing, in which the parties testify under oath and are subject to cross-examination. *Id.* § 733.135. The examiner forwards his decision and a transcript of the hearing to the Commission. If the Commission decides that the employee has engaged in a prohibited activity, it will notify the agency to apply the prescribed penalty. *Id.* § 733.137.

20. *Id.* § 733.201.

21. *Id.* § 733.202. An employee of the excepted service may appeal to the Commission within 15 days from the date of receipt of notice of the agency decision. *Id.* § 733.203. The procedures followed on appeal are the same as those for employees in the competitive service. *See id.* § 733.204.

22. 5 U.S.C. § 7324(d) (1970), as amended, (Supp. IV, 1974).

23. *Id.* § 7326(1).

24. *Id.* § 7326(2).

25. *Id.*

26. *Id.* § 7327.

27. *See* 5 C.F.R. § 733.124 (1976).

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vote as they choose and to express opinions on political subjects and candidates.²⁸ In addition, Commission regulations specify the political activities permitted of federal employees.²⁹

Sections 1501 and 1502 of title 5 prohibit state and local employees whose principal employment is in connection with an activity that is financed by federal loans and grants from using their official authority or influence for the purpose of interfering with or affecting the result of an election or nomination for office, directly or indirectly coercing or attempting to coerce, command, or advise, any state or local employee to contribute anything of value for political purposes, or taking an active part in political management or in political campaigns.³⁰

In determining whether state employees are subject to the restrictions on political activity, additional questions are raised. First, is the employee's principal employment with an activity that is financed, either in whole or in part, by loans or grants from the federal government?³¹ Commission decisions determining principal employment have

28. 5 U.S.C. § 7324(b) (1970).

29. A federal employee is permitted by regulation to participate in the following political activities: registering and voting in any election; expressing an opinion as an individual privately and publicly on political subjects and candidates; displaying a political picture, sticker, badge, or button; participating in nonpartisan activities of a civic, community, social, labor, or professional organization; being a member of a political party or other political organization and participating in its activities to the extent consistent with law; attending a political convention, rally, fund-raising function, or other political gathering; signing a political petition as an individual; making a financial contribution to a political party or organization; taking an active part as an independent candidate or in support of an independent candidate in a partisan election which is exempted for specific municipalities; taking an active part, as a candidate, or in support of a candidate, in a nonpartisan election; being politically active in connection with a question which is not specifically identified with a political party such as a constitutional amendment, referendum, approval of a municipal ordinance, or any other question or issue of a similar character; serving as an election judge, or clerk, or in a similar position to perform nonpartisan duties as prescribed by state or local law; and participating fully in public affairs except as prohibited by law, in a manner which does not materially compromise efficiency or integrity as an employee or the neutrality, efficiency, or integrity of the employee's agency. 5 C.F.R. § 733.111 (1976).

30. The prohibited activities for state and local employees are substantially the same as those for federal employees. 5 C.F.R. § 151.121(a) (1976); see note 14 *supra*. The restrictions on state and local employees have been changed, see Act of Oct. 15, 1974, Pub. L. No. 93-443, § 401(b)(1), 88 Stat. 1290 (codified at 5 U.S.C. § 1503 (Supp. IV, 1974)), to permit nonpartisan political activity. See note 48 *infra* and accompanying text.

31. The decisions indicate that part-time employment by an agency concerned with federal money may constitute principal employment under the Hatch Act. See *Smyth v. United States Civil Serv. Comm'n*, 291 F. Supp. 568 (E.D. Wis. 1968). But see *Anderson v. United States Civil Serv. Comm'n*, 119 F. Supp. 567 (D. Mont. 1954) (attorney spending 75 percent of his time in private practice was not principally employed as a legal advisor to a state federally funded state general welfare department); cf. *Matturi v. United States Civil Serv. Comm'n*, 130 F. Supp. 15 (D.N.J. 1955), *aff'd*, 229 F.2d 435 (3d Cir. 1956) (position as an uncompensated officer of a federally funded municipal housing authority does not constitute principal employment).

Administrative responsibility rather than time spent on the job appears to determine the character of employment. See, e.g., *Palmer v. United States*

suggested that an employee may have a principal employment even if it is uncompensated³² and that as between two public positions, the amount of time spent³³ or the income earned³⁴ is not conclusive. The test is whether, as incident to the employee's principal position, he performs duties in connection with an activity financed in whole or in part by federal loans or grants.³⁵

A second question is whether the state activity is federally financed. Under Commission decisions, all forms of loans or grants constitute federal financing, as does a lease or demise of property to a state agency.³⁶ The question is simply whether funds or grants reached a local agency;³⁷ it is not pertinent if the funds for the local agency were channeled through the state.³⁸ A specific demonstrative link between the grant from the United States and a state employee's compensation is not essential. All that is required is that the principal employment be in connection with an activity federally financed in whole or in part.³⁹

The statutory procedure for enforcing the prohibition against political activity by state and local employees,⁴⁰ and the Civil Service Commission regulations implementing the statute,⁴¹ are similar to the procedures for enforcing prohibitions against political activity by federal employees. The Commission investigates allegations of improper political activity by state or local employees and, when deemed appropriate, issues charges and a summary of the alleged violations to the employee and to the state or local employing agency.⁴² A period for answer is allowed⁴³ and a hearing is permitted before a hearing examiner appointed by the Commissioner.⁴⁴ The hearing is conducted according to Civil Service Commission procedures.⁴⁵

If the Commission finds that the removal for the violation of the prohibitions is appropriate, it notifies the state or local agency employing the individual of its recommendation. If the state or local employee has not been removed from office 30 days after notice of the Commission recommendation or if the employee is appointed within 18 months of his removal to an office or employment in the same state, the Commission orders the federal agency involved to withhold from its grants to the local or state agency an amount equal

Civil Serv. Comm'n, 297 F.2d 450, 451-54 (7th Cir.), *cert. denied*, 369 U.S. 849 (1962).

32. Lesniak, 2 P.A.R. 799 (1969).

33. Palmer, 2 P.A.R. 590 (1959); Weise, 2 P.A.R. 449 (1954); Emery, 2 P.A.R. 53 (1943).

34. Nicely, 2 P.A.R. 759 (1966).

35. Tineri, 2 P.A.R. 825 (1969); Reicher, 2 P.A.R. 409 (1952); Anderson, 2 P.A.R. 356 (1950); Duberstein, 2 P.A.R. 131 (1944); Hankins, 2 P.A.R. 121 (1944); Emery, 2 P.A.R. 53 (1943).

36. Normandin, 2 P.A.R. 422 (1952).

37. Bollettieri, 2 P.A.R. 674 (1962).

38. Walsh, 2 P.A.R. 382 (1949).

39. Hilburn, 2 P.A.R. 701 (1964); Tinstman, 2 P.A.R. 313 (1948).

40. 5 U.S.C. §§ 1504-08 (1970).

41. 5 C.F.R. §§ 151.131-138 (1976).

42. 5 U.S.C. § 1504 (1970); 5 C.F.R. § 151 (1976).

43. 5 C.F.R. § 151.133 (1976).

44. See 5 U.S.C. §§ 1504-05 (1970); 5 C.F.R. § 151.135 (1976).

45. 5 C.F.R. §§ 131.135-136 (1976).

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to two years pay at the rate the employee was receiving at the time of the violation.⁴⁶ The Commission's withholding order is issued when the hearing examiner, after petition by the general counsel and an opportunity for the state or local agency to respond, issues a recommendation to the Commission which is accepted.⁴⁷

Exemptions to the restrictions on the political activities of state and local employees are similar to the exemptions for federal employees. Nonpartisan political activities are not prohibited.⁴⁸ State and local employees retain the right to vote and to express opinions on political subjects and candidates.⁴⁹ Prohibitions against taking an active part in political management or in a political campaign do not apply to the governor or lieutenant governor of a state, the mayor of a city, the elected head of a state or local executive department who is not classified under the state or local civil service system, or an individual holding elected office.⁵⁰

The history of restrictions upon the political activities of public employees suggests several arguments for such restrictions upon federal and state employees. Efficient administration of government requires that public employees be appointed and promoted upon their capacity as individuals to perform the duties for which they seek appointment. Public employees, moreover, should be protected in their jobs from political coercion. Also, unbiased administration of the laws requires that public employees' participation and involvement in public affairs be limited. On the other hand, limitation on the political activities of federal and state employees has been seen as an unconstitutional restriction on the rights of employees as citizens. In addition, the application of political restrictions by the federal government on state and local employees has been attacked as an unconstitutional interference with the sovereignty of the states.

46. 5 U.S.C. § 1506 (1970).

47. 5 C.F.R. § 151.138 (1976).

48. 5 U.S.C. § 1503 (1970), *as amended*, (Supp. IV, 1974). Nonpartisan political activities are activities connected with an election or preceding campaign in which none of the candidates is nominated or elected as representing a political party any of whose candidates for presidential elector received votes in the preceding presidential election, or activities connected with a question not specifically identified with a national or political party. These questions include constitutional amendments, referenda and approval of municipal ordinances. *Id.*

49. 5 U.S.C. § 1502(b) (1970). The political activities permitted by civil service regulation to state and local employees are substantially the same as those permitted federal employees listed at note 14 *supra*. See 5 C.F.R. § 151.111 (1976).

50. 5 U.S.C. § 1502(c) (1970). The scope of the exemption for an individual holding elective office is limited to persons elected to positions in a federally assisted agency and does not extend to an appointed agency employee elected to a public office outside the agency. The Hatch Act exemption for employees holding elected office applies only when the elected office is the principal employment. See *In re Higginbotham*, 340 F.2d 165 (3d Cir.), *cert. denied*, 382 U.S. 853 (1965); cf. *Northern Va. Reg. Park Authority v. United States Civil Serv. Comm'n*, 437 F.2d 1346 (4th Cir.), *cert. denied*, 403 U.S. 936 (1971).

The United States Supreme Court first upheld the constitutionality of the Hatch Act and the Act's restrictions on the political activities of federal employees in 1947, ruling in *United Public Workers of America v. Mitchell*⁵¹ that Congress and the administrative agencies have authority over the discipline and efficiency of the public service in order to preserve the nation from "what many sincere men believe is a threat to the democratic system."⁵² In dissent, Mr. Justice Black contended that "[t]here 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."⁵³ The Court did not, however, consider the validity of the Hatch Act provision that incorporated by reference the Civil Service Commission determinations of prohibited political activity.⁵⁴

In a companion case, *Oklahoma v. United States Civil Service Commission*,⁵⁵ the Court upheld the Hatch Act extension to state and local employees of agencies receiving federal funds. The Court perceived no interference with the sovereignty of the state because a state had the option of refusing to remove an employee.⁵⁶ Congress, the Court stated, was accomplishing a permitted end by appropriate means.⁵⁷

Despite these decisions, debate continued to surround the Hatch Act. The Commission on Political Activity of Government Personnel reported that restrictions on the political activities of public employees exceeded what appeared to be needed.⁵⁸ The *Mitchell* decision had characterized public employment not as an unconditional right, but as a privilege, the acceptance of which could be conditioned upon surrender of constitutional rights.⁵⁹ When the characterization of public employment as a privilege was subsequently undermined,⁶⁰ the deci-

51. 330 U.S. 75 (1947).

52. *Id.* at 99. The Court explained later:

When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional.

Id. at 103.

53. *Id.* at 111.

54. This question was expressly reserved. See *id.* at 103-04. See note 14 *supra* and accompanying text.

55. 330 U.S. 127 (1947).

56. *Id.* at 143.

57. *Id.*

58. See Jones, *Reevaluating the Hatch Act: A Report on the Commission on Political Activity of Government Personnel*, 29 PUB. ADMIN. REV. 249 (1969).

59. 330 U.S. at 99n.34, quoting *McAuliffe v. New Bedford*, 155 Mass. 216, 220, 29 N.E. 517 (1891).

60. See *Birnbaum v. Trussell*, 371 F.2d 672, 678 (2d Cir. 1966) (state employee must be afforded adequate procedural rights in dismissal action); *Scott v. Macy*, 349 F.2d 182, 183-84 (D.C. Cir. 1965) (job applicants constitutionally protected from arbitrary government employment practices); cf. *Greene v. McElroy*, 360 U.S. 474, 506-08 (1959) (employee presumptively must be afforded traditional due process safeguards absent explicit executive or legislative intent). See generally K. DAVIS, *ADMINISTRATIVE LAW TEXT* §§ 7.12-13 (3d ed. 1972). For a discussion of the right/privilege distinction see D. ROSEN-BLOOM, *supra* note 3, at 169-97.

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sion in *Mitchell* and the restrictions on the political activities of public employees were cast in doubt.

During the period after the *Mitchell* decision, Congress has extended the restrictions on political activity to persons not previously covered. The Equal Employment Opportunity Act extends the restrictions to certain employees of private corporations.⁶¹ The Economic Opportunity Act provides that any overall community action agency which assumes responsibility for community anti-poverty programs and receives assistance under the Act, is a state or local agency for purposes of the statutory prohibitions against use of official authority or influence for the purposes of interfering with or affecting the result of an election or nomination for office, or coercing directly or indirectly a political contribution.⁶² The Postal Reorganization Act made the provisions of chapter 73 of title 5 applicable to the Postal Service.⁶³ The Emergency Employment Act of 1971 similarly extended restrictions on political activity to personnel employed in the administration of programs established under the Act.⁶⁴

All 50 states have passed statutes modeled after the federal statute restricting the political activities of state employees.⁶⁵ When a number of these "little Hatch Acts" were declared unconstitutional for vagueness and overbreadth,⁶⁶ the decisions invalidating these similar statutes on a point left expressly undecided in *Mitchell* cast further doubt upon the validity of the restrictions on the political activities of federal employees.

Nevertheless, in 1973, when the constitutionality of the Hatch Act restriction of the political activities of federal employees was challenged as overbroad and vague in *National Association of Letter*

61. 42 U.S.C. § 2943 (1970).

62. *Id.* Assisted programs are not to be carried out in a manner identifying them with any partisan or non-partisan political activity or any other political activity associated with a candidate or contending faction or group in an election for public or party office, any activity to provide voters or prospective voters with transportation to the polls or similar assistance in connection with any such election, or any voter registration activity. Under the Act, the Director of the Office of Economic Opportunity, after consultation with the Civil Service Commission, must issue rules and regulations providing for the enforcement of these provisions. These regulations are to include provisions for summary suspension of assistance or any other action necessary to permit enforcement on an emergency basis. *Id.*

63. 39 U.S.C. § 410 (1970), as amended, (Supp. IV, 1974).

64. 29 U.S.C. § 848(g) (1970), as amended, (Supp. IV, 1974).

65. These "Little Hatch Acts" are listed in *Broadrick v. Oklahoma*, 413 U.S. 601, 604n.2 (1973).

66. See *Hobbs v. Thompson*, 448 F.2d 456 (5th Cir. 1971); *Lecci v. Cahn*, 360 F. Supp. 759 (E.D.N.Y. 1973); *Mancuso v. Taft*, 341 F. Supp. 574 (D.R.I. 1972), *aff'd*, 476 F.2d 187 (1st Cir. 1973); *Huerta v. Flood*, 103 Ariz. 608, 447 P.2d 866 (1968); *Rosenfield v. Malcolm*, 65 Cal. 2d 559, 421 P.2d 697, 55 Cal. Rptr. 505 (1967); *Bagley v. Washington Township Hosp. Dist.*, 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966); *Minicelly v. State*, 242 Ore. 490, 411 P.2d 69 (1966).

Carriers, AFL-CIO v. United States Civil Service Commission,⁶⁷ the Supreme Court reaffirmed the authority of Congress to limit the political activities of public employees, including plainly identifiable acts of political campaigning and management.⁶⁸ The Court determined that "neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees."⁶⁹ The Court emphasized the considerations justifying congressional imposition of such restrictions on political activity: Public laws and programs should be administered without bias or the appearance of bias; the government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine; employment and advancement should not depend upon political preference; and employees should be free from pressure to perform political chores.⁷⁰

The Court refused to hold unconstitutional for vagueness and overbreadth the statutory prohibition against taking an active part in political management or in political campaigns based on the prohibitions of the competitive service before July 19, 1940.⁷¹ Although the Court recognized that "Congress intended to deprive the Civil Service Commission of rule making power . . . in fashioning a more expansive definition of the kind of conduct that would violate the prohibition," it reasoned that the repeated adjudications by the Civil Service Commission were "subject to sufficiently clear and summary statement for the guidance of the classified service."⁷² The Court thus specifically approved the civil service regulations as the current interpretation of the statute by the agency charged with its interpretation and enforcement.⁷³ The Court observed that an employee in doubt as to the coverage of the regulations could address questions to the Information Unit of the General Counsel's Office of the Civil Service Commission.⁷⁴

In a companion case, *Broadrick v. Oklahoma*,⁷⁵ three employees of the Oklahoma State Corporation Commission had challenged that state's "little Hatch Act." They were charged with violating its restrictions on political activity by participating in the re-election campaign of a corporation commissioner.⁷⁶ The employees sought to have the statutory provisions declared unconstitutional on their face and to enjoin their enforcement as violative of the first amendment.⁷⁷ The government interests that were balanced against the

67. 413 U.S. 548 (1973).

68. *Id.* at 556.

69. *Id.*

70. *Id.* at 564-67.

71. *Id.* at 568; see text accompanying note 12 *supra*.

72. *Id.* at 571-72.

73. *Id.* at 573.

74. *Id.* at 580n.22.

75. 413 U.S. 601 (1973); see Note, *Constitutional Law: Constitutionality of Oklahoma's "Little Hatch Act" Restrictions on Political Activity of State Employees*, 27 OKLA. L. REV. 685 (1974).

76. 413 U.S. at 609.

77. *Id.* at 602.

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employees' interests in free expression, similar to the government interests emphasized by the Court in *National Letter Carriers*, were found to be weightier.⁷⁸ The Court rejected the contention that the statute was vague,⁷⁹ pointing to the availability of the state personnel board to rule in advance on the permissibility of the contemplated political activities.⁸⁰ The Court also rejected the contention that the statute was overbroad because it forbade conduct both protected and unprotected by the first amendment.⁸¹ To invalidate on its face a statute dealing with expressive conduct, the Court said that substantial overbreadth must be found.⁸²

The effect of *National Letter Carriers* and *Broadrick* is to validate restrictions upon the political activities of public employees. The principle of political neutrality has been accepted as a basic characteristic of public employment and the responsibility for substantial changes in this principle now appears to rest with legislative bodies.

Legislative Responses

Soon after the *Broadrick* and *National Letter Carriers* decisions, Congress altered the political restrictions on state and local employees whose principal employment is in connection with federally funded activities. The Federal Election Campaign Act Amendments of 1974 repealed the prohibition against taking "an active part in political management or in political campaigns"⁸³ and substituted the prohibition of "being a candidate for public office."⁸⁴ In addition, the Amendments allowed state and local employees to become non-partisan candidates for public office.⁸⁵

Bills introduced in the Ninety-Fourth Congress,⁸⁶ radically altered the restrictions on the political activities of federal employees. After extensive hearings,⁸⁷ the House Committee on Post Office and Civil Service approved legislation that removed the restrictions on voluntary political activities for most federal employees and provided safeguards to protect federal employees from coercion to engage in

78. *Id.* at 616.

79. *Id.* at 607.

80. *Id.* at 608 n.7.

81. *Id.* at 610.

82. *Id.* at 615.

83. Act of July 19, 1940, ch. 640, § 5, 54 Stat. 767, as amended 5 U.S.C. § 1503 (Supp. IV, 1974).

84. 5 U.S.C. § 1503 (Supp. IV, 1974).

85. *Id.*; see notes 30, 48 *supra* and accompanying text.

86. See S. 372, 94th Cong., 2d Sess. (1976); H.R. 8617, 94th Cong., 1st Sess. (1975).

87. See *Hearings on H.R. 3000 Before the Subcomm. on Employee Political Rights and Intergov'tal Programs of the House Comm. on Post Office and Civil Service*, 94th Cong., 1st Sess. (1975).

political activities.⁸⁸ The House of Representatives passed the bill, entitled the Federal Employees Political Activities Act;⁸⁹ the Senate approved the bill with several amendments;⁹⁰ and, after Conference,⁹¹ the legislation was forwarded to President Ford, who vetoed it on April 12, 1976.⁹²

The proposed Federal Employees Political Activities Act contained several significant modifications of civil service law. First, the Act removed the present prohibitions on the voluntary political activities of federal employees, thus enabling federal employees to participate in the management of political campaigns, contribute money to political candidates and campaigns, and run for elective office.⁹³ The Act forbade an employee⁹⁴ from engaging in political activity while on duty, while in any room or building occupied in the discharge of official duties, or while wearing a uniform or official insignia.⁹⁵ The Act provided, however, that an employee who is a candidate for elective office could be granted accrued annual leave at his request for the purpose of engaging in the candidacy.⁹⁶

Second, the Act established safeguards against coercion of federal employees into political activities and against the use of government position for political purposes. Federal employees were prohibited from giving or offering a political contribution to any individual to vote or refrain from voting against a candidate or measure or soliciting or accepting a contribution to vote or refrain from voting against a candidate or measure.⁹⁷ An employee was prohibited from knowingly giving a political contribution to a superior and from soliciting or re-

88. H.R. 8617, 94th Cong., 1st Sess. (1975).

89. *Id.*

90. H.R. 8617, 94th Cong., 2d Sess. (1976).

91. H.R. REP. NO. 943, 94th Cong., 2d Sess. (1976).

92. See H.R. Doc. No. 449, 94th Cong., 2d Sess. (1976).

93. The bill began with an amendment to 5 U.S.C. § 7321 by expressing the will of Congress that:

employees should be encouraged to fully exercise, to the extent not expressly prohibited by law, their rights of voluntary participation in the political processes of our Nation.

H.R. 8617, 94th Cong., 2d Sess. § 102 (1976).

In effect, the bill "repealed" the current prohibition against partisan political management and campaigning. Employees generally would have been permitted to engage in activities, other than fund solicitation, now specifically prohibited under 5 C.F.R. § 733.122(b)(3) (1976). See note 14 *supra*. Restrictions would have been retained in 5 U.S.C. § 7324 for all employees of the Internal Revenue Service, the Department of Justice, and the Central Intelligence Agency, except those appointed by the President, by and with the advice of the Senate. H.R. 8617, 94th Cong., 2d Sess. § 102 (1976).

94. Among those excepted from this prohibition were the President and Vice President, persons paid from the White House Office appropriation, and the Mayor of the District of Columbia and any member of the District of Columbia Council. H.R. 8617, 94th Cong., 2d Sess. § 102 (1976).

95. *Id.* (amending 5 U.S.C. § 7325 (1970)).

96. *Id.* (amending 5 U.S.C. § 7326 (1970)).

97. *Id.* (amending 5 U.S.C. § 7324 (1970)). "Political contribution" was broadly defined to include gift, subscription, loan, advance, or deposit of money or anything of value. It included a contract, promise, or agreement to make a contribution and payment by any person other than a candidate or a political organization of compensation to another person for personal services rendered to such candidate or political organization without charge for any such purpose. *Id.* (amending 5 U.S.C. § 7322 (1970)).

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ceiving a contribution from a subordinate or member of a subordinate's immediate family.⁹⁸ Federal employees were prohibited from directly or indirectly using or attempting to use official authority or influence to interfere with the result of any election or from using the same to coerce any individual to vote or not to vote in a certain way, to give or withhold a political contribution, or to engage or not engage in any political activity.⁹⁹

Third, the Act provided a new enforcement structure and modified existing penalties. The Civil Service Commission was required to investigate reports and allegations of violations of the Act,¹⁰⁰ and the Commission was given responsibility for hearing and deciding those cases in which it believed a violation had occurred.¹⁰¹ The Act created a Board on Political Activities of Federal Employees to hear and decide cases of alleged violations of the Act.¹⁰² The procedures for the hearing were specified¹⁰³ and the results were subject to judicial review.¹⁰⁴ Unlike the Hatch Act,¹⁰⁵ the Federal Employees

98. *Id.* (amending 5 U.S.C. § 7324 (1970)). "Superior" was defined as an employee other than the President or Vice President who exercises supervision or control or administrative direction over another employee. *Id.* (amending 5 U.S.C. § 7322 (1970)). The definition of superior was "intended to limit the prohibition to instances where a superior has the authority to affect an employee's employment." HOUSE COMM. ON THE POST OFFICE AND CIVIL SERVICE, FEDERAL EMPLOYEES ACTIVITY ACT OF 1975, H.R. REP. NO. 444, 94th Cong., 1st Sess. 19 (1975). The inclusion of the phrase "member of an employee's immediate family" was intended to "prohibit possible circumvention of the literal prohibition against a superior soliciting political contributions from an employee such as where a superior solicits a contribution from the employee's wife. A member of an employee's immediate family would have generally included those blood relations who reside in the employee's household, although in certain instances it would have included other relations such as parents, children, brothers, or sisters, who reside in the nearby vicinity, and whose decisions to give or not to give a political contribution to a superior of an employee could be affected by the superior-employee relationship." *Id.* at 19.

99. H.R. 8617, 94th Cong., 2d Sess. § 102 (1976) (amending 5 U.S.C. § 7323 (1970)). "Use of official authority" was defined to include, but not limited to, "promising to confer or conferring any benefit (such as appointment, compensation, grant, contract, license, or ruling), or effecting or threatening to effect any reprisal (such as deprivation of appointment, promotion, compensation, grant, contract, license, or ruling)." *Id.* (amending 5 U.S.C. § 7323 (1970)).

100. *Id.* (amending 5 U.S.C. § 7328 (1970)). The House report on this provision stated:

It is the committee's intent that enforcement efforts by the Commission under this subsection not be limited to responding to formal reports or allegations, but additionally, that such efforts include all steps necessary to insure that the prohibitions are observed by employees.

H.R. REP. NO. 444, *supra* note 98, at 22.

101. H.R. 8617, 94th Cong., 2d Sess. § 102 (1976) (amending 5 U.S.C. § 7327 (1970)).

102. *Id.* Not more than two of the Board's three members could have been of one political party. *Id.*; see notes 104-06 and accompanying text.

103. H.R. 8617, 94th Cong., 2d Sess. § 102 (1976) (amending 5 U.S.C. § 7328 (1970)).

104. *Id.* The bill continued to provide for judicial review in the United States District Court, not in the Court of Appeals as is normal for judicial

Political Activities Act provided no mandatory penalties, instead giving the Board discretion to apply a number of penalties, including removal and suspension without pay.¹⁰⁶

Finally, the Act imposed educational and reporting requirements upon the Civil Service Commission, ordering it to establish a program designed "to inform all employees of their rights of political participation, and to educate employees with respect to those political activities which are prohibited."¹⁰⁷ The Commission was directed to report annually to Congress regarding its investigatory and educational responsibilities.¹⁰⁸

Supporters of the Federal Employees Political Activities Act contend¹⁰⁹ that the Hatch Act is unnecessarily broad,¹¹⁰ that the Hatch Act restricts federal employees in their exercise of the basic right of political involvement enjoyed by other citizens,¹¹¹ and that the vagueness of the Hatch Act causes many employees to censure their own activities and conduct.¹¹² Those opposing the Federal Employees Political Activities Act assert that allowance of political activities would hamper the efficiency of public employees,¹¹³ that political involvement by employees would affect public faith and confidence in government,¹¹⁴ that only bars on significant political activity can truly protect federal employees from coercion,¹¹⁵ and that repeal of the Hatch Act would lead to the creation of powerful political machines built upon the power wielded by public employees.¹¹⁶

review. One court has criticized this structure of review. See *Polcover v. Secretary of Treasury*, 477 F.2d 1223, 1227-28 (D.C. Cir.), cert. denied, 414 U.S. 1001 (1973).

105. 5 U.S.C. §§ 7301-27 (1970), as amended, (Supp. IV, 1974).

106. See H.R. 8617, 94th Cong., 2d Sess. § 102 (1976) (amending 5 U.S.C. § 7329 (1970)). The House committee report noted that under the mandatory penalty provision there "is no opportunity for the Commission to temper the penalty in accordance with any unique conditions concerning violation" as the bill permits "any penalty ranging from a warning to removal from office." H.R. REP. NO. 444, *supra* note 98, at 6.

107. H.R. 8617, 94th Cong., 2d Sess. § 102 (1976) (amending 5 U.S.C. § 7330 (1970)).

108. *Id.*

109. Many of the arguments are political and polemic. John Bolton summarizes arguments supporting and opposing the Federal Employees Political Activities Act in J. BOLTON, *THE HATCH ACT: A CIVIL LIBERTARIAN DEFENSE* (1976).

110. See H.R. REP. NO. 444, *supra* note 98, at 13.

111. *Id.* at 14-15.

112. *Id.* at 14.

113. See, e.g., Letter from Robert Hampton, Chairman, Civil Service Commission, to David Henderson, Chairman of The Comm. on the Post Office and Civil Service, March 24, 1975, in H.R. REP. NO. 444, *supra* note 98, at 31. Section 7325 of the bill, which prohibited political activity while on duty, appears directed to this concern.

114. H.R. REP. NO. 444, *supra* note 98, at 31. The provision of the bill to amend 5 U.S.C. § 7325 (1970), which prohibited political activity while in uniform or wearing an official insignia, seems addressed to this concern.

115. H.R. REP. NO. 444, *supra* note 98, at 31. The detailed provisions of the bill amending 5 U.S.C. § 7325 (1970) designed to prevent coercion appear directed to this concern.

116. H.R. REP. NO. 444, *supra* note 98, at 31. The provisions that prohibited coercion or the use of official influence, amending 5 U.S.C. § 7323 (1970), seem addressed to this concern. Arguably, the Act meant that a federal employee has nothing inappropriate to give a political organization.

*Restrictions on Political Activity and
the Character of the Civil Service*

The arguments surrounding the Federal Employees Political Activities Act raise two fundamental questions. First, is the removal of restrictions on voluntary political activity by federal employees likely to seriously and adversely affect the character of the federal civil service. Second, absent restrictions on voluntary political activity, can the Act protect federal employees from coercion. Although closely related, the two questions are considered separately for purposes of analysis.

To evaluate the effects of removing the restrictions on the political activities of public employees, it is necessary to consider the purposes of these restrictions. A brief review of foreign experience and an examination of the motivation for civil service reform in the United States suggests that one of the principal functions of the restrictions on voluntary political activities is to ensure the impartial administration of law.

Restrictions in Other Countries

The House Committee Report on the Federal Employees Political Activity Act relied upon foreign experience in contending that the restrictions placed upon the voluntary political activities of federal employees in the United States are unduly limiting for a democratic nation.¹¹⁷ The difficulty with this reliance on foreign experience is that the ability of any civil service system to ensure the impartial administration of the laws depends not upon a single provision, but upon the interrelationship of a number of factors. These include the rigidity of competitive examination requirements, the nature of public employee accountability, and the structure and power of agencies responsible for oversight and review.¹¹⁸ The constitutional, legal, political, and cultural setting in which the civil service operates must also be considered.¹¹⁹

Although foreign experience should not be overly relied upon in determining the precise nature of restrictions to be imposed, it is helpful in focusing on the essential purposes to be served by restrictions on the political activities of public employees. Restrictions on

117. See H.R. REP. NO. 444, *supra* note 98, at 12-13.

118. 121 CONG. REC. 10, 124-25 (daily ed. Oct. 21, 1975) (comments of Congressman Beard).

119. Civil service reform, patterned after that in the United States, failed in Brazil because the legislature did not consider the greater role of the family in Brazilian life, the aristocratic heritage of Brazilian Civil Service, and the introduction of civil service reform during a period when developing political parties, often mirroring egalitarian aspirations, required patronage as a unifying device. L. GRAHAM, CIVIL SERVICE REFORM IN BRAZIL: PRINCIPLES VERSUS PRACTICE 125, 177-78 (1968).

the political activities of public employees are usually found in multiparty states¹²⁰ because the impartial administration of law in those states is crucial to the maintenance of the multiparty system.¹²¹ Political restrictions imposed by multiparty nations have varied from a complete bar on all political activity, including membership in a political party, to provisions allowing senior level civil servants to take a leave of absence to run for public office.¹²² Although the purpose of these restrictions is occasionally perceived as necessary merely to preserve the appearance of impartiality,¹²³ a study by the United Nations of national civil service laws concludes that "[t]he political neutrality of the civil service is a fundamental feature of multiparty democracy, and is essential for its efficient operation."¹²⁴

The United Nations itself places limitations on the political activities of its employees, suggesting that the need for political neutrality is not based simply upon concerns for efficiency or image, but also upon ensuring the loyalty of civil servants to the law and programs they administer. The Charter of the United Nations establishes that an employee of the international organization owes his first loyalty to the international body. The employee is not a representative of his state; he is an international civil servant. Article 100 of the Charter imposes the duty upon the Secretary-General and the staff not to seek or receive instructions from an external authority, and the obligation upon members to respect the international character of the U.N. staff.¹²⁵ These obligations are buttressed by the provision of the Staff Regulations¹²⁶ and by the oath required of U.N. employees.¹²⁷

This restriction on the political activities of United Nations employees serves a function analogous to that served by restrictions on political activities in national civil service systems. If such restric-

120. For a general discussion of restrictions on the political activities of government employees in one-party states, see A. BARNETT, *CADRES, BUREAUCRACY, AND POLITICAL POWER IN COMMUNIST CHINA* (1967). Barnett indicates that in a one-party state, public employees may be required to belong to the party or at least have political attitudes acceptable to the party. *Id.* at 49-60.

121. See PUBLIC ADMINISTRATION BRANCH, U.N. DEPT. OF ECONOMIC AND SOCIAL AFFAIRS, *HANDBOOK OF CIVIL SERVICE LAWS AND PRACTICES* 106, U.N. Doc. ST/TAO/M.29 (1966).

122. A. ADU, *THE CIVIL SERVICE IN COMMONWEALTH AFRICA* 166 (1970); H. SCARROW, *THE HIGHER PUBLIC SERVICE OF THE COMMONWEALTH OF AUSTRALIA* 154-55 (1957).

123. A. ADU, *supra* note 122, at 166.

124. *HANDBOOK*, *supra* note 121, at 106.

125. Article 100 provides:

1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action that might reflect on their position as international officials responsible only to the Organization.

2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

U.N. CHARTER art. 100.

126. See, e.g., U.N. Staff Regulations, art. I, reg. 1.3. United Nations Staff Regulation 1.7 provides that "[s]taff members may exercise the right to vote but shall not engage in any political activity which is inconsistent with or might reflect upon the independence and impartiality required by their status as international civil servants."

127. See U.N. Staff Regulations, art. I, reg. 1.9.

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tions were not imposed and United Nations officials could actively participate in political activities, the Secretariat of the United Nations would become embroiled in political conflicts occurring outside it.¹²⁸ Considering the profound difference in political systems among member states, the involvement of officials of the Secretariat in active political matters could only lead to internalizing such disputes within the Secretariat, thus reducing its independence and impartiality.

The experience of other countries also suggests that arguments about "excessive union power," "second class citizens," and "political machines" can obscure the relationship between restrictions on voluntary political activity and a bureaucracy guided by law rather than by partisan political considerations. An examination of the history of civil service reform in the United States and review of recent assaults on the career service illuminate the relationship between restrictions of voluntary political activities of public employees and the impartial administration of the laws.

History of Civil Service Reform

The change from the spoils system to the modern civil service characterized by the Pendleton Act resulted from two historical forces. First, "genteel reformers" pressed for a change in the corrupt system which seemed to them to threaten democracy itself. Second, business and social concepts of "efficiency," coupled with the increased importance of government action, demanded competency in the civil service. These forces, popularized by many post-Civil War abuses in government and culminating in the assassination of President Garfield by a disappointed office seeker, created the climate for civil service reform.

The genteel reformers were men like Henry Adams and his brother Charles Francis Adams, Jr., Charles Elliot Norton, Harvard professor and late Harvard president, economists Edward Atkinson and David A. Wells, lawyer politician Jacob D. Cox, writer and landscape architect Frederick L. Olmstead, and journalists George Curtis and Edwin Godkin. They were generally born in the Northeast, highly educated, and of old well-to-do families. "They had few friends and no allies. Almost everywhere in American life—in business as well as in politics—an ingenuous but coarse and ruthless type of person had taken over control of affairs."¹²⁹

128. See T. YOUNG, *INTERNATIONAL CIVIL SERVICE: PRINCIPLES AND PROBLEMS* 37 (1958).

129. R. HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* 176 (1963). Chapter VI of this book recounts the decline of the gentleman in American political life. Character portraits of the genteel reformers are contained in *id.* at 172-86; Blodgett, *Reform Thought and the Genteel Tradition*, and Hoogenboom, *Civil Service Reform and the Public Morality*, in *THE GILDED AGE* 55, 77 (W. Morgan ed. 1970).

The reformers expressed many grounds for concern with the spoils system. After the Civil War and Reconstruction, "it became clear that beyond the minimal goal of saving the Union nothing had been accomplished and nothing learned."¹³⁰ The social fabric of the nation was rent by the rise of big business and the influx of immigrants. It is indicative of the age that the most renowned men were the robber barons who amassed great fortunes with little scruples in their methods.¹³¹

The period became irrevocably connected with corruption.¹³² The influx of immigrants created the "boss system," epitomized by the notorious Tweed Ring in New York and the "Gas" Ring in Philadelphia. State governments were so corrupt that *The Nation* wrote that the votes of the New York legislature were bought and sold like "meat in the market,"¹³³ and that no measure could be carried through the Pennsylvania legislature without the consent of the Pennsylvania Central Railroad Company.¹³⁴

Civil service reform efforts brought the genteel reformers into direct opposition with the practical politician. Politicians' objections to a merit system varied from the thinly disguised remarks of Congressman McKee of Mississippi, amounting to a complaint that if competence were required he would be unable to get jobs for his Mississippi constituents,¹³⁵ to the fear that examination would create an aristocracy of the college educated.¹³⁶ The reformers on the other hand questioned the "queer notion of the Republican party that they can get along without their brains."¹³⁷

Godkin's magazine, *The Nation*, to which most of the reformers contributed at one time or another, indicated their commitment. When President Garfield lay dying after being shot by an office seeker, *The Nation* found two consolations. First it would show the world the "corruption" of New York state politics from which Vice President Arthur had emerged. Second, it would emphasize the need for civil service reform by showing "that it will not do to lead great hordes of shiftless, half-cracked ne'er-do-wells to look to the Government for a living when their friends get tired of supporting them."¹³⁸

Underlying the reformist position was a sense of moral urgency. Though the merit system would bring about more efficient government, the more meaningful lessons were moral. The merit system

130. R. HOFSTADTER, *supra* note 129, at 172.

131. See generally M. JOSEPHSON, *THE ROBBER BARONS* (1973).

132. See M. JOSEPHSON, *THE POLITICOS* (1938). It has been suggested that this corruption has been overemphasized. See Hoogenboom, *supra* note 129, at 78-81.

