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Federal Restrictions on the Political Activities of State and Local Employees

David Minge*

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I. INTRODUCTION

Restrictions on the political activities of public employees

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are commonplace and controversial.¹ Virtually all federal employees in the executive branch of government are so restricted by the Hatch Act.² Little Hatch Acts and a plethora of miscellaneous statutes, regulations, charter provisions, and ordinances restrict the political activities of several million state and local employees.³ However, the most significant source of restrictions on state and local employees is not these state or local provisions but the federal Hatch Act, which limits the political activity of over two and one-half million such employees who work in programs that receive federal financial assistance.⁴ This ap-


3. R. CHRISTOPHERSON, REGULATING POLITICAL ACTIVITIES OF PUBLIC EMPLOYEES (Civil Service Assembly Report No. 543, 1954); 2 COMMISSION, supra note 1, at 91-154; P. FORD, supra note 1, at 51-99; Comment, Economic Institutions and Value Survey, 40 NOTRE DAME LAW. 606, 614-28 (1965).

4. See 5 U.S.C. §§ 1501-1508 (1970). The two and one-half million estimate is based upon statements made at recent Senate hearings that the Hatch Act applies to five million public employees at all levels of government. According to some of the testimony only two and one-half million of the five million are federal employees. Thus the remaining
plication of the Hatch Act is an exercise by Congress of its power
to attach conditions to the availability of federal funds. Al-
though the states have endured this imposition on their preroga-
tives because of their need for financial assistance, the Act has
had an abrasive effect on intergovernmental relations in our
federal system. Furthermore, the nature of the activities pro-
scribed and the number of persons affected by these and com-
parable restrictions have led courts, commissions and commen-
tators to criticize them as being at variance with the first amend-
ment guarantee of freedom of political expression and with this
country's commitment to participatory democracy.

The original version of the Hatch Act, passed in 1939 and ap-
plied only to federal employees, was the culmination of sev-
eral years of agitation in Congress for legislation to end the
two and one-half million would be state and local. See Hearings on S.
3374 and S. 3417 Before the Senate Comm. on Post Office and Civil
Serv., 92d Cong., 2d Sess. 170, 199, 209, 228 (1972) [hereinafter cit-
as Senate Hearings]. More recently an official of the Civil Service Com-
mission estimated that three to five million state, local and poverty
program employees were covered by the Hatch Act. Letter from L. Col-
llins, Office of General Counsel, United States Civil Serv. Comm'n to
the author, Dec. 11, 1972. Since there were only 10.4 million state
and local employees in 1971, and five and one-half million of these
worked in educational institutions (Bureau of Census, Dep't of Com-
merce, Public Employment in 1971 at 8 (1971)), and are thus not sub-
ject to the Act (see 5 U.S.C. § 1501(4) (B) (1970)), it appears that at
least 50% of non-educational state and local employees are covered by
the Act.

It might also be noted that there has been a significant increase in
the number of state and local employees subject to the Act over the
years. In 1940 an estimated 500,000 state and local employees were
covered. In 1967 the figure was one and one-half million. The increase
is related to the increased federal aid to state and local government,
which was $572 million in 1940, $17.5 billion in 1967, $35 billion in
1972, and is projected to be at least $60 billion by 1980. See Senate
Hearings 199; 1 Commission, supra note 1, at 24 n.2.

For earlier discussions of the Hatch Act and its application to
state and local employees see Friedman & Klinger, The Hatch Act:
Regulation by Administrative Action of Political Activities of Govern-
mental Employees (Part II), 7 Fed. B.J. 138 (1945) (Part I of this article,
cited supra note 2, deals primarily with the law as it affects federal em-
ployees); Comment, supra note 3, at 608-14. See also Annot., 8 A.L.R.

5. See note 247 infra and accompanying text. Cf. Welsh, The
Hatch Act and the States, 37 State Gov't 8 (1964).

6. See, e.g., Hobbs v. Thompson, 449 F.2d 456 (5th Cir. 1971). In
Hobbs and nine other recent cases restrictions have been declared un-
constitutional. See cases cited in notes 214, 220 infra. See also T.
Emerson, The System of Freedom of Expression 582-92 (1970); P. Ford,
supra note 1, at 5-9; Nelson, supra note 1; cf. 1 Commission, supra
note 1, at 16-17.

“pernicious” political activities of public employees allegedly occurring in connection with the emergency public relief programs during the depression. In 1940, before Congressional concern had abated and at President Roosevelt’s request, the Hatch Act was made applicable to almost all state and local employees whose principal employment was in activities financed in whole or in part with federal moneys.

In the thirty-three years since its passage, no change of substance has been made in the provisions of the Act as it relates to state and local government. However, it is likely that federal revenue sharing, by substantially increasing the number of employees restricted by the Act, will lead to an enlivened interest in the subject. Moreover, it appears that the Supreme Court is about to decide important questions concerning the constitutionality of the Act. Thus, it is again appropriate to undertake an examination of the content, application, enforcement, constitutionality, and desirability of these restrictions of the Hatch Act. In addition, this Article will consider the federal standard for state merit systems regarding political activity. This standard simply incorporates by reference the Hatch Act restrictions and thus requires states to both include and enforce these restrictions as a part of the state merit system required for personnel working in designated federally assisted activities.

II. RESTRICTIONS

A. THE PROVISIONS

The most important restrictive provisions of the Hatch Act relating to state and local employees are contained in 5 U.S.C. § 1502(a), which provides:

8. 1 COMMISSION, supra note 1, at 9-10. For a different analysis of the motives behind the Act see Mosher, supra note 2, at 234-37.
9. Message to the United States Senate, Aug. 2, 1939, in 8 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 410, 415 (1939). It is of interest to note that President Roosevelt asked only that the participation of state and local employees in federal elections be restricted. The Act, as will be seen, goes much further.
11. The number of attempts to repeal or amend the Hatch Act as it applies to state and local employees is impressive. For a partial list see H.R. REP. No. 2707, 85th Cong., 2d Sess. 35-41 (1959).
12. See text accompanying note 149 infra.
13. See text accompanying notes 219-21 infra.
14. 45 C.F.R. § 70.6 (1972).
A State or local officer or employee may not—
(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office;
(2) directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes; or
(3) take an active part in political management or in political campaigns.