133. *THE NATION*, April 11, 1867, at 286.

134. *THE NATION*, April 18, 1867, at 315.

135. See R. HOFSTADTER, *supra* note 129, at 183.

136. *Id.* at 182-85; A. SAGESER, *THE FIRST TWO DECADES OF THE PENDLETON ACT: A STUDY OF CIVIL SERVICE REFORM* 17 (1935).

137. Letter from J.R. Lowell to E.L. Godkin, Dec. 20, 1871 in 2 *LIFE AND LETTERS OF EDWIN LAWRENCE GODKIN* 87 (R. Ogden ed. 1907).

138. *THE NATION*, July 7, 1881, at 1.

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was preferable because it was "the only method that can be depended upon to exclude from the subordinate places in the Government the demoralizing element of favoritism and political serfdom, and to lift the service to a higher moral atmosphere."¹³⁹ Although they spoke for the need of competency and efficiency in government, reformers were motivated by the desire to eliminate the corruption accompanying the political use of patronage.¹⁴⁰

Congressional debate on the Pendleton Act reflected these considerations. Reform was seen as essential to "disarm that great body of officials who as disciplined armies go forth to control the Presidential elections."¹⁴¹ The opponents of reform, rather than seeking to justify the political use of patronage, expressed disdain for "the literary, the dilettante fashion" of speaking of the "whole public service of this country as corrupt,"¹⁴² and expressed doubts that "any utopian theories" could be put into practice without changing the "nature of the Government and . . . human nature."¹⁴³ Yet, to Senator Pendleton there was no choice: "I believe that . . . the 'spoils system' must be killed or it will kill the Republic."¹⁴⁴

The Pendleton Act contained specific provisions to guard against political corruption in office. No civil servant was obligated to "contribute to any political fund or to render any political service," and no office holder was "to use his official authority or influence to coerce the political action of any person or body."¹⁴⁵ Additional sections prohibited the solicitation of contributions for political purposes.¹⁴⁶ Illegal solicitation of political funds from civil servants was made a misdemeanor.¹⁴⁷ These restrictions extended to all civil servants, regardless of whether their position was in the classified service or not, and the Commission was empowered to investigate and report violations of these provisions.¹⁴⁸ Another section of the Act precluded the consideration of recommendations from Members of Congress for classified positions.¹⁴⁹ The Act clearly indicates that

139. THE NATION, July 21, 1881, at 42.

140. See Elliot H. Goodwin, "Speech Before New York Civil Service Commission Association," stating that the goal of the reformers was "the restoration of free government for the people and destruction of the boss system of so-called government, absolutely foreign to democratic ideas . . ." National Civil Service League Collection, Box No. 3, File IA-10, on file in United States Civil Service Commission Library. For further evidence that morality was the main concern of the genteel reformers, see P. VAN RIVER, HISTORY OF THE UNITED STATES CIVIL SERVICE 80-82 (1958).

141. 14 CONG. REC. 208 (1882) (remarks of Senator Pendleton).

142. *Id.* at 242 (remarks of Senator Hawley).

143. *Id.* at 278 (remarks of Senator Brown).

144. *Id.* at 206 (remarks of Senator Pendleton).

145. The Civil Service Act of 1883, ch. 27, § 2, 22 Stat. 404 (codified at 5 U.S.C. § 7321 (1970)).

146. The Civil Service Act of 1883, ch. 27, §§ 11-14, 22 Stat. 406-07.

147. *Id.* § 15.

148. *Id.* §§ 2(4), (5), (codified at 5 U.S.C. § 1302 (1970)).

149. The Civil Service Act of 1883, ch. 27, § 10, 22 Stat. 406 (codified at 5 U.S.C. § 3303 (1970)).

the principal purposes of civil service reform were to prevent political corruption and to ensure the impartial administration of the laws.

Reformers also were concerned about the strife that had developed between the legislature and the executive over the political uses of civil service positions. By regulating the appointing power and placing it in the hands of a bipartisan commission, Congress hoped to place patronage beyond both the executive and itself in order to remove a major source of discord.

The conflict between the legislature and the executive developed initially from different interpretations of presidential and legislative powers under the Constitution. Article II states that the President:

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States . . . the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.¹⁵⁰

This clause fails, however, to specify who has the power to remove officials. Because removal could force the appointment of an official favorable to the President, and since these higher ranking officials usually controlled the appointment of inferior officials, the removal power carried considerable control over patronage.¹⁵¹

As early as 1789, in establishing the Department of Foreign Affairs, Congress debated at length whether the President alone had the power to remove the Secretary of Foreign Affairs. James Madison, arguing on the basis of the theory of separation of powers, advanced the executive position that the Constitution grants the President "executive power" and that executive employees are appointed in order to aid the President in the exercise of this power. In order to fulfill his executive function, the President must be able to hold these employees accountable. The President could not effectively administer the laws if he could not remove superior officials quickly or if these officers could remain in office against the President's will. The resolution of the congressional debate was that the power to appoint included the power to remove, that the President had both of these powers, and that the Senate had a veto of appointments.¹⁵²

Considerable power over personnel still resided within the Senate, for it retained the power to determine whether the President alone, the courts, or the heads of departments would appoint the various

150. U.S. CONST., art. II, § 2(2); see *id.* §§ 2(3), 3. The debate on these clauses at the Constitutional Convention is recounted in C. MORGANSTON, *THE APPOINTING AND REMOVAL POWER OF THE PRESIDENT OF THE UNITED STATES* 4-14 (1929).

151. "Inferior" means subordinated to one in whom the power of appointment may be vested. See *Collins v. United States*, 14 Cl. Cl. 563 (1878). See also *Scully v. United States*, 193 F. 185 (C.C.D. Nev. 1910).

152. C. MORGANSTON, *supra* note 150, at 15-30; P. VAN RIVER, *supra* note 140, at 14-16. The President also has the important power to fill, without Senate approval, vacancies that occurred during recess of the Senate. U.S. CONST., art. II, § 2(3); see C. FISH, *THE CIVIL SERVICE AND THE PATRONAGE* 191-92 (1904).

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"inferior" officials.¹⁵³ Congress could also specify qualifications for officers.¹⁵⁴ Finally, the power to veto presidential appointments was aggrandized through the invention of "senatorial courtesy"—a practice whereby senators would jointly approve an appointment only if it was approved by either senator of the state of appointment.¹⁵⁵

The considerable powers of Congress resulted in a political accommodation between the President and Congress. The President had the power to remove unwanted officials, usually those of a previous President, while Congress limited his power of appointment. The President often removed many officials upon his inauguration, but if his appointments rubbed against the political grain of Congress, it could refuse the appointment or employ the powerful weapon of appropriations against the offending department.¹⁵⁶ For the accommodation to work smoothly, Presidential subservience to Congress was required.

The tenuous accord between the President and Congress lasted until President Lincoln sought to use the latent powers of the Presidency. Lincoln asserted the political supremacy of the Executive by using the patronage, as well as other executive powers, as a tool to balance the radical Republicans against the conservative elements of Congress.¹⁵⁷ The political use of patronage and other executive powers to enhance Presidential authority heightened congressional distrust of the Executive.¹⁵⁸ Andrew Johnson exacerbated this tension by declaring openly that he would use his power over patronage in his battles with Congress. Aware of the great number of jobs Johnson had to distribute and opposed to his reconstruction policies, Congress battled the President over patronage through the passage of the Tenure of Office Act in 1867.¹⁵⁹ The Act attacked the President's power of removal and revoked the understanding of 1789 by providing that all appointing officers would retain their positions until their successor had been appointed by the President and approved by the Congress. Johnson's defiance of the Act led to his impeachment by the House and near conviction by the Senate.¹⁶⁰

The battle between Congress and the Executive over control of personnel continued during subsequent administrations. Congress

153. U.S. CONST., art. II, § 2(2). Congressional control of the appointing process was based on this clause and the "necessary and proper" clause. See *United States v. Perkins*, 116 U.S. 483 (1886).

154. U.S. CONST., art. II, § 2(2).

155. C. FISH, *supra* note 152, at 100-01.

156. See *id.* at 247-252.

157. J. BURNS, *THE DEADLOCK OF DEMOCRACY* 72-73 (1963).

158. C. FISH, *supra* note 152, at 186-87.

159. Act of March 2 1867, ch. 154, 14 Stat. 430. The Act also curbed the President's power to make recess appointments. *Id.*

160. C. FISH, *supra* note 152, at 193-200.

often rejected nominations or returned them for consideration of whether the appointment had been brought about through a removal. Of 58 cases tested during the Grant administration, nine were rejected. Against the less docile Hayes,¹⁶¹ Congress rejected 51 of 92 contested cases.¹⁶² One historian has called this congressional pressure, "the attempt of the Senators by combination to make the President a mere clerk to transmit to the Senate as a constitutional body nominations handed to him unofficially by the individual Senators."¹⁶³ President Garfield brought the issue to a head by appointing as Collector of the Customs of New York Harbor a political enemy of the powerful Senator Roscoe Conkling of New York. Garfield summarized the issue thus, "shall the principal port of entry in which more than 90% of all our custom duties are collected be under the direct control of the Administration or under the local control of a factional Senator."¹⁶⁴ Garfield persisted in his nomination despite the opposition of both New York senators and Vice President Arthur. Pratt and Conkling, the New York senators, resigned in order to attempt to enforce the doctrine of senatorial courtesy, that "the Senators shall severally control [appointments] for their respective states . . ."¹⁶⁵ They were defeated for reelection and the Senate confirmed Garfield's appointee.¹⁶⁶ Though Senate influence over Presidential appointments has always remained substantial, these events mark the end of any senatorial claim to govern executive discretion.

The legislators themselves realized that the spoils system, which encouraged factional rivalries between the legislature and the executive department, was beginning to destroy rather than promote the party system.¹⁶⁷ It was well recognized on the floor of Congress that the Republicans' crushing defeat in the 1882 interim elections was due to this state of affairs.¹⁶⁸ It was also recognized that this conflict debilitated the constitutional standing of the legislature¹⁶⁹ and that it

161. Hayes fought the Congressional practice to the extent that he could say, perhaps as an exaggeration, that "[a]ppointments are no longer regarded as belonging to Congressmen." 3 *DIARY AND LETTERS OF RUTHERFORD BIRCHARD HAYES* 495 (C. Williams ed. 1924).

162. C. FISH, *supra* note 152, at 203-04.

163. *Id.* at 205.

164. GARFIELD-HINSDALE LETTERS 490 (M. Hinsdale ed. 1949).

165. C. FISH, *supra* note 152, at 205-07.

166. *Id.* at 206.

167. One member of Congress described the state of affairs as follows:

The bestowal of office has been farmed out to political leaders for the purpose of enabling them to make war on their own rivals, and of crushing all independence in thought and action in even those who are adherents of the party in power. Servility to that faction of the Republican party to which a President belongs has been the exaction demanded of those who aspired either to receive office or influence its bestowal.

14 *CONG. REC.* 319 (1882) (remarks of Senator George).

168. See 14 *CONG. REC.* 204-06, 277, 279, 283, 317 (1882).

169. See *id.* at 317 (1882). The rivalry between the executive and the legislature over the appointing power was seen as destructive to a balanced government:

The legislative must become syncophantic . . . or it cannot have the patronage; or, on the other hand, legislative department will absolutely control the executive department in its actions and its appointments.

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harmed the character of government by resulting in "many men being put into office who are unnecessary and who are unworthy."¹⁷⁰

The legislative-executive conflict may have affected the content of the Pendleton Act more than its passage, but certainly the Act was designed to effect some sort of compromise between the branches. Because the Act mandated that positions were to be filled on the basis of merit,¹⁷¹ neither the President nor Congress could theoretically influence the selection of candidates for political purposes. In addition, the Act specifically prohibited such interference.¹⁷²

The legislative-executive conflict also influenced what Congress omitted from the Act. In establishing the merit system, Congress strained not to interfere with the power of the Executive. Despite many calls for legislative control of the President's power of removal,¹⁷³ proponents of the Act opposed such a limit as an unconstitutional intrusion on the executive branch.¹⁷⁴ Rather, they suggested that appointment based on merit effectively removed any incentive of the executive to remove employees improperly. Supporters of the bill also rejected amendments that sought to ensure the independence of the Civil Service Commission by giving each commissioner a tenure of six years. These amendments, thought to be an intrusion upon the President's power of removal, were deemed to be unwise, if not unconstitutional.¹⁷⁵

Public employees, of course, are not completely impartial because their backgrounds create perspectives that may affect the administration of programs. Civil service reform was concerned, however, with the greater risk that a politicized public service would administer programs according to political expediency rather than according to the law. Civil service reform was perceived not as an act of convenience, but as one of necessity. Senator Hoar wrote that the passage of the Pendleton Act was "necessary for free government—I am now better convinced than ever that our form of government is safe for another century."¹⁷⁶

Almost a century later, the Watergate revelations and the documentation of the Nixon Administration's assault on the civil service have emphasized the importance of an impartial civil service. This

There should never be any such conflict.

Id. (remarks of Senator Miller).

170. *Id.*

171. The Civil Service Act of 1883, ch. 27, § 2, 22 Stat. 404 (codified at 5 U.S.C. § 7321 (1970)).

172. The Civil Service Act of 1883, ch. 27, § 10, 22 Stat. 406 (codified at 5 U.S.C. § 3303 (1970)).

173. See, e.g., 14 CONG. REC. 207 (1882) (remarks of Senator Pendleton).

174. See, e.g., *id.* at 277, 282, 322, 323.

175. See, e.g., *id.* at 248-49, 274, 277, 322, 323, 354.

176. Letter from A.S. Hewitt to James F. Colby, Jan. 8, 1883, Papers of the National Civil Service League, Box I, file A-2 on file in the Civil Service Commission Library.

recent experience also suggests the possible effects a removal of restrictions on the voluntary political activities of federal employees might have on the character of the civil service.

Political Encroachment Upon the Civil Service System

Attacks by the Nixon administration on the career service illustrate the potential for tyranny created by political control of the civil service. All administrations have sought jobs for political supporters and, in so doing, violated civil service provisions. The Nixon attack on the civil service, however, went beyond these "patronage raids" and threatened "free government" by seeking to exploit the vulnerability of the civil service to gain the ability to manipulate and violate the law.

The success of the merit system depends upon the special relationship which develops between each President and the civil service. The President has ultimate authority over the administration of the civil service system,¹⁷⁷ and he, by extensive use of patronage, can undermine the purposes of civil service reform. The dilemma of the modern civil service is that its dependence upon the Executive, which ensures its effectiveness, creates the potential for abuse. Presidential control of the civil service can undermine the purposes of civil service reform and acquire for the President extensive authority at the expense of the Congress. The history of the relationship between the presidency and the civil service illustrates this dilemma.

Perhaps no President better knew how to use the civil service than Theodore Roosevelt. He freely delegated authority and responsibility because he recognized efficient government required it. He habitually turned to subordinates for advice and information.¹⁷⁸ This practice not only restricted the President's own power by requiring reliance on those expert in a given field, but also restrained subordinates by the logic of their own information and experience. In addition, Theodore Roosevelt's approach enabled him to recruit and retain subordinates of stature because he offered them the satisfaction of achievement.¹⁷⁹

Franklin Roosevelt had many of the same abilities. He knew how to retain control over the decisionmaking process and he had the ability to use the bureaucracy to get the proper information to make decisions. As Arthur M. Schlesinger has suggested, he knew how to attract and utilize creative talent in the federal service.¹⁸⁰ For FDR this meant circumventing the civil service system. Like Theodore Roosevelt and most other presidents, he undertook a number of appointments for political purposes.¹⁸¹ More importantly, Roosevelt

177. 5 U.S.C. §§ 1301, 1302 (1970).

178. J. BLUNT, *THE REPUBLICAN ROOSEVELT* 18-21 (1969).

179. *Id.* at 19.

180. See 2 A. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL* 96-98 (1953).

181. D. HARVEY, *THE CIVIL SERVICE COMMISSION* 11-14 (1970); see G. MOWRY, *THE ERA OF THEODORE ROOSEVELT* 167 (1953).

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believed that the new agencies established to administer the New Deal could only operate effectively if they were independent of the merit system. Because FDR perceived the civil service as "an arsenal of obfuscation, populated with workers ideologically opposed to the New Deal," he kept the regulatory agencies out of the competitive service until 1938.

Roosevelt's refusal to include regulatory agencies in the competitive service aroused much criticism¹⁸² and his refusal to extend the competitive service was used against him in the presidential election. His patronage policies were attacked on the claim that he was buying the election.¹⁸³ Nevertheless, the prestige of the public service rose substantially during Roosevelt's administration, and during the 1930's, his Civil Service Commission appointee, Leonard B. White, was building a service which would be a career service in the full sense of the term. Like FDR, White wanted a system with no barriers to recognition of men and women of capacity. He also wanted a system that automatically eliminated its "deadwood."¹⁸⁴ In 1938, FDR by executive order extended the classification system to the limits of the President's authority.¹⁸⁵ By the end of World War II, the Civil Service Commission noted the close relationship between the President and the Commission.¹⁸⁶

Although Truman supported a civil service based on merit and his appointees to the Commission were among the most qualified of all commissioners, the general perception of the quality of the civil service suffered.¹⁸⁷ Truman used patronage, but did not try to extend patronage to the permanent service.¹⁸⁸ In a major reform, he extended the merit system to many officers within the Bureau of Internal Revenue.¹⁸⁹ Moreover, he appointed career employees to cabinet level positions. Still, because Truman's political appointees and the style of his administration lacked the intelligence and flair of the Roosevelt years, morale was not high and the influx of talented people to the civil service ebbed.¹⁹⁰

Eisenhower effectively attacked the weaknesses in Truman's personnel policies during the 1952 campaign. He played on the corruption of the Truman administration and although he concentrated on

182. National Civil Service League Files, Box I, files A3-2.

183. *Id.*

184. P. VAN RIPER, *supra* note 140, at 329.

185. See D. HARVEY, *supra* note 181, at 15-16.

186. Letter of Transmittal to United States Civil Service Commission, 61st Annual Report (1944); White, *Franklin Roosevelt and the Public Service*, 6 PUB. PERS. REV. 139, 142 (1945).

187. P. VAN RIPER, *supra* note 140, at 404-05.

188. *Id.*

189. *Id.*

190. *Id.* at 405-09; cf. D. HARVEY, *supra* note 181, at 21-23.

attacking subversives, he noted that "[t]he purposes that [McCarthy] and I have of ridding the Government of the incompetent, the dishonest, and above all the subversives and the disloyal are one and the same. . . . [t]he differences apply to method. . . ."¹⁹¹ Eisenhower himself had many problems with the civil service. He staffed the government with middle-age, sometimes anti-intellectual, businessmen.¹⁹² These appointments not only caused a number of conflicts of interests, but also created a serious recruitment problem for his administration.¹⁹³ The recruitment problem was exacerbated by the peculiar position of the civil service. Holdovers from the New Deal were attacked by a President who either questioned their loyalty and partisanship or curtailed many of their functions.¹⁹⁴ At the same time, the civil servant was subject to harassment from Congress, purportedly in the interest of national security.¹⁹⁵

The early nonpatronage stance of the Eisenhower Administration gradually changed under pressure from the office-starved Republican Party. By 1954, the "Willis Directive" had been developed to coordinate the distribution of jobs to the Republican National Committee by means of a special assistant in each department. While Eisenhower denied that the program was designed to apply to career positions, the covertness of the plans regarding it suggests that it was nothing less than a spoils raid.¹⁹⁶ The Senate reported that in several agencies, "political clearance is required for appointment and promotions even below grade fourteen and that the special assistants dominate the management with personnel directors relegated to strictly routine duty."¹⁹⁷ As a result of this turmoil, the Chairman of the Civil Service Commission lost his function as White House advisor on personnel management, partly because he was viewed as too susceptible to political influence.¹⁹⁸

During the Kennedy Administration, the fact that Civil Service Commission Chairman John Macy also served as an informal White House advisor was perceived as a potential conflict with the Commission's role to protect the career service. In both the Kennedy and Johnson Administrations, the patronage pressures of the New Deal and of the Eisenhower Administration recurred. After eight years of Republican administration, politics often took precedence over principle when Democrats sought jobs. Furthermore, the New Frontier faced the same problem that had confronted the New Deal. New programs of a new administration were being administered by those perceived as unsympathetic to them. Like FDR, Kennedy sought out ideological sympathizers to fill policy-making positions to avoid this

191. Quoted in M. PUSEY, *EISENHOWER THE PRESIDENT* 29-30 (1956).

192. See P. VAN RIER, *supra* note 140, at 482.

193. *Id.* at 483-84.

194. *Id.* at 485-86.

195. See generally D. HARVEY, *supra* note 181, at 23-25.

196. P. VAN RIER, *supra* note 140, at 493-94.

197. STAFF OF THE SENATE COMM. ON THE POST OFFICE AND CIVIL SERVICE, 85th CONG., 2d SESS., *ADMINISTRATION OF THE CIVIL SERVICE SYSTEM* 34 (1957).

198. See D. HARVEY, *supra* note 181, at 25-26.

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problem.¹⁹⁹ However, there remained the problem that had plagued the civil service from its inception: How to resolve the conflict between the position of civil service reform and the reliance of the Civil Service Commission upon the executive.

This dilemma of civil service reform culminated in the Nixon Administration, which has been characterized as the "rape of the merit system." This was the stated goal of the "Federal Political Personnel Manual."²⁰⁰ It is not clear how much of the program's design to subvert the merit system actually went into effect and the precise role the Civil Service Commission played. Nevertheless, the various schemes developed emphasize the vulnerability of the civil service at the hands of the President.

The primary purpose of this extraordinary effort was to "politicize" the executive branch.²⁰¹ Presidential Assistant Fred Malek wrote to H.R. Haldeman, "[T]he President's unique asset in the forthcoming campaign is his control of the Executive Branch. . . . The White House must ensure that the President is able to capitalize fully upon this asset."²⁰² These documents expose the immense power available to an incumbent president to undercut civil service reform and to increase his own power. The recognized patronage "resources" included jobs, revenue (contracts, grants, subsidies, bank deposits, social need programs, and public works projects), the execution of federal law, public relations offices, and the provision of domestic and international transportation.²⁰³ Political disposal of this cornucopia was called "grantsmanship."²⁰⁴ One Nixon aide boasted that he had helped rechannel about one million dollars of Commerce Department funds to a political beneficiary.²⁰⁵ This spending power was made all the more effective by feeding money to "target areas" considered crucial to the election. The General Services Administration, for example, was to emphasize building construction in key states, cities, and counties, and to emphasize minority procurement "in those States

199. See Lomax, *The Federal Personnel System and the Challenge of the Space Age*, 18 *West. Pol. Q.* 263, 266-67 (1965).

200. Federal Political Personnel Manual, Exhibit No. 35, at 72, reprinted in *Hearings on S. Res. 60, Watergate and Related Activities, Use of Incumbency—Responsiveness Program Before the Senate Select Comm. on Presidential Campaign Activities*, 93d Cong., 2d Sess., Bk. 19, at 8903, 8976 (1974) [hereinafter cited as *Responsiveness Hearings*].

201. Memorandum from Fred Malek to H.R. Haldeman, Dec. 23, 1971, Malek Exhibit No. 5, in *Responsiveness Hearings*, Bk. 18, at 8320.

202. *Id.* at 8322.

203. Memorandum from Peter Millsbaugh to Harry Flemming, June 23, 1971, Malek Exhibit No. 9, in *Responsiveness Hearings*, Bk. 18, at 8360.

204. Memorandum from Fred Malek to H.R. Haldeman, March 17, 1972, Malek Exhibit No. 4, in *Responsiveness Hearings*, Bk. 18, at 8311, 8312. Grantsmanship included the manipulation of procurement and construction contracts, loans and subsidies, as well as grants. *Id.*

205. *Id.* at 8313.

and areas where there is a real opportunity to win some of the Black vote."²⁰⁶

According to the Malek program, a White House aide would meet with each agency head to show how the immense power of the government could be used to affect election results. The aide would tell the agency which states and voter blocs were important.²⁰⁷ The department would be expected to cultivate the leaders of organized groups affected by the department to gain support for the President's re-election. Similarly, the departments would be expected to take discrete steps within the agency to gain employee support for the President's re-election. Each department was to establish a plan to make government resources responsive to political needs.²⁰⁸ The White House would review each plan and, according to a system which could be envied by the Civil Service Commission, ensure compliance through the use of progress reports, evaluations, and follow-ups.²⁰⁹ Nearly all the agencies drew up plans.²¹⁰

White House control was crucial to the scheme. Although it was impossible for the White House to control the day-to-day operations of the agencies, it was a coordinating agency to "establish management procedures to ensure that the Departments systematically identify opportunities and utilize resources for maximum political benefit."²¹¹ For example, when a grant was particularly important, it would be designated a "must." Once a key locality was identified, the coordinating group would determine the kind of grant best suited to the needs and available program resources. A campaign representative would then inform the appropriate local official what kind of grant application to submit.²¹² The White House would ensure its acceptance.

Control of civil servants was necessary if the executive branch was to manipulate programs and, in some instances, violate the law. This control depended upon usurpation of the civil service system. The "Federal Political Personnel Manual" described how to organize a "political Personnel Office to ensure political control of each department."²¹³ The first task was to find an Assistant Secretary "fiercely loyal to the President"²¹⁴ who would be in charge of personnel, and then to find a key budget official to create extra positions.²¹⁵ The system was called "a political equivalent of the Civil Service Commis-

206. Malek Exhibit No. 5, *supra* note 201, at 8323.

207. Malek Exhibit No. 4, *supra* note 204, at 8314.

208. *Id.* at 8315.

209. *Id.* at 8316-17.

210. See Memorandum from Fred Malek to H.R. Haldeman, June 7, 1972, Malek Exhibit No. 16, in *Responsiveness Hearings*, Bk. 18, at 8330, 8381.

211. Malek Exhibit No. 5, *supra* note 201, at 8323.

212. Memorandum from William Horton to William Gifford and Peter Millapough, June 24, 1971, Malek Exhibit No. 8, in *Responsiveness Hearings*, Bk. 18, at 8348, 8353.

213. Federal Political Personnel Manual, Exhibit No. 35, at 6, in *Responsiveness Hearings*, Bk. 19, at 8911.

214. *Id.* at 8-9, in *Responsiveness Hearings* at 8913-14.

215. *Id.* at 11-12, in *Responsiveness Hearings* at 8916-17.

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sion certification process."²¹⁶ A reference form printed by the government spelled out the applicant's name and his political reference.²¹⁷ One section gave the value of the placement to the President politically. The five categories were Must Placement (placement will bring great political value to the party and/or the President), Priority Placement (some political benefit), Courtesy Referral (small political benefit), Politically Undesirable (failure to place will be politically beneficial), and Political Problem (holding category until further classification can be made).²¹⁸ The political personnel office also handled recruitment. The office informed political officials of vacancies and "Area Liaison Officers" would work with local political officials to determine the political loyalty of individuals.²¹⁹

The purpose of this program was more than simply patronage. Its purpose was to obtain political control over the operation of each governmental agency.²²⁰ Positions earmarked as crucial were those controlling the image of the agency, its relations with Congress, its spending power, and its policy.²²¹ In these politically crucial areas, the political personnel officer would evaluate political sensitivity of those in office and give political clearance to both policy and nonpolicy appointments.²²² Another important function of the political personnel office was to reward loyal political employees by raising their grade. It was claimed that "a loyal classifications specialist" could get any grade he asked for.²²³

As one might expect, this program entailed a degree of cynicism regarding civil service reform. The merit system was described as "a device by which bureaucrats operate their own patronage system while telling politicians to 'keep their hands off' so as not to interfere with the 'merit system.'" Advised the manual, "they can really insure the certification of someone they have pre-selected and so can you."²²⁴ To circumvent the system, one only needed to draw the qualifications of the job to fit the candidate and then send some loyal personnel

216. *Id.* at 13, in *Responsiveness Hearings* at 8918.

217. *Id.* at 16-17, in *Responsiveness Hearings* at 8921-22.

218. *Id.* at 19-20, in *Responsiveness Hearings* at 8924-25.

219. *Id.* at 21, in *Responsiveness Hearings* at 8926.

220. *Id.* at 7, 26, in *Responsiveness Hearings* at 8911, 8931.

221. *Id.* at 26, in *Responsiveness Hearings* at 8931.

222. The legal procedures for political appointment to designated policy-making decisions are set forth in 5 C.F.R. §§ 213.3301-3399 (1976).

223. Federal Political Personnel Manual at 50-51, in *Responsiveness Hearings* at 8954-55. The Personnel Manual advises:

In short, you can pretty well do what you want, within reason in classifying a position within an agency at GS-15 and below. Your classifications specialist ought to also be able to artistically write a position description sufficient to enable the Civil Service Commission to classify a position at a supergrade level, providing that a supergrade quota is available.

Id. at 51, in *Responsiveness Hearings* at 8955.

224. *Id.* at 72, in *Responsiveness Hearings* at 8976.

officers over to the Commission to be sure that he is chosen.²²⁵

To some extent, however, the tradition of impartial public service ingrained in the civil service by 50 years of civil service reform worked. Malek noted with disappointment that "[a] major problem is the general insensitivity to political needs."²²⁶ He recognized the substantial risk in trying to pressure "nonpolitical" civil servants to undertake partisan activities.²²⁷

The final personnel operation in the Nixon Administration was to circumvent the civil service system in removing unwanted employees in crucial positions. The Federal Political Personnel Manual observed dolefully, "[t]he Civil Service system creates many hardships in trying to remove undesirable employees from their positions."²²⁸ Officials were told not to reduce people to "lower status and/or grades" because such reductions were adverse actions, which required formal procedures.²²⁹ Certain other devices were suggested instead. One method was simply to tell the employee that he was no longer wanted and that if he would resign, he would get a farewell luncheon and a good recommendation. The Manual explained further that if this offer were rejected, the employee could later be forced out and "his employment references from the Department and his permanent personnel record may not look the same as if he had accepted your offer. . . . There should be no witness at this time."²³⁰

Another method was the "Transfer Technique." It required finding a geographical area such that the employee would resign rather than be transferred there.²³¹ Another method was the "Special Assignment Technique (the traveling salesman)," designed for the family man who did not enjoy traveling. He was to be assigned to a special evaluation project ostensibly because of "special competence," but in fact to drive him into submission by keeping him on the road.²³² Other methods included establishing new offices to do civil servants' jobs, thus rendering "those bureaucrats who have not quit in disgust into meaningless technical positions . . .,"²³³ or simply trans-

225. *Id.* at 72-73, *Responsiveness Hearings* at 8976-77.

226. Malek Exhibit No. 5, *supra* note 201, *Responsiveness Hearings* at 8323.

227. *Id.* at 8324.

228. Federal Political Personnel Manual at 102, in *Responsiveness Hearings* at 9006.

229. *Id.*

230. *Id.* at 102-03, in *Responsiveness Hearings* at 9006-07. A number of alternative methods are discussed in chapter 2 of R. VAUGHN, *THE SPOILED SYSTEM: A CALL FOR CIVIL SERVICE REFORM* (1975).

231. Federal Political Personnel Manual at 103-04, in *Responsiveness Hearings* at 9007-08.

232. The Personnel Manual explains:

Along with his promotion in assignment your expert is given extensive travel orders criss-crossing him across the country to towns (hopefully with the worst accommodations possible) of a population of 20,000 or under. Until his wife threatens him with divorce unless he quits, you have him out of town and out of the way. When he finally asks for relief, you tearfully reiterate the importance of the project and then state that he must continue to obey travel orders or resign. Failure to obey travel orders is a grounds for immediate separation.

Id. at 105, in *Responsiveness Hearings* at 9009.

233. *Id.* at 108-09, in *Responsiveness Hearings* at 9012-13.

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ferring personnel into "apparently meaningful, but essentially meaningless, new activity. . . ." ²³⁴

The effects of the Incumbency-Responsiveness Program of the Nixon Administration were summarized in the Senate Watergate Report, which identified flagrant abuses of federal funding of minority and constituent groups stemming from the "improper involvement of campaign officials in government decisionmaking."²³⁵ For instance, a Spanish-American official at the Committee to Re-Elect the President allegedly had the power to approve or disapprove of grants to Spanish-speaking communities.²³⁶ The administration penalized groups that did not support the President²³⁷ or, in an effort to neutralize them, held out the promise of funding when none was contemplated.²³⁸ Campaign officials took part in the selection process of money awards of GSA architectural and engineering design contracts.²³⁹ A special referral procedure was established at GSA to facilitate the patronage effort.²⁴⁰

These activities of the Nixon Administration laid the blueprint for executive tyranny. The activities illustrate how an executive could use a politicized civil service to establish such tyranny. Control of the civil service gives the executive the power to violate the law and to exercise the immense discretion granted by Congress, not as a means of accomplishing program objectives, but as a method of coercing political conformity by those affected by administrative action. The acquisition of such power would rapidly undermine democratic government.

The material reviewed demonstrates that the feasibility and wisdom of removing restrictions on the voluntary political activities of public employees must be judged in light of the risks to the impartial administration of law. Only after these risks are clearly identified can they be weighed against the important right of public employees to participate fully as citizens in political affairs. The Federal Employees Political Activities Act fails to adequately recognize these risks.

The removal of restrictions will encourage public employees to take, and will give to the bureaucracy, a definite political outlook. Pressures imposed from the top of the bureaucracy may force other

234. *Id.* at 109, in *Responsiveness Hearings* at 9013.

235. SENATE SELECT COMM. ON PRESIDENTIAL CAMPAIGN ACTIVITIES, S. REP. NO. 981, 93d Cong., 2d Sess. 361 (1974).

236. *Id.* at 382.

237. *Id.* at 386-91.

238. *Id.* at 391-93.

239. *Id.* at 412.

240. *Id.* at 412-13. A similar procedure was proposed by the White House for the Department of Housing and Urban Development, but was never established.

federal employees to adopt political positions. If political involvement were to change the perspectives of federal employees, the already dangerously thin line between the appropriate exercise of discretion under the law and political expediency could well become more indistinct. It is difficult to isolate one's political and professional life, and as federal employees become more deeply involved in partisan activities, this perspective is likely to affect their administration of specific programs. The extent of this risk from the relaxation of prohibitions on voluntary political activity is difficult to assess. The effectiveness of the other protections against the development of a partisan bureaucracy, such as competitive examinations and protection of federal employees, is difficult to measure. The experience of the Nixon Administration and an examination of civil service protections²⁴¹ suggest the weakness of these protections. The arguments that employees may already be appointed on ideological grounds and that program administration is presently politically motivated are hardly grounds for removal of the restrictions. On the contrary, uncertainty about the effectiveness of other safeguards for an impartial civil service should suggest caution and incline one to overestimate, not minimize, the risks from removing restrictions on voluntary political activities.

One may assert that a politically involved federal service is less susceptible to manipulation than "faceless, nameless bureaucrats who are inert in their localities and submissive to some master's voice."²⁴² It is, nevertheless, difficult to perceive how political involvement will make employees less susceptible to pressures that already exist. To allow employees to seek a safe harbor by involvement in local and national politics is to endorse political patronage rather than legal protection. The problem is that civil service law at present inadequately embodies the concepts of personal responsibility and accountability. The answer is a recognition of the employees' ultimate responsibility to law²⁴³ and the development of better methods of accountability.²⁴⁴

A second risk is that the removal of restrictions may increase the ability of the executive to manipulate the civil service. The experience of the Nixon Administration suggests that the impartiality ingrained in the civil service provided some protection to employees and the integrity of government programs. The removal of restrictions could alter not only the perspectives of federal employees, but the attitude of the executive. An executive who fears for unsympathetic administration of his programs may be more likely to justify the use

241. See R. VAUGHN, *supra* note 230, at 13-27.

242. *Broadrick v. Oklahoma*, 413 U.S. 601, 621 (1973) (Douglas, J., dissenting).

243. For an example of legal protection granted for failure to obey an unconstitutional order, see *Parrish v. Civil Serv. Comm'n*, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967).

244. See Vaughn, *The Personal Accountability of Public Employees*, 25 AM. U.L. REV. 85 (1975).

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of weaknesses in the civil service if defeated political candidates or political activists hold crucial civil service positions in his administration.²⁴⁵ As importantly, the public's perception of the propriety, if not legality, of executive action is likely to change. The public may more readily accept the contention that the executive is politically accountable to the whole people and, therefore, can exercise power concomitant with that responsibility if partisan political motivations are clearly attached to federal employees. If, however, the public were willing to accept such an expansive definition of executive authority over the conduct of the civil service, the removal of restrictions on partisan political activities could lead to a substantial accretion of executive authority at the expense of Congress.

The third risk, which follows in part from the previous ones, is that governmental authority will be more likely to be exercised to coerce desired political conduct, not only of employees, but also of citizens.²⁴⁶ To an extent the Federal Employees Political Activities Act recognizes this risk to the general public and retains restrictions on certain employees of the Internal Revenue Service, the Department of Justice, and the Central Intelligence Agency.²⁴⁷ The rationale for these exceptions from the Act is that political influence on law enforcement should be reduced.

Even within the limits of these exceptions, however, the legislation is inadequate. It applies restrictions only to employees holding sensitive positions under Executive Order 10,450,²⁴⁸ which established the Government's loyalty and security programs.²⁴⁹ The risks causing a position to be classified as sensitive for loyalty and security purposes, however, may not be the same risks necessitating that employees in certain law enforcement activities be restricted in their political activities. Furthermore, even employees in sensitive positions may be allowed under the Act to actively participate in politics if the agency head determines, by regulation, that "active political participation by incumbents of those positions would not adversely affect the integrity of the Government or the public's confidence in the integrity of the

245. The prospect of defeated political opponents serving as high level civil servants in the victorious administration has created difficulty in Australia. H. SCARROW, *supra* note 122, at 152-60. The Australian Civil Service Commission, however, is quite independent and exercises strong centralized control of the civil service. See U.N. HANDBOOK, *supra* note 121, at 25.

246. See BOLTON, *supra* note 109, at 16-21.

247. See note 93 *supra*.

248. 3 C.F.R. 57 (1974), 5 U.S.C. § 7311 (1970), as amended, (Supp. IV, 1974).

249. For a history of the federal loyalty security program, see D. ROSEN-BLOOM, *supra* note 3, at 144-68. Agencies enjoy some discretion in characterizing positions as critical-sensitive, noncritical-sensitive, or nonsensitive. See BUREAU OF PERSONNEL INVESTIGATION, U.S. CIVIL SERV. COMM'N, THE INVESTIGATIVE AND SUITABILITY EVALUATION PROGRAMS OF THE U.S. CIVIL SERVICE COMMISSION (1969).

Government."²⁵⁰ This allows the executive to determine which employees may engage in political activities and tends to increase, rather than decrease, the risk of political manipulation of certain law enforcement activities.

In any event, there seems to be no reason to differentiate law enforcement activities from other government authority in terms of the risks created by permitting partisan activity. Although abuses involving the Internal Revenue Service, the Department of Justice, and the Central Intelligence Agency were the more publicized abuses of the Nixon Administration, the Incumbency-Responsiveness Program rested heavily upon manipulation of grants, subsidies, and regulatory actions.²⁵¹ Government authority in these areas can be equally effective in coercing political conformity by those subject to federal regulation. As government involvement in private activity increases, the risk of misuse of this authority is also likely to increase.

Considering the purposes of civil service reform and the history of political encroachment on the civil service, a strong case is made that removal of all restrictions on the voluntary political activities of public employees will adversely affect the character of the civil service. In many ways, veto of the Public Employees Political Activities Act may lead to legislation that more carefully considers the precise balance to be drawn. The veto provides the time, as well as the incentive, to enact a coordinated program of civil service reform which accounts for the relationship between restrictions on political activities and other civil service provisions. Consideration of other reforms will be crucial to an accurate assessment of the risks created by the removal of restrictions on the voluntary political activities of federal employees.

Protection of Employees from Coercion Involving Political Activity

Closely related to the effect of removal of restrictions on the character of the civil service is the question whether, absent such restrictions, federal employees can be protected from coercion regarding their political activities.²⁵² The loosening of restrictions on political activities removes the major device that federal employees have to protect themselves from pressure: the assertion that they may not engage in

250. H.R. 8617, 94th Cong., 2d Sess. § 102 (1976) (amending 5 U.S.C. § 7325 (1970)).

251. See text accompanying notes 207-12 *supra*.

252. It has been noted:

The debate [surrounding the Federal Employees Political Activities Act] has thus isolated a curious paradox; the freer the employees are to engage in voluntary political activity, the greater is the possibility that they will be coerced into involuntary political activity.

BOLTON, *supra* note 109, at 13. Bolton reviews the history of the Works Progress Administration, employees of which were allowed to engage in political activities, and concludes that coercion could become a serious problem for federal workers removed from political restrictions. *Id.* at 9-10, 12.

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political activity because of the restrictions of the Hatch Act.²⁵³

With the removal of the "I'm Hatched" defense, the Federal Employees Political Activities Act undertakes to protect federal employees from coercion by specific prohibitions which are combined with an enforcement structure,²⁵⁴ but the task undertaken truly is a difficult one. Coercion in any large organization based upon a hierarchical structure is difficult to control because it is difficult to detect.²⁵⁵ Subordinates often need little direction to conform their conduct to the wishes of their superiors.²⁵⁶ For an employee who is slow to understand the unstated expectations of his superior, moreover, the superior-subordinate relationship provides many vehicles for imposing "penalties" through promotions, job assignments, reassignments, and control of the working atmosphere.²⁵⁷ The plans of the Nixon Administration relied heavily on the use of informal structure and sanctions.²⁵⁸ If federal employees perceive that coercion will result from the removal of restrictions on political activities,²⁵⁹ a receptive audience for subtle pressure is clearly available.

Furthermore, employees subject to coercion often are not likely to complain because of the dangers of reprisal and the limited availability of relief. A study of the Federal Equal Employment Opportunity Program indicated that a large number of federal employees did not file discrimination complaints for fear of reprisal.²⁶⁰ A study of the reinstatement remedy granted by the National Labor Relations Board found not only that many workers refused reinstatement for fear of retaliation, but also that three-quarters of those reinstated left the company within two years because of "bad company treatment."²⁶¹

253. Statement of Anthony Mondello, General Counsel of the United States Civil Service Commission, *Hearings on H.R. 3000*, *supra* note 87, at 33.

254. See text accompanying notes 97-99 *supra*.

255. See generally WHISTLE BLOWING: THE REPORT OF THE CONFERENCE ON PROFESSIONAL RESPONSIBILITY (R. Nader, P. Petkas, & K. Blackwell eds. 1973).

256. John Macy, Chairman of the Civil Service Commission, in his testimony to the Commission on Political Activity of Government Personnel, observed that "... one man's coercion is another man's persuasion, ..." and that "... [w]here [coercion or persuasion] is involved in an employer/employee relationship, the extent of voluntarism tends to be rather substantially circumscribed." 3 COMMISSION ON POLITICAL ACTIVITY OF GOVERNMENT PERSONNEL, *HEARINGS* 759 (1968).

257. See R. VAUGHN, *supra* note 230, at 13-27.

258. See text accompanying notes 207-12 *supra*.

259. In a survey of federal employees conducted in 1967, 52% of the employees believed that "things like promotion decisions and job assignments" would change if federal employees were allowed to be more active in politics. 2 COMMISSION ON POLITICAL ACTIVITY OF GOVERNMENT PERSONNEL, *RESEARCH* 21 (1968). After the Nixon Administration, one wonders what would be the perception of the effects of removing the restrictions today.

260. Brewer, *Behind the Promises: Equal Employment Opportunity in the Federal Government* (unpublished draft 1972), cited in R. VAUGHN, *supra* note 230, at 88.

261. Aspin, *Reinstatement is Not Enough: Discussion of the Taft-Hartley Act Reinstatement Remedy* (draft), cited in R. VAUGHN, *supra* note 230, at 88.

Even if penalties are available against a superior, a complaining employee may find life in the organization, perhaps under the same supervisor, difficult to endure.

The Act's enforcement structure for controlling coercion of federal employees is inadequate. First, given the unique practical problems in discovering coercion, the investigative provisions of the Act were defective. Although the Act required the Civil Service Commission to investigate complaints²⁶² and the legislative history stresses that the Commission must seek out abuse,²⁶³ the ability of the Civil Service Commission to enforce the Act aggressively in the face of an Executive dedicated to a program of coercion is doubtful. Civil Service Commissioners serve at the pleasure of the President²⁶⁴ and the Commission has been clearly identified with the Executive.²⁶⁵ As the history of political encroachment on the civil service shows,²⁶⁶ the attitude of the President is crucial to the effective operation of the Civil Service Commission. Additionally, by training and program, the Commission is sympathetic to the perspectives of the management of federal agencies.²⁶⁷

Second, the adjudicatory board lacked sufficient independence of the executive. Even if the Board on Political Activities is considered "independent" of the prosecuting authority, the Civil Service Commission, it would have relied upon the Commission for support staff and administrative services.²⁶⁸ The Board would not have been independent of executive pressure or influence since its members, appointed by the President for fixed terms, were not granted tenure for good behavior.²⁶⁹ Furthermore, the Act required members of the Board to be federal employees and did not permit the members to serve on the Board 60 days after separation from this federal service.²⁷⁰ As employees, members of the Board would have been subject to informal pressures. This adjudicatory structure, combined

262. H.R. 8617, 94th Cong., 2d Sess. § 102 (1976) (amending 5 U.S.C. § 7328 (1970)).

263. See note 115 *supra*.

264. 5 U.S.C. § 1101 (1970).

265. See text accompanying notes 177-240 *supra*. See also Guttman, *Development and Exercise of Appellate Powers in Adverse Action Appeals*, 19 AM. U.L. REV. 323 (1970).

266. See text accompanying notes 156-240 *supra*.

267. In 1970, the following disciplinary action was taken in 15 cases in which supervisors were found guilty of discriminatory conduct: Five supervisors received letters of warning; five were orally admonished; in one case, letters of reprimand were issued to three supervisors; one supervisor was suspended; one foreman was barred from supervisory duty; one supervisor was reprimanded and reassigned to nonsupervisory work; and one supervisor facing disciplinary action retired.

During the first half of 1971, the following disciplinary action was taken in 14 cases: Two supervisors were orally reprimanded; in one case, two supervisors received letters of warning; one supervisor was cautioned regarding informal disciplining of employees; in one case, two activity officials were orally admonished; one activity official was admonished; three officials received letters of reprimand; one military chief of staff was relieved of his position and given supervisory training; and two supervisors received "appropriate disciplinary action." R. VAUGHN, *supra* note 230, at 71-72.

268. H.R. 8617, 94th Cong., 2d Sess. § 102 (1976) (amending 5 U.S.C. § 7327 (1970)).

269. *Id.*

270. *Id.*

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with substantive provisions giving the Board immense discretion in the selection of penalties, makes the inadequacy of the enforcement structure obvious. Even in those instances where employees were found guilty of coercion, only the most moderate penalty might have been applied.²⁷¹

Finally, the Board would have had no independent budget and would have lacked the structure and prerogatives normally associated with independent regulatory agencies.²⁷² Although history and logic suggest that the greatest independence is needed by such an enforcement authority, the Act did not provide it.

The Hatch Act is certainly far from perfect and legislative modification of it is in order, but considering the risks involved and the defects of the legislation, the case has not been made for the Federal Employees Political Activities Act.

271. *Id.*

272. See generally *Hearings on S. 448 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 92d Cong., 2d Sess. (1971).

Mr. CLAY. Our next witness will be the Honorable Joseph L. Fisher. Congressman, you may proceed as you wish.

**STATEMENT OF HON. JOSEPH L. FISHER, A REPRESENTATIVE
FROM THE STATE OF VIRGINIA**

Mr. FISHER. Thank you, Mr. Chairman. I would like to testify today in favor of H.R. 3645, a bill which I have introduced and which I believe to be a more balanced approach to revising the Hatch Act than is H.R. 10.

Last year as you know, Congress passed H.R. 8617, which was almost identical to H.R. 10. It would have lifted the prohibition on Federal employees taking an active part in political campaigns and party organizations. The bill was vetoed and the veto was sustained.

During the House consideration of H.R. 8617 I offered an amendment to permit Federal employees to engage fully in political activity in State and local elections, while retaining the prohibition against such activity in Federal elections. My amendment failed on a vote of 147 to 260.

The Hatch Act of 1939, of course, prevents Federal employees from taking an active part in election campaigns and other political activity at any level of government, either voluntarily or under pressure from others.

Under the act, Federal employees may: register and vote; express opinions as private citizens, but not as active political campaigners; wear political buttons and display political bumper stickers, except when having contact with public during work hours; participate in nonpartisan elections; serve as election judges; be politically active in referendums, constitutional amendments, approval of municipal ordinances, etc.; participate in nonpartisan activities of civic associations; belong to political organizations, but not be officials of one; attend political conventions, rallies, etc. but not organize one; sign petitions and nominating petitions, but not initiate or canvass for them; and petition a Member of Congress or local or State official.

The issue raised by the Hatch Act juxtaposes the right of employees to free speech on the one hand and the right of citizens to expect an impartial administration of the laws from Federal employees and the right of Federal employees to a work environment free from pressures regarding political involvement on the other hand.

Those are the two really important values that collide. And the question that is to be resolved is, how much political activity by Government employees can be allowed while still preserving the fair administration of Government policy and the full protection of Government employees against political pressure.

Under the present Hatch Act, all Federal employees may express political opinions, but may not actively engage in political campaigns.

In Metropolitan Washington and some other places similarly impacted with Federal employees, a partial exemption from the Hatch Act permits employees to participate fully in local political campaigns for nonparty candidates even in partisan campaigns.

This exemption covers about 11 percent of the Federal workers. The remainder can be active only in nonparty campaigns.

Under our system of government, the citizen has the right to petition his government and the government has an obligation to deal with that citizen impartially. The citizen can be reasonably certain of impartial dealings when he knows they are politically neutral. Neither will his case be harmed because his political affiliation is different from that of the bureaucrat with whom he must deal, or will it be helped because his affiliation is the same.

A public employee, just as a private citizen, should be guaranteed that the Government will not attempt to influence his political opinions.

Federal employees should not be made vulnerable to direct coercion to engage in political activities. The most effective way to prevent this coercion is to forbid the activities.

The question then is whether all political activity is equally damaging. If there is improper pressure on the Federal employee to take part in election activities, it would most likely come in connection with a campaign for Federal office where the outcome might make a difference to the employee's supervisor or to the agency for which he works.

Similarly, an employee's participation in a Federal campaign would be the most likely to make the employee vulnerable to charges of playing politics on the job. On the other hand, State and local political campaigns have relatively little significance for, or influence on the Federal bureaucracy, relatively, of course.

I do not think that a Federal employee's impartiality would be affected by his involvement in the State or local campaign on his own time, nor do I think there would be great likelihood of fellow employees or supervisors improperly influencing other employees to become involved in campaigns with little direct relevance to the Federal Government.

My bill would permit involvement in State and local politics. It would permit Federal employees to run for part-time State and local office and to campaign for others running for State and local office, whether full or part time.

My bill would considerably broaden the opportunities for political activity by Federal employees.

Although approximately three-quarters of all local elections are nonpartisan, most of the partisan elections are in the bigger cities where there are large numbers of Federal employees.

Under my bill, Federal employees would be able to work in campaigns for all local candidates and State ones, also. They would also be able to run for offices which are part time, as measured by tradition, typical duties, number, and frequency of official meetings. Thus, they would be eligible to run in 78 percent of the mayoral and 94 percent of the city council positions, well more than half of the county board positions, and even some State offices.

Federal employees are already permitted to express political opinions in the same way most citizens do.

My bill would permit more active political participation at levels of government closer to home.

I believe my bill is a balanced proposal to permit Federal employees to take part in much of the political life of this country without exposing them to political pressures that could jeopardize their jobs, working conditions or chances of promotion.

I believe we should experiment with this partial lifting of the Hatch Act protections in order to see the effect, before we proceed further.

I would like to cite a questionnaire that I sent out a little over a year ago to the people in my district, which is across the river in northern Virginia.

The question, which was worked out very carefully with professional polling people, asked :

The Hatch Act prohibits Federal civilian employees, including postal workers, from full participation in partisan politics in order to protect them from possible coercion by supervisors for political activities. Do you think the Hatch Act should or should not be amended to permit an increase in Federal employee participation in political activities such as working for candidates nominated by national political parties?

And those who thought the Hatch Act should be amended along the lines of your bill came to 33.5 percent. Those who thought the Hatch Act should not be changed at all, 59 percent; undecided, 7.4 percent. This is not a scientific poll, but there were some 20,000 respondents. Many of them were quite knowledgeable and experienced in Federal employment, the Hatch Act, and similar matters. That's the way that came out.

I do urge the committee to give serious consideration to the approach I'm offering, as a balance and a compromise, and even an experimental approach with modifying the Hatch Act in the direction of allowing Federal employees much, much larger participation in the political activities of the Nation.

Thank you, Mr. Chairman.

Mr. CLAY. Thank you, Mr. Fisher.

First of all, let me ask you this: How much credence do you put in the survey that you made in your district, and how much credibility do you think we should put in it?

Mr. FISHER. Well, I can't—because it's not a random sample, or even a very well structured sample—I can't give you statistical measures of reliability. But since it's nearly 2 to 1 against any change in the Hatch Act, I would think that the evidence is pretty clear that at least of 20,000 people in my district, there is a clear preference for leaving the Hatch Act alone.

They probably won't even go for as much change as I'm proposing.

Now, in addition to that, I consulted a large number of people personally in the labor movement, government and unions, experienced civil servants. I consulted in depth with two former chairmen of the Civil Service Commission, one a Republican, one a Democrat. And I consulted with the professional groups like the American Society for Public Administration, which had a special committee that worked on this for some period of time.

In short, I really went several extra miles to find out not only what the large numbers of people in my district thought, but what the people knowledgeable in civil service matters thought.

And, of those I consulted, the labor people, of course, wanted the kind of bill you are offering. But most of the others, almost unanimously, either wanted no change, or something in the middle, or along the line of my approach.

Mr. CLAY. Did you happen to watch the television production of Alex Haley's "Roots"?

Mr. FISHER. I saw some of it; yes.

Mr. CLAY. Would you think that if the slave owners had taken a similar survey and asked the slaves how many of them wanted to be free that they would have come up with the same kind of results?

Mr. FISHER. I'm inclined to refuse to answer the question on grounds that Federal civil servants are not slaves.

Mr. CLAY. Don't you think that this Congress has a responsibility—in spite of what some employees might think about their servitude, and denial of their first amendment rights—to extend those rights to every American citizen?

Mr. FISHER. Again, I refuse to go along that line. I don't think Federal employees are in any sense in servitude. I say that partly with tongue-in-cheek, but with all seriousness, looked at from a different angle.

Mr. CLAY. Let me ask you a question about the bill that you have proposed. Would these Federal employees who would be permitted to run for public office at the State and local level be in partisan elections or not?

Mr. FISHER. That would be in partisan elections.

Mr. CLAY. So you are saying that—let's take Chicago, for instance—and I think you mentioned here that they could run for offices which are part time. Is that correct?

Mr. FISHER. That is correct.

Mr. CLAY. Do you know anything about Chicago politics?

Mr. FISHER. I have not participated in Chicago politics. But like most people, I have read a good deal about it.

Mr. CLAY. Do you know that the Democratic committeemen in Chicago are part-time jobs, and they are the dispensers of patronage, and they actually run the system?

Now, under your bill, it would be perfectly all right for the Democratic ward committeeman in Chicago to run for public office and be in a position of giving out the kinds of patronage that is available in Chicago; and not just in Chicago but in St. Louis, Kansas City, and other cities across this country; under the provisions of your bill it would be perfectly all right for them to run for these jobs—which are the most powerful parts of the political machines.

With respect to the impartiality that you have just said was so important about our Federal employees—how would it look for a ward committeeman in Chicago to be a Federal employee?

Mr. FISHER. I do not think it would—I would not think it would get such a Federal employee who might run for such a position in Chicago crosswise of his Federal Government supervisor.

It could conceivably, but not at all likely, as compared to what would happen to him if he could run for or directly participate in Federal elections, in my judgment.

Mr. CLAY. I think it is very conceivable that a Federal employee could be a ward committeeman in Chicago, because they have the slates. If his cousin was on the slatemaking body, he just might propose that his cousin, the Federal employee, be slated as a ward committeeman. And in all probability he would be elected.

Mr. FISHER. I think that is conceivable, possible, and it is in the nature of any compromise, workable compromise, that there would be a few instances in which things would occur that would be reprehensible.

But I think the bulk of the cases of Federal employees running for or engaging in political activities for candidates at the State and local level would not involve them in difficulties or pressurization, discrimination, et cetera, with their Federal supervisors. And my bill does prohibit them from running for office in a party organization.

Mr. CLAY. Thank you, Mr. Harris.

Mr. HARRIS. Thank you very much.

I want to extend my welcome and my appreciation for my colleague coming before the committee. As usual, he has given an extremely thoughtful statement on the issue. And I know—since his district is so much like mine—I know it is a difficult issue to deal with.

When I looked at the first page of your statement, Congressman Fisher, and saw that you were able in one-third of the first page to put down what a Federal employee could do under the Hatch Act, I said, "At last I found it. A good, short one-third of a page statement of what a Federal employee can do under the Hatch Act."

But then, as I read it, I realized this does not pretend to list all the things that a Federal employee can do. These are examples of some of the things. Isn't that right, that there are other things that the Federal employee can do?

Mr. FISHER. Yes. I think these are the principal ones, or most of the principal ones.

Mr. HARRIS. Yes. Of course, the Federal employee actually can run for public office, and does in our area quite often.

Mr. FISHER. Yes.

Mr. HARRIS. That was not included here. It says, "Participate in nonpartisan elections."

Mr. FISHER. Yes, that is correct.

Mr. HARRIS. But, anyway, there are probably a number of other things that a Federal employee can do that you do not have here. But even in this list, I noticed difficulties. One of the problems when I look at the information the Civil Service Commission sends out, says, "This is what a Federal employee can do. And this is what a Federal employee can't do." And I said, "If I am a Federal employee and tried to look at those lists and tried to make sense out of those lists, I would have an awful time."

In your list, the No. 2 thing is, "Express opinions as private citizens, but not as political campaigners." And "Belong to political organizations, but not be officials of them." And if I am a Federal employee, Joe—if you could just help me on this—if I am a Federal employee and I am told I can express my opinion as a private citizen but not as active political campaigner, when do I stop being a private citizen and start being a campaigner when I express my opinion on one candidate or the other. When does this happen?

Mr. FISHER. For example, when you buttonhole a person approaching a poll to vote, and express your opinion decidedly and forcefully to him, you are then an active political campaigner. And I could cite as many instances that are fairly clear, as probably you could cite instances that are not so clear. I would say—

Mr. HARRIS. What if I am not at the poll. What if I just smile and say, "Excuse me, but could I tell you what a good guy Herb Harris is?"

Am I campaigning at that point?

Mr. FISHER. When Herb Harris smiles at a voter, it is an active political campaign. [Laughter.]

Mr. HARRIS. I hope so.

Mr. FISHER. I would like to say that I believe the Civil Service for some time has put out a little foldover, a very brief, simple statement to guide civil servants in what they may do.

Mr. HARRIS. That is where you get statements like this, that you can express your opinion as a private citizen but not as an active political campaigner. And for the life of me, I don't know how in the world a Federal employee understands the do's and don't's. I think you probably recognize the difficulties here, also.

Mr. FISHER. Sure I do. It is difficult, Herb. And this is one reason why I would like to take most elections and most campaigns out from under the restrictions of the Hatch Act.

And I believe taking the State and local campaigns, you know, completely out achieves that. And this covers nearly all of the elections. After all, there are only Presidential, Vice Presidential, 535 Members of Congress, those elections for which I would still retain the existing restrictions of the Hatch Act.

But I concede that you can't have everything you want in what I regard as a balanced and sensible compromise.

Mr. HARRIS. OK. I think that my colleague and I both recognize that the restrictions of the Hatch Act are confusing, and there are confusions created by the Hatch Act, and that they could be improved and corrected.

And my colleague feels perhaps as an experiment, as a first step, to apply it to the State and local elections and see how it works, before you consider applying it to the Federal elections. Is that fair? Is that a fair statement?

Mr. FISHER. Yes. And my memory of the Watergate period is very fresh. My memory of the Senator Joe McCarthy period is very fresh. And I think because those experiences still are fresh, and one of them hardly 2 years behind us, we do owe it not only to the Federal employees, but to all persons who have business with the bureaucracy, to take significant steps in the directions of opening up the political process, but be very cautious about opening it up at the Federal level, where we are involved with 537 campaigns only.

Mr. HARRIS. OK.

How would your bill apply to elections where there were State, local, and Federal candidates that were running together? Would it mean, for example, that if a Governor and Senator were running on the same ticket in a State, the Federal employee could support and actively campaign for the Governor's candidacy, but not for the Senator's candidacy? That would preclude them from running a joint campaign I guess.

Mr. FISHER. Yes, so far as the limited number of Federal employees that there might be involved in that campaign. Yes; this would have to be determined through rulings.

But I would think that the Federal employees would not be permitted to engage in politics for a campaign, you know, thoroughly, jointly presented, involving somebody running for Federal office.

Mr. HARRIS. I just happen to think, though, what we would get is that same list of can'ts and can's that the Federal employees get now,

and say, "This still applies to Federal elections, except with all these can't's; these don't apply any more to State and local elections, except when those things are done jointly with the Federal campaign."

Mr. FISHER. Yes. But if I could just—

Mr. CLAY. The gentleman's time has expired.

Mr. Taylor?

Mr. TAYLOR. Thank you, Mr. Chairman.

As the Federal employee becomes more involved in political life, do you think that this might affect his attitude and his effectiveness and his administration of the duties that he has as a Federal employee?

Mr. FISHER. I think if he becomes actively involved in campaigning for candidates to Federal office and gets wrapped up in it, it is likely that at least for some the performance of his official duties would be affected; yes.

Mr. TAYLOR. Congressman Fisher, on page 3 of your testimony you state that State and local political campaigns have relatively little significance on the influence of the Federal bureaucracy.

But isn't it true that the flow of Federal funds into State and local projects would certainly be an issue if a Federal employee were running against a non-Federal employee?

Mr. FISHER. Well, yes. It could be, of course. But I think in a relative sense there would be far less risk of that at the State and local level than in a direct Federal campaign. I don't rule it out entirely. But I think it is unlikely.

I come to this position from local politics for many years, local supervisor in a county, an elected official. And I have been through many campaigns at that level. And I just do not think that the Federal angle gets very much involved at all at that level.

Occasionally, yes. But rarely, and quite rarely. And never in my experience, even though the local government that I was elected to was right in the Washington region.

Mr. TAYLOR. Did the government that you worked in as a supervisor have a merit system?

Mr. FISHER. Yes.

Mr. TAYLOR. Were there provisions prohibiting political activity within the merit system in the political subdivision that you were employed by?

Mr. FISHER. Yes, I'm thinking—but I think it was analogous to my bill. It pertained to the local level. And they were local officials.

Mr. CLAY. Are you gentlemen going to make the vote on the floor?

Mr. FISHER. We would like to.

Mr. TAYLOR. Is that the first bell?

Mr. CLAY. That is the second bell.

Congressman, we certainly thank you.

The committee will take a 10-minute recess.

[Recess.]

Mr. CLAY. The hearing will come to order.

The next witness is Mr. Bertrand Harding, president of the National Civil Service League.

Good morning.

Mr. HARDING. Good morning.

Mr. CLAY. Without objection, your entire statement will be inserted in the record at this point.

[The statement follows:]

PREPARED STATEMENT OF BERTRAND M. HARDING, PRESIDENT, NATIONAL CIVIL SERVICE LEAGUE

Mr. Chairman and members of the subcommittee, I am Bertrand M. Harding, President of the National Civil Service League of Washington, D.C. On behalf of the League's Board of Directors, I want to thank you for soliciting our views as to H.R. 10 and successor bills which would end the Hatch Act's ban on participation in political management and political campaigns by federal employees. I speak today for the Board of Directors, as well as for myself.

Before commenting on H.R. 10, let me briefly say something about the League and about why it is especially suitable for its views to be represented here today. I will also say a bit about my own qualifications.

The National Civil Service League was founded in 1881 by reformers who wanted to replace the old "spoils" system with a public service based on merit. During the following two years, the League played a key role in drafting the Pendleton Act, and securing its passage. We have been working for the advancement and preservation of efficient, economical and merit-based public services at all levels of Government ever since.

Today, the League is a nonprofit, non-partisan corporation which provides training and assistance to governments which want to modernize their personnel systems. Our 1970 Model Public Personnel Administration Law, which includes some very advanced provisions relating to affirmative action and the strengthening of managerial control, has been widely influential. The League also attempts to educate the public as to key issues in public employment and as to the continuing need for hiring and promotion based on merit. On request, our Board of Directors, which includes three former Civil Service Commissioners, provides advice and counsel to the President, Congress and other officials on civil service matters; that of course is what we are doing here today.

Finally, through activities such as its Career Service Awards program honoring outstanding federal civil servants, the League attempts to build and sustain positive communications between the public and those who work for the public. Given widespread negative attitudes toward Government and "bureaucrats," this is not always an easy job.

As for myself, I was a career federal employee for 33 years before my retirement in 1973. I was Deputy Commissioner of the Internal Revenue Service from 1961 until 1966, Deputy Director of the Office of Economic Opportunity, 1966-69, and Associate Administrator of the Federal Aviation Administration from 1970 until 1973. I have been President of the League since January 1976.

I think I know something about the dynamics of the career public service as it relates to the political process, and about how many career workers feel on the questions before this Committee. At the same time, I speak today as the representative of a citizens' organization which strives to express, as best it can, the broad public interest in issues such as those before you. I will do my best to articulate that public interest, and I hope that my views will be useful to you.

Concerning H.R. 10, the National Civil Service League opposes it, as it has opposed similar bills proposed during the last several years. We believe that termination of the Hatch Act's ban on participation by federal employees in political management and campaigns would be a bad thing: bad for the employee, who would find his career more and more determined by political allegiance and activity, rather than by performance on the job; bad for the political leader, who would become increasingly unsure of career employees' reliability; and bad for the public, which has a crucial interest in the impartial delivery of services.

Passage of this bill at this time would be doubly unfortunate, for two principal reasons. First, we have had in the recent past an ominous example of how the merit system can be manipulated, and of how uncooperative career employees can be driven from their jobs—even with the Hatch Act intact. Second, for quite some time now we have had a climate in which much of the public, as well as politicians, have shown themselves to be suspicious of, and even hostile to "the bureaucrats." To open government employment up to even the appearance of politicization would, it seems to me, only make this particular bad situation worse.

I want to expand on some of these basic themes, but first let me say a few things about the history and character of the Hatch Act issue, as well as about the nature of American politics and government.

In its preamble, H.R. 10 is characterized as a bill "to restore to Federal civilian and Postal Service employees their right to participate voluntarily, as

private citizens, in the political processes of the Nation. . . ." The problem is formulated in terms of the curtailment of fundamental liberties. The implication is that a great wrong must be righted. Who could object to repeal when the problem is stated in such terms?

No one—if it were that simple. Granted that employee rights are limited by the Hatch Act, the question is: Are there other, greater, goods which must override? I think that there are.

A little historical perspective may be useful here. One favorite myth of recent vintage is that the idea of banning political activity dates primarily from the passage of the Hatch Act in 1939. In this version, the prohibition was the product of anti-FDR and anti-New Deal feelings in a conservative Congress particularly aroused by reports of political manipulation in the non-career WPA Program. There is truth to this, but not all of the truth. In 1801, President Thomas Jefferson issued a circular in which he said:

"The President of the United States has seen with dissatisfaction officers of the general government taking on various occasions active parts in the elections of public functionaries, whether of the general or state governments . . . the right of any officer to give his vote at elections as a qualified citizen is not meant to be restrained, nor, however given, shall it have any effect to his prejudice; but it is expected that he will not attempt to influence the votes of others, nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it."

If you know your American history, you know that this circular was ineffective. Yet it has significance in that it shows that the ideal of the politically neutral civil servant goes back to the Founding Fathers, and particularly to the one—Jefferson—who was most sensitive to the need to protect and promote individual rights. If anyone would have perceived in the placing of limits on political activity by government employees a danger to basic liberties, it would have been Jefferson. Yet the above is what he had to say on the subject.

An actual ban on career employee's participation in active politics came much later. First, the Pendleton Act of 1883 itself banned assessments on employees, and forbade the giving of contributions to other employees. Then in 1907, President Theodore Roosevelt—who was an early Vice President of the National Civil Service League—issued this Executive Order:

"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 political subjects, shall take no active part in political management or in political campaigns."

This order was quickly incorporated into the Civil Service Rules. It, and not the later Hatch Act, put politics off limits for career employees. The Hatch measure merely gave the existing prohibition standing in law, and extended it to unclassified employees.

In short, when we talk about the concept of curtailing political activity by Government workers we are talking about an idea that goes back to Jefferson and which was first given official standing early in this century by Theodore Roosevelt. We should also keep in mind that until very recently the Congress as well as the President saw fit to retain the Hatch Act's limitations, and that the Supreme Court has repeatedly held that there is ample justification for doing so.

There are also some eminently current and practical reasons for retaining the present ban on political management and campaigning. Our political system is a competitive, indeed an adversary, one in which groups compete for greater or lesser shares of political power and influence. In part, our interest-group system works because we have put limits on it, especially so far as the actual process of governance is concerned. One such limit has been creation of an impartial career civil service. Through this career service, we have ensured that those who come to office can expect to implement policies without the necessity of turning great numbers of employees out of their jobs. We have also given the public reason to expect regular and impartial delivery of services. And we have enabled ourselves to govern a tremendously complex economy and society effectively.

The career service, then, has a distinctive and crucial role to play, to which its impartiality and nonpartisanship are central. Any measure which threatens that impartiality—or even the credibility of the career service in relation to it—endangers our whole governmental system. More is involved in repeal of the Hatch Act than the individual rights of federal employees.

Now, this may seem an excessively subtle argument. But we are dealing with a relatively subtle problem. That is why I find the protections offered career workers by this bill inadequate. H.R. 10 does of course contain some extensive protections against certain kinds of blatant coercion. Yet H.R. 10 makes at least two assumptions that I cannot share: that a ready distinction can be made between "voluntary" and "involuntary" political activities by public employee; and that it is enough to establish severe penalties, for those who attempt to coerce career workers.

That would be enough, I suppose, if we were just dealing with old-fashioned patronage. Again, however, things aren't that simple. The Washington Star came closer to reality when it said:

"The fact is that direct pressure would not have to be used.

Ambitious, eager-beaver employees would see the handwriting on the wall and would volunteer their political services to their bosses, and other employees, seeing that their only chance for career advancement would depend on their political participation, would also rush into the fray."

In my opinion, this or something like it is about what would happen in short order without the Hatch Act's restrictions. That which is permitted would quickly become that which is required. To think otherwise and to act on it is to invite collapse of our whole merit system. At best, we would end up with an employment system in which every other employee who failed to get a promotion would claim political discrimination. At worst we could get within a fairly short time an out-and-out patronage system. More sophisticated, perhaps, but a patronage system nonetheless. It would be a system in which political loyalty would come to be expected of career civil servants by the incumbent President and his Party—and in which an incoming Chief Executive would be afflicted with an understandably intense itch to clear out those career workers who were politically identified with a predecessor regime.

There would be other ramifications as well. Grants must be made, contracts awarded, sites chosen for this or that program. Inevitably, individuals, governments and private institutions which lost out on such decisions would charge political discrimination based upon the public record of bureaucratic partisanship. Suspicion and hostility would intensify between public and government, between politician and career worker, between employees themselves.

Traditionally, only a very small percentage of people involve themselves directly in political campaigns. And, like it or not, many of these people expect to get something out of it—very often, a job. In our system, then, there is a long-standing connection between being active politically, and getting a public job. That's what the old spoils system was all about. In the interest of efficient government—an increasingly important consideration in an age of computers and specialization—we elected in 1883 to limit this politics-jobs connection. Now we propose to open the door to such an arrangement again, with regard to career jobs.

At the first election after the Hatch Act repeal, there would be the subtle pressures mentioned above; the second, there would be the expectation by people both within and without the career service, of jobs or promotion as reward for political activity; by the third or fourth election we would have something very much like that which existed before 1883—a pure spoils system.

Does all of this mean that I, or the National Civil Service League, oppose any and all change in the Hatch Act? The answer is No. We recognize that the Act undoubtedly needs clarification and simplification, and that enforcement has been spotty, and therefore unfair. All of that can and should be rectified.

On the positive side, the League is already on record as approving participation by public employees in local nonpartisan elections, in non-political community affairs and even in officeholding, provided that it is part time, nonpartisan and carries with it only nominal remuneration.

The fact is that there is much that public employees can and should do, short of full participation in partisan politics. Employees should also be effectively educated as to their rights; we applaud that section of your bill which addresses itself to that task.

However, repeal of the Hatch Act is not, in my view, what Federal employees want or what the American public wants, and I don't think it would be good for the country. The merit system has just gotten through a very bad time. Public opinion is less than friendly towards "bureaucrats." Let's not compound the situation by throwing the doors open to a spoils politics which would be far more sophisticated and pervasive than any we've had before.

Rather, this is a time to begin re-establishing a basis for public faith in Government. That involves reaffirming this Nation's need for, and commitment to, an impartial efficient and genuinely merit-based civil service. We of the National Civil Service League believe that passage of H.R. 10 would be counter-productive in this regard.

Thank you, Mr. Chairman and members of the subcommittee, for your time, and attention to our views.

STATEMENT OF BERTRAND M. HARDING, PRESIDENT, NATIONAL CIVIL SERVICE LEAGUE, ACCOMPANIED BY EDWARD MCCARTHY, RESEARCH DIRECTOR

Mr. HARDING. All right.

I would like to just make a few very brief remarks and let the statement stand in the record.

I have with me Mr. Edward McCarthy, who is the research director of the league, if you would like to know about the activities of the league, I have only been an active member for a year. So I am certainly not the world's greatest authority. I speak as the president of the league and as the representative of the league's board of directors. Most particularly, I speak as a long-time career servant, some 30 years in the Federal bureaucracy, most recently with the Federal Aviation Administration as an Associate Administrator for Manpower, prior to that the Acting and Deputy Director of the Office of Economic Opportunity, and prior to that for 5 years as the Deputy Commissioner for Internal Revenue.

The league and I feel strongly that there are improvements that could be made in the Hatch Act, and most particularly in the administration of the Hatch Act. On the other hand, we feel that the—that H.R. 10 and the repeal of the Hatch Act would be adverse to the public service.

I feel this for very personal reasons in that, during my career in the Federal service, I encountered, even in the protected environment of the Internal Revenue Service, instances in which the political affiliation of career people, particularly at the upper career levels—became a matter of great interest to the political managers, be they Democrats or Republicans. And, therefore, any activity on the part of career people to identify themselves with either one of the major political parties would, in my view, bring forth allegations of political bias on the part of a new political administration, on the part of civilians, on the part of outside agencies, and so forth.

Our position is not inflexible. We do say that changes would not be desirable. But, on balance, our advice to you, Mr. Chairman, and to the Congress is not to modify to any great extent the protection now offered to career service by the Hatch Act.

Mr. CLAY. Thank you.

Mr. McCarthy, did you have a statement?

Mr. MCCARTHY. No; I don't, sir.

Mr. CLAY. In your prepared statement, you speak of how the desire to regulate and restrict political activity among Federal employees goes way back beyond 1939. But the fact is that in 1939 it was the Hatch Act that was enacted.

And for all the reasons you have given—you have given us a number of reasons as to why the act was enacted in the first place. But don't

you seem to say that the times have changed sufficiently since the enactment of the act in 1939?

Mr. HARDING. I wish that times had changed that substantially, Mr. Chairman. I left the service 3 years ago—the Federal service, that is. And I cannot testify to what has happened in those intervening years. But it was certainly my judgment at the time that I left that there was still intense interest on the part of the political manager, particularly in the White House, as to the political affiliations of top career bureaucrats throughout the Federal service.

And those views and opinions were made known to administrators of agencies, Secretaries, et cetera, with suggestions that those who had been identified as of the other political party be in some way moved, retired, transferred, or taken out of sensitive positions because of political affiliations.

So, no, sir, I do not believe that much—much as I would like to believe—that either political party has lost its intense interest in the political loyalty or disloyalty, as alleged, of career employees.

Mr. CLAY. But you would agree that certain factors exist today to protect the Federal employee that did not exist in 1939?

You would agree that the merit system has become institutionalized, would you not, and that there—

Mr. HARDING. It has become more institutionalized. If you look at the Nixon years, I think you will see that the apex of efforts to undermine that system—and very successful efforts, in a number of agencies.

Mr. CLAY. That may go on for future generations on the part of unscrupulous Presidents. But the fact is that the Hatch Act, that you are depending on today, does not cover people like Nixon, or any President or his operatives in the White House.

So how does that enter into the question here? It doesn't restrict the political activities of the White House staff or the President.

Mr. HARDING. No, sir.

Mr. CLAY. So how does that argument enter into the picture?