Another limitation is included in section 595 of title 18, which prohibits the use of official authority for the purpose of interfering with, or affecting, the nomination or the election of any candidate for [elected federal office] . . . .

With two minor exceptions these restrictions are identical to the Hatch Act restrictions applicable to federal employees. One difference is that the federal employee provisions do not contain any clause expressly limiting solicitation. This discrepancy is, however, explained and rendered unimportant by other statutes covering solicitation and by the general language of the counterpart to section 1502(a) (3) which presumably proscribes solicitation. The other difference is the omission in the federal employee counterpart of section 1502(a) (1) of the words "or a nomination." This difference is also unimportant since elections may be construed to include nominations and since, in any event, the general language of the counterpart to section 1502 (a) (3) can again be used to prohibit the same activity.

Of these four restrictive clauses, section 1502(a)(3) is the critical one. The other three deal with blatant employment-related conduct—the abuse of official authority and the coercive solicitation of other employees for the purpose of influencing the political process. As will be seen below, section 1502(a)(3) has been construed by the United States Civil Service Commission, the agency responsible for its enforcement, as applicable not only to job-connected conduct, but also to a multitude of other employee activities regardless of when they occur or whom they involve. The importance of the other three limitations is that they are not subject to the exception for nonpartisan political ac-

ivity and that they alone apply to certain state and local officials excepted from coverage of section 1502(a)(3). In addition, section 595 carries criminal penalties and is therefore enforced by the Justice Department, not the United States Civil Service Commission.

It should also be noted that these provisions do not apply to all state and local employees, but only to those working in connection with federally funded activities. They are also inapplicable to state and local employees working for educational or research institutions. Finally, substantive exceptions exist for conduct related to nonpartisan activity and to certain referendums. Both the application question and the exceptions will be discussed below.

B. THE DEFINITIONAL PROBLEM

Perhaps the most conspicuous feature of section 1502(a)(3) is its ambiguity. What specific acts are included in the proscription against taking "an active part in political management or in political campaigns"? In a misguided attempt to give it meaning, Congress defined the phrase in section 1501(5) as those acts of political management and campaigning prohibited by the decisions of the United States Civil Service Commission prior to July 19, 1940. Since there are over 3,000 such decisions, the only copies of which are in the offices of the Commission, only an archivist could make such a definition meaningful. To clarify this situation, the Commission has published pamphlets and posters indicating permitted and prohibited activities. However,

20. See 5 U.S.C. § 1502(c) (1970) discussed in text accompanying notes 153-56 infra. The first two provisions of § 1502(a) are also discussed at that point.
22. Id. § 1501 (4) (B).
23. Id. § 1503.
24. See text accompanying notes 78-92 infra discussing nonpartisan activity and referred questions and Section III infra discussing application of the Act.
27. See, e.g., UNITED STATES CIVIL SERV. COMM'N, STATE AND LOCAL EMPLOYEES POLITICAL PARTICIPATION (G.C. 39, 1972) [hereinafter cited as STATE EMPLOYEE PAMPHLET]; Poster headed "State and Local Employees Who Work in Federally Aided Programs Know the Rules on Politi-
because of their unofficial nature and ambiguities, these publications fail to adequately solve the definitional problem.

In the last three years the Civil Service Commission has taken two commendable steps to give meaning to the congressional definition. In 1970 it promulgated regulations listing 12 permitted and 13 prohibited activities for state and local employees covered by the Hatch Act and containing some general comments. 28 In 1971 it issued the Political Activity Reporter—a three volume set of all of its decisions since 1940 with an index, a digest and a promise of annual supplements. 29 Although helpful in resolving ambiguities and predicting the Commission's decisions in particular cases, and a clear improvement over the previous combination of 3,000 obscure decisions and unofficial pamphlets, the legal status of the regulations and the Political Activity Reporter is subject to question. There is no apparent legal authority for these regulations regarding state and local employees. 30 Furthermore, the pre-1940 decisions of the Commission still constitute the official definition, and they are as obscure as ever. Whether the Commission would be able to resort to a pre-1940 decision prohibiting activity allowed by the regulations is an unanswered question. 31 In the converse situation, if an individual were charged with violating the statute by engaging in activity proscribed by the regulations but approved by an early decision, the decision would presumably prevail. Although the post-1940 Commission decisions contained
in the Political ActivityReporter are excellent indicators of the Commission’s current interpretation of the Hatch Act, these decisions have no legal status comparable to the pre-1940 decisions.

The ambiguity of the language in section 1502(a)(3) as defined in section 1501(5) may even rise to the level of constitutional infirmity. In a recent case, National Association of Letter Carriers v. United States Civil Service Commission, a three judge Federal District Court held an identical definition in that portion of the Hatch Act dealing with federal employees unconstitutional for vagueness and overbreadth. Although the opinion expressly disclaimed any decision on the validity of section 1501(5), the opinion is persuasive, and its application to the provision affecting state and local employees is obvious. In any case, the definitional problem is one that clearly requires congressional clarification.

C. PARTICULAR ACTIVITIES

Notwithstanding the ambiguities, the particular political activities of state and local employees that are in practice permitted and proscribed under the Hatch Act can be determined with some certainty on the basis of other provisions of the Act, the regulations, and Commission and court decisions. Moreover, since virtually identical substantive restrictions regarding political activity apply to federal employees, decisions of the courts and interpretive statements and decisions by the Commission dealing with federal employees are directly relevant.