We are talking about extending the rights of free speech and assembly to 2.8 million people who are now denied that right because of the act.

Mr. HARDING. The Hatch Act certainly does not prohibit political activity on the part of the White House staff or any other political appointee. It is an imperfect device for the protection of the career service, in my view, against interference on a political basis with their activities.

Mr. CLAY. But you have just admitted that, apparently, it is not working. You say that Nixon did almost anything he wanted to do in terms of coercion and pushing the system around.

Mr. HARDING. I characterized it as an imperfect tool, and I believe it to be imperfect, but better than none at all.

Mr. CLAY. But those are not the options. You see, the bill that we are talking about today, H.R. 10, vastly improves the protections for Federal employees, much greater than they presently exist under the Hatch Act.

Mr. HARDING. Those protections are for the overt instances in which employees are mistreated by political people for political purposes. It is the subtle—the subtleness, Mr. Chairman, that bothers me, that will not serve as a basis for an appeal to the appellate body.

They are the cases of the regional commissioners who are transferred to undesirable places. They are the top-level assistants in Washington who all of a sudden find themselves being sent to lonely spots in Arizona with no adverse action, no basis for an appeal, and no real opportunity for those employees to demonstrate that these actions were taken for political purposes.

Mr. CLAY. If you have such information, I would contend that those are isolated cases.

Are you saying to me that the vast majority of Federal employees in positions of responsibility are not the type of people who would obey the law of the land, and if we passed H.R. 10 that the vast majority of them would just completely ignore the law?

Mr. HARDING. Are you talking about career people or political people?

Mr. CLAY. I am talking about career people.

Mr. HARDING. I'm not concerned about career people violating H.R. 10 or the Hatch Act. My concern is directed toward the imposition of political decisionmaking on the top career service by political people.

Mr. CLAY. Can you cite one case, just one case in the last 40 years, where a political figure has transferred a career employee somewhere because he refused to go along with his politics?

Mr. HARDING. Well, I can give you a case that I would like to cite, Mr. Chairman, well within the last 40 years, that happens to be good because it reflects both on the Democratic Party and the Republican Party. And that is a regional commissioner in the Internal Revenue Service who, when the Democrats came in under Mr. Kennedy, was labeled as a holdover Republican—he happened to be the regional commissioner in Boston, which made the pie sweeter.

When the Democrats came in, the then-Commissioner, Mr. Caplin, was directed to move him for political reasons. Mr. Caplin successfully combated that effort, and Mr. Bacon was retained for the entire period of the Democratic administration.

The first person to be dismissed by the then-incoming Republican Party was Mr. Bacon, because he was a holdover Democrat. This was a career employee of the Internal Revenue Service.

Mr. CLAY. Are you saying that this type of activity is so pervasive and so widespread that we cannot extend the first amendment rights to 2.8 million people in the Federal Government?

Mr. HARDING. Mr. Chairman, this, as in most of the terrible decisions that you in the Congress have to make—represents a tradeoff. I, as much as you, would like to see all of those people have their full first amendment rights. But I think there is a higher priority: The protection of the upper level of the career service from this sort of political activity, either by the incumbent party or by newly incumbent party. This is a more important value to be protected than is the first amendment rights that you would extend under your bill.

Mr. CLAY. Now I am getting a bit different argument than I have heard in some 30 or 40 hearings that we have had in the past 2 years.

As I understood the people who were expressing reservations and fears about coercion, it was not from elected public officials but it was from those same upper career level people that you are now saying we have to protect.

Most of the witnesses that come in here—say a supervisor. What happens if a supervisor tells a guy, “You have to make a contribution or you have to support this candidate”?

Very few people have come before us and complained about the possibility of elected officials. They are complaining about the same people, these upper career level people that you are now saying we ought to protect in some way. Those are the culprits as the witnesses have described them.

Mr. HARDING. It depends upon where you sit, Mr. Chairman. Where I sat, I saw more of the problem that I am talking about than I did of the problem you are talking about.

I don't remember a case in all of my years in the service in which there was serious question about a career person “putting the arm” on a lower level employee for political contributions.

I am sure it occurred. And I am sure it is a potential evil in the system.

But it just does not happen to be the one that strikes me personally as the most pervasive and the most serious.

Mr. CLAY. I think we are saying the same thing. I am saying that the vast majority of Federal employees, including the upper career level people, are law abiding, and that they will be the ones that will make this procedure work. They were the ones that exposed Nixon and Malek. If it were not for them, we never would have known of it.

So what I am saying is that I don't think there is enough indication for the kinds of fears that people have expressed about someone tampering with the system if we extend these rights to Federal employees.

Mr. HARDING. I agree with you if we are talking about illegal action on the part of career people. And I am not primarily concerned about that.

I have great confidence in the career service of this country.

Mr. CLAY. I do, too.

Mr. HARDING. It is the imposition of attitudes and requests from outside the career service that I would like to not see happen. Or at least to any greater extent than it now is.

Mr. CLAY. Mr. Wilson?

Mr. WILSON. How many members are there in your league?

Mr. HARDING. About 1,000.

Mr. WILSON. Are they principally based in Washington?

Mr. HARDING. They are spread throughout the country. We have both individual members and corporate members.

Mr. WILSON. Are they usually upper grade members of the civil service?

Mr. HARDING. Very few members of the civil service as such. It has been historically a citizen's organization. And, for example, I was not eligible to be on the board of directors until after I retired from the service.

We don't have any active career people on the board.

Mr. WILSON. Are most of them former civil service employees?

Mr. HARDING. No, sir. There are several on the board now. Three former chairmen of the Civil Service Commission.

Mr. WILSON. What generally is the political philosophy of the group? Is it a conservative group, a liberal group, or what? Or do they have a philosophy?

Mr. HARDING. I would say it is a good cross-section from liberal to conservative. And this is an issue which historically has been shared by both liberal and conservative people in terms of good Government and protecting the merit system.

Mr. WILSON. Actually I think that what you have told us here so far is very strong arguments in favor of the legislation.

In the first place, as Mr. Clay brought out, the enforcement procedures against political pressure that are in the bill are considerably stronger than what is in the present Hatch Act.

It seems to me that this is what the people are interested in, in a good, strong civil service.

No one is going to go back to 1936, 1938. You have a more sophisticated situation in Government now than there was at that time. The public is watching Government very closely these days and that would prevent the type of thing you make reference to from ever happening. And I think we all know that.

Mr. HARDING. Well, sir, I don't think it is a Republican or a Democratic problem. It is a function, in my view, of the overemphasis on the part of political people on what they call loyalty, what they call responsiveness, and they, both Republicans and Democrats, have a history of wanting to replace career people that they feel are not of their own political persuasion.

Mr. WILSON. You can only do that in exempt positions, Mr. Harding. You can't fool around with the other people.

If you can give us any cases, specific cases now concerning the unnecessary transfer of people because of politics, I would like to hear it. As you know there are any number of reasons why a person is transferred from what they might consider an ideal location to one less ideal to him. As an example I don't know that Mr. Udall would appreciate your comment about Arizona.

Mr. HARDING. Very arid part of Arizona.

[Laughter.]

Mr. WILSON. Out on the reservation or somewhere like that.

[Laughter.]

Mr. WILSON. As a matter of fact, we have had no evidence or no testimony to really convince us that the fears that you people are imagining might happen. All you can do is go back to the old spoil system in the 1880's through the beginning of the Roosevelt administration to support your concerns.

Mr. HARDING. Mr. Wilson, I am not—I was not operative during that period of time. I am talking in a very recent framework. And I have been in positions where I interfaced very closely with the political overlay of the career service. And I assure you that one of the major interests that the political people had was—is that guy who is supposed to be a career servant, is he really a Democrat or is he a Republican?

If that man has just finished running for some position, then the administrator, the career administrator is going to have a great deal of difficulty in saying he is neither Republican or Democrat, he is an impartial career servant who is trying to do his best for whichever party is in power.

It takes away the effective tool that the top level career people have in trying to protect a continuing merit system in the Federal Service.

Mr. WILSON. I think we would all be very naive if we ever thought that the people in the Federal service are not politically motivated and interested in politics or that they don't participate in one party or another. They may have to do it through a spouse.

But what we would like to do is give them an opportunity to be honest about it and at the same time have good safeguards and good enforcement so that nothing can be done to bother them or the type of work they are doing.

Mr. HARDING. If I really believed that the safeguards would avoid political retribution against people who were identified in either major party in the career service, then I would agree with you.

I believe that the influences are too subtle and the strategies are too well designed that those of us in the career service could protect those who are publicly identified as Republican or Democrats because they were running for public office or sponsoring one party or the other.

Mr. WILSON. Well, I think that the witnesses who have testified as to what they think might happen are wrong. However, we know what happened under the Hatch Act. And it sure as heck has not been perfect. It has been abused.

The Civil Service Commission has not been noted for doing a good job of enforcement. That is why we want to change the law and create a new enforcement agency that will meet that responsibility.

I think they ought to be given a chance to try it and see if the people have changed enough to accept more freedom.

That is all I have, Mr. Chairman.

Mr. CLAY. Thank you, Mr. Wilson. And thank you, and we appreciate your testimony.

Mr. HARDING. Thank you, Mr. Chairman.

Mr. CLAY. Our next witness is Mr. Walter John. You may proceed as you wish.

TESTIMONY OF WALTER W. JOHN, EXECUTIVE DIRECTOR, ORGANIZATION OF PROFESSIONAL EMPLOYEES OF THE U.S. DEPARTMENT OF AGRICULTURE

Mr. JOHN. Mr. Chairman and members of the subcommittee, I am the executive director for the Organization of Professional Employees of the U.S. Department of Agriculture, commonly known and referred to as OPEDA. I appreciate the opportunity to present this statement in behalf of OPEDA.

Our organization is opposed to any major changes in the Hatch Act which would appreciably lessen its restrictions on political activities of professional classified employees without provisions for strengthening their protection.

We see no justification for amending the Hatch Act at this time. It has effectively protected the Nation's millions of civil servants for nearly 40 years. It provided a protective shield over them during the conniving by the White House in its attempt to politicize the bureaucracy during the Watergate period, and it has been a safeguard against involuntary involvement of career classified employees in political campaigns throughout its history.

The membership of OPEDA supported passage of the Hatch Act in 1939, testified strongly for it before the Political Activity Commission in 1969, and opposed changes in it as recommended in H.R. 3000 in 1975.

We have consistently favored and actively supported each strengthening of the Federal merit system. We consider it to be a noble concept of Government service, of great value both for the citizens of this country and for its Federal employees. Our members are strongly opposed to enactment of any legislation which would endanger the proper functioning of the system.

Some statements in support of H.R. 10 and its Senate counterpart indicate that these revisions of the Hatch Act would give Federal employees "a greater measure of political freedom," and indicate also that we employees may be denied some of our birthrights under the present law.

Let me assure you that some of us who have completed our Government careers never felt any loss of our political birthrights or any denial of political freedom under the Hatch Act. We felt secure against political pressure under the Hatch Act umbrella, and I am certain that the large majority of present employees have the same feeling.

Professional employees are grateful for the protection afforded by the Hatch Act, and they are not unmindful of their political responsibilities to our Nation. They do not shirk these responsibilities. Career employees are proud to vote and to support the candidates of their choice. What they don't want is being told by a supervisor how to vote or whom to support.

We fear the insidious tactics which some supervisors may use if the so-called "greater political freedom" is granted. There are many subtleties of political pressure which can be used in governmental offices. They can include undesirable work assignments, failure to promote, lower efficiency ratings, and a wide range of other techniques of disfavor.

Efforts to locate and correct these subtleties are extremely difficult. Some charges of political coercion may require years of investigation, hearings and appeals. In the meantime, the affected career employees are held back in their jobs.

The title of H.R.10 and its first proposed amendment of the Hatch Act would seem to open the door to politicization of classified employees. We believe that the proposed measure would subject Federal employees to more political coercion than now exists. Although the proposal contains provisions for penalties against Federal officials who engage in this practice, we regard these provisions as unenforceable.

We are not saying that there should be no changes in the Hatch Act. Some refinements may be needed, but they should be aimed at strengthening, not weakening it. You hear Congressman Fisher say that the Hatch Act should be limited to national elections. We would be in agreement with that.

The Civil Service Commission spends considerable time investigating violations in State and local elections. If they could devote all of their investigative time to Federal elections, perhaps we would have more effective enforcement.

The consensus of OPEDA is that the Civil Service Commission is the proper agency to administer the Hatch Act. But we also believe that the leadership of the Commission must be reconstituted if it is to give adequate attention to the merit system and to the needs of Federal employees. We recommend that the employees be permitted to choose one or more of the Commissioners.

Mr. Chairman, our Constitution and the Congress established an excellent political system to provide the structure and the leadership for our Republic. More recently, the Congress fashioned the splendid merit system as a guardian of the rapidly growing number of classified employees.

These two systems have worked exceedingly well together. Both have the same major overall objectives—to make available to all our citizens, the rights, services, and protection of a democracy. But each also has its own specific purposes, needs, and methods.

When we try to apply the methods of either of these systems to the other, there is a real danger of lessening the effectiveness of both.

Thank you, Mr. Chairman, for the privilege of presenting this statement before your subcommittee.

Mr. CLAY. Thank you.

How many people are in your organization?

Mr. JOHN. About 6,500, sir.

Mr. CLAY. And you were a Federal employee?

Mr. JOHN. Yes, sir, for about 40 years.

Mr. CLAY. Were you ever a supervisor?

Mr. JOHN. Yes, sir.

Mr. CLAY. Did you ever coerce or intimidate anybody under your supervision?

Mr. JOHN. No, sir.

Mr. CLAY. Do you feel that your standard of morality is unique among Federal supervisors?

Mr. JOHN. No, I don't.

I think this has created an atmosphere among employees that they feel secure and protected by it. That is why I am hesitating to suggest a change.

Mr. CLAY. They feel secure and protected, I would think, because they feel that those who are in positions above them are law abiding, and the law says that you will not do this; is that correct?

Mr. JOHN. Well, it has become a custom among classified employees, and it is because they have had the Hatch Act.

Mr. CLAY. Do you think that H.R. 10 is mandating that people meddle with political activities?

Mr. JOHN. No. But I think it opens the door a little bit more to it, to a little more politicization.

Mr. CLAY. Opens what door?

Mr. JOHN. It encourages greater political activities on the part of classified employees.

Mr. CLAY. What would be permissible if H.R. 10 passed that is not permissible today?

Mr. JOHN. I agree that there are no specifics in it. I think it would create the atmosphere that there is greater freedom and they could take more chances in using political coercion.

Mr. CLAY. Well, let's talk about this untouchable Hatch Act for a second.

What does it actually protect the Federal employees against?

Mr. JOHN. Well, against having someone insist that he vote for a certain candidate or against making him contribute to political campaigns.

Mr. CLAY. And you think the Hatch Act protects an employee against that even if an unscrupulous supervisor wanted to do it?

Mr. JOHN. I have seen some do it, Mr. Chairman.

Mr. CLAY. And what happens?

Mr. JOHN. They got by with it in some cases.

Mr. CLAY. Then the Hatch Act didn't affect it.

Mr. JOHN. But those of us who didn't want to go along with it didn't feel we had to go along with it.

Mr. CLAY. But the Hatch Act did not protect those persons?

Mr. JOHN. Because the Hatch Act cannot be enforced completely as we would like to see it. It cannot be. There is not that much manpower to do it.

Mr. CLAY. Let me ask you another question, or let me inform you that in December the former subcommittee I chaired had hearings, and two people from the Agriculture Department testified before the subcommittee that their photographs were used in a political brochure that was put out by a staff member at the White House indicating that not only them, but 284 other career servants were in some way endorsing Ford's reelection.

How did the Hatch Act protect those people? And there is absolutely nothing we can do to the White House staff person, because he is not covered by the Hatch Act.

Mr. JOHN. Because the one responsible for it was not under the Hatch Act. He was above the level of the classified employees.

Mr. CLAY. That is what I am saying, that everybody comes before this committee talking about how great the Hatch Act is. But when you get right down to it, the Hatch Act is nothing. The thing that is so derogatory about it, is that it denies 2.8 million people the right to actively participate in the political process.

Now you say in your statement that you never felt that you were denied your birthrights or anything else.

Mr. JOHN. That is right.

Mr. CLAY. But in effect you were. You see, originally this act was put on the books to protect Federal employees from elected officials.

Now 40 years later, we find that the elected officials are using the act to protect them from the employees. And you can't tell me that you didn't at some point feel you were denied your basic rights when you wanted to lobby for or campaign for or against a particular candidate in office who represented your basic interest. You can't tell me that Federal employees who watch their representatives stand here in this Congress day after day and vote against their best interests, don't want to get out and replace that official with somebody who would represent his basic interest.

And if he can't do it, he ought to feel like a second-class citizen.

Mr. JOHN. I never felt second-class, and I never felt denied any privilege of that sort, because I just felt that many—there were plenty

of people who could do that job of the campaigning and all without the Federal employees having to participate in it in a public way.

Certainly, we encouraged everybody to vote. And we got out and campaigned in some local elections that were permitted by the Commission.

Mr. CLAY. Thank you.

Mr. Wilson?

Mr. WILSON. Thank you, Mr. Chairman.

Mr. John, the Organization of Professional Employees, are those all supervisory employees?

Mr. JOHN. Not all of them. They are all professional.

Mr. WILSON. What do you mean by "professional?"

Mr. JOHN. We have a definition of it in our constitution. I might just take a minute to read it. It is defined as "a person possessing technical skills as a result of formal education, training, and other experience, and who is assigned a job that requires consistently high quality individual judgment in the use of these skills."

And that can mean anyone from a grade 4 or 5 secretary to a grade 18 administrator.

Mr. WILSON. I guess most of them are upper grades, aren't they?

Mr. JOHN. More in the upper grades. But we have some in the lower grades, yes.

Mr. WILSON. It seems that the great fear of changing the Hatch Act comes from the professional or the upper grade Federal employees. While the great demand for change and support for H.R. 10 comes from the lower grades.

Now, what is there that the upper grades enjoy or what is it about H.R. 10 that causes them to oppose the legislation?

Mr. JOHN. I hesitate to compare the two or contrast them, either one. I can't answer why that is. But professional people are interested in the job that they are doing. It is their career. They have done it for 20 years or more, or 15 or 10 years. And they are interested in doing that job and serving the public in the best possible way that they can.

And they don't feel that they need to be dealing in politics to get that job done.

And they don't feel that they want anybody to tell them how to vote or how to spend their money or whatever.

Mr. WILSON. Hasn't there been a practice among some of the upper grade employees to change their registration when a new administration of a different party comes in?

Mr. JOHN. There may be a few. I certainly never changed mine. And I voted the way I wanted to vote every time.

I didn't see much change.

Mr. WILSON. Everybody can vote the way they want. And I don't understand this fear that you people have, unless it is just that you fear that someone will suggest how you should vote. I don't know that they would. But I would assume the supervisors are all dedicated people like you and that they have the same interests and integrity.

Mr. JOHN. I would say that most of them are very dedicated. I won't compare them with me. But I would say most of them are very dedicated and will do a great job. But we think there is a real danger of more and more political influence filtering through the classified system, if there is an encouragement to do more political activity.

Mr. WILSON. OK. I understand.

Mr. CLAY. Mr. Taylor?

Mr. TAYLOR. Thank you, Mr. Chairman.

Mr. John, in your judgment how do you think the public would perceive a change that might happen, if a civil service employee is dealing with the public and a judgment is made as to some claim or some matter they might put before that agency, if they got an adverse decision based on the political interests of the employee, do you think the public might perceive this, that there was a politician involved in the decision that was made?

Mr. JOHN. I would be afraid of that, yes, sir.

Mr. TAYLOR. I believe that is all. Thank you, Mr. Chairman.

Mr. CLAY. Thank you.

Mr. John, in your statement you say that our organization is opposed to any major change in the Hatch Act?

Mr. JOHN. Yes.

Mr. CLAY. How did you establish that position? Did you have a meeting, a vote, or a policy, or what?

Mr. JOHN. We had a meeting 2 weeks ago, Mr. Chairman, of our national council, of 20 members. And they are in close touch through chapters with members in the States. We have members in every State and every agency of the department. And they are in touch with them and know how they feel. And they voted unanimously at the council meeting for this particular approach. Also our board of directors and the others who are leading the organization here in the Department of Agriculture. And I would estimate that if you took a vote of all of our members, Mr. Chairman, it would be somewhere between 8 and 9, 8 to 2 or 9 to 1 against changing the Hatch Act.

Mr. CLAY. On page 1 you say, and I quote, "We see no justification for amending the Hatch Act at this time." But on page 3, and I quote, you say, "We are not saying that there should not be changes in the Hatch Act." What do you mean?

Mr. JOHN. I am saying that some time there might need to be changes. At this time I see no reason for a change in the Hatch Act. If there are changes and if they want to make this change that I mentioned, we would not be opposed to it. But we don't, we don't think that there needs to be a change in the terms of what is proposed in H.R. 10.

Mr. CLAY. Thank you.

Mr. JOHN. Thank you.

Mr. CLAY. Thank you for your testimony.

Our next witness is Mr. John Bolton.

Your prepared statement will be made a part of the record at this point.

[The statement follows:]

STATEMENT OF JOHN R. BOLTON, ATTORNEY AT LAW

Mr. Chairman and Members of the Subcommittee, I wish to thank you for the opportunity to testify on H.R. 10, a bill that would substantially repeal the statutory restrictions on political activity by Federal employees known as the Hatch Act. The Act has been the subject of considerable controversy ever since its enactment, controversy centering largely on its alleged deprivation of the political freedom of Federal workers. While those familiar with the continuing debate over the Hatch Act know of its fundamentally partisan nature, and the likelihood of

an ultimately partisan outcome, the merits of the dispute nonetheless warrant close attention.

Several reasons have been advanced for the Hatch Act—the prevention of corruption and the maintenance of the professionalism of the civil service against the dangers of politicization are two of the most noteworthy. These are important considerations. Were we not dealing with restrictions on political activity, they might well be dispositive. But standing alone, they do not seem sufficient to merit the continued existence of the Hatch Act as presently written. In fact, however, there are far weightier reasons that support the Act and justify opposition to H.R. 10 or similar proposals.

Properly viewed, the Hatch Act provides crucial protection for civil liberties. Two groups are the fundamental beneficiaries. The first group is composed of Federal employees. Although civil servants are often portrayed as victims of the Act, quite the opposite is the case. Many of them fully appreciate the importance of the protection the Act affords them. The second group is often ignored when the Hatch Act is considered, and yet that group is comprised of all the rest of American citizens. This inchoate agglomeration of individuals is unrepresented here because they are not organized to protect or adamant on behalf of, their civil liberties.

Federal employees have a core First Amendment interest in the freedom not to engage in political activity if they so choose. That freedom is put in serious jeopardy if they are not free to refuse with complete impunity to be partisan. If it sounds paradoxical to argue that some freedom is enhanced by restricting other kinds of freedom, it is because we have failed to recognize the particular injustice of the coercion of one group of Federal workers by another. Political coercion is always obnoxious, but it is all the more so when the power underlying enforced political activity by civil servants stems from the grants of power we have given the government. In short, the ability to coerce that would accrue to some were the Hatch Act gutted is governmental power. The Hatch Act is, in effect, not a regulation of Federal employees but a regulation of the government itself.

I stress these concerns because governmental power ought not under any circumstances be used to advance private ends for any reason, least of all partisan reasons. Yet that is precisely the result that would obtain were the full range of political activity to be allowed to Federal employees. Such a result would run directly contrary to what the Supreme Court has called "the judgment of history," and it is not avoided merely by retaining a prohibition against coercion. Such a prohibition is insufficient because it places the burden of invoking it on the employee, that is, on just the person most likely to be fearful of the consequences of dissent. That burden is too heavy to bear. It is not enough for the civil servant to be able to say "I prefer not to engage in political activity." Only the ability to say "I may not do so" is full protection.

Moreover, the remedy provided by H.R. 10 for alleged coercion demonstrates this insufficiency. A career may well be left in ruins whether or not the proposed Board on Political Activities of Federal Employees finds that a violation has occurred. There need never be an explicit finding of coercion for the damage to be done. And to require someone to come forward with a complaint when he or she would be subject to the tacit sanctions often applied to the dissidents is simply too much to ask of the average, or even a courageous, person. The person most in danger is, in effect, required to assume the role of prosecutor, a far more defiant posture than most people ever assume. Far more likely is that there will be many acts of quiet submission. And every time such acts occur, freedom will be correspondingly diminished.

The second category of the Hatch Act's beneficiaries, the general public, is, in fact, even more defenseless than the Federal employee. The Board on Political Activities is far more distant from the citizen at large than from civil servants. The "chilling effect" of a politicized bureaucracy on the political activities of non-Federal employees is potentially even greater than on civil servants. Obviously, the influence of the Federal government is both massive and pervasive. Many people, not the least of whom is our new President, are concerned about the impact of the government on the everyday lives of all citizens. Yet the prospect of politically active Federal employees raises dangers far more grave than those embodied in the normal operation of the government.

It is no accident that evidence of widespread political coercion of citizens by the government was first found in the Works Progress Administration during the

New Deal. That was an agency that brought many average citizens into much closer contact with the Federal establishment than ever before in our history. The more directly the government touches our lives, the more likely it is that citizens will be made to feel the pressures of an unabashedly political government. Given that the size of the Federal government today would give pause even to ardent New Dealers, those pressures are even more important and dangerous now than when the Hatch Act was first passed.

As was the case with civil servants, the power brought to bear against the general citizenry by partisan Federal workers will be governmental power, in fact if not in name. In short, power granted by the people to the government will be turned back against them if the Hatch Act is effectively repealed. This is surely an astounding and disturbing turn of events. Rest assured that pressures will exist even in spite of the proposed 5 U.S.C. § 7323, which purports to prohibit the use of official authority or influence to affect the outcome of an election. A politically active employee need not be so crass and unsophisticated as to violate that section in order to exert political influence. As all of you understand, political influence can be subtly exerted, and no statute need be transgressed to "send a message."

The limited exception from H.R. 10 applicable to certain employees of the Internal Revenue Service, the Department of Justice and the Central Intelligence Agency is not sufficient to avoid the undesirable consequences just described. First the exception is itself quite narrow as the proposed language easily demonstrates. (I note also that proposed 5 U.S.C. § 7324(b)(3) contains a legislative veto provision that is itself unconstitutional.) While the three agencies singled out clearly have immense power, they are not readily distinguishable from other agencies. The power of an I.R.S. agent may pale before that of a local agent of the Department of Agriculture. A United States Attorney may be insignificant when compared to an official of the Department of Health, Education and Welfare. A Federal labor-dispute mediator may have far more influence than the neighborhood C.I.A. employee.

The ancient Romans had a phrase to describe this fear—"quis custodiet ipsos custodes," or "who guards the guardians?" Who indeed when they are running for elective office?

In short, the best defense of the Hatch Act is a civil-libertarian defense. The protection of Federal employees and the public at large is infused with First Amendment considerations, considerations that ought not be lightly disregarded. H.R. 10, as presently drafted, is shot through with insensitivity to the right of citizens to be let alone, to free from partisan duress. Should it be enacted, it will result in a diminution, not an increase, in political liberty. That alone is a sufficient and compelling reason to oppose it.

[The article submitted by Mr. Bolton follows:]

THE HATCH ACT

A Civil Libertarian Defense

John R. Bolton

Introduction

The Hatch Act was originally passed in 1939.¹ It has been the subject of three major challenges before the Supreme Court² and almost continuous congressional debate since its enactment.³ Now the Congress is considering legislation that would effectively eliminate almost all restrictions on the participation of federal employees in partisan political activity.⁴

The heart of the act is section 9(a),⁵ which prohibits employees of executive agencies from using their "official authority or influence"

¹ The provisions of the Hatch Act, 53 Stat. 1147, now codified at 5 U.S.C., sections 7321-27, originally applied only to federal employees. In 1940, coverage of the act was extended to certain state and local officials as well, 54 Stat. 767, 5 U.S.C., sections 1501-08. Here only the restraints on federal employees will be considered, although much of what is said would clearly apply to governmental employees below the federal level.

² *United Public Workers v. Mitchell*, 330 U.S. 75 (1947); *Oklahoma v. Civil Service Comm'n*, 330 U.S. 127 (1947); *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548 (1972); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), a companion case to *Letter Carriers*, upheld against constitutional challenge a provision of the state of Oklahoma's "little Hatch Act."

³ The most recent revision, part of the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263, 2 U.S.C., sections 431 *et seq.*, eliminated certain federally imposed restrictions applicable to state and local employees.

⁴ H.R. 8617, 94th Congress, 1st session (1975), passed the House of Representatives by a vote of 288 to 119, *Congressional Record*, vol. 121 (daily ed., October 21, 1975), p. H 10162. Although public attention is once again focused on the legislative branch, considerable attention is paid herein to Supreme Court opinions, not alone for constitutional theory, but because in those opinions the arguments in the Hatch Act debate have been the most persuasive, the most sophisticated, and the least partisan.

⁵ 5 U.S.C., section 7324(a).

to interfere with or affect the results of an election, or from taking "an active part in political management or in political campaigns." Federal employees are also barred from coercing the political action of others.⁶ Government employees are permitted to express their opinions on political subjects and candidates, and they may engage in nonpartisan political activity.⁷

Much of the congressional debate over the Hatch Act since it was first proposed has been substantially motivated by overtly political considerations. Obscured by the often shrill partisanship of the legislative debate, however, are important issues of democratic theory and individual civil liberties. The central question today, as in 1939, is whether justifiable reasons exist for treating federal employees differently from other citizens with regard to freedom to engage in political activity. The answer to that question has important implications not only for the government workers affected, but for the public at large as well.

Several arguments have been advanced in defense of the Hatch Act, and those employed the most often have usually been the least satisfactory. Intellectually, the act's opponents have dominated the continuing debate, and yet the statute's central provisions have remained largely unaffected. Essentially four arguments have been advanced in defense of the act, arguments which are often overlapping, indistinct, and confused.

The desire to eliminate corruption—which at its core has meant the desire to prevent the explicit exchange of government favors in return for something of value—has often been stressed by the act's proponents. They have also emphasized that the efficiency and professionalism of the civil service require that it be divorced from partisan politics. While both of these contentions involve valid public concerns, neither justifies broad prohibitions against the political activities of Americans—activities that are fundamental to our constitutional system.

The fact is that a strong civil libertarian defense of the Hatch Act can and should be made. Although its opponents argue that the act restricts the political freedom of federal employees, they fail to recognize the important First Amendment values supporting restraints on the partisan activities of such employees. Government workers have a right to be free from political coercion—particularly from any systematic solicitation by either their superiors or their co-workers. Since the power to coerce derives in substantial amount from power

⁶ *Ibid.*, section 7322.

⁷ *Ibid.*, sections 7324(b), 7326.

vested in the government, the Hatch Act is, in effect, a case of the government restraining itself. Non-governmental employees have similar First Amendment rights—the right not to have their freedom to engage in political activity “chilled” by political activists who also administer government programs and regulatory or law-enforcement agencies. As Professor Meiklejohn asserted, “The First Amendment does not protect a ‘freedom to speak.’ It protects the freedom of those activities of thought and communication by which we ‘govern.’ It is concerned, not with a private right, but with a public power, a governmental responsibility.”⁸ The most acute government responsibility is that government not allow itself to be used to skew the political process. The political debate can never be “uninhibited, robust, and wide-open”⁹ if government employees can coerce their colleagues or intimidate the general public. When viewed as an inhibitor imposed on the government itself, the Hatch Act is as justifiable as other restrictions—judicially or legislatively created—that prevent the government from regulating the “free market” of ideas.

1. The Prevention of Corruption

Beyond question, the major stated reason for passage of the Hatch Act was to prevent corruption of the type reportedly widespread during the 1938 election campaigns,¹⁰ and revealed by Senate investigations chaired by Senator Morris Sheppard (Democrat, Texas).¹¹ Although supporters of the proposal by Senator Carl Hatch (Democrat, N. Mex.) often indiscriminately joined corruption and coercion together,¹² this section deals only with corruption in the sense of bribery, graft, and personal profiteering. Coercion of public employees, discussed below (Section 3), is viewed most accurately as penalizing or threatening to penalize employees who refuse to engage in political activity, without regard to whether the coercer is enriched by his actions. Thus, requiring “kickbacks” in exchange for jobs is

⁸ Alexander Meiklejohn, “The First Amendment as an Absolute,” *Supreme Court Review*, 1961, pp. 245, 255.

⁹ *New York Times v. Sullivan*, 376 U.S. 254 (1964).

¹⁰ Paul P. Van Riper, *History of the United States Civil Service* (1958), p. 340.

¹¹ See, for example, *Report of the Special Committee to Investigate Senatorial Campaign Expenditures and Use of Governmental Funds in 1938*, 76th Congress, 1st session (1939) Part I, p. 11 (hereinafter, *Report of the Special Committee*).

¹² See, for example, remarks of Representative Hamilton Fish (Republican, New York), *Congressional Record*, vol. 84 (July 20, 1939), p. 9601, and Representative U. S. Guyer (Republican, Ohio), *ibid.*, p. 9600.

accurately classified as corruption, while requiring attendance at political rallies is more properly viewed as coercion.

A contemporary observer, examining the special committee's over four hundred page report, would not likely find the kind of massive and pervasive corruption one might have expected. Indeed, were it not for the congressional pyrotechnics, one might well wonder why any close attention to corruption was warranted at all. The Supreme Court, however, has made it plain that congressional judgments about the effect of corruption on federal employees will not be re-examined as part of the process of judicial review:

When actions of civil servants in the judgment of Congress menace the integrity and the competency of the [public] service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. We cannot say . . . that these restrictions are unconstitutional.¹³

In *Civil Service Commission v. Letter Carriers*, the Court reaffirmed this view by noting with approval congressional fears of corrupt political machines emanating from the government's bureaucracy, and candidly stating: "Perhaps Congress at some time will come to a different view of the realities of political life and Government service; but that is its current view of the matter, and we are not now in any position to dispute it."¹⁴

The Supreme Court's attitude on this subject leaves much to be desired—there are numerous areas of activity in which pervasive regulation could be justified once the specter of corruption has been invoked. Undoubtedly, the Supreme Court's view was much affected by statements such as those of Representative Robert Ramspeck (Democrat, Georgia) during the 1939 debate: ". . . I believe that the thing that is going to destroy this Nation, if it is destroyed, is political corruption, based upon traffic in jobs and in contracts, by political parties and factions in power."¹⁵ Any court in a democratic society is understandably reluctant to second-guess such statements made by "experts" in the political process. Nonetheless, it is precisely because legislators have such an enormous stake in their own re-elections and those of their like-minded colleagues that remarks such as those of Representative Ramspeck ought not be accepted at face value when a statute undergoes judicial scrutiny. If such acceptance were to be-

¹³ *United Public Workers v. Mitchell*, 330 U.S. 75, 103 (1947).

¹⁴ 413 U.S. 548, 563 (1973).

¹⁵ *Congressional Record*, vol. 84 (July 20, 1939), p. 9610.

come commonplace where First Amendment freedoms are affected, those freedoms would be in serious jeopardy.

Barring any sudden reversal by a majority of the Court, congressional decisions about eliminating corruption will be accepted. It is, therefore, particularly important for the legislators to appreciate the values at stake when the prevention of official corruption is advanced as a rationale for limiting the participation in politics of several million federal employees.

The plain truth is that there is insufficient evidence of corruption or the possibility of corruption to justify the significant interference with freedom of political activity the Hatch Act embodies. Neither in the 1939 and 1940 debates nor in the recent House debate on H.R. 8617 did Hatch Act proponents present a convincing case that corruption was endemic in the federal bureaucracy.¹⁶ Reasonable people can, of course, disagree on what level of corruption necessitates what magnitude of legislative response. Even if the level of corruption were or were likely to become significantly higher than proponents of the Hatch Act contend—indeed even if it were as high as the 1939 supporters of Senator Hatch's bill believed—it would still not provide a justifiable basis for the Hatch Act's restrictions on political activity and association. As Mr. Justice Black warned in his *Mitchell* dissent:

It is argued that it is in the interest of clean politics to suppress political activities of federal and state employees. It would hardly seem to be imperative to muzzle millions of citizens because some of them, if left their constitutional freedoms, might corrupt the political process. All political corruption is not traceable to state and federal employees. Therefore, it is possible that other groups may later be compelled to sacrifice their right to participate in political activities for the protection of the purity of the Government of which they are a part.¹⁷

If corruption is a serious problem and not a code word for other concerns, then it is to corruption that Congress should address itself. It should determine precisely what forms of improper activity are occurring, define with care the conduct it wishes to proscribe, and

¹⁶ See generally *Report of the Special Committee, and Hearings before the Subcommittee on Employee Political Rights and Intergovernmental Programs of the House Committee on Post Office and Civil Service on H.R. 3000, 94th Congress, 1st session (1975), Parts I and II (hereinafter, Hearings on H.R. 3000)*. (H.R. 3000 was a predecessor to H.R. 8617 which eventually passed the House of Representatives.)

¹⁷ 330 U.S. 75, 112-13 (Black, J., dissenting).

ensure to the best of its ability through adequate funding and staffing that the agency charged with enforcing the anti-corruption laws does in fact enforce them. All other forms of activity—and particularly forms of activity replete with First Amendment implications—should remain permissible. Even if defining “corruption” seems extremely difficult, it is by no means an intractable problem. There is no convincing reason why the intellectual rigor required for an exact definition should be forsaken for the easy alternative of a broad-brush prohibition.¹⁸

When political activity is circumscribed, it should be only after failure of other means that intrude less drastically on freedoms of speech and association. This is not only a wise constitutional doctrine, but prudent advice for Congress as well. Even as here, where the Supreme Court has recently sustained a statute’s constitutionality, if Congress can achieve its goals by narrower means, it by all means should do so. If corruption alone were the target of the Hatch Act, that goal could not justify prohibitions as broad as those in the statute.

2. Maintaining “Efficiency” and “Professionalism”

The notion of “efficiency” has been given considerable prominence in the Hatch Act debates. The term is not intended to be coextensive with the prevention of employee coercion or the impartial and unbiased administration of the laws.¹⁹ Instead, it encompasses two separate concerns: first, that the productivity and achievements of the civil service will be diminished or impaired if employees are

¹⁸ Although it is not within the scope of this study to provide the proper statutory definition of corrupt activities, there are clearly certain activities that fall within any minimally effective prohibition. Where, for example, there is an explicit quid pro quo arrangement—a promise or delivery of private benefit in exchange for governmental action—Congress clearly can intervene. See *United States v. Brewster*, 408 U.S. 501 (1972). Beyond such core infractions, however, the legislature must proceed with considerable care. The prudent course would perhaps entail, in the first instance, an *underinclusive* list of proscribed activities, to which additions could be made as new evidence of improper conduct arose. Concededly, some costs would be incurred in terms of corrupt practices that would escape proscription, but the benefits in terms of enhanced civil liberties that would accrue more than justify such a procedure. Perhaps the most troublesome aspect of this recommendation is that it requires a Congress sufficiently aware of its responsibilities to eschew the “easy” road of generalized prohibitions and to maintain its span of attention on the problem for more than one legislative session.

¹⁹ These issues will be discussed in the two subsequent sections. To the extent that “inefficiency” entails employee coercion or a chilling effect on those affected by governmental agencies, of course, different questions arise. The present section examines “inefficiency” as an alleged vice in itself.

permitted to engage in political activity; and second, that whether or not there is any impact on the bureaucracy's work, it is simply improper (almost as a matter of professional "ethics") for federal employees to engage in partisan political activities.²⁰

The Supreme Court stated unequivocally in *Mitchell* that the Hatch Act's "interference with free expression is seen in better proportion as compared with the requirements of orderly management of administrative personnel." The Court noted with considerable approval "... the growth of the principle of required political neutrality for classified public servants as a sound element for efficiency," and concluded that if Congress and the President (those "responsible for an efficient public service") judged that "efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection."²¹

In *Letter Carriers*, the Court quoted in support of its decision a passage from *Pickering v. Board of Education*:²²

The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees.²³

During the present debate over possible evisceration of the Hatch Act, one witness argued that the matter, at

its most fundamental level . . . addresses itself to the extraordinarily delicate balance between individual political

²⁰ Dr. Clyde J. Wingfield (president of the Bernard M. Baruch College of the City University of New York) stated that "[f]or the Public Service to conduct itself in the highest professional manner, it remains . . . desirable that it be protected from the encroachments of partisan politics. . . ." *Congressional Record*, vol. 121 (daily ed., November 17, 1975), p. S 20210. This position essentially involves a desire to avoid the return of a "spoils system" rather than a "merit system" within the civil service. The anti-spoils system arguments are appropriately considered in this section rather than in the preceding section on corruption because changes in administrations could involve massive non-corrupt changes in the bureaucracy based solely on the concept that the new "ins" have a mandate from the electorate to remove the old "ins" from control of the levers of executive power. Such was certainly Andrew Jackson's original intention. So too was the so-called "Malck Plan," developed by a high official in the Nixon administration to bring the civil service—presumed by many in the Nixon White House to be antagonistic to the President's program—"under control." See, for example, Testimony of Dr. Nathan T. Wolkomir in *Hearings on H.R. 3000*, p. 142.

²¹ 330 U.S. 75, 94, 97, 99.

²² 391 U.S. 563, 568 (1968).

²³ 413 U.S. 548, 564 (bracketed material in the original).

[freedom] on the one hand, and those responsibilities endemic to the effective and efficient administration of the public's business on the other. Since its inception the character of this Republic has consistently reflected the need for proper balance between rights and responsibilities.²⁴

It is difficult to see how maintaining the productivity of the federal bureaucracy requires the sweeping prohibitions on partisan activity embodied in the Hatch Act. If, for instance, political activities during working hours prevented the accomplishment of assigned tasks, then narrow "time, place, and manner" restrictions forbidding such activity could easily be drawn which are no different in intent or effect from similar rules in private industry, or rules prescribing the length of lunch hours or the working day. If, however, the concern were that political activity after working hours would cause an adverse effect during the working day, narrow regulations similar to rules intended to ensure that an employee's proficiency is maintained at a desired level could alleviate that concern. If, finally, the fear were that overt displays of political involvement would create tensions among the employees that would interfere with their work, again, narrowly drawn restraints could prevent such results in much the same way that attempts are made to minimize racial tensions.

Under close examination, therefore, the "efficiency" defense of the Hatch Act falls far short of the persuasiveness required to justify restrictions on First Amendment freedoms. Even if some marginal loss of efficiency were entailed, the general public could not merely for the sake of some undetermined amount of convenience properly deny to federal employees what the public itself retains. If the effectiveness of a governmental program were to be seriously jeopardized because of some degree of political involvement by some of its staff members, then the real question would not be whether the activity should be proscribed, but whether the program itself were at all necessary.

The second value encompassed within the notion of "efficiency" and "professionalism"—that civil servants ought to be divorced from partisan politics without regard to whether any political involvement would adversely affect their work performance—is quite clearly a "good government" argument. That is, the appearance of a pristine and nonpartisan professionalism is at least as important as the actual presence of professionalism. As one representative of a federal union

²⁴ Statement of Dr. Wingfield, p. S 20209. As reprinted, Dr. Wingfield's statement did not include the word "freedom," printed within brackets in the text. His statement would make sense with either "freedom" or a synonym.

opposed to substantial weakening of the Hatch Act testified: "the spectacle of public workers in the Federal departments and agencies up to their eyebrows in partisan political campaigning would tend to increase the criticism and the cynicism which now is so endemic throughout our country."²⁵ Again, the concern expressed is not the appearance of partiality or coercion, but rather the appearance of politicization standing alone.

Resistance to the appearance of political involvement is an often unarticulated and almost emotional rather than a rational position. It is akin in several respects, although with far less persuasive reason, to the doctrine that judges should be "above politics." Indeed, the argument verges on asserting that it is aesthetically unpleasing to see civil servants involved in partisan campaigns. In a nation even minimally committed to First Amendment values, such a defense of the Hatch Act is patently insufficient. As Mr. Justice Brandeis said, the fear "of serious injury cannot alone justify suppression of free speech and assembly. . . . Those who won our independence were not cowards. They did not fear political change. They did not exalt order at the cost of liberty."²⁶

The most severe inadequacy of the "efficiency" rationale is, ironically, that it provides a straw target for opponents of the Hatch Act. The Senate Committee on Post Office and Civil Service recently argued in support of H.R. 8617 that ". . . it does not see the continuance of the merit system in public employment as being dependent upon maintenance of the severe restrictions on employees' first amendment rights that now exist."²⁷ The committee's argument is convincing, and if "professionalism" and "efficiency" were the most persuasive rationales for the Hatch Act, little reason would exist to preserve that statute.

3. The Coercion of Public Employees

The Sheppard committee's investigations in 1939 revealed several instances of actual or attempted coercion of public employees for political purposes. Certified Works Progress Administration (WPA) employees in Kentucky holding views contrary to those of Senator Alben W. Barkley (Democrat, Kentucky) were discharged after canvassing of such workers by their supervisors.²⁸ In Tennessee, there

²⁵ Testimony of Dr. Nathan T. Wolkowir in *Hearings on H.R. 3000*, p. 148.

²⁶ *Whitney v. California*, 274 U.S. 357, 376-77 (1927) (concurring opinion).

²⁷ S. Rep. No. 94-512, 94th Congress, 1st session (1974), p. 4.

²⁸ *Report of the Special Committee*, p. 12.

were substantial efforts to raise campaign funds from federal employees (both from civil service workers and from those on relief), including in some circumstances the use of intimidation and coercion.²⁹ WPA workers and employees in Pennsylvania were told that there was "no excuse" for not attending a certain political rally in late October 1938.³⁰ Other WPA workers ("even women on sewing projects" as the Senate committee put it) were ordered to change their voter registration from Republican to Democratic, and several who refused to comply were fired from the WPA.³¹ In a Maryland Senate race, an internal revenue collector took a clearly delineated position on behalf of one candidate by reading a prepared statement to his subordinates.³²

Based on these and other similar findings, supporters of the Hatch Act concluded that federal employees needed protection from coercion and threats of coercion by their supervisors.³³ Opponents of the act argued to the contrary that "it is wrong and un-American for this Congress to legislate to curtail the political right and the political freedom of the WPA employee in my district, who is laboring with a spade for \$26 per month."³⁴ Representative Vito Marcantonio (American Labor Party, N.Y.) warned that the Hatch Act "is a step in seven-league boots toward disenfranchising the unemployed of this country."³⁵ Hatch Act supporters brushed aside these objections.

²⁹ Ibid., p. 18.

³⁰ Ibid., p. 24. The Sheppard committee found that the term "no excuse" addressed to WPA workers on relief "is indefensible, and that it is in the nature of an implied threat and a grave interference with the right of relief workers to be free from coercion in the exercise of their political rights." Ibid., p. 25.

³¹ Ibid., pp. 25, 27.

³² Ibid., p. 31.

³³ An enlightening episode during House debate over the Hatch bill corroborates this rationale. Section 6 of the bill (and also of the act) made it unlawful to disclose lists of persons receiving federal aid to political candidates or their associates. Representative Edward Creal (Democrat, Kentucky) proposed to delete the section, stating "I maintain it is a monstrosity to say that we cannot receive such a list, if we want to send our remarks for or against some bill in which they are interested, after having received numerous letters. . . . You cannot in your own county know who is on the WPA or who is on the relief rolls. You may want this information in order to tell them your views on certain legislation in which they are interested." *Congressional Record*, vol. 84 (July 20, 1939), p. 9620. It is, of course, precisely the fact that elected officials or other partisans "told" too much to WPA employees and others that motivated many legislators to support Senator Hatch's bill.

³⁴ Remarks of Representative Green, *Congressional Record*, vol. 84 (July 20, 1939), p. 9630.

³⁵ Ibid., p. 9632.

The Supreme Court has consistently relied upon the possibility of employee coercion to uphold the constitutionality of the Hatch Act. Speaking of appellant Poole in the *Mitchell* case, the Court noted that

if in free time he is engaged in political activity, Congress may have concluded that the activity may promote or retard his advancement or preferment with his superiors. Congress may have thought that government employees are handy elements for leaders in political policy to use in building a political machine. . . . Evidently what Congress feared was the cumulative effect on employee morale of political activity by all employees who could be induced to participate actively.³⁶

In *Letter Carriers*, the Court characterized as "the judgment of history" the proposition "that federal service should depend upon meritorious performance rather than political service" and upheld the congressional policy that the bureaucracy ". . . be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs."³⁷

The immediate response of many opponents of the Hatch Act—particularly from those union leaders whose power would increase the most if the act's strictures were to be discarded—is that coercion has not been and will not be a problem. Obviously, in their view, the act is neither necessary nor desirable. A second response to the coercion argument is that private employees are just as subject to political pressures as government employees and thus also arguably in need of a Hatch Act to protect them. Mr. Justice Black strongly implied that no such law applicable to private citizens could, in his view, pass constitutional muster.³⁸ He stressed that if political favoritism rather than merit governed advancement in federal service, that element of bias should be proscribed, just as some state statutes made political coercion of private employees unlawful. In short, in Justice Black's view, federal employees were "second-class citizens" because they were treated differently from workers outside the government.³⁹

³⁶ 330 U.S. 75, 101.

³⁷ 413 U.S. 548, 557, 566.

³⁸ 330 U.S. 75, 113 (Black, J., dissenting).

³⁹ The "second-class citizen" argument at times degenerates into simplistic sloganeering, as does so much of the debate over the Hatch Act. During hearings in Cleveland, Ohio, recently, Representative William Clay (Democrat, Missouri)

The notion that coercion is not or would not become a serious problem is one that is quickly disproven, as the WPA experience demonstrates. Moreover, the general counsel of the Civil Service Commission has observed that many federal employees read the Hatch Act very broadly in order to protect themselves from what they perceive to be political pressure. They are able to say "I'm Hatched" even in circumstances to which the act may not apply, and by so doing ward off attempts to have them engage in political activity.⁴⁰ While ostensibly disclaiming an intention to intimidate government employees, one official of a union strongly supporting significant modification of the act complained that some "Federal workers really are afraid to get too mixed up in politics, and some Federal employees really hide behind the Hatch Act as a way to get out of participating or voting. . . ." ⁴¹ It seems clear that both supporters and opponents of the act fully recognize that it can be and often is used as a shield. We are justifiably concerned when that shield is threatened by random and individualistic threats of coercion; when it is threatened by the organized and comprehensive pressure of public employee unions or supervisory personnel (most likely in an effort to create a political power base), our concern necessarily increases accordingly.

An interesting variation on the argument that coercion will not increase is the contention that there are already so many political activities federal employees may engage in voluntarily (so that, consequently, they are subjected to coercion to engage in precisely those activities), that repeal of the major provisions of the Hatch Act would not alter the existing situation to any considerable degree.⁴² This argument, if valid, would properly lead not to the conclusion that the act should be gutted, but that it is underinclusive as written—that not enough activities are prohibited—and that it should be strengthened. Civil servants can currently engage in numerous activities ⁴³ that consistency might indicate should also be prohibited. Mr. Justice Black dismissed such activities as mere "minor exceptions" in *United Public Workers v. Mitchell*,⁴⁴ and Congress's failure to include them

equated the status of federal employees with that of citizens of the Soviet Union, and told one union official opposed to H.R. 3000 that "You are a second-class citizen because of this Hatch Act, whether I convince you of it or not." *Hearings on H.R. 3000*, p. 480.

⁴⁰ Statement of Anthony L. Mondello, *ibid.*, p. 33.

⁴¹ Statement of Dennis Garrison, executive vice president of the American Federation of Government Employees, *ibid.*, p. 130.

⁴² *Ibid.*, pp. 37-39, 132-33.

⁴³ See 5 C.F.R., sections 733.111, 733.124.

⁴⁴ 330 U.S. 75, 107 n. 4.

within the scope of the Hatch Act may reflect more of a judgment of their political irrelevance than any effort at principled decision making.

The debate has thus isolated a curious paradox: the freer the employees are to engage in voluntary political activity, the greater is the possibility that they will be coerced into involuntary political activity. Hatch Act supporters must thus argue that proscribing certain activities leaves civil servants with more freedom, while its opponents must contend that when those very activities are permitted, civil servants can more easily resist pressure to engage in them.

Supporters of proposals such as H.R. 8617 attempt to avoid this dilemma by arguing that full protection can be afforded to the employees by strengthening the laws against coercion while removing the restraints on truly voluntary partisan involvement.⁴⁵ Apart from the fact that such suggestions ignore other arguments in favor of the Hatch Act's broader restraints (see below, Section 4), they provide inadequate protection to the employees. It should be emphasized, moreover, that the employees have a First Amendment right to be free from coercion. It is not merely desirable that they not be coerced; in the governmental context, it is required that they not be coerced.

Restraints on coercion alone force an employee who believes he is being subjected to such coercion to come forward to complain about it, a highly unlikely prospect if that employee is already in fear of his job or his employment future. The only possibly effective method to eliminate coercion is thus to forbid the activity as well as the intimidation. This route (the one followed by the Hatch Act) is strong medicine, to be sure. Nonetheless, there does not appear to be any other equally protective alternative. The Hatch Act as now written is not a perfect solution and Civil Service Commission enforcement may be less than adequate,⁴⁶ but it at least provides one more extremely important layer of protection to the employee. The difference between being able to say "I'm Hatched," and "I don't agree with your candidate and I choose not to work for him," is enormously significant, and the degrees of protection involved are far different.

This is not by any means to say that the Hatch Act as written is somehow mandated by the Constitution. It means only that in examining the question of coercion of public employees, it should be borne firmly in mind that there are First Amendment rights on both sides of the issue. There is no a priori reason why one employee's First

⁴⁵ S. Rep. No. 94-512, p. 5.

⁴⁶ Indeed the commission's enforcement activity is now essentially limited only to responding to complaints. *Hearings on H.R. 3000*, pp. 46-47.

Amendment right to engage in partisan activity should be given preference (as repeal of the Hatch Act limitations would do) over his colleague's equally important First Amendment right not to be forced to engage in partisan activity. Of course, there is no *a priori* reason why the contrary of this proposition is not also valid.

Some would argue, accordingly, that we are left apparently in equipoise, with important First Amendment values on both sides, and with no strong indications of which way to proceed. At this point, opponents of regulation might pose Mr. Justice Black's question—why should public employees be treated differently from private employees? And if they should not be treated differently, does that not provide a strong rationale for not having a Hatch Act?

If the First Amendment is to continue to fulfill its role as a guarantor of government nonintervention in the area of speech and association, the last question should be answered in the negative. In this instance, the Hatch Act does not represent government regulation of citizens so much as it represents government regulating itself. When one federal employee applies political pressure to another, he is in effect applying power vested in his hands by his position in the government. That power comes from the general public, conferred upon the government to perform functions on behalf of the citizens. A federal employee has no more right to use that power for purposes of the political coercion of another employee than an agency of the government has the right to use its power for purposes of political coercion of the general citizenry.

One currently favorable line of defense for congressional supporters of the Hatch Act is that it must be retained to prevent "... a power grab by Federal union leaders to place conscientious Federal employees at the mercy and calling of politicians at every level of political activity."⁴⁷ To the extent that this statement merely reflects a distaste for powerful labor unions, it is not a constitutionally permissible rationale for regulation. To the extent, however, that it reflects an appreciation of the need that the government not be used as a coercive weapon to induce political involvement, it is completely accurate.

Indeed, the difference between coercion of an employee by a supervisor (the paradigm of 1939) and coercion of an employee by a

⁴⁷ Minority Views of Representative Edward Derwinski (Republican, Illinois) to H.R. Rep. No. 94-444, 94th Congress, 1st session (1975), reprinted in *Documentary Background to the Federal Employees' Political Activities Act of 1975*, U.S. Senate Committee on Post Office and Civil Service, 94th Congress, 1st session (1975), p. 134.

union—which may include supervisors—(the paradigm of today) is that coercion by a union is far harder to resist. Moreover, it may well be that unions are far more capable of engaging in the systematic solicitation and intimidation of federal employees than a network of supervisors. Public employee unions were not of significant size when the Hatch Act was originally passed, but their advent has, if anything, only made the Hatch Act more important. Union protestations that their presence renders supervisor coercion less likely,⁴⁸ however accurate, still provide no answer to the question of what renders union coercion less likely. Those concerned about union political pressure will not find their fears assuaged by the fact that the conventions of three of the most powerful federal employee unions supporting H.R. 3000 were unanimous in their opposition to the Hatch Act as currently written.⁴⁹ Nor does the fact that the convention of one union opposed to modification of the Hatch Act was also unanimously for its position⁵⁰ do anything to lessen fears of coercion.

The government intervenes to prevent the coercion of federal bureaucrats because not to do so would be in effect to permit the use of federal power to mandate partisan activity. Whatever the permissible grounds of regulation of private employer-employee political relationships, it is clear that some government regulation to protect its own employees from political association enforced against their will is in theory not only consistent with the First Amendment, but virtually required by it.

Theoretical statutes, however, are rarely enacted and the Hatch Act is certainly no constitutional lawyer's Platonic ideal of legislative lawmaking. It is with some uncertainty we can conclude that with respect to preventing the coercion of federal workers, the act as currently written is more desirable than a reform moving in the direction of H.R. 8617. Nevertheless, against a demonstrated historical background of employee coercion, and with the use of public employee unions that represent a potential source of pressure on the individual employee at least as great as that represented by his supervisor, caution in the effective repeal of a statute that has functioned at least adequately is warranted. Such caution is especially justified because the First Amendment rights against coerced political activity of numerous government workers may hang in the balance. The best argument on this question may thus still be that made by Representa-

⁴⁸ *Hearings on H.R. 3000*, pp. 83-84.

⁴⁹ *Ibid.*, pp. 87, 97, 126.

⁵⁰ *Ibid.*, p. 140.

tive Robert A. Green (Democrat, Florida) during the 1939 debate: "I am for [the act] because I sincerely believe that it is restoring to millions of WPA workers who have been coerced and abused in recent years their rights as American citizens."⁵¹

4. "Chilling" the General Public

Conceptually, the political intimidation of the general public is not substantially different from pressure applied to government employees, but the possible adverse consequences are far greater. Moreover, there are additional dangers, according to traditional democratic theory, raised by a politicized bureaucracy that is either overzealous in its loyalties to an administration, or is recalcitrant in carrying out the mandate of elected officials. Thus it is that, as noted previously, the idea of forbidding government workers from engaging in partisan political activity is at bottom a civil libertarian idea—the government is, in effect, restraining itself, and thus in classic First Amendment terms protecting free and voluntary political activity by individuals.

Those who deal with the federal government or those who are significantly affected by it—and in 1976 that surely includes virtually all Americans—must be concerned about the effects of their political opinions and activities when they face federal bureaucrats able to engage in partisan political activity. In constitutional terms, the non-governmental citizen may be "chilled" in his willingness to speak or associate when the consequences of such action may include adverse treatment at the hands of federal officials. Since there "is practically universal agreement that a major purpose of the [First] Amendment was to protect the free discussion of governmental affairs,"⁵² it should come as no surprise that restrictions on federal workers' partisan activities are, in their plain effect, restrictions on governmental interference with speech and associational freedoms. As in the case of coercion of government employees, those federal workers who make decisions politically are improperly using power vested in government to serve their own political ends and, most important, doing so at the expense of other citizens. A politically active bureaucracy raises grave dangers that, at least in part, government by the people risks being replaced by government by the government.

There are only a very few indications that Congress in 1939 believed that protection of the individual citizen was a major reason

⁵¹ *Congressional Record*, vol. 84 (July 20, 1939), p. 9632.

⁵² *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

for supporting the act.⁵³ On the contrary, at least some members fully realized the importance of a politically active bureaucracy. Representative Emanuel Celler (Democrat, New York), one of the chief House opponents of Senator Hatch's bill, reminded his colleagues that:

Fifty Members of the Congress came to the House at the time they were United States attorneys, marshals, or holding a Federal office. They could not have come to the Congress if . . . [the act] were in effect, because they would have been an officeholder, and they could not have taken part in a political campaign.⁵⁴

Representative Elizabeth Holtzman, Representative Celler's successor in the House, has provided the correct rebuttal:

if there is one lesson we should have learned from Water-gate, it is that we must strive to reduce, rather than increase, political influence in the Federal law enforcement and investigative agencies. This bill [H.R. 8617] would, instead, authorize and invite the politicizing of the Justice Department, FBI, U.S. Attorneys' Offices, and Internal Revenue Service, as well as the CIA, National Security Agency and Defense Intelligence Agency.⁵⁵

She posed the hypothetical situations of a U.S. attorney or a district director of Internal Revenue pledged to a particular candidate, and asked how exacting the enforcement of the appropriate statutes against their favored candidate would be.

Equally as deleterious as favoritism to a particular partisan candidate is the possibility for discriminatory enforcement against other candidates or their supporters. Such discrimination could be motivated by distaste for a candidate's philosophy, or from personal, political ambition. Repeal of the Hatch Act's prohibitions against partisan activity would, for instance, allow a United States attorney with political ambitions to enforce the criminal provisions of the Federal Election Campaign Act against an incumbent senator or representative or other potential opponent, and then run for that same office himself as a vindicator of "campaign reform" laws.⁵⁶

⁵³ Colloquy between Representatives Alfred Bulwinkle (Democrat, North Carolina) and James Mott (Republican, Oregon), *Congressional Record*, vol. 84 (July 20, 1939), pp. 9614-15.

⁵⁴ *Ibid.*, p. 9597.

⁵⁵ *Congressional Record*, vol. 121 (November 18, 1975), p. H 11390.

⁵⁶ As passed by the House, H.R. 8617 would amend 5 U.S.C., section 7326 to require federal workers who become candidates to take a ninety-day leave without pay prior to any election in which they are a candidate. The impact of this section

Moreover, fundamental principles of democratic theory are transgressed when the bureaucracy oversteps its limits. Whether it be the use of repression to advance the administration (as in the WPA case, see above Section 3), or the resistance to an administration's policies (as was feared when the post-World War II Labour government assumed power in Great Britain), a politicized civil service would risk violating rules at the core of representative government. Because bureaucrats, particularly higher-level ones, possess established channels of communication to the policy-making organs of the government, they have opportunities to affect decision making to an extent far beyond the ability of the average citizen. If partisan activity were also permitted to them, their influence—as a consequence of the access to federal power provided by their jobs—would be even more disproportionate to that of their fellow citizens.

With partisan activity allowed, government workers would undoubtedly come under more pressure from their partisan colleagues to engage, in effect, in partisan activity on the job, as did WPA officials during the Roosevelt administration. Many in the Nixon administration feared resistance to its initiatives by a hostile bureaucracy. Whether that estimate was correct or not, the partisan proclivities of federal employees would almost certainly be encouraged by permitting them to engage in and be subject to the pressures of partisan activity. Not only would the will of the electorate, as previously expressed, be in danger of transmogrification, but future activity by the electorate would also be interfered with.

Although Representative Holtzman's concern was focused on law-enforcement and intelligence-gathering agencies of the federal government,⁵⁷ there is also ample reason to fear the effects politicization would have on citizens who deal with other government bureaus. Other government workers who might have a significant impact on the public include those holding such varied positions as government contracting officer (with the power to grant or deny contracts of

is substantially lessened, however, by its provision that such workers may utilize accrued annual leave time to engage in political activity in addition to the ninety-day leave. In any case, the leave provisions do not apply to workers actively engaged in partisan campaigns but who are not themselves candidates.

⁵⁷ It was, of course, a law-enforcement officer that caused Mr. Justice (then Judge) Holmes to write that a municipal regulation forbidding members of the police department from soliciting money for political purposes was legitimate and that "the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McCauliffe v. New Bedford*, 29 N.E. 517, 517 (Mass. 1892). Hatch Act cases have in fact involved law-enforcement officials; see, for example, *Brooks v. Nacrelli*, 415 F. 2d 272 (3rd Cir. 1969) (members of a municipal police force alleged to be Republican Party committeemen).

potentially enormous value),⁵⁸ official of a federal housing authority,⁵⁹ census employee (with access to confidential information),⁶⁰ non-partisan city manager (whose selection of a candidate may determine the availability of federal grants for his city),⁶¹ Federal Trade Commission administrative law judge,⁶² and official of the Veterans Administration.⁶³ The list could go on and on. It was perhaps no accident that the first widely publicized evidence of coercion appeared in the WPA, a welfare agency; with so much of the public dependent on federal subsidies or federal regulation today, the possibilities for coercion are even greater now than at the zenith of the New Deal.

The plain fact is that people do not rigidly compartmentalize their lives; they are, in the main, incapable of being at the same time a neutral government worker by day and a partisan political operative by night. With virtually no limits on federal employees' partisan activity, the deleterious effects of a politicized civil service noted above are almost certain to occur. Although government employees are doubtless not philosophical neuters today, their training and habits discourage the expression of political viewpoints in their work. With the Hatch Act removed, such restraints would be gone. Representative Herbert Harris (Democrat, Virginia) a member of the House Civil Service Committee and a supporter of H.R. 8617, recently stated that:

I think this person out there who deals in the matters of the Federal Government in his daily life doesn't stop being that type of person when he goes home and his activities in the community are usually very consistent. The notion that this is the type of person who somehow can foreclose himself in the interest of his local government, his community activities, and the State and Federal processes going on around him that influence his life so very intimately I think is a misconception of the type of individual we're dealing with.⁶⁴

That statement can easily be turned around—"the type of individual we're dealing with" does not isolate his daily work from the "processes going on around him" any more than he does the opposite.

⁵⁸ *Hearings on H.R. 3000*, pp. 53-54.

⁵⁹ *Soldevila v. Secretary of Agriculture*, 512 F. 2d 427 (1st Cir. 1975).

⁶⁰ S. Rep. No. 94-444, 94th Congress, 1st session (1975), p. 136 (minority views).

⁶¹ *Ibid.*

⁶² Remarks of Representative Gilbert Gude (Republican, Maryland) *Congressional Record*, vol. 121 (October 21, 1975), p. H 10130.

⁶³ *Ibid.*

⁶⁴ *Hearings on H.R. 3000*, p. 18.

Representative Harris is correct in cautioning us against "misconceptions," but he draws a completely mistaken conclusion from his premise.

Although it appears to be fashionable for some Republicans to oppose measures repealing the Hatch Act's prohibitions on partisan activity by federal workers because of the power of allegedly Democratic-oriented public employee unions, if Congress is to make a legislative judgment purely on the merits of the issue, such partisan attitudes can, of course, play no legitimate part. There is merit, however, in asking whether there is any emphatic direction to the political attitudes that substantial modification of the Hatch Act would release. To the extent that an "un-Hatched" bureaucracy, or a discreet or identifiable segment of it, does have an easily recognizable political or ideological coloration, the "chilling" effect of its partisan activity on the public at large will necessarily be the greater.⁶⁵

As noted previously, when the Hatch Act was passed, large and powerful public employee unions did not exist. Now they do, and the possibilities for concerted action to influence public policy (and therefore the general public) are far greater than they were thirty-five years ago. Just as concern is properly voiced when governmental power is improperly used to coerce federal workers, so too concern is warranted when individuals subject to the government's power are restrained or pressured. The monopoly of legitimate coercive power vested in the government and the access to it by government employees warrant restraints on the government and its workers so that the state's power is not used in unintended ways.

Dissenting in *Brondrick v. Oklahoma*, Mr. Justice Douglas applauded a "bureaucracy that is alert, vigilant, and alive" and decried the "suppression of First Amendment rights that creates faceless, nameless bureaucrats who are inert in their localities and submissive to some master's voice."⁶⁶ The real concern, however, is "faceless, nameless" citizens "submissive" to the government's voice spoken through its employees. Mr. Justice Douglas was far more accurate in 1947 when he cautioned against "the vast discretionary powers vested in the various agencies, and the impact of their work on

⁶⁵ The theoretical possibility that the political activity of those with views sympathetic to the bureaucracy will increase in sufficient magnitude to offset the decline in activity of those chilled (so that total political activity will not decline) is insufficient to refute this argument. First Amendment theory is not based on undifferentiated mass activity; it is based on individual right. That some individuals may feel "liberated" by a certain action has never been an adequate justification to repress others.

⁶⁶ 413 U.S. 601, 621 (Douglas, J., dissenting).

individual claimants as well as on the general welfare," and warned that "If the incumbents were political adventurers or party workers, partisanship might color or corrupt the processes of administration with which most of the administrative agencies are entrusted."⁶⁷ The First Amendment's command that the government not interfere with the people's political debate is thus obeyed when the government restricts itself by precluding partisan political activity by its employees.

Conclusion

Although it has not been frequently made in the past, the best defense of a statute restricting partisan activity by government employees is, in fact, a civil libertarian one. Others that come to mind—such as the prevention of corruption or inefficiency within the civil service—suffer from an insensitivity to the speech and associational rights of those workers who do wish to become involved in political affairs. Without a statute like the Hatch Act, however, the insensitivity to such rights would be borne by the general public and those civil servants who did not wish to engage in partisan politics.

Much of the foregoing may be seen more as a defense of an idealized version of the Hatch Act than of the act itself. Indeed, the act could certainly profit from significant revision. The 1940 amendments added section 15 to the act,⁶⁸ defining the phrase "an active part in political management or in political campaigns" to mean those acts the Civil Service Commission had forbidden employees in the competitive civil service to engage in before the 1940 amendments. Although this section survived a constitutional challenge in *Letter Carriers*, Congress could surely do better in defining what exactly it is proscribing.⁶⁹ H.R. 8617 is clearly no improvement, because it makes no attempt whatever to define "political activity." In addition, the Civil Service Commission's enforcement authority could be strengthened. Rather than awaiting complaints of coercion, the commission should take preventive steps to avoid having federal workers pressured into involuntary political activity.

Until someone drafts an alternative statute that fully protects both government employees and those who deal with the federal gov-

⁶⁷ 330 U.S. 75, 121-22 (Douglas, J., dissenting in part).

⁶⁸ 5 U.S.C., section 7324(a).

⁶⁹ Prior to the interpretation of section 15 in *Letter Carriers*, the problems it caused were discussed perceptively in Henry Rose, "A Critical Look at the Hatch Act," *Harvard Law Review*, vol. 75 (1962), p. 510.

ernment from having their First Amendment rights to express themselves chilled, the Hatch Act, with all its deficiencies, still provides a significant measure of protection. To abandon it completely would risk not only politicizing some elements of the federal bureaucracy, but also chilling the political activities of much of the rest of the nation. A risk so inconsistent with fundamental First Amendment values should not be taken.

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Mr. CLAY. You may proceed.

STATEMENT OF JOHN R. BOLTON, ATTORNEY AT LAW

Mr. BOLTON. I would like to thank you for the opportunity to testify and with your indulgence I have already submitted to the staff for the record a study which was published last year for the American Enterprise Institute, which I did, called "The Hatch Act, a Civil Libertarian Defense." That study spells out in somewhat greater detail than my prepared text here my reasons for opposition to H.R. 10. As I say in the testimony, there are two principal reasons to be opposed to substantial repeal of the Hatch Act. And they are both civil libertarian reasons.

Two groups are protected by the act's provisions. One is composed of Federal employees who have a first amendment right in not being coerced into involuntary political activity. Typically, proponents of repeal of the Hatch Act argue that the first amendment values apply on the side of those employees who wish to engage in partisan activity. But it is clear that there are equally compelling, freedom of speech and freedom of association values on the other side.

It may sound somewhat paradoxical to argue that restraining some Federal employees who might otherwise wish to engage in partisan activity is justified, because those who do not are thereby protected.

But on examination it turns out not to be paradoxical at all.

The reason that we fear coercion of Federal employees so much is that the power from which the ability to coerce stems is governmental power. That is to say, power granted by the citizens to the Government for all of the various reasons that you might think of. Given the unique position of the Federal Government in our society and given the reasons for which citizens gave certain powers to the Government, we should be quite alarmed when that power is turned to partisan uses, as it would be with Federal employees coerced into political activity.

The second group which is protected by the Hatch Act is a group that I don't think has had any representatives testify on its behalf at these hearings or the ones previously held, and that group is composed of all the rest of us.

The average American citizen who is not an employee of the Federal Government, but who finds more and more aspects of his or her life influenced by Federal decisionmaking.

Mr. Chairman, your bill makes some effort to prevent the general public from being adversely affected.

You have limited provisions regarding the Department of Justice, the CIA and the IRS, where certain employees there would still be "Hatched."

But I would argue that that is far too limited a view of the impact of the Federal Government on our lives.

And in my prepared testimony I gave several examples of Federal officials who might influence the public in their dealings with the Government.

I note that testimony of several other witnesses gives other examples. And I won't elaborate on them now.

But the mere fact that the general public is not represented at the hearings should not lead you to believe that their first amendment in-

terests are of any less importance than employees of the Federal Government.

Quite to the contrary, I believe they are far more important.

In addition, I think that some of the statements that I have heard here this morning about the prohibitions on coercion that are obtained by H.R. 10, somewhat miss the mark. It is a crucial distinction for a Federal employee who is confronted with a possible coercive situation to be able to say, "I simply may not engage in this activity," as compared to the situation that would obtain if H.R. 10 is enacted where that employee is forced to say, "I do not choose to engage in that activity." The defense from coercion is far stronger in the former instance—a considerable measure of protection now contained in the Hatch Act would then be lost.

While I have no enforcement procedures to suggest, I believe that those procedures in H.R. 10 are insufficient and perhaps even more so than the present procedures.

To require an individual citizen, Federal employee, to file a complaint is to impose on the person least able to defend himself the burden of coming forward with his objections.

If that person is subject to political coercion and he fears for his career, if he doesn't submit to it, the possible consequences of bringing a complaint are, I think, obviously equally dangerous, if not greater.

So for all these reasons and for the reasons elaborated in length in my study for AEI, I do oppose H.R. 10. It is not to say that the Hatch Act is a perfect statute and there certainly could be some clarification of various of its provisions.

But that is not the direction in which H.R. 10 goes and for that reason I oppose it.

Mr. CLAY. Thank you. You have just made a statement that imposing the requirement for an individual who has been coerced to file a charge is unfair in some sense. Who would you think, or who would you suggest should file the complaint, if not the individual who has been aggrieved?

Mr. BOLTON. Well, in a situation where political activity is permitted to Federal employees, the possibility for coercion would be so much greater that to have an effective enforcement mechanism would simply require an immense agency.

Now, I am not sanguine about the enforcement heretofore by the Civil Service Commission. And I think that that could certainly be strengthened. Whether or not the restraints on political activity are repealed, my point really is that when you permit political activity, you make it that much more difficult for the individual to come forward.

It is really no different I think than a lot of situations we face both in private and governmental affairs wherein an individual is hesitant to bring a complaint on behalf of his rights. And I think we ought to encourage—I think we ought to provide mechanisms for fair enforcement that don't require so much of the average citizen.

Mr. CLAY. I think the record will indicate that is just the opposite of what you have said. The problem now would be, with the Equal Employment Opportunity Commission is that they have a backlog of

130,000 cases they can't process where individuals have gone and filed complaints against their employers in private industry.

So the fact is—and we anticipated at the time we passed that legislation that you would only receive about 20,000 or 30,000 complaints a year. But they are getting 100,000 complaints a year and the backlog is getting greater and greater. The fact is that people are no longer afraid to demand what is rightfully theirs. And I think that is part of the reason why we are considering this bill today, because the Government employees are agitated; they want the right to participate in politics. And they want to exercise their first amendment rights.

I don't see that there is much fear. We don't have it with the NLRB. People are constantly filing complaints about their employers denying them their rights to jobs. I think the record would indicate just the opposite is true.

Mr. BOLTON. I would like to disagree with you, because I think that where the employees are protected by a strong union, the fear is lessened. In this case, the real danger is that the very large and powerful Federal unions that didn't exist at the time the Hatch Act was passed might well be the principal source of coercion. And in that case—

Mr. CLAY. In what respect would the union people be in a position to coerce anyone?

Mr. BOLTON. I think that the past testimony on proposals similar to H.R. 10, and the testimony that was presented here yesterday indicates that a substantial majority of Federal employee unions are in favor of permitting partisan political activity.

Mr. CLAY. That is true.

Mr. BOLTON. And—

Mr. CLAY. But explain for the committee, you made a statement how union leaders would be in a position to coerce any Federal employee.

Mr. BOLTON. I think it is fairly obvious on its face, Mr. Chairman, with well-organized union officials throughout the Government who decide that a particular candidate is one they want to support. It is quite possible to be very subtle in the way in which the union can make its feelings known to Federal employees and have them support candidates that the union supports.

And I might add—

Mr. CLAY. Mr. Bolton, you are an attorney at law?

Mr. BOLTON. Yes, sir. I am.

Mr. CLAY. You understood my question?

Mr. BOLTON. And I believe I am answering it. And it seems to me that the coercion can exist quite apart from whether or not the statutory prohibition in your bill is violated or not.

Mr. CLAY. Do you know that union officials serve at the pleasure of the membership, they have to seek office periodically? I think it is every 2 years, at least. And there is no compulsion for anybody in the Federal Government to join a union. I could understand it if they had a hiring hall concept, that if members had to come to the union hall to get a card in order to work, there might be a possibility of coercion. But explain for this committee how union leaders could coerce their membership if this bill passed?