1. Voting

Although the scope of activities prohibited by the Hatch Act is very broad, the Act does not include any proscriptions on the exercise of the right to vote. Rather, the right to vote is guaranteed both by statute and by the regulations. Under the regulations, freedom to sign petitions is also protected.


33. 346 F. Supp. at 579 n.1.

34. See notes 15-17 supra and accompanying text.


37. 5 C.F.R. § 151.111(a) (?) (1972).
2. Individual Expression

The statute and regulations also recognize the right of the state and local employee to express his opinion, publicly as well as privately, on political subjects and candidates. This includes varieties of symbolic expression such as the right to display bumper stickers, badges, buttons and pictures. At some point, however, expression of opinion becomes an "active part in political management or in political campaigns" and is thus prohibited by section 1502(a)(3). The Civil Service Commission has taken the position that this occurs whenever the expression of opinion is related to campaign strategy or is addressed to a political group. A radio speech attacking a candidate, solicitation of votes, participation in a political parade, and endorsements in advertisements and campaign literature are examples of expression that the Commission has held violative of the Hatch Act.

38. 5 U.S.C. § 1502(b) (1970); 5 C.F.R. § 151.111(a)(2) (1972). Prior to the adoption of the Hatch Act, the regulations of the Civil Service Commission recognized only the limited right of civil service employees to "express privately their opinions." UNITED STATES CIVIL SERV. COMM'N, TWENTY-FOURTH ANNUAL REPORT 55 (1907). In the course of congressional deliberation the word "privately" was deleted, an indication of congressional intent to accord a greater degree of freedom to the affected employees. See remarks of Senator Hatch, 83 Cong. Rec. 7999-8000 (1938), 86 Cong. Rec. 2870-71 (1940). The Civil Service Commission has recognized this intent in their rules, as have the courts. See Wilson v. United States Civil Serv. Comm'n, 136 F. Supp. 104 (D.D.C. 1955).

40. 5 U.S.C. § 1502(a)(3) (1970). For a probing analysis of this inherent ambiguity in the Hatch Act provisions, see Nelson, Political Expression under the Hatch Act and the Problem of Statutory Ambiguity, 2 MIDWEST J. POL. SCI. 76 (1958). Professor Nelson breaks the ambiguity into four areas: (1) Public expression on political matters, (2) distinguishing between partisan and nonpartisan topics, (3) expression that influences other individuals, and (4) "unorganized" expression of opinion. Illustrative of the problem is the fact that expression before campaigns is less restricted than expression during campaigns. However, in view of the advance work done by presidential "candidates," it is hard to tell when campaigns begin. Id. at 81. See also Comment, 24 GEO. WASH. L. REV. 239 (1955).
41. See 5 C.F.R. § 151.122(5), (7), (10), (12). See also STATE EMPLOYEE PAMPHLET, supra note 27, at 3-4.
43. 5 C.F.R. § 151.122(7) (1972).
44. Pamphlet 20, supra note 27, at 15. See In re Langley, 1 POL. ACT. RPTR. 332 (1947).
45. 5 C.F.R. § 151.122(b)(10) (1972).
46. A related but slightly different problem is the employees' expression of opinion concerning some work related subject. Critical pub-
The courts are perhaps more sensitive than the Commission to the right of freedom of expression, and in two cases involving federal employees, Commission findings of violations have been reversed. In *Gray v. Macy*, a speech at a meeting of a county political party on behalf of the candidacy of an American communist leader was held protected. This appears to conflict with a provision in the Commission regulations. In *Wilson v. United States Civil Service Commission*, it was decided that a letter to the editor of a newspaper at election time criticizing a candidate for governor was also protected. The *Wilson* court indicated, however, that the right of expression is limited by the prohibition against active participation in political campaigns. Thus, if the letter had been a part of an organized effort, rather than an individual action, the result would probably have been different.

3. **Party Activities**

State and local employees subject to the Hatch Act may be members of political parties and clubs and attend open meetings of such organizations. Virtually all other activity in connection with political parties and clubs is, however, proscribed. Employees subject to the restrictions may not participate in organizing such parties and clubs; be officers at any level, including the precinct; be a member of any committees thereof; be delegates, alternates or proxies to any political convention; or be a candidate for any such positions. The Civil Service Com-

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47. 358 F.2d 742 (9th Cir. 1966), rev'd 239 F. Supp. 658 (D. Ore. 1965).

48. See 5 C.F.R. § 151.122(b) (12) (1972). Since the regulations were not adopted until after the decision, the court could not have been aware of the possibility of a conflict.


50. 5 C.F.R. § 151.111(a) (5), (6) (1972).

51. 5 C.F.R. § 151.122(b) (1), (2), (11) (1972). This interpretation of the Hatch Act has been conceded or followed in numerous cases. Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947) (acting as chairman of party's state central committee and being member of committee planning fund raising dinner for party); Palmer v. United States Civil Serv. Comm'n, 297 F.2d 450 (7th Cir. 1962), cert.
mission has taken the position that even work in unofficial capacities including pedestrian volunteer work is prohibited, that attendance at meetings is limited to general membership meetings, that participation in meetings is limited to voting on candidates and issues, and that addressing the meeting in connection with any candidacy is proscribed.52

This extremely restrictive interpretation of the Hatch Act seems to be at variance with its wording. The Act merely prohibits taking "an active part in political management or in political campaigns"53 and, as previously noted, it provides that an employee subject to its restrictions "retains the right . . . to express his opinions on political subjects and candidates."54 The Gray case held that the right of expression included addressing a meeting regarding a candidate and that trying to induce people to assume party office was not sufficient to constitute taking an "active" part.55 Furthermore, the court expressed doubt about whether the solicitation of votes for candidates for local party office would constitute an "active" part. Whether other courts will follow this restrained application of the Hatch Act to party activities is uncertain. Although such moderation in application would seem welcome, it could lead to significant ambiguity as to what activities constitute "active" participation.