Mr. BOLTON. Well, I thought I just described it in the daily contacts that they have with their members, the message that they want to get across can well be gotten across. And I believe that coercion can take

many forms, some of them quite subtle and very unsuspectible to legislative regulation.

Mr. CLAY. But doesn't there have to be the possibility of some reprisal in order for you to coerce somebody? Doesn't there have to be the threat of some harm or some danger?

Mr. BOLTON. Typically, that is correct.

Mr. CLAY. OK. Now, where? Explain to this committee, this is very important. Explain to this committee how a union official could threaten some harm or some danger to one of its members if that member did not abide by the wishes of the union leadership?

Mr. BOLTON. In exactly the same way that some unions are able to exercise coercion over their members in the private sector by making the working environment quite unpalatable. In some cases, where the union might include supervisors by exercising adverse judgment over that individual.

Mr. CLAY. What unions include supervisors?

Mr. BOLTON. Not necessarily supervisors in the sense of OPEDA. But there are any number of categories—

Mr. CLAY. They have their own unions, don't they?

Mr. BOLTON. In some cases, yes. And—

Mr. CLAY. And in private industry what unions include supervisors?

Mr. BOLTON. As I understand the testimony from the gentleman just before me, OPEDA includes supervisory people.

Mr. CLAY. No. They have their own union. They are all supervisors.

Mr. BOLTON. If that is a union of supervisors, that has underneath its members staff and office assistants, and the like, it may well be that union that is exercising the coercion.

Mr. CLAY. But they represent management. And the union leaders who have been up here agitating for this bill don't represent management.

Mr. BOLTON. Let me give you another example. The Postal Workers Union, for instance, although I don't believe it includes supervisors except at a very low level—

Mr. CLAY. They have their own union.

Mr. BOLTON [continuing]. Is nonetheless quite a powerful union and quite capable of making the working environment of the typical postal employee who chooses to dissent from the political position the union espouses unlivable.

Mr. CLAY. Apparently you don't understand the structure of labor unions in the Federal Government. The union leaders don't decide if a person works, what his hours are, what his work consists of.

Mr. BOLTON. I think the union representative in the local post office is quite an influential person. Having worked for two summers in the U.S. Post Office, I became very familiar with how that operation works.

Mr. CLAY. Mr. Wilson?

Mr. WILSON. I have to agree with Mr. Clay. I don't know what your personal experience was, Mr. Bolton, but the union leaders who have to be elected to office are so worried about keeping their jobs, that they spend a lot of their time campaigning for reelection. I have never known of a case where they deliberately harassed their own union members. They are out trying to make friends with them so they won't vote against them in the next election. What was the experience you

had with the Post Office that leads you to believe that the shop steward can make life miserable for people? Actually, it is the postmaster and the supervisors that make work assignments.

Mr. BOLTON. I should say that my life was never made miserable. But it is the existence of the power of the union. And as to the point you made before, I think the fact that until now, there has not been the kind of coercion that I fear would occur if H.R. 10 is passed, is simply an indication that the Hatch Act works, that the unions have not attempted to influence their members because it is prohibited and because they know the employees are protected from that kind of coercion.

Mr. WILSON. The Federal employee unions do participate in Federal campaigns. They do it through voluntary funds. They help many of us.

Mr. BOLTON. And I believe that buttresses my point, since I think when the opportunity becomes more widespread to engage in political activity, they will attempt to do so. And it is in that set of circumstances that the danger of coercion occurs.

Mr. WILSON. We have had illustrations given of how people got bad job assignments when they didn't do what a supervisor said. That goes on now, I assume. They way to get along in the Federal Government, Hatch Act or no Hatch Act, is to get along with the guy who is your superior. If an employee deliberately crosses his supervisor whether it has to do with politics or anything else, I could imagine that supervisor would make life miserable for him. This is going to go on anyway. This is human nature.

Mr. BOLTON. I agree with that. And I think because it is so important that people not lose the first amendment right not to engage in political activity that the Hatch Act ought to remain essentially as is.

Mr. WILSON. I agree with your statement on page 6, where you indicate that you felt there should be a limited exemption for the CIA, IRS, and FBI. You state further that there are other people in other departments that could hold just as sensitive positions making decisions that affect the public. I would just as soon see the bill without any exceptions. The exceptions were put in to try and make it a little more agreeable to those people who are frightened about the fact that these agencies might be too sensitive. But again I don't think there should be any exemptions. You also say you feel there is an unconstitutional provision in the bill.

Mr. BOLTON. Yes; proposed sections 7324(b) (3) and 7331 of title 5, United States Code.

Mr. WILSON. That is based on your opinion as a lawyer?

Mr. BOLTON. Yes, sir.

Mr. WILSON. Are you pretty firm on that? Is there an actual constitutional violation here or is there an imperfection in the bill that should be corrected?

Mr. BOLTON. I believe the technique known as the legislative veto is unconstitutional. I have another study coming from the American Enterprise Institute early next month that discusses the unconstitutionality of that. I mention that here because—

Mr. WILSON. If you could present us with some help along the way, that is why we are having these hearings.

If you can help us make it a better bill, I am sure the committee would appreciate it.

Mr. BOLTON. Certainly, sir. I would be glad to submit a copy of the study when it is published.

Mr. WILSON. Thank you, Mr. Bolton.

Mr. BOLTON. Thank you.

Mr. CLAY. Our next witness is Mr. Jon Minarik, director of congressional affairs, Public Service Research Council.

STATEMENT OF JON MINARIK, DIRECTOR OF CONGRESSIONAL AFFAIRS, PUBLIC SERVICE RESEARCH COUNCIL, ACCOMPANIED BY DAVID DENHOLM, EXECUTIVE VICE PRESIDENT

Mr. MINARIK. Thank you, Mr. Chairman.

On my left is Mr. David Denholm, executive vice president of the Public Service Research Council.

Mr. Chairman, members of the committee, my name is Jon Minarik. I am director of congressional affairs for the Public Service Research Council, a 600,000-member citizens' lobby which opposes the extension of new powers and special privileges to public sector union organizers through compulsory public sector bargaining legislation.

The PSRC and its action arm, Americans Against Union Control of Government, are strongly opposed to H.R. 10. We regard this bill as being completely against the public interest.

The Federal Employees Political Activities Act of 1977 is a bill that in its innocence hopes to restore to Federal employees "their rights of voluntary participation in the political processes of our Nation."

"Voluntary participation in the political processes of our Nation" is a phrase filled with code words for something that, in our opinion, will turn out to be the most detrimental piece of legislation since the Davis-Bacon Act.

Mr. Chairman, we seriously question whether any Federal employee will be able to withstand the pressures put upon him when it comes time for politicking.

We are not speaking here of official pressure, nor are we speaking of pressure by one employee on another. Both of these types are professedly prohibited by the present language of H.R. 10. Yet, even then we doubt the effectiveness of those prohibitions.

Our main concern, however, lies in the area of union pressure—which is far harder to resist, and much more difficult to prove. Yet, the coercion that a union can place on an individual is frighteningly powerful. Nowhere, however, in the entire proposal is the pressure of unions recognized and/or prohibited.

We submit that this omission was conscious, and last year's attempt by Senator Fong to prohibit such union activities was defeated. For the record, this was amendment No. 1277, introduced by Senator Fong on March 10, 1976, and defeated 66 to 25.

This came as no surprise, because it was a known fact that the union bosses were very eager to see the Hatch Act overhauled. There were dozens and dozens of newspapers editorializing on the fact that the Hatch Act repeal was a goal of the union bosses, and not once did the union hierarchy deny their happy anticipation of the passage of H.R. 8617. In fact, as one union boss put it, "If we can get this Hatch Act bill into law we can really get moving."

We know that there are many people who claim blindness or bafflement when it comes to union pressure.

There are those who say that heavy, abusive pressure by a union on an individual is a thing of the past. We are told that there are safeguards to prevent union coercion on Federal employees from parroting the union line.

The all too numerous instances of such pressure only remind us that this union intimidation is as real as the Presidency of Jimmy Carter.

Let me relate a couple of instances.

In Virginia, three employees of the Federal Postal Service chose not to join the old dominion branch of the letter carriers union.

These men were called scabs by the union newsletter and described as "a two-legged animal with a corkscrew soul, a water brain, a combination of backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles."

These men were taunted, jeered, and intimidated by the union for exercising their right of free choice. They sued the union, and the case went before the Supreme Court. The Court ruled against them in these words.

... Federal law gives a union license to use intemperate, abusive, or insulting language without fear or restraint or penalty if it believes such rhetoric to be an effective means to make its point.

What's to prevent a union publication in the future from printing the names of those newly unhatched Federal employees who did not actively support the favored union candidate? And of describing these nonactivists in a manner similar to the way the Virginia postal workers were described? Certainly not the law—and, if not the law, then what?

Mr. Tiso Anthan can attest to union pressure and intimidation.

He refused, after a while, to continue participating in union coercion tactics against the management over a labor dispute.

As a consequence, tremendous pressure was put on Anthan by the union for not going along.

Intimidation, jeers, interfering with his ability to perform an effective job were all part of the union tactics to make Anthan conform.

Anthan took legal action against the union, and he won. The treatment he was forced to undergo, the hardship his family endured because of union intimidation is a sad story. It is, however, illustrative of typical union pressure and how they view freedom of expression and choice when that choice does not coincide with the union's.

In an article written by John Bolton, entitled "The Hatch Act: A Civil Libertarian Defense," we quote:

Indeed, the difference between coercion of an employee by a supervisor (the paradigm of 1939) and coercion of an employee by a union—which may include supervisors—the paradigm of today is that coercion by a union is far harder to resist. Moreover, it may well be that unions are far more capable of engaging in the systematic solicitation and intimidation of federal employees than a network of supervisors. Public employee unions were not of significant size when the Hatch Act was originally passed, but their advent has, if anything, only made the Hatch Act more important. Union protestations that their presence renders supervisor coercion less likely, however accurate, still provide no answer to the question of what renders union coercion less likely. Those concerned about union political pressure will not find their fears assuaged by the fact that the conventions of three of the most powerful federal employee unions supporting H.R. 3000 were unanimous in their opposition to the Hatch Act as

currently written. Nor does the fact that the convention of one union opposed to modification of the Hatch Act was also unanimously for its position do anything to lessen fears of coercion.

In addition, we can see how the individual member can become a pawn in the hands of a union.

Because an individual union member is not liable for the prohibited political activity of a labor union, it is thus able to perform partisan activities that might otherwise be denied.

By placing certain amounts of pressure on individuals to actively partake in an "individual" sense, and not as a union, the union once again succeeds in its goals and does not violate the law.

The powers of the unions in the political arena is incredible. No one denies the extensive role COPE plays in determining the outcome of elections. It is as if the Democratic Party and the unions were the same political party with different names. To permit an extension of this weight into the Federal work force would create a situation where highly cherished nonpartisanship would be hatched to death.

Because of this and what would result if the bill in its present language were to pass, we submit an amendment:

Wherever the word "official" appears in H.R. 10, the word "union" should be placed before it. This would be a step in the right direction toward prohibiting all types of pressure on an individual, and would further reduce the threat of the unions, instead of Government officials, from running the Federal work force.

The proponents of this bill claim the desire to give the Federal worker his right of expression. Let's then be consistent in that desire and allow him to say no if he wants, without the fear of union-boss reprisals, such as those black postal workers in Virginia who were not allowed to freely exercise their right without coercion and shame.

In an in-home, nationwide survey taken less than a year ago by Decision Making Information, over 70 percent of respondents expressed their preference at keeping the Hatch Act as it is.

Of the Government employees asked, 73 percent desire retention; 71 percent of the union members asked wish the law left untouched; and 81 percent of the public sector nonunion employees do not want the law tampered with.

These overwhelming figures give our Federal legislators an easy path to follow when trying to determine how their constituents feel on this issue.

The constitutional questions of H.R. 10 are for legal scholars to discuss. The civil libertarian aspects of the Hatch Act are plain but do not fall under this presentation.

But adding all those together on the scale, along with the numerous Supreme Court rulings upholding the legitimacy of the law, plus Thomas Jefferson's warnings against a politically active bureaucracy, and the numerous surveys showing the Federal work force opposed to unhatching themselves, we can only conclude that this is special interest legislation, designed for special interests.

And those special interests, the big unions, are the only ones who would benefit from this bill. That benefit would be a yoke on the bureaucracy and the country, leaving the name of impartiality in the Federal work force a joke.

We will entertain any questions the committee has now, Mr. Chairman.

Mr. CLAY. Did you have a statement, sir?

Mr. DENHOLM. No; Mr. Chairman, I just came in case there were questions I could better answer.

Mr. CLAY. My first question here deals with the statement you made about union pressure, and the fact that this Letter Carriers Union published in their bulletin some things that were distasteful, perhaps, and unkind about an individual. But you further go on to say that the Supreme Court upheld their right to do that.

You are not implying that the Court does not have the responsibility to interpret the rights, are you?

Mr. DENHOLM. No. The central point there is that it is obviously legal for a union to use that sort of tactic to accomplish its goals. And since unions' goals are often political goals we can assume that under the Hatch Act provisions a union official who was not a Federal employee could use any tactic of that nature to coerce and this is evident in itself that they do coerce.

You asked earlier of another witness the types of discrimination that would be available to a union. And last year if you remember the hearings on H.R. 5023, which was the bill to remove the exclusive representation nature of the unions, representation on grievances, the record is replete with a fairly constant pattern of discrimination in grievances.

Now, that was a record of racial discrimination. And we are not suggesting that that discrimination in politics would be racially motivated or racial in nature. But that obviously the ability to discriminate is there through the vehicle of exclusive representation, and exclusive representation is part and parcel of the whole union arrangement under the Executive Order 11491.

So, you have the distinct problem of, how does the union discriminate? Well, if the union is charged with representing employees in grievances and an employee albeit a minority in this case, perhaps, a political minority rather than a racial minority, doesn't follow the union thinking they have that vehicle available to them to discriminate and they have a pattern, a historic record of having used a system at particular discrimination for accomplishing goals in that regard.

In St. Louis, Mo., the union decided in the air traffic controllers to engage in a harassing tactic against management. One of the members would not participate in that harassment and the union used its power to coerce the employee, the union member to participate in the union harassment of management.

This is not speculation in that the employee filed the charge against the union and won that charge in a court. Again, it is just evidence that unions have a pattern of using the power available to them to accomplish their goals by coercion and discrimination.

And I think, therefore, that our amendment, in other words, just to make sure that as you proceed to lift the lid, so to speak, to make sure that a union official is regarded just as a management official might be, in other words, if it is illegal for a management official to discriminate and coerce an employee into political activity that that same protection should be available to the employee from the union.

Mr. CLAY. In your statement, you said that amendment was offered last year in the Senate by Senator Fong, and it was voted down 65 to 25.

Mr. DENHOLM. I believe it was 66.

Mr. CLAY. Doesn't that indicate to you that the prevailing thought in the Senate is that the amendment had very little merit?

Mr. DENHOLM. No, sir. That would indicate to me that the prevailing thought was that, if this bill is to be of use to the unions, that they ought not to amend it in that fashion.

In testimony yesterday the unions said they had no intention of engaging in this sort of coercion. And since they have no intention of doing that, I can't see why the committee would object to inserting a prohibition.

Mr. CLAY. I don't think the Senate cares one damn bit about what the labor unions want. The greatest issue of the labor movement now is repeal of 14(d), the right-to-work laws.

Do you think they are going to pass that in the Senate?

Mr. DENHOLM. I don't want to speculate on that, sir. That is not my field.

Mr. CLAY. They won't even come close. All of this power people say they have, certainly they have not been able to use it to work their will in this Congress. So I think some people are just throwing around certain code words, as you say in your statement, about power that does not exist.

On page 2 of your statement, you mention that there were dozens and dozens of newspapers editorializing on the fact that the Hatch Act repeal was the goal of the union bosses, and not once did the hierarchy deny their happy anticipation of the passage.

Now, I assume that that statement was put there in some way to convince this committee that the real protectors of the rights of the civil servant are the newspapers. And I would just like to say that 90 percent of the newspapers in this country in 1972 supported Richard Nixon for reelection and editorialized in the same fashion about how great this man was. Yet, it was Richard Nixon who almost destroyed the merit system in this country and who did more to violate the Hatch Act than all of the previous Presidents combined. So I'm still trying to understand why you put a statement in there that the newspapers editorialized and attempted in some way to protect the rights of Federal workers, when they also successfully pawned Richard Nixon off on us, the greatest enemy of the merit system and the Hatch Act.

Mr. MINARIK. The statement was put in there to indicate that throughout the country, as this survey showed, the consensus of opinion was against overhauling the Hatch Act. And we felt that, as is mentioned often, once we get beyond the Potomac into Ohio and Kansas and further west, there is generally a difference as to how a policy should be implemented, and the laws that are passed, rather than in the small so-called elite group. That is why it was put in there.

And, also, I think that these newspapers editorialize to keep the Hatch Act as it is because they saw the abuses created by former President Nixon and wanted to prevent that type of abuse from occurring again. So, probably, they learned a lesson from that.

Mr. CLAY. You don't believe that newspapers are impartial bystanders in the struggle between labor and management, do you?

Mr. MINARIK. No, sir.

Mr. CLAY. The mere fact that management runs full-page ads of

\$5,000 and labor unions don't advertise, you don't think that would influence the opinion and judgment of newspaper editors, do you?

Mr. MINARIK. Well, I have seen ads by the American federations which are full pages throughout the country.

Mr. CLAY. Maybe once a year, but not every day.

Mr. MINARIK. You are right.

Mr. CLAY. Mr. Wilson?

Mr. WILSON. Yes.

The Public Service Research Council and your action arm, Americans Against Union Control of Government, really, doesn't it make you happy when bills like this are introduced, because you can solicit money?

This is the greatest excuse in the world for you to go out and drum up contributions for your organization, and you do it, too, because we are already getting postcards from your organization. And you got these people so excited; you got a 600,000-member mailing list that you are able to use. And I bet you really look forward to this.

I would like to see what kind of money you raise for these causes. But, of course, that is your right, and you are entitled to do it.

Are you associated with the Right-to-Work Committee?

Mr. MINARIK. No, we are not.

Mr. WILSON. They are happy about it, too. They have been building their treasury up, too. [Laughter.]

Mr. DENHOLM. You will probably notice that that committee is not here today, because the Hatch Act has nothing to do with compulsory unionism.

Mr. WILSON. We got some bills pending on it, but we are going to go slow on our labor bills this year. [Laughter.]

We went a little too fast in the last Congress. We are going to slow down a little bit this year. This may slow down some of your contributions. [Laughter.]

But we will try and work with you whenever we can.

I don't have anything further, Mr. Chairman.

I think that this is a statement that we would expect from such an organization. They are antiunion, and we just have an honest difference of opinion.

Thank you, Mr. Chairman.

Mr. CLAY. Thank you.

Mr. Taylor?

Mr. TAYLOR. Thank you, Mr. Chairman.

I want to thank the witnesses for their testimony and for your answers to these questions.

On page 3 of your testimony, in the Supreme Court decision, am I correct that the Supreme Court's actual language was that the Federal law gives the union a license to use this language "without fear of restraint or penalty if it believes such rhetoric to be an effective means to make a point?"

Mr. MINARIK. Yes; those are the words, Justice Marshall.

Mr. TAYLOR. I don't believe I ever saw anything worse coming out of the Nixon administration.

The thrust of this legislation—and I think it has merit, inasmuch as we are giving the employees the right to participate in the political

process. We have some serious reservations about the abuses that might accrue.

And I believe that the Federal employees should have the right to participate. And I think there might be some limitations that would be in the public interest. And they certainly have the right to vote, to express their views, and possibly even to run for public office. But I also believe that they should have the right to join the labor union if they so desire.

And I just wondered, would it be wise to afford them the same freedom of choice in their desire to join the labor union if they want to, to participate, to contribute to political funds if they want to, the same as I have the right to join the Chamber of Commerce if I desire to?

And it seems to me that this is—that this philosophy should be in the thrust of this bill. Do you have any comments on that?

Mr. DENHOLM. I think you have to look at the distinction between the right to participate freely and the protection against being coerced. And I would agree with you that the right to participate freely is an important one, so long as it can be protected from coercion.

In other words, can you lift the prohibitions or the restrictions without opening it up to coercion? This is the difficult problem that you are trying to cope with. And I am sure that's why, even in H.R. 10, they have left in substantial restrictions against certain types of activities by supervisors, to prevent that sort of coercion from taking place.

And what we are saying here is that, since the record shows that unions present an equally great threat in terms of that discrimination, that we should keep those same restrictions or protections vis-à-vis the employee from the union.

Mr. TAYLOR. I would agree. And I would say that subtle coercion is very hard to legislate. But I think we should make every effort to safeguard our employees against coercion by the labor unions or somebody else. And I think that labor unions can coerce even Federal employees in many ways if they want to, and there is no question that it can be done through subtle methods. It can be done in a business, as far as that's concerned, with the manager and his own employees.

I assume it can be done if he wants to do it. But I think we have the responsibility to guard against coercion, and I'm not sure that this bill has adequate teeth in it to offer that protection to the Federal employees from coercion, even by supervisors or labor union leaders.

That is all I have.

Mr. CLAY. Thank you.

We certainly want to thank you for your testimony.

Mr. MINARIK. We do want to thank you, also, for allowing us to appear before you today.

Mr. CLAY. Our next witness is Mr. Albert J. Schaffer, member, International Personnel Management Association.

STATEMENT OF ALBERT J. SCHAFER, MEMBER, INTERNATIONAL PERSONNEL MANAGEMENT ASSOCIATION

Mr. SCHAFER. Mr. Chairman and members of the committee, I commend you on your patience.

Mr. CLAY. And I commend you, knowing that you were here at 10 o'clock this morning.

Mr. SCHAFER. We're very much interested in this legislation and we would stay until 10 o'clock tonight for an opportunity to present our views.

Mr. CLAY. Thank you. Without objection, your statement will be included in the record after any presentation you wish to make.

Mr. SCHAFER. I will attempt to summarize and make some comments on the statement.

The young lady accompanying me is Ms. Enid Beaumont, director of the Washington office of the International Personnel Management Association.

The International Personnel Management Association appreciates the opportunity to present its position on H.R. 10, the Federal Employees' Political Activities Act of 1977. IPMA is a professional organization which seeks to improve public personnel administration at all levels of government.

My purpose in speaking for IPMA here today is to explain why IPMA continues to oppose these changes in the Hatch Act.

IPMA's opposition to H.R. 10 centers on three predictions. The first, H.R. 10 will result in the politicization of the civil service and of Government operations. Second, H.R. 10 will lead to situations of apparent conflict of interest. And third, which is a byproduct of the system, H.R. 10 will increase the administrative law caseloads at a staggering cost to the Federal Government. This third point has nothing to do with the basic intent of the law, but certainly it must be considered should this legislation become law.

I have been in the Federal Government for almost 40 years, in the field of personnel administration, and have seen things go from good to better to bad, to reasonably well. I speak with some experience in the field of personnel administration, particularly on the question of coercion and conflict of interest. My last full-time job was Director of Personnel for the Internal Revenue Service from 1960 to 1972.

The Internal Revenue Service in 1949 was rocked with scandals because of its political appointments of Collectors of Revenue. The King study, through its investigations, brought out the fact that the IRS should become a blue-ribbon organization because of the political abuses to our tax system. As a result it came in to being with the Reorganization Act of 1952 and has remained that way to this date.

H.R. 10 is a two-part problem. The first is, the question of conflict of interest which is very significant. You have recognized it in the bill by exempting from the bill certain positions that are defined as sensitive under Executive Order 10450.

We recognize what appears to be an apparent conflict of interest. It is a real problem of whether or not an internal revenue agent or anyone else connected with processing one's tax return can give the appearance of making an impartial decision.

Mr. CLAY. If I might interrupt at this point. That's a bone of contention among this committee. The Chairman's personal feeling is that nobody should be exempt. But I have to abide by the majority.

Mr. SCHAFER. I heard the Congressman say that this was a compromise which you gentleman have to do at times.

However, your staff may want to research the technical definition of a sensitive position as defined in Executive Order 10450 in the IRS

because there are very few such positions at present so designated by the Commissioner.

I guess this could be expanded or taken away. But what you're trying to do—has nothing to do with national security problems. And certainly the duties of an internal revenue agent or revenue officer has nothing to do with national security. He does have a sensitive relationship as to how he handles tax matters for a taxpayer. And I think that's what you're trying to get to. I think you ought to be sure that what you're trying to get to, gets to that particular point of issue.

Now, to the extent that this is an example of a sensitive relationship between a Federal employee and a taxpayer, it is equally true of custom employees who collect \$3 billion of revenue from taxpayers when goods or citizens enter the country. How you can separate a revenue officer from a customs officer, I don't know. How can you separate an alcohol and tobacco tax investigator who also collects money for taxes, when he goes into a plant that manufactures alcohol and determines whether or not it will assess certain taxes or not. Again you get one step removed, when you get to the VA appraisal and the HUD appraisal and on and on and on it goes.

In all of these cases and many more there is no way to separate the apparent conflict of interest.

Mr. CLAY. You have presented my arguments for why there should be no exemptions.

Mr. SCHAFFER. There is an apparent conflict of interest wherever judgment is involved between a Federal employee and citizen. There are lots of them, in the regulatory aspects, whether it's an application before the SEC, the Federal Trade Commission, the Federal Power Commission, etc, there will always be a question as to how a decision is reached if that decisionmaking Federal employee has been allowed to participate fully in political matters.

Now, there are a lot of employees who don't have to make that judgment at all. There are a lot of blue collar workers in the Federal Government who work in plants throughout the country who manufacture things. The postal employees who deliver the mail to the houses. He has a service to perform. The employee in the Treasury disbursing office who has to issue checks and performs a service with no judgment involved. So to the extent that services are provided and there is no conflict of interest in a large segment of the Federal Government, there is no direct conflict of interest.

But the second part of the problem that we see has to do with the subtle political coercion of all employees as they relate to personnel actions whether they be original appointments, promotions, or reassignments. To the extent that a person's supervisor has run for an X position in a partisan election, and to the extent that selection for promotions by that supervisor come up for consideration abuses of the merit system can occur. To the extent that it has been done at the higher levels, there is no reason why it won't be done at the lower levels, the clearance of employee political registration at the county courthouse can happen.

As you have said many times, "well, it has never happened." How does the Hatch Act protect them? It doesn't protect them. It could happen anyway. But if you have the choice of saying, I don't have

to do this, or choose to do it or not do it—is a big distinction. I think that the Hatch Act provides many, many opportunities to participate in the political activities of this country. He has the right to vote, he has the right to make contributions and many other things. The only two things that your bill is going to do is to permit him to run for office and manage a political campaign. Not during the 8 hours he is working, but when he is home after duty hours.

There are two things your bill will provide. It gives him his full first amendment rights, and treats him as all other citizens of this country.

Well, I think that a Federal employee who comes into the Federal Government, comes in under the merit system and progresses on his merits. He is entitled to have that protection and not be dependent upon somebody else's political desires.

I feel strongly about this. I realize that you're faced with the dilemma of the first amendment rights and the treating of Federal employees as second-class citizens. I think there was testimony presented to your committee a couple of years ago by Mr. Wolkomir, president, NFFE. His survey of 118,000 NFFE union members on the proposition of repealing the Hatch Act, indicated that 85 percent of them said no—5 percent said yes.

I think you ought to be aware that the great majority of Federal employees do not want to be pawns in a political situation. They are dedicated to provide fair and impartial service to this public. That's what they came in for, and they want to do the best job they can.

If HR 10 becomes law the first year, you're not going to get many reverberations. The second year you may get some. And in 3 years you're going to find that conflicts and coercion are there.

I want to comment that we represent all levels of government. All of the above comments applies equally to local and State governments.

Congressman Fisher wants to limit the change to the local and State level on a trial basis. I think there are closer political ties at the local levels for the politicians to engage in than in the Federal Government, where it's once removed from the local situation.

But being that as it may, we think that you cannot start out with the State and local and try it out. You should not try it out at all. And as I say, it's a simple question of coercion for merit system abuses and, second, for conflict of interest on judgment decisions between the public and employees of the Federal Government.

Thank you very much.

Mr. CLAY. Thank you.

You know, we have heard a number of people allude to certain surveys that have been conducted among Federal employees to establish how they feel about the repeal or revision of the Hatch Act. And we have gotten all kinds of statements.

You mentioned the one by Mr. Wolkomir. I think you said they had 118,000 members, and a large percentage of them were opposed to revising the Hatch Act.

But the most authoritative, the most professional study ever done in this area was a study conducted by the University of Michigan and commissioned by this Congress. And we paid the bill.

We asked them to establish for us what the feeling was, along with a number of other things. And the results of this highly professional

survey came back that almost 80 percent of the Federal employees did not even know what the provisions of the Hatch Act were. Didn't know what was permitted; didn't know what was prohibited.

So, starting at that basis, then, someone would have to interpret for me what Wolkomir's survey meant when he says 90 percent of his people were opposed to changing something that the University of Michigan says they don't know what it is.

Mr. SCHAFFER. I accept that.

Mr. CLAY. I think these surveys can be misleading. If 80 percent of the workers do not know what it is that they do not want to change, I do not think you can say there is much credibility in a survey like that.

Mr. SCHAFFER. I was just reporting the fact that this survey was taken. I must say I agree with one part of your proposed legislation. There is a great deal of educational need in the Federal service as to the do's and don'ts.

Having been in the people business for years, I know it is most difficult to translate this into ordinary language and then place it into action so that everybody understands it.

The communication problem in a subject like this is very, very difficult, because the line sometimes becomes very fine as to whether or not you make a contribution or whether your wife participates in the political campaign.

So, there needs to be a great deal of education to be done in this area. And I would hope that your bill would strengthen and do what you can in this area, because I think it is needed greatly.

Mr. CLAY. Thank you.

Mr. Wilson?

Mr. WILSON. Yes.

Mr. Schaffer, on page 7 of your statement, and then in your oral statement, you referred to other examples of sensitive positions where people could take advantage of the position they hold in connection with a campaign.

I agree with you. I think there probably are a lot of them. I think we are more sensitive about the IRS. Mr. Clay and I have the same views on this.

If an IRS agent were to run for office and show his title only, I think rather than helping him with any coercion, they would probably beat the heck out of him. [Laughter.]

Mr. SCHAFFER. I hope he does not have to revert to that.

Mr. WILSON. Maybe we are a little more concerned with the CIA. I think the important thing is that we try this out and see how it works instead of trying to curtail the legislation by fear because of what we think might happen.

Mr. SCHAFFER. I respect your statement. I heard Congressman Haris saying, "Let us try it out and see how it comes out." That is like locking the barn door after the horse has run away.

There is a lot of abuses that can go over the dam before repeal makes it necessary to go back to where we were.

We are concerned about opening that door ahead of time.

Mr. WILSON. Speaker O'Neill, last Sunday on "Face the Nation", said there are times when Congressmen have to be courageous enough to vote against what their constituents may appear to want. The point he made, I think, is very important.

You and the gentleman who preceded you made reference to polls by saying how important polls are. But if we polled our constituents on every subject that we have, my God, we might as well just have computers here to cast our votes. There would be no reason for the Congress.

I think we have more knowledge about this issue as a result of the witnesses we have heard than probably 95 percent of the people who have responded to any of these questionnaires or polls that were taken. And I think we have to have the courage as representatives of the people to vote our conscience.

I suppose I could be criticized for making that statement, too. I just mention that because I think we sometimes overdo this polling business.

Maybe the reason Dr. Wolkomir got those answers is the way he asked the questions.

Mr. SCHAFFER. That could be. And I think the committee would be helped considerably if you let the public personnel people and your committee staff write up a questionnaire and send it to the 2 million Federal people, I would be very interested in that.

Your authority to legislate laws to impose upon those 2 million Federal people is unquestionable. I know you have the authority. But then I don't know whether that is a good thing or not.

Mr. WILSON. Well, again, it is based on the information that is derived. Now, the postcards that come from the arm of the organization that was represented earlier, were sent to somebody and saying: "Sign your name and then send it to your Congressman."

I don't know how much thought was given to them. That is probably why the questionnaire results from the University of Michigan were different from those of Dr. Wolkomir's because they were probably done scientifically.

Mr. SCHAFFER. They were done by this committee's instructions.

Mr. WILSON. They were given complete freedom.

Mr. SCHAFFER. They were paid by the committee.

Mr. WILSON. But they did not know that was going to be the case.

Mr. SCHAFFER. Those that pay the bill have some influence on the outcome.

Mr. WILSON. Well, it was done scientifically. You do not trust that survey. And I do not know whether I would trust a survey that your organization had prepared, because you already have your own ideas about it.

Our hearings, I think, have been able to establish what the people want. We assume that when the unions present themselves before us and when they have resolutions that have been adopted at their conventions, that this must be the will of the great majority of their members. And do not try to tell me that their conventions are not democratic.

I have been to several union conventions. And I tell you that the union leaders do not have an easy job.

Mr. SCHAFFER. I have been to several, also. I know how they operate.

Mr. WILSON. Thank you very much.

We appreciate your testimony.

Mr. CLAY. Thank you.

Mr. Taylor?

Mr. TAYLOR. Thank you.

I have just one question that I would like to ask.

As a former IRS employee, how do you think the public might perceive an IRS agent who is a political activist, who made a determination as to a tax matter with the constituents, one that would adversely affect him? Do you think that the public might perceive this to be a politically motivated decision if he was a political activist?

Mr. SCHAFFER. His rationale could come to that point very easily, particularly if he had run for mayor the previous year on a partisan ticket, was defeated, and he was back again. Even though he took annual leave to run, the taxpayer is going to—

Mr. TAYLOR. Wouldn't this be true in other agencies as well where career people make decisions affecting lives of people?

Mr. SCHAFFER. Yes, sir. And there is no way to stop it.

Mr. TAYLOR. Thank you, Mr. Chairman.

Mr. CLAY. Thank you. And we certainly want to thank you for your testimony.

Mr. SCHAFFER. Thank you.

Mr. CLAY. The hearing will be adjourned subject to call of the Chair.

[Whereupon, at 1:20 p.m., the hearing was adjourned, subject to the call of the Chair.]

[The prepared statement submitted by Mr. Schaffer follows:]

PREPARED STATEMENT OF ALBERT J. SCHAFFER, INTERNATIONAL PERSONNEL
MANAGEMENT ASSOCIATION

The International Personnel Management Association appreciates the opportunity to present its position on H.R. 10, the Federal Employees' Political Activities Act of 1977. IPMA is a professional organization which seeks to improve public personnel administration at all levels of government.

My purpose in speaking for IPMA here today is to explain why IPMA continues to oppose these changes to the Hatch Act.

IPMA's opposition to H.R. 10 centers on three categories.

First, H.R. 10 will result in the politicization of the civil service and of Government operations.

Second, H.R. 10 will lead to situations of apparent conflict of interest.

Third, H.R. 10 will increase the administrative law case loads at a staggering cost to the Federal Government.

The Hatch Act was passed in 1939 to stop political abuses in the administration of Federal programs and to protect Federal employees from overzealous political office seekers and office holders. H.R. 10 proponents are re-writing history to arguing that the circumstances in the 1930's were never serious enough to justify limits on the voluntary political activities of Federal employees. They further argue that the circumstances today are even less compelling. The proponents point to the increased number of "Hatched" employees, the need for more citizens to actively participate in the political processes of the Nation, and the maturity of the merit system as signs of changing times. We agree that the times have changed, but the need to insulate the civil service from partisan politics is as compelling today as it was in 1939, if not more so.

Today close to 3 million Federal employees are covered by the Hatch Act. They are not second class citizens, and they are not petitioning for emancipation. They take pride in their impartial execution of the law. They accept the terms of their employment voluntarily and enjoy greater job security in return. They fear political coercion and discrimination far more than they covet the chance to run for partisan office, to attend a political convention or to manage a political campaign. Their sheer numbers and unique status make them easy marks for unethical politicians and political organizers.

At the same time that these three million employees are covered by the Hatch Act, they are also covered by the merit system. The civil service is more institutionalized today than in the 1930's. Merit principles are fixed in our sense of ethics. But none of this suggests that the merit system is any less vulnerable to abuse. This same Committee just last year investigated and reported on widespread merit abuses for political reasons and on the Civil Service Commission's

inability to deal with those abuses. How can we reason that the Commission and the merit system are now suddenly strong enough to withstand the new political pressures which H.R. 10 would unleash?

Let us examine those pressures and their potential impact on the Federal employee, on the general public, and on the administrative machinery of government.

IPMA is unaware of any survey of Federal employees to determine how many would likely run for elective office, manage a political campaign or actively campaign for a partisan candidate. Voter participation statistics are irrelevant because Federal employees can and do vote. It is IPMA's opinion, however, that relatively few Federal employees would exercise the maximum political rights restored to them by H.R. 10. Yet every Federal employee would feel its impact on the job. Employees, as well as public programs, would be labeled politically. The appearance of favoritism or discrimination based on political affiliation would be commonplace. Decisions having preferential or adverse impact on anyone would be seen and reported as politically motivated. Employees would second guess and mistrust the intent of superiors or co-workers holding different political views. At the same time, many would seek to ingratiate themselves with those of like political persuasions. The bureaucracy would divide against itself.

The "ins" would under-utilize the "outs." A shadow bureaucracy of politically motivated leakers, grievants, and malcontents would interfere with government operations. Truly, a change of Administration would be a day of reckoning.

The impact of H.R. 10 will go beyond the confines of the Federal bureaucracy. State and local governments following the Federal model might change their laws on political activities thus extending the negative impact of H.R. 10 to a much larger group of public employees. The public at large will suffer the consequences.

Newspapers and public opinion polls continually remind us that the public's confidence in government operations and in public officials is dropping. H.R. 10 sponsors obviously fear misuse of sensitive information for political ends. Hence they exclude certain employees of the Internal Revenue Service, Central Intelligence Agency, and the Department of Justice. IPMA is equally concerned about the far larger percentage of Federal employees whose jobs and political activities are certain to appear in conflict of interest. Some examples are:

An inspector from OSHA, the Bureau of Mines, or the Department of Agriculture is a party precinct captain. As such he solicits or receives political contributions from the businesses he inspects. In the course of his government duties he finds that an important political contributor is not complying with government regulations or standards. Can he avoid the appearance of conflict of interest? We think not.

A VA appraiser is running for a seat on the County Board of Supervisors. If elected, he serves in that part-time elective office without resigning his government position. The Board decides land uses, zoning changes or zoning variances having immediate or potential impact on real estate values. Can he avoid the appearance of conflict of interest? We think not.

A community development specialist in HUD is campaigning in support of a partisan candidate for mayor. Regardless of the outcome of the election, the employee must maintain positive relationships with the city government. Can he avoid the appearance of conflict of interest? We think not.

In addition to these specific examples, Consider the prospect of any Federal employee running for Congress, while on paid leave from the government and guaranteed the right to resume his position, if defeated. What other U.S. citizen would be paid a salary by the Federal government while seeking elective office? Conflict of interest situations such as these threaten to undermine the public's already shaky confidence in the decisions of government and in the actions of elected officials.

Furthermore, they reverse the trend toward tougher standards of conduct.

The prohibitions, protections and safeguards in H.R. 10 guard against the most overt dangers in liberalizing the Hatch Act. H.R. 10 will not only unleash allegations of political coercion for the Board of Political Activities of Federal Employees to adjudicate. It could also unleash hundreds of discrimination complaints based on political affiliation, grievances, conflict of interest rulings, adverse actions and appeals. Existing laws, Executive Orders and CSC regulations govern these situations. Anyone familiar with the procedures for processing discrimination complaints, employee grievances, conflict of interest rulings, or adverse action appeals, takes little heart in the safeguards in H.R. 10.

They know how difficult, burdensome, and costly it is to prove or disprove allegations of intent. A single discrimination case may last two years and cost the public hundreds of thousands of dollars. The potential costs to the taxpayers are staggering. While H.R. 10 does not authorize new expenditures, it will force the reallocation of existing appropriations to cover the costs of investigations and adjudications.

The greater the freedom, the more difficult it is to define its limits. The line between permissible and prohibited action in H.R. 10 is difficult to draw and would be impossible to enforce. If employees misunderstand the provisions of the Hatch Act, they most certainly will also misunderstand the provisions of H.R. 10.

IPMA views H.R. 10 as a trade-off between full potential rights exercised by a few and a direct cost to the public in protecting its rights to impartial government and in protecting the rights of all Federal employees to impartial treatment. H.R. 10 is not worth that cost.

[The statements which follow were received for inclusion in the record subsequent to the close of the hearings.]

STATEMENT OF SUSAN ALLEN, SECOND VICE CHAIRPERSON, DISTRICT OF COLUMBIA WOMEN'S POLITICAL CAUCUS

Mr. Chairman and distinguished members of the committee, the District of Columbia Women's Political Caucus which I am representing here today deeply appreciates this opportunity to comment on the legislation under consideration. Our organization supports amending the legislation known as the Hatch Act to permit Federal and District of Columbia employees to participate voluntarily in the partisan political process.

The District of Columbia Women's Political Caucus is a local affiliate of the National Women's Political Caucus. The purpose of the DCWPC is described in our bylaws: "The purpose of this organization is to assure the full rights of citizenship and equal participation in the political process to all women in the District of Columbia; to further the development and use of the potential of women; and to cooperate with and assist other organizations and individuals with the same goals without discrimination."

In short, we are a multipartisan organization concerned with the participation of women in the political process. We support amending the Hatch Act for the following reasons:

1. As our bylaws state, we are concerned with the equal participation in the political process for all women in the District of Columbia. This includes women who are employed by the Federal or District governments. We feel that the systemic exclusion of public employees from the partisan political system infringes on the first amendment freedom of speech and association, and in essence, makes public employees less than equal with other citizens.

2. We agree with the conclusion of the Commission on the Political Activity of Government Personnel that the ambiguity of the Hatch Act has a chilling effect which tends to discourage public employees from pursuing even permitted political activity.

In our membership drives there have been numerous cases of federally or district employed women reluctant to join our efforts. We have been astonished and dismayed by the depth of fear of reprisal which many of these women have exhibited. We have made many efforts to educate these women interested in joining our organization about the restrictions of the Hatch Act by widely distributing the booklet provided by the Civil Service Commission, "Fed Facts 2," to reassure them that participation in the DCWPC would not violate the Hatch Act. Finally, in desperation, we went to the Civil Service Commission itself and asked for advice concerning membership. I have excerpted the relevant part of the opinion.

"It is clear that an employee subject to the Hatch Act may become a member of the DCWPC, and may engage in activities concerned with political issues on the legislative front, nonpartisan voter registration work, political education not aimed at the election of partisan candidates, and in the 'excepted localities,' support or be an independent candidate."

The DCWPC has made available copies of this letter at almost every meeting we have held since receiving it because the question of the permissibility of "hatched" employees participating in the Caucus invariably is mentioned. I personally have witnessed public employees carefully study the letter prior to signing up for membership.

The paranoia exhibited by these public employees finally led us to developing our own brochure explaining the Hatch Act in terms of the DCWPC. A sample is attached to this statement. We have also been astonished and amazed to discover that the fear caused by ambiguity of the Hatch Act has extended to the point that some District residents who are "hatched" have questioned if they have the right to vote.

Therefore, we would agree with a point which Patrick Nilan, legislative representative of the AFL-CIO American Postal Workers Union, made in a letter to Joseph Young, in the column "9-4:30," in the Washington Star. Nilan wrote that the Hatch Act "flouts the deepest tradition of political activism in America. It is a form of repressive overkill."

3. We applaud the fact that the Title 18 was amended at the end of the 94th Congress when President Ford signed into law a bill which provides criminal penalties for those found guilty in the Civil Service of coercing public employees into involuntary partisan political activity. As Joseph Young wrote in an article in the Washington Star, December 21, 1976, "the new law's provisions will make it easier for federal employees who don't want to get involved in politics to refuse such requests from their political bosses. At the same time it will discourage heads of departments and agencies and their political subordinates from putting such pressure on career employees who don't want to take any part in political activities." In short, the passage of this law weakens the argument that restrictions on voluntary partisan activity are necessary to protect those who do not want to be involved. H.R. 10 will permit those who wish to be involved to do so; it restores to public employees free and complete political suffrage. The new law amending Title 18 provides even stronger protection against abuse and exploitation by unscrupulous superior officials and abolishes the need for restrictions on voluntary political activity permitted under H.R. 10. Therefore, there can be and should be no argument preventing the restoration of full citizenship to public employees. H.R. 10 should be passed.

4. Attached is a letter from one of our members to Representative Clay in which she describes the problem facing her as a Federal employee interested in issues in the District. She points out the ambiguity of the Hatch Act in terms of restricting support of partisan issues. She describes the "continuing difficulty in drawing a line in the District of Columbia between nonpartisan and partisan activities with a one-sided registration of more than 4 to 1—Democrats to Republican. . . . It is unfair that I am able to support an issue such as 'redlining' or discrimination in lending but am unable to support a candidate who will legislate to correct the problem."

In conclusion, the DCWPC urges the passage of H.R. 10 so that public employees may have the full rights of citizenship restored to them.

Thank you very much for your consideration of these views.

[Attachment 1: DCWPC Brochure]

DCWPC AND THE HATCH ACT

Q. 1. I am a federal (or D.C.) employee and therefore am covered under the Hatch Act. What political activity may I engage in?

§ 733.111 *Permissible activities*

(a) All employees are free to engage in political activity to the widest extent consistent with the restrictions imposed by law and this subpart. Each employee retains the right to—

- (1) Register and vote in any election;
- (2) Express his opinion as an individual privately and publicly on political subjects and candidates;
- (3) Display a political picture, sticker, badge, or button;
- (4) Participate in the nonpartisan activities of a civic, community, social, labor, or professional organization, or of a similar organization;
- (5) Be a member of a political party or other political organization and participate in its activities to the extent consistent with law;
- (6) Attend a political convention, rally, fund-raising function; or other political gathering;
- (7) Sign a political petition as an individual;
- (8) Make a financial contribution to a political party or organization;

(9) Take an active part, as an independent candidate, or in support of an independent candidate, in a partisan election covered by § 733.124;

(10) Take an active part, as a candidate or in support of a candidate, in a non-partisan election;

(11) Be politically active in connection with a question which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance or any other question or issue of a similar character;

(12) Serve as an election judge or clerk, or in a similar position to perform nonpartisan duties as prescribed by State or local law; and

(13) Otherwise participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise his efficiency or integrity as an employee or the neutrality, efficiency, or integrity of his agency.

(b) Paragraph (a) of this section does not authorize an employee to engage in political activity in violation of law, while on duty, or while in a uniform that identifies him as an employee. The head of an agency may prohibit or limit the participation of an employee or class of employees of his agency in an activity permitted by paragraph (a) of this section, if participation in the activity would interfere with the efficient performance of official duties, or create a conflict or apparent conflict of interests.

Q. 2. What political activity is restricted?

PROHIBITED ACTIVITIES

§ 733.121 *Use of official authority; prohibition*

An employee may not use his official authority or influence for the purpose of interfering with or affecting the result of an election.

§ 733.122 *Political management and political campaigning; prohibitions*

(a) An employee may not take an active part in political management or in a political campaign, except as permitted by this subpart.

(b) Activities prohibited by paragraph (a) of this section include but are not limited to—

(1) Serving as an officer of a political party, a member of a National, State, or local committee of a political party, an officer or member of a committee of a partisan political club, or being a candidate for any of these positions;

(2) Organizing or reorganizing a political party organization or political club;

(3) Directly or indirectly soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions, or other funds for a partisan political purpose;

(4) Organizing, selling tickets to, promoting, or actively participating in a fund-raising activity of a partisan candidate, political party, or political club;

(5) Taking an active part in managing the political campaign of a partisan candidate for public office or political party office;

(6) Becoming a partisan candidate for, or campaigning for, an elective public office;

(7) Soliciting votes in support of or in opposition to a partisan candidate for public office or political party office;

(8) Acting as recorder, watcher, challenger, or similar officer at the polls on behalf of a political party of partisan candidate;

(9) Driving voters to the polls on behalf of a political party or partisan candidate;

(10) Endorsing or opposing a partisan candidate for public office or political party office in a political advertisement, a broadcast, campaign literature, or similar material;

(11) Serving as a delegate, alternate, or proxy to a political party convention;

(12) Addressing a convention, caucus, rally or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office; and

(13) Initiating or circulating a partisan nominating petition.

Q. 3. As a hatched employee, may I be a member of the DCWPC?

Yes, you may be a member. According to the regulations, section 733.111(5) you may be a member of a political organization and participate in its activities to the extent consistent with law.

The following is an excerpt from a letter sent by the Civil Service concerning public employees' membership in the DCWPC. "In applying the previously stated principles to DC-WPC it is clear that an employee subject to the Hatch Act may

become a member of DC-WPC, and may engage in activities concerned with political issues on the legislative front, nonpartisan voter registration work, political education not aimed at the election of partisan candidates and, in the 'excepted localities,' support or be an independent candidate for local office."

Q. 4. What does the phrase "Participate in its activities to the extent consistent with law" mean in terms of the Caucus?

This means you may participate in all Caucus activities, including doing legislative research, lobbying, attending Democratic or Republican Party events (or other party events), being a member of the Republican or Democratic Women's Task Force, attending meetings, voting in elections of DCWPC officers, arranging candidate forums, arranging workshops, and doing fundraising for the Caucus with the following EXCEPTIONS: If the Caucus is raising money for a particular candidate, you may not participate in arranging the fundraiser although you may attend the fundraiser; If the Caucus is giving technical assistance to a partisan candidate you may attend the session to sit in and learn but you must not help with the workshop or give in support to the campaign (except for giving a monetary contribution and voting in the election); If the Caucus is involved in lobbying for a partisan issue (an issue which only 1 party is supporting), you must not participate in working on that issue. There are other exceptions to Caucus activity; each instance should be checked with the regulations in Section 733.122.

Q. 5. May I be an officer of the DCWPC?

Yes, you may be an officer.

The Civil Service has handed down an opinion that a hatched worker may be an officer of the DCWPC—but that some problems may arise if the Caucus begins to endorse candidates. The following is expected from a letter sent to Susan Allen:

"If DC-WPC decides to endorse partisan candidates, an employee who is also an officer of DC-WPC would need to be particularly careful to disassociate herself from all partisan activity, including the support of a partisan candidate. While such disassociation might be feasible if partisan activity were a small part of DC-WPC's overall program, it would not be an easy matter and might, indeed, negate much of the officer's effectiveness within the organization. On the other hand if DC-WPC decided to refrain from endorsement of partisan candidates and from other partisan activity there would be no Hatch Act related problem associated with having Federal or D.C. Government employees as officers in the organization."

The above letter is in ambiguous legalese. The clue to the opinion is the phrase "if partisan activity were a small part of DCWPC's overall program." Partisan activity is a small part of DCWPC's overall program. More specifically, Lynn Collins of the Civil Service stated verbally to Susan Allen that if the DCWPC were not in the practice of endorsing candidates regularly but decided to do so in a few isolated cases, DCWPC would not be in danger of being defined as a "Partisan political club" (see 733.122(b)(1)) and the hatched worker who is an officer would not violate the Hatch Act by being an officer. (She would violate the Act, however, if she participated actively in the endorsement and support of the candidate.)

Therefore, in short, a hatched worker may be an officer of the DCWPC as long as the Caucus does not regularly endorse candidates (and does not have a policy indicating that it will regularly endorse candidates)—and if the Caucus would irregularly endorse candidates, the hatched officer must not participate in the endorsement or support of that candidate. She must not handle campaign funds or participate in the management of the campaign. See 733.122 for the list of restricted activity.

Q. 6. May a "hatched" worker be an officer of the Republican or Democratic Women's Task Forces?

No, these are clearly partisan groups.

Q. 7. What is the current state of the Hatch Act?

Chances for amendment have increased under the 95th Congress. See Washington Post article, Tuesday, February 15, 1977.

In addition, the odds that the Hatch Act will be amended to allow increased voluntary activity in the political arena by federal and D.C. workers have been increased by the fact that President Ford signed into a law a bill which increases penalties for those in the civil service guilty of coercing hatched workers into partisan political activity. The passage of this law reduces the strength of the argument that the Hatch Act is necessary to protect employees from coercion. See Washington Star article dated Tuesday, December 21, 1976.

On the other hand, the courts have added a twist. See UPI release dated February 17, 1977 which indicates the U.S. Circuit Court of Appeals struck down a Civil Service regulation allowing DC hatched workers to campaign in partisan political campaigns for independent candidates. (DC is an accepted area" which means hatched workers could campaign for independent candidates in partisan elections.) This court ruling reverses that regulation. Nevertheless, the Congress can reverse this ruling through legislation—and if it amends the Hatch Act to allow voluntary participation in partisan campaigns, the whole issue of excepted areas will become moot.

[ATTACHMENT 2: MEMBER'S LETTER]

WASHINGTON, D.C., May 1, 1975.

Hon. WILLIAM L. CLAY,
House of Representatives,
Washington, D.C.

DEAR MR. CLAY: I am a federal employee who devotes four out of seven nights a week and usually Saturday morning to community work in Washington, D.C. So many times I get caught up in situations which are difficult to clearly define as nonpartisan. One example is my activities in the D.C. Women's Political Caucus, an affiliate of the National Women's Political Caucus. Although we have an opinion from the Civil Service Commission upon examination of the bylaws that this activity is exempt from the provisions of the Hatch Act, it poses continuing difficulty in drawing a line in the District of Columbia between nonpartisan and partisan activities with a one-sided registration of more than 4 to 1—Democrat to Republican.

I am further frustrated by my activities which are related to issues such as the housing crisis in the City and invariably end up in the City Council and take on a posture of partnership. It is unfair that I am able to support an issue such as "redlining" or discrimination in lending but am unable to support a candidate who will legislate to correct the problem.

I heartily support your activities to remove the unfair restrictions imposed upon federal employees by the Hatch Act. I would like to suggest a form of registration of a federal employee's activities as part of his/her official record. This would clearly and publicly state one's activities and may, therefore, prevent attempts at private coercion based upon political activities.

Should you have any further questions, please feel free to call me on 755-9280 (office) or 833-1634.

Again, thank you for your support of this important issue.

Sincerely,

MARIE DRISSEL.

STATEMENT ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION AND
AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA

(By Thomas C. Matthews, Jr.)

The last Congress passed Chairman Clay's bill H.R. 8617 that would have restored basic citizenship rights to our millions of public servants. President Ford vetoed that bill. Now we have a new president who was elected on a platform that contained a plank reading as follows:

"We support the revision of the Hatch Act so as to extend to Federal workers the same political rights enjoyed by other Americans as a birthright, while still protecting the Civil Service from political abuse."

In face of these significant developments since last year's bill was defeated by veto, this subcommittee is presented with a superb opportunity to strike a blow for the preservation of basic First Amendment rights.

Meaningful participation by citizens in political processes was a fundamental goal for those revolutionaries who founded this nation. Two centuries ago the founders of this nation fought in armed protest against their government's exclusion of its colonial citizens from participation in key political decisions.

At that time, the total population of the thirteen colonies approximated two and one-half million,¹ less than the roughly two and three-quarter million Fed-

¹ S. E. Morison, "Oxford History of the American People," (1965), 173.

eral employees² who today are excluded from a wide range of significant political activity by Section 9(a) of the Hatch Act.³ This Committee should note that it sits in review of a statute regulating and limiting the exercise of political speech and association by millions of citizens. The rights for which the Revolution was fought are largely the same as the rights now largely denied Federal employees.

In the last session of Congress the Civil Service Commission opposed reform of the Hatch Act. Chairman Hampton and General Counsel Goodman made a series of arguments in favor of the current ambiguous and overbroad restrictions that cannot hold up under close analysis.

Chairman Hampton suggested that a majority of Federal employees do not want greater political freedom than they now enjoy.⁴ He offered no evidence for this doubtful proposition, but more significantly, his remarks are beside the point because the real question is not one of numbers but of fundamental civil liberties protected by the Bill of Rights. Even if only a small minority of Federal employees seek to exercise wide freedom of speech and association in the political arena, their rights cannot be abridged without a compelling demonstration that such freedom will pose a genuine threat to important countervailing public interests.

The Chairman alluded to the Supreme Court's holdings that Section 9(a) of the Hatch Act is not invalid under the Bill of Rights.⁵ The Court, however, has recognized that the Congress remains free to reconsider the wisdom of this obviously restrictive legislation. Thus, Mr. Justice White, writing for the Court in the recent *Letter Carriers* case, suggested that "perhaps Congress at some time will come to a different view of the realities of political life and Government service . . ." (413 U.S. at 567).

General Counsel Goodman expressed concern about the public's perception of the civil service when its members are allowed to engage in politics, and offered the example of a Federal employee who campaigns for a candidate who is advocating changes in that employee's program.⁶ The Hatch Act, however, does not prevent Federal employees from publicly discussing their programs, so the bills pending before this Committee do not really affect this problem. Impartial performance and loyalty to programs are not addressed by the Hatch Act, and preservation of these worthwhile values is not a valid argument against revision of the Hatch Act. Moreover, those who are working in Federal programs are likely to know more about the programs than anyone else. If an employee feels that his program needs changes and cares enough to donate time to a candidate who supports those changes, that fact should help the electorate to make an intelligent choice.

Chairman Hampton's fundamental argument, of course, was that "whatever political activity is permitted to Federal employees will quickly become that which is required of them."⁷ This concern that Federal employees not be subject to partisan political pressure has traditionally been the main justification for prohibiting their voluntary political activity. There are four points to be made in response to this concern: first, there is no historical or empirical basis for concluding that sweeping restrictions on the rights of free speech and association are necessary to safeguard the merit system; second, since any restriction on an individual's political activity necessarily limits the exercise of our most basic freedoms, its justification must be clear, compelling, and convincing; third, H.R. 10 provides new safeguards against coercion that would appear to be effective and that, in any event, could easily be modified if they would prove less than effective; and fourth, an approach of establishing specific, limited prohibitions on voluntary activity where they are needed is far preferable to the Hatch Act's vague and overbroad scheme.

First, there is no historical justification for restrictions on voluntary, off-duty political activity by Federal employees. Contrary assertions by defenders of the present prohibition represent a misreading of historical record. For example,

² U.S. Civil Service Commission, Manpower Statistics Division, Table I, Monthly Release of Federal Civilian Manpower Statistics (Feb. 1975).

³ As amended, now 5 U.S.C. § 7324(a) (2).

⁴ Statement of Robert C. Hampton, Chairman, Civil Service Commission, at hearings before the Senate Committee on Post Office and Civil Service (November 5, 1975) at 87 (hereinafter cited as "1975 Senate Hearings").

⁵ Hampton Statement, *supra*. The two decisions on this matter are: *U.S. Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947).

⁶ 1975 Senate Hearings, at 185.

⁷ 1975 Senate Hearings, at 88-89.

Thomas Jefferson did not (despite contrary assertions by the Supreme Court⁸ and the Civil Service Commission⁹) have his department chiefs issue a circular restricting the political activity of government employees.¹⁰ The very first Congress rejected a bill that would have restricted the political activities of customs inspectors because, in the words of Representative Fisher Ames of Massachusetts, it would "muzzle the mouths of freemen, and take away the use of their reason."¹¹ Half a century later, Senator John C. Calhoun objected to a bill restricting the political activity of Federal officers on the ground that "a citizen does not cease to be one in becoming a federal officer."¹² President Theodore Roosevelt, the "Rough Rider", was the first to impose any restrictions on voluntary political activity of Federal employees when he issued Executive Order 642 on June 3, 1907. Thirty-two years later, Congress simply enacted this order into the Hatch Act with some changes but without affording meaningful analysis of the relationship between the abuses it had found in the 1936 and 1938 elections and the need for such a sweeping abridgement of First Amendment rights of Federal employees.¹³

In short, there never has been a critical evaluation, based on actual experience as distinct from opinion and argument, of the need for restrictions on voluntary off-duty political activity by Federal employees. Since basic freedoms of speech and association are entailed, the burden of justification certainly falls on the proponents of such restrictions.

In this regard, H.R. 10 is itself objectionable in that Section 7325(d) (2) would perpetuate the vague and sweeping prohibitions of the 1939 Hatch Act as to employees of Internal Revenue Service, Department of Justice, and Central Intelligence Agency. It well may be that some continuing restrictions are warranted by exigent public policy consideration for some limited groups of employees, but such restrictions should be defined precisely. In addition, it would seem unwarranted to extend the restrictions to all employees of the selected agencies: there seems no better reason to abridge basic liberties of a filing clerk or typist at the Justice Department than of an employee with identical duties at, for example, the Federal Trade Commission.

The second point is that any infringement of basic First Amendment rights must be fully justified by a specifically identified, overriding and compelling governmental interest. This proposition is a fundamental concept of our constitutional jurisprudence frequently recognized by the Supreme Court¹⁴ and is particularly important where, as here, the First Amendment rights involved have their "fullest and most urgent application precisely to the conduct of campaigns for public office."¹⁵ All legislative efforts to resolve tensions between conflicting principles entail an element of risk. Where First Amendment rights of free speech and association are at stake, the countervailing interests invoked as justification for restrictions must be especially clear and compelling. Such rights should never be restricted lightly, and the risks to a neutral and impartial civil service attendant on vindicating First Amendment rights of millions of citizens are ones that a robust democracy should willingly bear.

The third point is that H.R. 10 has been carefully designed to prohibit the kinds of coercion that concern Chairman Hampton. The bill prohibits the use of official authority, influence or coercion with respect to the right to engage in political activity, and it prohibits solicitation of political contributions to superior officials. Violators are subject to removal or suspension. The Civil Service Commission is given increased investigatory powers, and an independent Board is established to adjudicate alleged violations of the law. Most Federal employees are unlikely to want to coerce their subordinates in any case, and this flat ban combined with improved enforcement mechanisms should deter the few who may be tempted.

⁸ *U.S. Civil Service Comm'n. v. National Ass'n. of Letter Carriers*, supra, 413 U.S. at 557.

⁹ 1975 Senate Hearings, at 165.

¹⁰ A detailed analysis of the historical evidence on this point is set out in the Appendix to the Brief for the Appellees to the Supreme Court in the *Letter Carriers* case, at 3a-5a (a copy of that brief has previously been submitted to this Subcommittee). Primarily, this assertion is based on contemporaneous correspondence between Jefferson and Gallatin. The assertions to the contrary are based on an erroneous speech made on the Senate floor some twenty years after Jefferson's death.

¹¹ 2 Annals of Congress 1876-78 (1791).

¹² Cong. Globe, 25th Cong., 2d Sess. App. 234 (1838).

¹³ A detailed analysis of the legislative history of the Hatch Act is set out in the Brief for the Appellees, *U.S. Civil Service Comm'n. v. National Ass'n. of Letter Carriers*, at pp. 18a-27; cf., H.R. Rep. No. 94-444, 94th Cong., 1st Sess. (1975), at 8-12.

¹⁴ See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Gooding v. Wilson*, 405 U.S. 518 (1972).

¹⁵ *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

Fourth and finally, there may be certain political activities which are particularly subject to coercion or otherwise inappropriate for Federal employees. The Hatch Act deals with those problems by prohibiting, in language that defies comprehension by ordinary citizens, almost all political activities. The result is that many activities are unnecessarily prohibited or are believed to be prohibited even though beyond the reach of the statute. By its breadth and vagueness, the Hatch Act scares Federal employees away from the activities that it permits. Thus, not only does the present statute unjustifiably prohibit the exercise of constitutionally protected liberties, it chills the exercise of other liberties that it does not, by terms, prohibit.

Obviously, it would be far better to impose specific, limited prohibitions where they are needed. H.R. 10 takes this approach, barring activity while on duty in Federal buildings, or in uniform, and forbidding political contributions in Government rooms or buildings, in addition to the prohibitions on coercion. If there are additional areas that need restrictions, this Committee can easily add them without compromising the basic approach of this reform legislation. If other problems turn up in the future, the Congress can readily enact additional prohibitions without undertaking full-scale review. Such an approach would meet Chairman Hampton's concerns while limiting any restrictions on First Amendment rights to those that are in fact justified by compelling governmental interests, such as preservation of the merit system.

The value of this approach is illustrated by the examples General Counsel Goodman cited in his testimony to this Committee. Mr. Goodman offered the example of a superior who has his "right hand man" solicit campaign contributions from subordinates.¹⁶ This possibility exists under the present law, since a superior can let it be known that he supports a candidate and have someone outside the civil service do the soliciting. The only difference under H.R. 10 would be that a civil servant—other than a superior—could do the soliciting. If this Committee feels that difference would create significant problems, it could add a provision forbidding all Federal employees from soliciting campaign contributions from one another. Such a limited prohibition would provide as much protection as the Hatch Act does, without the Hatch Act's overkill.

Mr. Goodman's second example was an employee whose superior is actively supporting a candidate and who feels pressured to support that candidate to advance his own career.¹⁷ Once again, this problem exists under the Hatch Act. A superior can favor a candidate today and can let his subordinate know how he feels. The subordinate may feel impelled to help that candidate in order to get a promotion; the only difference under H.R. 10 is that he might do campaign work instead of contributing money or taking other steps not prohibited by the present statute. The problem identified by Mr. Goodman is not solved by the current statute; hence, invocation of that problem cannot possibly justify the current statute's sweeping restriction of free speech and association.

Mr. Goodman's final example was the employee who helps defeat a candidate and then finds that candidate appointed as his superior.¹⁸ Such a circumstance obviously would occur so rarely as to be a true "sport." There are relatively few political appointees in the multi-million member federal workforce, even fewer of them are defeated candidates for office, and the odds are that even fewer of that small group would be appointed to supervise those who were publicly identified as working against their unsuccessful bid for elective office. Moreover, H.R. 10 does not force federal employees to help campaigns; it merely permits them to do so. The possibility that an employee who chooses to exercise that privilege would happen to work against a candidate who would subsequently become his supervisor is so remote as not to justify any sweeping restriction on constitutionally guaranteed liberties of millions of citizens.

There are two values that the Congress must keep in mind when considering amendments to the Hatch Act: one, the inequity of a politically neutral civil service, and two, the First Amendment rights of millions of Federal employees. It must be acknowledged that there is a tension between these two values and that different balances may be struck at different times. For almost forty years now that balance has been struck so as to broadly sweep down individual liberties of affected employees. The time has come to adjust that balance in favor of greater recognition that Federal employees are citizens and are entitled to the greatest degree of individual freedom that is consistent with protection against the politicalization of the civil service.

¹⁶ 1975 Senate Hearings, at 180-81.

¹⁷ 1975 Senate Hearings, at 183.

¹⁸ *Ibid.*

STATEMENT OF ROBERT D. GORDON, SECRETARY-TREASURER, INTERNATIONAL
CONFERENCE OF POLICE ASSOCIATIONS

Mr. Chairman, my name is Robert D. Gordon and I am the Secretary-Treasurer of the International Conference of Police Associations, which represents over 170,000 police officers in the United States and Canada. On behalf of myself and our President, Edward Kiernan, I thank you for the opportunity to present our views to your subcommittee.

I wish to speak again on behalf of this legislation which was vetoed by President Ford in the last Congress. For many years, the Hatch Act has deprived public employees of their rights under the Constitution to engage in political activities.

When this legislation was first enacted into law over 35 years ago, the fear was that public employees would be used as a club by the political parties of our country. Without getting into the merits as to whether or not that was the position at that time, I think it is safe to say that in the enlightened atmosphere of politics today with the constant scrutiny of the news media of all things political, it seems ridiculous to perpetrate this discriminatory act.

Speaking on behalf of police officers who have probably been more harshly restricted by the prohibitions against becoming involved in politics than any other public employee group, I can only say that we have deeply resented the restrictions and look forward to the day when a responsive Congress will grant to us the same rights being enjoyed by every other citizen of this country.

We have no objections to safeguards within any of these bills that would prevent political organizations from being able to use coercion or threats against public employees in order to get their support but we do feel that the fear of the possibility of this happening should not preclude affirmative action on this legislation.

The numerous cases throughout the country where police officers have been prevented from becoming involved in local politics such as holding office on non-salaried local school boards and the harsh discipline that has been meted out to these men for being so daring as to try to perform their duties as citizens, would astonish many of you.

In closing let me reaffirm our support of any bill currently before your Subcommittee that would liberalize the present restrictions currently in force restricting the ability of Federal, State, or Local police officers from taking part in the political process.

Thank you.

STATEMENT OF ALAN J. WHITNEY, EXECUTIVE VICE PRESIDENT, NATIONAL
ASSOCIATION OF GOVERNMENT EMPLOYEES

Mr. Chairman, members of the subcommittee, at the outset, may I express the thanks of my organization to the Chairman and the members of the Subcommittee for their initiative in addressing the lack of political franchise of Federal employees.

As we noted in testimony in 1975, few subjects have generated more debate and less action than the advisability of amending or eliminating the statutory restrictions on Federal employee political activity as contained in the Hatch Act. Less action, that is, until the 94th Congress, which last year overwhelmingly approved legislation identical to H.R. 10, which you are presently considering, only to see it fall to a presidential veto.

Resolution of this issue, obviously, can come only from the Congress. The Supreme Court, in a June, 1973, decision in the case of *U.S. Civil Service Commission v. National Association of Letter Carriers*, held that the Hatch Act is constitutional, that the Congress is empowered to forbid employees from engaging in partisan political activity and that the language of the Act is not overbroad or vague. Writing for the Court, Justice White said:

"The problem in any case is to arrive at a balance between the interest of the employee as a citizen, in commenting upon matters of public concern, and the interest of the government, as an employer, in promoting the efficiency of the services it performs through its employees. Although Congress is free to strike a different balance than it has if it so chooses..."

"Perhaps Congress at some time will come to a different view of the realities of political life and Government service."

We are confident that the Congress still holds that "different view", and will act affirmatively to grant Federal workers the right to participate in the public affairs of their communities, their states and the nation.

Any attempt to analyze the impact of the Hatch Act must start with a viewing of the law in relation to the historical period of its enactment.

In response to pressure to investigate alleged use of relief and relief work funds for political purposes, Congress established a bi-partisan committee in 1938. The deliberation of the "Sheppherd Committee" resulted in sixteen recommendations which formed the basis for an anti-corruption bill introduced by Senator Hatch.

However, of these sixteen proposals, only eight related specifically to political activity, and they dealt essentially with the appropriating of funds for political purposes, the buying and selling of civil services positions and the contribution of political donations by Federal employees.

Although these points addressed by the Sheppherd Committee were written into the Hatch Act, the law went further and restricted all partisan political activities by Federal employees and other public employees paid with Federally-administered funds. Initially, an employee found to have violated the Act faced dismissal from his job; the penalties, however, have been lessened by amendments over the years.

Section 9a of the original law (codified in Chapter 72 U.S.C. Title 5) restricted political activity on the part of administrative or supervisory personnel. This section generated much debate in the House in 1939.

Congressman Hobbs, with only minor over-statement warned :

"If you do this thing, you not only violate the Constitution, you not only violate every natural right of every citizen in the United States, but you divest him of citizenship and you have set up the process of disintegration whereby the government 'of the people, by the people and for the people' will have begun to perish from the earth." Congressional Record, volume 84, page 9622.

And Congressman Kennedy added :

"I think there should be another amendment to this bill, and that amendment should provide a lawyer for every W.P.A. worker because I do not know how any citizen can be expected to know his rights if we pass this bill." Congressional Record, volume 84 page 9605.

But the warnings of these perceptive individuals went unheeded, and the result has been to deprive Federal workers for nearly forty years of one of the most basic and integral rights accompanying membership in a democratic society. And the effect of the inequity has grown enormously: in 1939, the Act applied to about 500,000 employees; today, there are some 2½ million Federal workers.

From our analysis of the debates preceding passage of the Hatch Act, it appears that only two extremes were considered: no restrictions at all and complete restriction on partisan political activity. That Congress responded to the clamor for reform by adopting the harshest extreme is regrettable, but not surprising. Had Congress' attention been more appropriately focused on the corruption aspects of the issue, we believe that it most likely would have enacted more moderate legislation which would have done less damage to the important and sensitive First Amendment rights of the individuals affected.

The decline of the so-called 'Little Hatch Acts' provides an analogous situation to the Federal statute, which exemplifies the growing public and legal sentiment against laws restricting the political activities of public employees. Most states have on their books legislation limiting political activity similar to the Hatch Act. However, there is a growing tendency on the part of state courts to question these statutes, with the central question being whether they strike an appropriate balance between the public's right to a politically untainted civil service and the individual's right to full citizenship.

A state has the authority, as does the Federal Government, to restrict the activities of its employees in the political sphere if this is done within reasonable bounds in accordance with the principles set forth in 1947 by the Supreme Court in its noted *Mitchell* decision. However, state courts have gone beyond the doctrine of *Mitchell* and further required that any limitations of First Amendment rights must be justified by a clear public interest and directly threatened evils.

The California Supreme Court articulated this "rational relationship" requirement as follows:

"1) That the political restraints rationally relate to the enhancement of public service, 2) that the benefits which the public gains by the restraints outweigh the resulting impairment of constitutional rights and 3) that no alternative less subversive of constitutional rights are available." (*Bagley v. Washington Township Hospital District*, 55 California Reporter 401).

State court decisions offer a variety of standards which Congress may consider in re-evaluating the desired extent of Federal legislation in the area of political activity. More important, these standards generally offer a different and more relevant rationale than that enunciated some twenty-eight years ago in the *Mitchell* decision.

These respective state court rulings have required that there be a compelling public interest, or a rational relationship between those standards adopted and the legislative goals sought. This is a major step beyond the "reasonable limits" standard set forth in *Mitchell*.

In dealing with such sensitive issues as First Amendment rights, we believe that the statutory provisions must be clearly defined so that there is no room for doubt or confusion. Also, the objective of efficiency and integrity in civil service must be carefully balanced against those negative effects which necessarily accompany the imposition of restrictions on political activity.

In our view, the present law does not constitute a proper balance. We concur with the Federal District Court in the case of *Manusco v. Taft* (341 Fed Supp. 574 at 576, 1972), when it said: "Whatever the current status of *Mitchell* as law, it appears that the facts of *Mitchell's* words are not the facts of life today."

In 1966, Congress established the Commission on Political Activity of Government Employees. The Commission was charged with the responsibility of making a complete study of laws which limit or discourage the participation of Federal employees in political activities.

After nearly a full year's work, and hearings held in six cities, the Commission offered ten recommendations, which to this date have not been adopted. H.R. 10 incorporates those recommendations which the Commission proposed. However, the bill also deals with the dilemma which was not resolved by the Commission, i.e. whether government employees should be allowed to run for public office. The National Association of Government Employees is in complete agreement that federal employees should be permitted to take an active part in political activity.

The state courts, in discussing the issue of candidacy for elected public office, stated that precautions should be taken against situations where a public service employee might run against his superior. Otherwise, they have not spoken authoritatively on the candidacy question.

It is conceivable that full-time candidacy could misdirect an employee's attention from his work and this should be prevented. The National Association of Government Employees believes that leaves of absence could be permitted to encourage political participation, as is done by some private employers.

While we believe it would be beneficial to liberalize those provisions of the law which restrict political activity, we also believe that the penalties for coercion and solicitation of contributions for political purposes while on duty are not strong enough and are in need of revision.

In the interest of achieving the objective enunciated by the Commission on political activity, i.e., to enact narrow and specific legislation, we recommend that the Subcommittee consider incorporating Section 1622 of the Commission proposal, which cites specific examples under the general heading of "Coercion, Solicitation, Illegal Payments, and Prohibited Activities," and would provide a useful standard for the guidance of employees.

To restate, Mr. Chairman, some of the points which we made in our 1975 testimony on H.R. 3000, it is our position that we are dealing here not only with the right of employees to participate on a partisan basis in the governmental affairs of their communities, but also with the right of their communities to the full participation of those individuals who can bring intelligence and dedication to bear on the critical problems facing our local jurisdictions.

If the political structure of a community is along partisan lines, then we feel that it works against good government to force Federal employees to limit their participation to non-partisan activities.

The implication also has been advanced that Federal employees possess more political freedom under the existing law than many care to exercise.

Regrettably, we must agree that this is so. However, it constitutes no rationale for limiting anyone's political rights. We doubt that anyone would seriously suggest that because a substantial percentage of the eligible American electorate

fails to vote in a general election it constitutes justification for restricting the political rights of the general public.

In conclusion, we believe that the interests of both the individual employee and of the public demand that Federal workers be accorded the basic right to participate fully, in a partisan fashion if they desire, in political activities.

With appropriate safeguards, there is little threat in this direction to the principles of impartiality, efficiency and merit which are the basic foundations of the career civil service.

STATEMENT OF ALAN B. MORRISON, DIRECTOR OF LITIGATION FOR PUBLIC CITIZEN

H.R. 10 (the Federal Employees Political Activities Act of 1977) is a most important piece of legislation dealing with issues of great concern to both Federal employees and citizens in general. either I nor Public Citizen has any particular expertise with the basic premises of the Bill and therefore, our comments are limited solely to one question: the proper scope of the exemption from the prohibitions of H.R. 10 of the President and Vice President of the United States. In specific, we oppose the broad exemption created by section 7325(b) (2) which would appear to permit between 400 and 500 employees of the White House to engage in full time political activities without violating the Hatch Act or for that matter any other law. Because we believe this is wrong as a matter of policy, we recommend that the Committee delete section 7325(b) (2) entirely so that taxpayers' monies are never again used to finance only the campaign of an incumbent and not that of the challenger.