It should be noted that these restrictions only apply to partisan political activities. Activities of a nonpartisan nature are governed by different rules.56 Work with community improve-

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52. STATE EMPLOYEE PAMPHLET, supra note 27, at 3. It may be that the Commission believes that this restrictive approach is required by its pre-1940 decisions. See In re Arrington, 2 POL. ACT. RPR. 209, 211 (1944); In re Caddell, 2 POL. ACT. RPR. 116, 117 (1943).
54. Id. § 1502(b).
55. Gray v. Macy, 358 F.2d 742 (9th Cir. 1966).
56. See notes 78-89 infra and accompanying text.
ment or fair election groups is not considered partisan. Although the statutes do not define with precision what constitutes a partisan organization, it is unlikely that lobbying groups or public interest organizations such as the Sierra Club would be considered partisan for Hatch Act purposes. The concern of these groups is with political issues, not parties. Only when the organization has a clear relationship to a recognized political party is participation subject to restrictions. Thus, political clubs and organizations which may not be the official party for legal purposes but which serve as de facto units of or adjuncts to political parties are partisan organizations for purposes of the Hatch Act.

4. Political Contributions

The regulations approve financial contributions to political parties and organizations. However, all solicitation and direct or indirect work in connection therewith are prohibited. For example, the sale of tickets to political dinners and other fund raising activities is proscribed. Any attempt to solicit another employee is, of course, prohibited. Such solicitation can be subtly coercive, especially when done by a superior. Thus, it should be considered a violation of both the general prohibition against playing an active role in political management or campaigns and the explicit prohibition against solicitation.

5. Supporting Candidates

Since state and local employees subject to the Hatch Act

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62. See Jarvis v. United States Civil Serv. Comm'n, 382 F.2d 339 (6th Cir. 1967). The Commission has even gone so far as to suggest that when an official allows solicitation of funds by subordinates for his political activity, he may violate the Act. See In re Huet, 2 Pol. Act. Rptr. 100 (1942).
POLITICAL ACTIVITIES

may not take an active part in any political campaign, efforts that are a part of a campaign such as circulating nominating petitions, soliciting votes, distributing literature, and serving on committees are all prohibited. Although signing nominating petitions and displaying bumper stickers, badges, buttons and pictures, as well as expression of personal views regarding candidates are permitted, there may, as discussed, be limits on such expression if it is too closely identified with a campaign.

6. Candidacy for Office

Candidacy for partisan public office at any level of government is prohibited. Thus, announcing one’s candidacy for an office and arranging for advertising of candidacy constitute a violation of the Hatch Act even though no campaigning is actually done. Election to office by a truly spontaneous write-in effort is apparently not in violation of the Act. Seeking and holding nonpartisan offices are permitted under the circumstances described below.

66. See note 37 supra.
67. See note 39 supra.
68. See text accompanying notes 38, 47-49 supra.
69. See text accompanying notes 40-49 supra.
70. 5 C.F.R. § 151.122(b)(6) (1970). See Northern Va. Reg. Park Auth. v. United States Civil Serv. Comm’n, 437 F.2d 1346 (4th Cir.), cert. denied, 493 U.S. 936 (1989) (candidate for and member of state legislature); In re Higginbotham, 340 F.2d 165 (3d Cir.), cert. denied, 382 U.S. 853 (1965) (candidate for alderman on partisan ticket); In re Ramshaw, 266 F. Supp. 73 (D. Idaho 1967) (candidate for sheriff); cf. Smyth v. United States Civil Serv. Comm’n, 291 F. Supp. 568 (E.D. Wis. 1968) (candidate for county clerk); Matturi v. United States Civil Serv. Comm’n, 130 F. Supp. 15 (D.N.J. 1955), aff’d per curiam, 229 F.2d 435 (3d Cir. 1955) (candidate for congress. If, however, an individual holds elective public office at the time he is appointed to a position covered by the Hatch Act, he may complete his term in that office. He may also accept appointment to a vacant elective office and apparently complete the unexpired term while holding a position subject to the Hatch Act. But in neither situation may the employee retain his position and run for election or re-election. State Employee Pamphlet, supra note 27, at 4.

71. Smyth v. United States Civil Serv. Comm’n, 291 F. Supp. 568 (E.D. Wis. 1968). The Commission has also taken the position that activities prior to formal declaration of candidacy are prohibited. See Pamphlet 20, supra note 27, at 15.
72. Pamphlet 20, supra note 27, at 15.
7. Election Activities

As has been noted, the right to vote is recognized by the Hatch Act. Participating in get-out-the-vote efforts and functioning in positions such as poll watchers or challengers are proscribed activities if done on behalf of a party or candidate. Serving as an election judge or other official is permitted if it involves only the performance of nonpartisan duties prescribed by law. Although at one time the Commission apparently took the position that bipartisan or nonpartisan voter registration and get-out-the-vote efforts were prohibited, it appears to have reversed its stand on these matters.

8. Nonpartisan Political Activity

Exempted from the general prohibition of section 1502(a)(3) is political activity in connection with:

- an election and the preceding campaign if none of the candidates is to be nominated or elected at that election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected . . . .

The Civil Service Commission has indicated that this provision was intended to allow state and local employees otherwise subject to the Hatch Act either to be a candidate for or to play an active role in the campaign of another for an office that state law designates as nonpartisan. In most states only local government officials such as school board and municipal council

73. See note 36 supra.

74. 5 C.F.R. § 151.122(b) (8), (9) (1972). Partisan voter registration efforts are presumably also prohibited if done on behalf of a party.

75. 5 C.F.R. § 151.111(a) (11) (1970). Even if such election officials must be chosen from different parties and are recommended by the party, their function is not thereby rendered partisan. See STATE EMPLOYEE PAMPHLET, supra note 27, at 4.

76. See 1 COMMISSION, supra note 1, at 21.


78. 5 U.S.C. § 1503(1) (1970). The restrictions of § 1502(a)(1) and (2) do, however, apply to such elections. These restrictions are set forth and discussed in text following note 14 and accompanying notes 18-20 supra.

79. See In re Broering, 1 POL. ACT. RPTR. 778 (1955). Of course, partisan primaries do not fall within the exceptions even though no party designation appears on the ballot. See STATE EMPLOYEE PAMPHLET, supra note 27, at 3.
members are elected on such a nonpartisan basis. However, in at least two states some statewide offices are also nonpartisan, and thus the exception applies.

Although its purpose is clear, the wording of this exception requires comment. It should be noted that the word “nonpartisan” is not used. Instead, the factor determining whether an election is open to participation is the representative status of the candidates. If any candidate “represents” a party which had a presidential candidate who received votes in the last election, then all participation is precluded and the exception is inoperative. If no such representative files for an office, the exception applies even though the election is not by state law required to be nonpartisan. In such a situation, the public employee could engage in political activity until a person representing a party whose presidential nominee received at least one vote in the last election becomes a candidate for the office in question. In a community where the major parties traditionally are not active in local elections, but by law could be, the existence of the exception is subject to the caprices of local party leaders.

The exception does not apply when any candidate “represents a party.” Thus, the Commission has stated that if in a nonpartisan election candidates are endorsed or supported by parties, the exception may be inoperative. The point at which such support becomes representation of a party is impossible to determine with precision. Financial support of candidates may not be known until after an election, and endorsements may be unsolicited. Presumably, a state or local employee would be allowed to participate in an election unless partisan support of one candidate in the election was generally known and the candidate receiving that support had either sought or made use of it.

The scope of the exception could be severely limited in many jurisdictions if the term “election” is too broadly defined. It is possible to construe that term as referring either to the fill-
ing of a particular public office or to the balloting for all offices to be determined on a given date. If the latter interpretation is adopted, state and local employees are precluded from activities in connection with those local nonpartisan offices that, by coincidence, are filled on the same day as a general, statewide, or national election. This broad approach would seem to be so arbitrary as to raise the question of its constitutionality. Although none of the cases decided by the Civil Service Commission has indicated adherence to the broad approach, its position is far from clear. The former approach would seem to be more reasonable. Thus, voting for each office should be considered a separate election regardless of the fact that balloting for other offices occurs on the same date and at the same polls.

This exception for nonpartisan elections is subject to criticism. A majority of the Commission on the Political Activity of Government Personnel concluded that “there is no such thing as a non-partisan campaign or non-partisan election.” A California study indicates that there are relationships between local, state and national politics regardless of the participation of major parties in local contests. Furthermore, the statutory definition of a partisan election which ties it to votes for electors for president and allows one party to contaminate an otherwise nonpartisan election is cumbersome and arbitrary. A better approach would be simply to allow participation in elections at certain levels of government regardless of partisan participation. Some limitation ought, however, to be placed on participation of an employee in the politics of the governmental entity for which he works to avoid conflicts of interest, abuse of position for political gain and disruptive conflicts within the entity involved. The state or local employer, not the federal gov-

85. Counsel for the Commission on Political Activity of Government Personnel was unable to decide what approach the United States Civil Service Commission followed. The manager of a county employee union felt that the broad definition of “election” was the law. 3 COMMISSION, supra note 1, at 616-17, 622.
87. 1 COMMISSION, supra note 1, at 23.
89. Compare the recommendations of the Commission on Political Activity of Government Personnel. 1 COMMISSION, supra note 1, at 4.
ernment, would be the appropriate agency to impose and enforce such a restriction.

9. Referendums

In addition to excepting participation in elections where candidates do not represent a major political party, the Hatch Act does not apply to political activity in connection with "a question which is not specifically identified with a National or State political party." The Act goes on to find that for the purposes of this provision, questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, are deemed not specifically identified with a National or State political party. It is not clear whether this finding is so conclusive as to exempt activity even when political parties have supported or opposed a referred question. The Civil Service Commission has not taken a clear position on the matter. Thus the employee is faced with the difficulty of determining whether a question is sufficiently identified with a party to make the exception inoperative. It is suggested that support or opposition to a referred question by political parties should not be enough of an identification because party platforms frequently take positions on referred questions, especially constitutional amendments. Only when major parties take opposing positions and make the matter a major public issue would there be any justification for restricting public employees' activities, and even then it is conjectural whether the Hatch Act imposes such a restriction.

10. Indirect Activities

In the past the Civil Service Commission has taken the position that political activities of state and local employees which are directly prohibited by the Act cannot be accomplished by indirection. Under this view, employees would be accountable

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91. Id. § 1503.
92. The United States Civil Service Commission does not appear to have decided any cases involving referred questions. Its regulations and literature are basically a rephrasing of part of the statute. See 5 C.F.R. § 15.111(10) (1972) and STATE EMPLOYEE PAMPHLET, supra note 27, at 2.
93. PAMPHLET 20, supra note 27, at 10; cf. UNITED STATES CIVIL SERV. COMM'N, STATE AND LOCAL EMPLOYEES POLITICAL PARTICIPATION, Question 4 (undated publication, predecessor to STATE EMPLOYEE PAMPHLET, supra note 27).
for political activities of their spouses if engaged in collusively.\textsuperscript{94} Although the apparent purpose is simply to prevent circumvention of the Hatch Act, such an application to members of an employee's family is troublesome. In addition to problems of proof and interspousal immunity,\textsuperscript{96} this application of the statute has the effect of restricting the voluntary acts not only of employees but of their families as well. To avoid jeopardizing a husband's or father's job, family members may simply avoid political activity. This increases significantly the number of citizens affected by the Act. Perhaps the enforcement problems and the unfairness of such indirect restrictions explain the omission of any reference to indirect activities involving family members in the recent regulations, the pamphlet for state and local employees and other current documents.\textsuperscript{98} Hopefully, the Civil Service Commission has decided to abandon its efforts to police such activities.