Background

Public Citizen's involvement with this issue dates to the summer of 1972 during the re-election campaign of then-President Richard Nixon. On August 30, 1972, the Washington Post published a memorandum written by White House Special Counsel Charles Colson to members of his staff regarding the election campaign, a copy of which is submitted as Exhibit 1 to the statement.¹ In substance that memorandum told the staff of 19 who worked for Mr. Colson that they were to engage in full-time campaign activities while on the federal payroll for the remaining 71 days of the campaign. There are, of course, certain advantages of incumbency that can never be overturned, but our examination of the law enabled us to reach the conclusion that the use of taxpayers' money to run political campaigns was wholly unauthorized and hence was in violation of Article 1, Section 9, Clause 7 of the United States Constitution and 31 U.S.C. § 628. We recognized that under the Hatch Act the activities were permitted, but our position was that the Hatch Act exemption in 5 U.S.C. § 7324(d) (1) did not create any authorization of the kind required by the Constitution or 31 U.S.C. § 628. I was, in our view, as though the Nixon re-election campaign had simply written a check on the Treasury of the United States to pay the salaries of workers in the campaign, with the only difference being the form of the raid on the Treasury.

After the election we filed a lawsuit during the course of which we took extensive discovery that demonstrated conclusively that the White House had been a campaign headquarters, with politics the number one business and the business of government a secondary concern. After concluding our factfinding, both sides moved for summary judgment, and our brief at pages 9-26 summarizes the evidence of White House involvement in the 1972 campaign. A copy of that brief is annexed as Exhibit 2 to this statement.¹ Unfortunately, the District Court never reached the merits of the controversy because an intervening decision of the Supreme Court severely limited the right of taxpayers to challenge the illegal use of taxpayers' money, and the District Court eventually dismissed the complaint. Our appeal was also rejected by the D.C. Circuit Court, and the case has now been finally resolved against us, without reaching the merits of this issue.

The question of White House involvement in political campaigns arose again in the 94th Congress, when the scope of the exemption for political activities of the White House was an issue with regard to HR 8617. We were unaware that the matter was coming up in the House in October 1975 and hence did not participate in the efforts of Congressman Herbert Harris to narrow the scope of that exemption. However, in the Senate, we worked extensively in an effort

¹ Retained in the subcommittee file.

to limit the exemption because as HR 8617 was passed by the House, the exemption appeared to create the very authorization to engage in activities which the prior law had left open, and thus, in our opinion, the situation was worse than it was under the prior law.

Our efforts in the Senate, along with that of numerous other groups, particularly Common Cause, were only partially successful. Because no hearings were held in the Senate, we were unable to make our views known at the Committee level, and hence the ability to probe the issue in depth and to perhaps reach a compromise were seriously undermined. Senator Richard Clark nonetheless introduced an amendment to delete section 7325(b)(2), but that amendment was not voted upon because a motion to table was passed by a vote of 52-34. See *Cong. Rec.* March 11, 1976, S. 3226-30 (daily ed.). As a compromise, a new provision was added to at least eliminate any inference that anything in HR 8617 would authorize the expenditure of taxpayers' money for those purposes and thus return the law to the *status quo ante*. *Id.* S. 3239. That provision was modified somewhat in conference and now appears as subsection 7325(c) in HR 10, but that provision as now in HR 10 does very little to solve the problem. It states no more than that nothing in this section shall be deemed to override other specific prohibitions in the law, but the problem is that there are no specific prohibitions and the question is, are there any specific authorizations? Thus, at the very least, the final portion of subsection (c) beginning with the word "otherwise" and continuing to the end, should be deleted and in its place should be inserted the following language: "unless there is a specific authorization in law permitting them to do so."

Election law considerations

More importantly, however, there is another aspect of the problem which did not exist in 1972. The Federal Election Campaign Act Amendments of 1974 for the first time created public funding of Presidential elections. The twin cornerstones of those provisions are a limitation on spending and the equality of spending applicable to all candidates. It is absolutely impossible to comply with those cornerstones if the White House can launch 500 additional workers, plus all of the support facilities that the White House can muster, in support of the reelection bid of the President. That is simply not equality, and any use of White House staff must in some sense be taken into account. If it is not, the constitutionality of the spending limitation for non-incumbents is in serious constitutional trouble.

This issue has been raised before the Federal Election Commission in a complaint filed on behalf of Citizens for Reagan against the election bid of President Ford. Public Citizen filed an *amicus curiae* brief in support of that complaint, a copy of which is submitted with this statement as Exhibit 3.¹ Unfortunately, the FEC never decided the merits of that question, and Citizens for Reagan never took the Commission to court on it. In addition, we also raised this issue with respect to proposed regulations that the Commission had regarding the definition of contribution as it applied to voluntary services. See Sections 100.4(a)(5), 100.13, and 100.7, 41 F.R. 21572-74, May 26, 1976. We submitted comments on that issue, but once again in the final regulations adopted by the Commission the issue has been left up in the air, no doubt to avoid a very hot political question during the middle of a Presidential campaign. See 41 F.R. 35934-36, August 25, 1976.

This identical issue will almost certainly arise again this year in connection with a proposal to provide federal funding for Congressional as well as Presidential elections. It cannot be fairly avoided in the legislative debates and surely will be the subject of challenges in lawsuits brought against incumbents by challengers. In fact, one of the points raised by opponents of Senator Clark's amendment to HR 8617 last year was a complaint that the amendment applied only to the White House and would be seen by some as exhibiting a holier-than-thou attitude on the part of Congress without putting its own house in order.

I suggest to this Committee that the Congress should deal with this matter directly and not leave it to the FEC and the courts to resolve. Many members of Congress have already put their offices in order and have created the sharp division between election campaign work and House and Senate work. It is, I suggest, irrelevant whether Committee has jurisdiction over those provisions of law. A vote to limit the White House use of its staff to work on campaigns

¹ Retained in the subcommittee files.

will be seen by all as a vote by each Member of this Committee to limit his or her own campaign activities accordingly. And it will surely set the stage for proper treatment of the matter when it comes up in the context of campaign financing of House and Senate elections.

Recommendations

It should be made clear in the legislative history, however, that nothing in its entirety. The result will be that no White House staff member may engage in political activities while on duty or in public buildings. It will doubtless be argued by some that the definition of political activity and on-duty status are terribly complex matters and that they cannot be wholly separated from the responsibility of high appointees of the Executive Branch. The first response is that the problem will not evaporate regardless of section 7325(b)(2) since HR 10 applies to all officials of the government, including Cabinet officers who were not formerly subject to the Hatch Act. Thus, the Civil Service Commission will have to resolve the issue in any event and any additional problem created by inclusion of the White House is very small.

It should be made clear that in the legislative history, however, that nothing would prohibit, for example, Press Secretary Jody Powell from answering a reporter's question about the President's intention to run in a 1980 primary, nor would it prohibit the President from asking Hamilton Jordan his opinion about the likelihood of a challenge within the Democratic Party or from a particular Republican if Mr. Jordan was sitting in a public building at the time he was asked. The Civil Service Commission will simply have to write rules providing for *de minimis* but not wholesale exceptions.

What the White House will not be permitted to do is to exempt the kinds of activities that took place during the 1972 campaign as well as matters such as the writing of speeches for the President on political trips paid for out of campaign funds, nor the preparation and advance work for those trips done by salaried employees of the federal government. It is a matter of fundamental fairness that the occupant of the White House campaign equally with whoever may challenge the President in 1980, and this Committee cannot authorize the inequality to continue or to be magnified in the future.

There is an alternative, which I do not support with the same enthusiasm as a total deletion of section 7325(b)(2), but which would certainly ameliorate the situation considerably. It is possible to amend section 7325(b)(2) to limit its exemption to a designated group of employees in the White House of perhaps 10 or so, rather than the 500 to which it is now applicable. Those employees would have to be specifically named by the President or Vice-President in a document to be published in the Federal Register and filed with the Civil Service Commission and/or the Federal Election Commission. Those employees would be specifically permitted to engage in incidental on-duty, in-public-building political activities. Rules and regulations issued by the Civil Service Commission would also define incidental, and all such employees would file monthly reports indicating the nature of their political activities and the approximate percentage of time devoted to political as opposed to governmental work.

This would still leave unresolved the question of how to take into account even those incidental activities with respect to the campaign financing laws. Here again, the question must be dealt with directly, and I recommend two alternatives. One, sufficient records could be maintained so that the salaries for the time spent on campaigning could be "counted" against the total expenditures allocated to the President's campaign. In this way a true equality would be maintained, although at the considerable record keeping cost needed to do that. Second, it would be possible to make an estimate, based on outer limits of the term "incidental" and the number of employees involved, and thereby to calculate an outside figure and then to allocate to challengers to the President an additional sum which probably would amount to no more than \$5,000 or \$10,000. That would equalize the inhouse spending on White House salaries and facilities at a far lesser cost in terms of record keeping.

It might be possible to simply exempt the incidental expenditures from the definitions of "contributions" and "expenditures" under the campaign financing law without raising Constitutional questions. On the assumption that the total amount of salaries expended for those purposes did not exceed \$10,000, and considering that the expenses allowed in the last campaign were \$21.7 million and by all accounts are expected to rise fairly significantly before 1980, the Supreme Court might well hold that a variation in equality of that small a magnitude

would not upset the balance so as to make the spending limitations on challengers unconstitutional. *Buckley v. Valeo*, 424 U.S. 1 (1976), can be read to require rough, but not perfect equality, and if the limitations on White House utilization of employees for political purposes were truly maintained at a low level, rough justice could be achieved without sacrificing the spending limits in the campaign law.

CONCLUSION

The problem of how to deal with White House staff in a campaign is a long-standing dilemma that will not and indeed should not go away. It is time that Congress in general, and this Committee in particular, deal directly and openly with the matter and that the issues be resolved once and for all at this time, in favor of fairness and justice and against taxpayer support for only one candidate simply because that candidate is an incumbent President.

95TH CONGRESS
1ST SESSION

H. R. 10

IN THE HOUSE OF REPRESENTATIVES

JANUARY 4, 1977

Mr. CLAY introduced the following bill; which was referred to the Committee on Post Office and Civil Service

A BILL

To restore to Federal civilian and Postal Service employees their rights to participate voluntarily, as private citizens, in the political processes of the Nation, to protect such employees from improper political solicitations, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Federal Employees'
4 Political Activities Act of 1977".

5 SEC. 2. (a) Subchapter III of chapter 73 of title 5,
6 United States Code, is amended to read as follows:

7 "SUBCHAPTER III—POLITICAL ACTIVITIES

8 "§ 7321. **Political participation**

9 "It is the policy of the Congress that employees should
10 be encouraged to fully exercise, to the extent not expressly

1 prohibited by law, their rights of voluntary participation in
2 the political processes of our Nation.

3 **“§ 7322. Definitions**

4 “For the purpose of this subchapter—

5 “(1) ‘employee’ means any individual, including
6 the President and the Vice President, employed or
7 holding office in—

8 “(A) an Executive agency,

9 “(B) the government of the District of Co-
10 lumbia,

11 “(C) the competitive service, or

12 “(D) the United States Postal Service or the
13 Postal Rate Commission;

14 but does not include a member of the uniformed services;

15 “(2) ‘candidate’ means any individual who seeks
16 nomination for election, or election, to any elective office,
17 whether or not such individual is elected, and, for the
18 purpose of this paragraph, an individual shall be deemed
19 to seek nomination for election, or election, to an elective
20 office, if such individual has—

21 “(A) taken the action required to qualify for
22 nomination for election, or election, or

23 “(B) received political contributions or made
24 expenditures, or has given consent for any other
25 person to receive political contributions or make

1 expenditures, with a view to bringing about such
2 individual's nomination for election, or election, to
3 such office;

4 “(3) ‘political contribution’—

5 “(A) means a gift, subscription, loan, advance,
6 or deposit of money or anything of value, made for
7 the purpose of influencing the nomination for elec-
8 tion, or election, of any individual to elective office or
9 for the purpose of otherwise influencing the results of
10 any election;

11 “(B) includes a contract, promise, or agree-
12 ment, express or implied, whether or not legally
13 enforceable, to make a political contribution for any
14 such purpose;

15 “(C) includes the payment by any person,
16 other than a candidate or a political organization of
17 compensation for the personal services of another
18 person which are rendered to such candidate or po-
19 litical organization without charge for any such pur-
20 pose; and

21 “(D) includes the provision of personal serv-
22 ices for the purpose of influencing the nomination
23 for election, or election, of any individual to elective
24 office or for the purpose of otherwise influencing the
25 results of any election;

1 “(4) ‘superior’ means an employee (other than the
2 President or the Vice President) who exercises super-
3 vision of, or control or administrative direction over, an-
4 other employee;

5 “(5) ‘elective office’ means any elective public
6 office and any elective office of any political party or
7 affiliated organization; and

8 “(6) ‘Board’ means the Board on Political Activi-
9 ties of Federal Employees established under section
10 7327 of this title.

11 **“§ 7323. Use of official authority or influence; prohibition**

12 “(a) An employee may not directly or indirectly use
13 or attempt to use the official authority or influence of such
14 employee for the purpose of—

15 “(1) interfering with or affecting the result of any
16 election; or

17 “(2) intimidating, threatening, coercing, com-
18 manding, influencing, or attempting to intimidate,
19 threaten, coerce, command, or influence—

20 “(A) any individual for the purpose of inter-
21 fering with the right of any individual to vote as
22 such individual may choose, or of causing any indi-
23 vidual to vote, or not to vote, for any candidate or
24 measure in any election;

1 “(B) any person to give or withhold any
2 political contribution; or

3 “(C) any person to engage, or not to engage,
4 in any form of political activity whether or not such
5 activity is prohibited by law.

6 “(b) Nothing in this section shall be construed to au-
7 thorize the use by any employee of any information coming
8 to him in the course of his employment or official duties for
9 any purpose where otherwise prohibited by law.

10 “(c) For the purpose of subsection (a) of this section,
11 ‘use of official authority or influence’ includes, but is not
12 limited to, promising to confer or conferring any benefit
13 (such as appointment, promotion, compensation, grant, con-
14 tract, license, or ruling), or effecting or threatening to effect
15 any reprisal (such as deprivation of appointment, promotion,
16 compensation, grant, contract, license, or ruling).

17 **“§ 7324. Solicitation; prohibition**

18 “(a) An employee may not—

19 “(1) give or offer to give a political contribution
20 to any individual either to vote or refrain from voting,
21 or to vote for or against any candidate or measure, in
22 any election;

23 “(2) solicit, accept, or receive a political contribu-

1 tion to vote or refrain from voting, or to vote for or
2 against any candidate or measure, in any election;

3 “(3) knowingly give or hand over a political con-
4 tribution to a superior of such employee; or

5 “(4) knowingly solicit, accept, or receive, or be in
6 any manner concerned with soliciting, accepting, or
7 receiving, a political contribution—

8 “(A) from another employee (or a member of
9 another employee’s immediate family) with respect
10 to whom such employee is a superior; or

11 “(B) in any room or building occupied in the
12 discharge of official duties by—

13 “(i) an individual employed or holding
14 office in the Government of the United States,
15 in the government of the District of Columbia,
16 or in any agency or instrumentality of the fore-
17 going; or

18 “(ii) an individual receiving any salary or
19 compensation for services from money derived
20 from the Treasury of the United States.

21 “(b) (1). In addition to the prohibitions of subsection
22 (a) of this section, an employee to whom this paragraph
23 applies may not solicit, accept, or receive a political contri-
24 bution from, or give a political contribution to, an employee,
25 a Member of Congress, or an officer of a uniformed service,

1 “(2) Paragraph (1) of this subsection shall apply to
2 any employee of the Internal Revenue Service, the Depart-
3 ment of Justice, or the Central Intelligence Agency, other
4 than—

5 “(A) an employee of such an agency who is in a
6 position which is not a sensitive position,

7 “(B) an employee of such an agency who is in a
8 sensitive position with respect to which the head of such
9 agency has designated, by regulation, that if any person
10 holding such position engaged in activities prohibited by
11 paragraph (1) of this subsection or by section 7325
12 (d) (1) of this title it would not adversely affect the
13 integrity of the Government, or the public's confidence in
14 the integrity of the Government, or

15 “(C) an individual appointed by the President, by
16 and with the advice and consent of the Senate, who
17 determines policies to be pursued in the nationwide
18 administration of Federal laws.

19 For the purpose of this paragraph, ‘sensitive position’ means
20 any position designated as a sensitive position pursuant to
21 Executive Order Numbered 10450 or under any superseding
22 Federal statute or Executive order.

23 “(3) Regulations referred to in subparagraph (B)
24 of this paragraph shall be prescribed not later than 90 days
25 after the effective date of this section. Thereafter any revision

1 of such regulations shall be prescribed not later than March 1
 2 of the year in which such revision is to take effect. Such
 3 regulations shall become effective the first day after the close
 4 of the first period of 30 calendar days of continuous session
 5 of Congress after the date on which such regulations are
 6 transmitted to the Congress, unless both Houses of Congress
 7 adopt a concurrent resolution disapproving such regulations.
 8 Continuity of a session is broke only by an adjournment of
 9 the Congress sine die, and the days on which either House is
 10 not in session because of an adjournment of more than 3
 11 days to a day certain are excluded in the computation of
 12 the 30-day period.

13 **“§ 7325. Political activities on duty, etc.; prohibition**

14 “(a) An employee may not engage in political ac-
 15 tivity—

16 “(1) while such employee is on duty,

17 “(2) in any room or building occupied in the dis-
 18 charge of official duties by an individual employed or
 19 holding office in the Government of the United States,
 20 in the government of the District of Columbia, or in
 21 any agency or instrumentality of the foregoing, or

22 “(3) while wearing a uniform or official insignia
 23 identifying the office or position of such employee.

24 “(b) The provisions of subsection (a) of this section
 25 shall not apply to—

1 “(1) the President and the Vice President;

2 “(2) an individual—

3 “(A) paid from the appropriation for the
4 White House Office,

5 “(B) paid from funds to enable the Vice
6 President to provide assistance to the President, or

7 “(C) on special assignment to the White
8 House Office,

9 unless such individual holds a career or career-condi-
10 tional appointment in the competitive service; or

11 “(3) the Mayor of the District of Columbia, the
12 Chairman or a member of the Council of the District of
13 Columbia, as established by the District of Columbia
14 Self-Government and Governmental Reorganization
15 Act.

16 “(c) Nothing in this section shall be construed to au-
17 thorize an individual designated in subsection (b) (2) to
18 engage in political activity otherwise prohibited by or under
19 law.

20 “(d) (1) In addition to the prohibitions of subsection
21 (a) of this section, an employee of the Internal Revenue
22 Service, the Department of Justice, or the Central Intelli-
23 gence Agency to whom the prohibitions of sections 7324 (b)
24 of this title apply may not take an active part in political
25 management or political campaigns unless such part—

1 “(A) is in connection with (i) an election and pre-
 2 ceding campaign if none of the candidates is to be nom-
 3 inated or elected at that election as representing a party
 4 any of whose candidates for Presidential elector received
 5 votes in the last preceding election at which Presidential
 6 electors were selected, or (ii) a question which is not
 7 specifically identified with a National or State political
 8 party or political party of a territory or possession of the
 9 United States; or

10 “(B) is permitted by regulations prescribed by the
 11 Civil Service Commission and involves the municipality
 12 or political subdivision in which such employee resides,
 13 when—

14 “(i) the municipality or political subdivision is
 15 in Maryland or Virginia and in the immediate vicin-
 16 ity of the District of Columbia or is a municipality
 17 in which a majority of voters are employed by the
 18 Government of the United States; and

19 “(ii) the Commission determines that because
 20 of special or unusual circumstances which exist in
 21 the municipality or political subdivision it is in the
 22 domestic interest of the employees to permit polit-
 23 ical participation.

24 “(2) For the purpose of this subsection, ‘an active part
 25 in political management or in political campaigns’ means

1 those acts of political management or political campaigning
 2 which were prohibited on the part of employees in the com-
 3 petitive service before July 19, 1940, by the determinations
 4 of the Civil Service Commission under the rules prescribed
 5 by the President.

6 **"§ 7326. Candidates for elective office; leave, notification by**
 7 **employees**

8 "(a) Notwithstanding section 6302 (d) of this title, an
 9 employee who is a candidate for elective office shall, upon the
 10 request of such employee, be granted accrued annual leave for
 11 the purpose of allowing such employee to engage in activities
 12 relating to such candidacy.

13 "(b) An employee shall promptly notify the agency in
 14 which he is employed upon becoming a candidate for elective
 15 office and upon the termination of such candidacy.

16 "(c) The foregoing provisions of this section shall not
 17 apply in the case of an individual who is an employee by rea-
 18 son of holding an elective public office.

19 **"§ 7327. Board on Political Activities of Federal Employees**

20 "(a) There is established a board to be known as the
 21 Board on Political Activities of Federal Employees. It shall
 22 be the function of the Board to hear and decide cases regard-
 23 ing violations of sections 7323, 7324, and 7325 of this title.

24 "(b) The Board shall be composed of 3 members, ap-
 25 pointed by the President, by and with the advice and consent

1 of the Senate. One member shall be designated by the Presi-
2 dent as Chairman of the Board.

3 “(c) Members of the Board shall be chosen on the basis
4 of their professional qualifications from among individuals
5 who, at the time of their appointment, are employees (as
6 defined under section 7322 (1) of this title), except that not
7 more than 2 individuals of the same political party may be
8 appointed as members. Employees of the Civil Service Com-
9 mission shall be ineligible to be appointed to or to hold office
10 as members of the Board.

11 “(d) (1) Members of the Board shall serve a term of
12 3 years, except that of the members first appointed—

13 “(A) the Chairman shall be appointed for a term
14 of 3 years,

15 “(B) one member, designated by the President,
16 shall be appointed for a term of 2 years, and

17 “(C) one member, designated by the President,
18 shall be appointed for a term of 1 year.

19 An individual appointed to fill a vacancy occurring other
20 than by the expiration of a term of office shall be appointed
21 only for the unexpired term of the member such individual
22 will succeed. Any vacancy occurring in the membership of
23 the Board shall be filled in the same manner as in the case
24 of the original appointment.

25 “(2) If an employee who was appointed as a member

1 of the Board is separated from service as an employee, he
2 may not continue as a member of the Board after the 60-day
3 period beginning on the date so separated.

4 “(e) The Board shall meet at the call of the Chairman.

5 “(f) All decisions of the Board with respect to the
6 exercise of its duties and powers under the provisions of this
7 subchapter shall be made by a majority vote of the Board.

8 “(g) A member of the Board may not delegate to any
9 person his vote nor, except as expressly provided by this
10 subchapter, may any decisionmaking authority vested in the
11 Board by the provisions of this subchapter be delegated to
12 any member or person.

13 “(h) The Board shall prepare and publish in the Fed-
14 eral Register written rules for the conduct of its activities,
15 shall have an official seal which shall be judicially noticed,
16 and shall have its office in or near the District of Columbia
17 (but it may meet or exercise any of its powers anywhere
18 in the United States).

19 “(i) The Civil Service Commission shall provide such
20 clerical and professional personnel, and administrative sup-
21 port, as the Chairman of the Board considers appropriate
22 and necessary to carry out the Board's functions under this
23 subchapter. Such personnel shall be responsible to the Chair-
24 man of the Board.

25 “(j) The Administrator of the General Services Ad-

1 ministration shall furnish the Board suitable office space
2 appropriately furnished and equipped, as determined by the
3 Administrator.

4 “(k) (1) Members of the Board shall receive no addi-
5 tional pay on account of their service on the Board.

6 “(2) Members shall be entitled to leave without loss
7 of or reduction in pay, leave, or performance or efficiency
8 rating during a period of absence while in the actual per-
9 formance of duties vested in the Board.

10 **“§ 7328. Investigation; procedures; hearing**

11 “(a) The Civil Service Commission shall investigate
12 reports and allegations of any activity prohibited by section
13 7323, 7324, or 7325 of this title. Any such investigation
14 shall terminate not later than 90 days after the date of
15 its commencement, except that such 90-day limitation may
16 be extended upon the written approval of the Board for
17 the period specified in such approval. If the Commission
18 does not make the notification required under subsection
19 (c) of this section before the close of the period for in-
20 vestigation, subsections (c) (2) and (3) and (d) of this
21 section, and section 7329 of this title, shall not apply there-
22 after to the employee involved with respect to the activities
23 under investigation.

24 “(b) As a part of the investigation of the activities of
25 an employee, the Commission shall provide such employee

1 an opportunity to make a statement concerning the matters
 2 under investigation and to support such statement with any
 3 documents the employee wishes to submit. An employee
 4 of the Commission lawfully assigned to investigate a viola-
 5 tion of this subchapter may administer an oath to a witness
 6 attending to testify or depose in the course of the
 7 investigation.

8 “(c) (1) If it appears to the Commission after investi-
 9 gation that a violation of section 7323, 7324, or 7325 of
 10 this title has not occurred, it shall so notify the employee
 11 and the agency in which the employee is employed.

12 “(2) Except as provided in paragraph (3) of this sub-
 13 section, if it appears to the Commission after investigation
 14 that a violation of section 7323, 7324, or 7325 of this title
 15 has occurred, the Commission shall submit to the Board
 16 and serve upon the employee a notice by certified mail, return
 17 receipt requested (or if notice cannot be served in such
 18 manner, then by any method calculated to reasonably apprise
 19 the employee) —

20 “(A) setting forth specifically and in detail the
 21 charges of alleged prohibited activity;

22 “(B) advising the employee of the penalties pro-
 23 vided under section 7329 of this title;

24 “(C) specifying a period of not less than 30 days
 25 within which the employee may file with the Board a

1 written answer to the charges in the manner prescribed
2 by rules issued by the Board; and

3 “(D) advising the employee that unless the em-
4 ployee answers the charges, in writing, within the time
5 allowed therefor, the Board is authorized to treat such
6 failure as an admission by the employee of the charges
7 set forth in the notice and a waiver by the employee of
8 the right to a hearing on the charges.

9 “(3) If it appears to the Commission after investigation
10 that a violation of section 7323, 7324, or 7325 of this title
11 has been committed by—

12 “(A) the Vice President;

13 “(B) an employee appointed by the President by
14 and with the advice and consent of the Senate;

15 “(C) an employee whose appointment is expressly
16 required by statute to be made by the President;

17 “(D) the Mayor of the District of Columbia; or

18 “(E) the Chairman or a member of the Council
19 of the District of Columbia, as established by the District
20 of Columbia Self-Government and Governmental Reor-
21 ganization Act;

22 the Commission shall refer the case to the Attorney General
23 for prosecution under title 18, and shall report the nature and
24 details of the violation to the President and to the Congress.

25 “(d) (1) If a written answer is not filed within the time

1 allowed therefor, the Board may, without further proceed-
2 ings, issue its final decision and order.

3 “(2) If an answer is filed within the time allowed there-
4 for, the charges shall be determined by the Board on the
5 record after a hearing conducted by a hearing examiner
6 appointed under section 3105 of this title, and, except as
7 otherwise expressly provided under this subchapter, in ac-
8 cordance with the requirements of subchapter II of chapter 5
9 of this title, notwithstanding any exception therein for mat-
10 ters involving the tenure of an employee. The hearing shall
11 be commenced within 30 days after the answer is filed with
12 the Board and shall be conducted without unreasonable
13 delay. As soon as practicable after the conclusion of the hear-
14 ing, the examiner shall serve upon the Board, the Commis-
15 sion, and the employee such examiner's recommended deci-
16 sion with notice to the Commission and the employee of
17 opportunity to file with the Board, within 30 days after the
18 date of such notice, exceptions to the recommended decision.
19 The Board shall issue its final decision and order in the
20 proceeding no later than 60 days after the date the recom-
21 mended decision is served. The employee shall not be re-
22 moved from active duty status by reason of the alleged
23 violation of this subchapter at any time before the effective
24 date specified by the Board.

25 “(e) (1) At any stage of a proceeding or investigation

1 under this subchapter, the Board may, at the written request
2 of the Commission or the employee, require by subpoena the
3 attendance and testimony of witnesses and the production of
4 documentary or other evidence relating to the proceeding or
5 investigation at any designated place, from any place in the
6 United States or any territory or possession thereof, the
7 Commonwealth of Puerto Rico, or the District of Columbia.
8 Any member of the Board may issue subpoenas, and members
9 of the Board and any hearing examiner authorized by the
10 Board may administer oaths, examine witnesses, and receive
11 evidence. In the case of contumacy or failure to obey a sub-
12 pena, the United States district court for the judicial district
13 in which the person to whom the subpoena is addressed re-
14 sides or is served may, upon application by the Board, issue
15 an order requiring such person to appear at any designated
16 place to testify or to produce documentary or other evidence.
17 Any failure to obey the order of the court may be punished
18 by the court as a contempt thereof.

19 “(2) The Board (or a member designated by the
20 Board) may order the taking of depositions at any stage of a
21 proceeding or investigation under this subchapter. Deposi-
22 tions shall be taken before an individual designated by the
23 Board and having the power to administer oaths. Testimony
24 shall be reduced to writing by or under the direction of the

1 individual taking the deposition and shall be subscribed by
2 the deponent.

3 “(3) (A) After requesting in writing and obtaining the
4 approval of the Attorney General, the Board may determine
5 that an employee’s attendance and testimony are necessary
6 to the carrying out of the Board’s functions under this sub-
7 chapter. For purposes of the preceding sentence, if the Attor-
8 ney General does not notify the Board in writing within 30
9 days after the date on which a request for such approval is
10 made that the Board does not have his approval, then such
11 approval is deemed to have been given. Such 30-day period
12 shall be extended an additional 10 days if the Attorney Gen-
13 eral submits in writing to the Board the reason for such
14 extension.

15 “(B) If the Board makes a determination under sub-
16 paragraph (A) with respect to any employee, such employee
17 may not be excused from attending and testifying or from
18 producing documentary or other evidence in obedience to a
19 subpoena of the Board on the ground that the testimony or
20 evidence required of the employee may tend to incriminate
21 the employee or subject the employee to a penalty or for-
22 feiture for or on account of any transaction, matter, or thing
23 concerning which the employee is compelled to testify or
24 produce evidence. No employee shall be prosecuted or sub-

1 jected to any penalty or forfeiture for or on account of any
2 transaction, matter, or thing concerning which the employee
3 is compelled under this paragraph, after having claimed the
4 privilege against self-incrimination, to testify or produce evi-
5 dence, nor shall testimony or evidence so compelled be used
6 as evidence in any criminal proceeding against the employee
7 in any court, except that no employee shall be exempt from
8 prosecution and punishment for perjury committed in so
9 testifying.

10 “(f) An employee upon whom a penalty is imposed by
11 an order of the Board under subsection (d) of this section
12 may, within 30 days after the date on which the order was
13 issued, institute an action for judicial review of the Board’s
14 order in the United States District Court for the District of
15 Columbia or in the United States district court for the judicial
16 district in which the employee resides or is employed. The
17 institution of an action for judicial review shall not operate as
18 a stay of the Board’s order, unless the court specifically orders
19 such stay. A copy of the summons and complaint shall be
20 served as otherwise prescribed by law and, in addition, upon
21 the Board which shall then certify and file with the court the
22 record upon which the Board’s order was based. If applica-
23 tion is made to the court for leave to adduce additional evi-
24 dence, and it is shown to the satisfaction of the court that the
25 additional evidence may materially affect the result of the

1 proceeding and that there were reasonable grounds for failure
2 to adduce the evidence at the hearing conducted under sub-
3 section (d) (2) of this section, the court may direct that the
4 additional evidence be taken before the Board in the manner
5 and on the terms and conditions fixed by the court. The Board
6 may modify its findings of fact or order, in the light of the
7 additional evidence, and shall file with the court such modified
8 findings or order. The Board's findings of fact, if supported
9 by substantial evidence, shall be conclusive. The court shall
10 affirm the Board's order if it determines that it is in accord-
11 ance with law. If the court determines that the order is not in
12 accordance with law—

13 “(1) it shall remand the proceeding to the Board
14 with directions either to enter an order determined by
15 the court to be lawful or to take such further proceedings
16 as, in the opinion of the court, are required; and

17 “(2) it may assess against the United States reason-
18 able attorney fees and other litigation costs reasonably
19 incurred by the employee.

20 “(g) The Commission or the Board, in its discretion,
21 may proceed with any investigation or proceeding instituted
22 under this subchapter notwithstanding that the Commission
23 or the head of an employing agency or department has re-
24 ported the alleged violation to the Attorney General as re-
25 quired by section 535 of title 28.

1 **“§ 7329. Penalties**

2 “(a) Subject to and in accordance with section 7328 of
3 this title, an employee who is found to have violated any
4 provision of—

5 “(1) section 7323 of this title shall, upon a final
6 order of the Board, be suspended without pay from such
7 employee’s position for a period not less than 30 days,
8 or shall be permanently removed in which event that
9 employee may not thereafter hold any position (other
10 than an elected position) as an employee (as defined in
11 section 7322 (1) of this title) ;

12 “(2) section 7324 or 7325 of this title shall, upon
13 a final order of the Board, be—

14 “(A) removed from such employee’s position,
15 in which event that employee may not thereafter
16 hold any position (other than an elected position)
17 as an employee (as defined in section 7322 (1) of
18 this title) for such period as the Board may pre-
19 scribe;

20 “(B) suspended without pay from such em-
21 ployee’s position for such period as the Board may
22 prescribe; or

23 “(C) disciplined in such other manner as the
24 Board shall deem appropriate.

25 “(b) The Board shall notify the Commission, the em-

1 ployee, and the employing agency of any penalty it has im-
 2 posed under this section. The employing agency shall certify
 3 to the Board the measures undertaken to implement the
 4 penalty.

5 **"§ 7330. Educational program; reports**

6 “(a) The Commission shall establish and conduct a
 7 continuing program to inform all employees of their rights
 8 of political participation and to educate employees with
 9 respect to those political activities which are prohibited.
 10 The Commission shall inform each employee individually in
 11 writing, at least once each calendar year, of such employee's
 12 political rights and of the restrictions under this subchapter.
 13 The Commission may determine, for each State, the most
 14 appropriate date for providing information required by this
 15 subsection. Such information, however, shall be provided to
 16 employees employed or holding office in any State not later
 17 than 120 days before the earliest primary or general election
 18 for State or Federal elective office held in such State.

19 “(b) On or before March 30 of each calendar year, the
 20 Commission shall submit a report covering the preceding
 21 calendar year to the Speaker of the House of Representatives
 22 and the President pro tempore of the Senate for referral to
 23 the appropriate committees of the Congress. The report shall
 24 include—

25 “(1) the number of investigations conducted under

1 section 7328 of this title and the results of such
2 investigations;

3 “(2) the name and position or title of each individ-
4 ual involved, and the funds expended by the Commis-
5 sion, in carrying out the program required under
6 subsection (a) of this section; and

7 “(3) an evaluation which describes—

8 “(A) the manner in which such program is
9 being carried out; and

10 “(B) the effectiveness of such program in
11 carrying out the purposes set forth in subsection
12 (a) of this section.

13 **“§ 7331. Regulations**

14 “The Civil Service Commission shall prescribe such
15 rules and regulations as may be necessary to carry out its
16 responsibilities under this subchapter. However, no regula-
17 tion or rule of the Commission or any amendment thereto
18 shall take effect unless—

19 “(1) the Commission transmits such rule, regula-
20 tion, or amendment to the Congress; and

21 “(2) neither House of Congress has disapproved
22 such rule, regulation, or amendment within 30 legisla-
23 tive days from the date of transmittal to the Congress.”.

24 (b) (1) Section 3302 of title 5, United States Code, is

1 amended by striking out "7153, 7321, and 7322" and in-
 2 serting in lieu thereof "and 7153".

3 (2) Section 1308 (a) of title 5, United States Code, is
 4 amended—

5 (A) by inserting "and" at the end of paragraph
 6 (2);

7 (B) by striking out paragraph (3); and

8 (C) by redesignating paragraph (4) as paragraph
 9 (3).

10 (3) The second sentence of section 8332 (k) (1) of title
 11 5, United States Code, is amended by striking out "second"
 12 and inserting "last" in lieu thereof.

13 (4) The section analysis for subchapter III of chapter
 14 73 of title 5, United States Code, is amended to read as
 15 follows:

"SUBCHAPTER III—POLITICAL ACTIVITIES

"Sec.

"7321. Political participation.

"7322. Definitions.

"7323. Use of official authority or influence; prohibition.

"7324. Solicitation; prohibition.

"7325. Political activities on duty, etc.; prohibition.

"7326. Candidates for elective office; leave, notification by employees.

"7327. Board on Political Activities of Federal Employees.

"7328. Investigation; procedures; hearing.

"7329. Penalties.

"7330. Educational programs; reports.

"7331. Regulations."

16 (c) (1) Sections 602 and 607 of title 18, United States
 17 Code, relating to solicitations and making of political contri-

1 butions, are each amended by adding at the end thereof the
 2 following new sentence: "This section does not apply to any
 3 activity of an employee, as defined in section 7322 (1) of
 4 title 5, unless such activity is prohibited by section 7324 of
 5 that title."

6 (2) Chapter 29 of title 18 of the United States Code is
 7 amended—

8 (A) by adding at the end the following new sec-
 9 tion:

10 **"§ 618. Extortion of political contributions from Federal**
 11 **personnel**

12 "Whoever, by the commission of or threat of physical
 13 violence to, or economic sanction against, any person, ob-
 14 tains, or endeavors to obtain, from an officer or employee of
 15 the United States or of any department or agency thereof,
 16 or from a person receiving any salary or compensation for
 17 services from money derived from the Treasury of the
 18 United States, any contribution for the promotion of a polit-
 19 ical object, shall be imprisoned not less than two nor more
 20 than three years, or fined not more than \$5,000, or both.";
 21 and

22 (B) by adding at the end of the table of sections
 23 for such chapter the following new item:

"618. Extortion of political contributions from Federal personnel."

1 (d) Section 6 of the Voting Rights Act of 1965 (42
2 U.S.C. 1973d) is amended by striking out "the provisions of
3 section 9 of the Act of August 2, 1939, as amended (5
4 U.S.C. 118i), prohibiting partisan political activity" and by
5 inserting in lieu thereof "the provisions of subchapter III
6 of chapter 73 of title 5, United States Code, relating to polit-
7 ical activities".

8 (e) Sections 103 (a) (4) (D) and 203 (a) (4) (D) of
9 the District of Columbia Public Education Act are each
10 amended by striking out "sections 7324 through 7327 of title
11 5" and inserting in lieu thereof "section 7325 of title 5".

12 (f) The amendments made by this section shall take ef-
13 fect ninety days after the date of enactment.