Another type of indirect activity that remains a concern involves government employee labor organizations. Unions actively and directly participate in the political process in connection with matters of particular concern to their members such as wages and working conditions. In addition, unions have established political education committees to work toward general political goals such as the endorsement and election of candidates.\textsuperscript{97} Although the Commission has recently made it clear that active participation in political education committees is prohibited,\textsuperscript{98} the extent of this prohibition in the case of indirect participation has not been answered.\textsuperscript{99} The indirect use of offi-

\textsuperscript{94} PAMPHLET 20, supra note 27, at 10.
\textsuperscript{96} See 5 C.F.R. Part 151 (1972); STATE EMPLOYEE PAMPHLET, supra note 27. Indirect coercive solicitation is, of course, prohibited by both the statute and the regulations. See 5 U.S.C. § 1502(a)(2) (1970); 5 C.F.R. § 151.121(b) (1972).
\textsuperscript{97} See Zon, Labor in Politics, 27 LAW & CONTEMP. PROB. 234 (1962).
\textsuperscript{98} UNITED STATES CIVIL SERV. COMM'n, supra note 93. See also Letter from A. Mondello, General Counsel, United States Civil Serv. Comm'n, to D. Johnson, Veterans Administration, Mar. 22, 1972, reprinted in Senate Hearings, supra note 4, at 274-75, stating that federal employees could not solicit fellow employees to become members of a political education committee and that union officials who were federal employees could not use their local organization to encourage such enrollment. Presumably the same principles would apply to state and local employees covered by the Hatch Act.
\textsuperscript{99} If a union political committee is supported wholly by contributions from government employees covered by the Hatch Act, it is
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Social influence, coercion and other pernicious activities through labor unions should, of course, be proscribed. Employee unions should, however, be free to at least present their positions on job related issues directly to the electorate and to influence the elected officials that make these decisions. It would be unfair for government to foreclose such presentation to the public simply because the employer is a governmental entity and the matters may be issues in political campaigns. In any event, unions can be expected to contest strongly any attempt to interfere with their political committees' activities.

The Civil Service Commission has stated that, in general,

What is prohibited generally is activity which prominently identifies the individual with the success or failure of a partisan group, candidate, or political party.\(^{100}\)

Thus individual actions like voting, signing petitions, contributing, holding membership and attending meetings, along with any nonpartisan activities, are permitted. Although the regulations attempt to encourage full participation in public affairs, they warn that the prohibited activities listed in the regulations are not exclusive\(^{101}\) and that, unless a particular activity is expressly authorized, an employee may engage in such activity only

in a manner which does not materially compromise the neutrality, efficiency, or integrity of his administration of federally funded functions.\(^{102}\)

Furthermore, the regulations warn that employees to whom the Act applies may not engage in any activity prohibited by any other federal, state or local law.\(^{103}\) The most severe limitation prevails.

D. THE VAGUENESS PROBLEM

These open-ended warnings about the scope of Hatch Act restrictions exacerbate the problems resulting from the ambiguity of the Act. Although a researcher with ample time can usually describe with some certainty those acts that are permitted and prohibited, it is doubtful that the typical employee can do so. Furthermore, in trying to distinguish between permissible in-

\(^{100}\) State Employee Pamphlet, supra note 27, at 2.

\(^{101}\) 5 C.F.R. § 151.122(b) (1972).

\(^{102}\) Id. § 151.111(a)(12).

\(^{103}\) Id. § 151.111(b).
individual expression and taking "an active part in political management and political campaigns," it may be impossible to determine in advance precisely what activities are prohibited.\textsuperscript{104} This ambiguity of the restrictions when coupled with their breadth has apparently been a source of some confusion to employees. Studies of both federal and state employees sponsored by the Commission on Political Activity of Government Personnel found widespread misunderstanding.\textsuperscript{105} Sixty-four per cent of the federal employees interviewed thought that five or more of 10 specific activities were prohibited when in fact they were permissible.\textsuperscript{106} Similarly, an appreciable number of state employees thought the Hatch Act prohibited activities that were in fact permitted.\textsuperscript{107} The survey found that:

One fairly safe conclusion to be drawn... is that a moderate degree of confusion exists about the specific forms of participation allowed...\textsuperscript{108}

This confusion has discouraged participation in the political process. In the more comprehensive survey of federal employees, it was revealed that one-sixth of those interested in greater participation in political activity than the Hatch Act allowed refrained from engaging in activities that in fact were not prohibited.\textsuperscript{109}

Since the results of the above survey were announced, the United States Civil Service Commission has made praiseworthy efforts to correct the problem of misinformation. The regulations, Political Activity Reporter, and literature previously mentioned have hopefully clarified much misunderstanding.\textsuperscript{110} In addition, the creation of a speaker's bureau and the continuing practice of answering questions concerning proposed activities may have helped.\textsuperscript{111} Nonetheless, it is difficult to believe that the confusion has been entirely eliminated. The problems are in

\textsuperscript{104} See text accompanying notes 40-49 supra, and Nelson, supra note 40.
\textsuperscript{105} 2 COMMISSION, supra note 1, at 1-80.
\textsuperscript{106} 1 COMMISSION, supra note 1, 20.
\textsuperscript{107} 2 COMMISSION, supra note 1, 74-75.
\textsuperscript{108} Id. at 10.
\textsuperscript{109} Id. at 15, 18. Seventeen per cent of the employees said that they did not join political organizations or attend meetings because of the restrictions.
\textsuperscript{110} See notes 27-29 supra.
\textsuperscript{111} STATE EMPLOYEE PAMPHLET, supra note 27, at contents page and at 5. Employees with questions are urged to write or call the Commission, and the Commission offers to have its attorneys meet with groups of 30 to 60 officials representing state or local agencies to brief them on the Act and to answer questions. Id.
large part statutory, and employees are presumed to know the correct interpretation of the Act. Differences of opinion or a mistake regarding meaning are no defense when a violation of the Act is charged. The risks of a violation therefore fall entirely on the employees, some of whom undoubtedly feel incapable of interpreting even the most clearly written material and who are unwilling to risk their careers on the possibility of an error. Furthermore, the nuisance of obtaining opinions on proposed political activity has an obvious chilling effect on the expression of political opinion.

III. APPLICATION

The Hatch Act restrictions apply to most state or local officer[s] or employee[s] . . . whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal Agency . . . . There are, however, three general categories of exceptions (which will be examined in greater detail below). First, those employed by educational and research institutions or agencies are exempted. Second, those working in the legislative and judicial branches of state and local government are subject only to the criminal prohibition against the use of official authority in connection with the election of federal officials, and then only if they are employed in what the statute calls an "administrative position." Third, elected state and local officials in the execu-


113. Violations of the Act can result in dismissal. See text accompanying notes 172-74 infra.

114. 5 U.S.C. § 1501(4) (1970). Another coverage provision is contained in the Emergency Employment Act of 1971, which states that neither the programs funded under the Act nor the administrators thereof shall engage in "political activities in contravention of [5 U.S.C. §§ 1501 to 1508 (1970)]." 42 U.S.C. § 4881(h) (Supp. I, 1971). The significance of this provision is doubtful since this program is apparently being dismantled. However, to the extent it is continued, it duplicates the coverage provision of the Hatch Act with two exceptions: First, it arguably applies to employees participating in certain state and local government activities otherwise exempt from the Hatch Act, principally those working for educational institutions. Second, the enforcement responsibility appears to lie with the Secretary of Labor, not the United States Civil Service Commission.

115. See text accompanying notes 151-52 infra.

tive branch are subject only to the provisions regarding abuse of official authority and solicitation of contributions. In sum, the broad proscription of section 1502(a)(3) against taking "an active part in political management or political campaigns" does not apply to any of these three groups.

Ascertaining whether a particular employee is subject to the Hatch Act ought to be easy. In theory, it is necessary to determine only the individual's principal employment, whether it is with a state or local agency, whether it is in connection with a federally funded activity and whether any exceptions apply. However, questions of statutory construction and application arise at each step.

A. Principal Employment

Before one is subject to any of the restrictions of section 1502(a), his "principal employment" must be in connection with a federally assisted activity. In the past, the most troublesome principal employment question arose in situations of dual employment. If one of the positions is in connection with an activity financed in whole or in part with federal funds, the question is whether this position is the individual's principal employment. Although the Civil Service Commission originally held that the statute required that only the principal public employment need be in connection with federally financed activities, this construction was rejected by the courts. In the case of dual employment, the principal employment is currently determined by the amount of time spent on each job and the income

on this exception exists if the legislative or judicial branch hires people under the Emergency Employment Act of 1971. Any state or local employee administering such a program is then subject to the Hatch Act. See note 114 supra.


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produced by each.\textsuperscript{121} Therefore, if a private job or public job not related to a federally financed activity is determined to be the principal employment, none of the restrictions of the Hatch Act applies to the employee.\textsuperscript{122}

Some persons charged with Hatch Act violations have argued that, although they have but one public job, they devote most of their work time on that job to activities which are not federally assisted and that they are therefore not subject to the restrictions on political activity.\textsuperscript{123} The Commission has rejected this argument on the ground that such a construction of the words "principal employment" renders meaningless the express statutory exception for persons who exercise no function in connection with federally assisted activities.\textsuperscript{124} Instead, the Commission has taken the position that any employee whose principal employment is with any agency receiving federal funds is covered by the Hatch Act if, as a normal and foreseeable incident of his employment, he performs any duties in connection with federally financed activities.\textsuperscript{125} That the bulk of his work is in connection with activities not so financed is irrelevant.

The only exception to this rule exists where the employee's connection with the federally financed work is de minimis.\textsuperscript{126}


\textsuperscript{122} Of course, part-time state and local employees are not subject to the restrictions of 5 U.S.C. § 1502(a) (1970) if the part-time employment is not their principal employment. Thus, the restrictions regarding part-time federal employees are not applicable to state and local employees. This discrepancy occurs because the federal coverage provisions contain no principal employment requirement.


\textsuperscript{124} In re Hutchins, 2 Pol. Act. Rptr. 160 (1944); In re Slaymaker, 2 Pol. Act. Rptr. 56 (1943). These decisions contain a thorough analysis of this issue. The statutory provision in question, 5 U.S.C. § 1501(4) (1970), provides:

\begin{enumerate}
  \item "State or local officer or employee" means an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency, but does not include—
  \begin{enumerate}
    \item an individual who exercises no functions in connection with that activity . . .
  \end{enumerate}
\end{enumerate}

\textsuperscript{125} In re Hutchins, 2 Pol. Act. Rptr. 160 (1944); In re Slaymaker, 2 Pol. Act. Rptr. 56 (1943).

\textsuperscript{126} In re Todd, 2 Pol. Act. Rptr. 49 (1943). (If only one-tenth of
The de minimus exception was mentioned in *Palmer v. United States Civil Service Commission*, where the Director of the Illinois Department of Conservation was held subject to the Act even though as director he estimated that only one per cent of his time was spent on the federally funded activities of his department. Apparently the fact that eight per cent of his department's revenue consisted of federal grants and that six of the nine divisions in the department received some federal assistance led the court to conclude that overall responsibilities for federally financed projects as distinguished from actual time devoted to such projects determined whether the connection was de minimus. Using this approach, the de minimus exception is virtually unavailable to high level officials.

The Commission has also determined that the Hatch Act applies to employees who are on a leave of absence. This prevents resorting to leaves of absence to participate in political activity and protects employees from pressure to take such leaves. It could be argued, however, that once a person takes a leave of absence without pay that the employment he has left is not his present principal employment; it is only his former and, at his election, his future principal employment. Furthermore, it is not clear that it is necessary to prohibit employees from engaging in political activities while on leaves of absence. At least two states expressly provide for such leaves to allow employees to run for political office. Permitting such leaves of absence is a desirable way of ameliorating the harshness of political activity restrictions.

B. "STATE OR LOCAL AGENCY"

Although it is obvious that a state or local employee re-
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restricted by the Hatch Act must be employed by a state or local governmental entity, not all such entities are within the statutory definition. According to the statutes an individual must be employed by what is called a "state or local agency." This term is defined as

the executive branch of a State, municipality, or other political subdivision of a State, or an agency or department thereof. . . .

Individuals employed by the judicial and legislative branches of state and local government are not within the foregoing definition. This parallels the implied exception for legislative and judicial employees of the federal government and was perhaps provided because of the small number of such employees and the lack of concern over their political activities at the time the Hatch Act was passed. If, however, the political activities of public employees need to be restricted for the integrity and efficiency of the public service, it is difficult to understand why personnel of the judicial branch should be excluded. The necessity of insulating them from political activities would seem clearly greater than in the case of administrators.

Two problems are presented by the restriction to the executive branch. First, the classical division of government into three branches is difficult to apply to local government and certain state agencies. In the so-called weak mayor municipalities, for example, the city council, which is theoretically the legislative branch, has direct responsibility for the administration of many programs. The same holds true for county commissioners. Are the employees working under these legislative bodies employed by the legislative rather than the executive branch? Although the Civil Service Commission has not spoken to this issue, one would expect some difficulty in reconciling the language of the statute to situations where coverage would seem to be appropriate. It is suggested that at the local level the "executive branch" requirement should not be taken too liter-

135. See H. DUNCOMBE, COUNTY GOVERNMENT IN AMERICA 47-49 (1966).
ally, because an overly literal reading would result in very arbitrary differences in coverage from city to city depending upon the particular form of government involved. Categorization by governmental branch is more feasible at the state level. Even there, however, the existence of certain agencies like workmen's compensation commissions and rate-making bodies which basically exercise judicial or legislative powers confuse the situation.\textsuperscript{136} A second problem that arises under the state or local agency requirements relates to individuals who are employed by two branches of government. For example, an individual may serve as a state legislator and be employed by an urban renewal program. This situation is discussed below.\textsuperscript{137}

C. CONNECTION WITH FEDERALLY AIDED ACTIVITY

In addition to problems of determining what constitutes an employee's principal employment and whether it is with a state or local agency, determination of coverage may be complicated by the nature of the particular employee's connection with the federally financed activity. Although it has been argued that for an employee to be subject to the restrictions of the Hatch Act his wages must come from federal funds, the Commission has rejected this requirement.\textsuperscript{138} Thus, in one proceeding an engineer in charge of procuring rights-of-way for highway projects who

\textsuperscript{136} See generally 1 K. Davis, Administrative Law § 1.09 (1958). Another aspect of this problem which has not received any attention from the Civil Service Commission involves public corporations and public-private joint ventures. It is not difficult to imagine quasi-public projects in which state or local governments participate and federal moneys are provided. Whether such projects are a part of the executive branch of government so that the employees are subject to the Hatch Act is unclear. However, it is difficult to distinguish them from employees of government contractors and, except for private organizations receiving funds under the Economic Opportunity Act, Congress has not yet extended the Hatch Act to any private employees. See State Employee Pamphlet, supra note 27, at 1, apparently relying on 42 U.S.C. § 2943 (b) (1970).

\textsuperscript{137} See text accompanying notes 157-61 infra.

\textsuperscript{138} In re Bollettieri, 2 Pol. Act. Rptr. 674 (1962); In re Knies, 2 Pol. Act. Rptr. 578, 584 (1958); In re Tinstman, 2 Pol. Act. Rptr. 313 (1948); In re Duberstein, 2 Pol. Act. Rptr. 131 (1944); In re Slaymaker, 2 Pol. Act. Rptr. 56 (1943); In re Huiet, 2 Pol. Act. Rptr. 100 (1942). Although the courts have not considered the issue, several of the cases in which violations of the Hatch Act have been upheld have involved heads of state departments or boards. See Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947); Palmer v. United States Civil Serv. Comm'n, 297 F.2d 450 (7th Cir.), cert. denied, 369 U.S. 849 (1962); Engelhardt v. United States Civil Serv. Comm'n, 197 F. Supp. 806 (M.D. Ala. 1961), aff'd per curiam, 304 F.2d 822 (5th Cir. 1962). Presumably these high state officials were paid entirely with state funds.
was compensated by the state was held to be within the coverage of the Act since most of the projects would be financed with federal moneys. The Commission reasoned that the statute required only that an individual’s employment be “in connection with” a federally assisted activity, that but for the federally assisted activity the state paid employee would not have been hired, that the opportunity for pernicious political activities was made possible because of the federal funds, and that the Hatch Act should therefore apply. Such a result is perhaps justified by the difficulty of determining who is being paid with federal funds in activities where the state or locality involved is to share in costs and where budgets do not specify what parts of which salaries are to be paid with the moneys being provided by the different governmental entities. It is also possibly justified by the arbitrariness and room for manipulation that the contrary position would allow. It is suggested, however, that the rationale is dangerously broad. It could be construed as forcing the states and localities to require all of their employees who perform anything more than a de minimus role in a federally assisted activity to abide by federal restrictions regardless of who ultimately pays them. Whenever a causal relation between the existence of their state position and the federally assisted activity is clear, the possibility of federal domination of the political lives of state and local employees exists.

Although the Civil Service Commission has determined that an engineer working on acquisition of rights-of-way for highway construction was sufficiently connected to the federally assisted activity of construction, it has also held that persons employed by the same state agencies to maintain highways are not sufficiently connected with the federal activity to render them subject to the restrictions of the Act. Similarly, in the case of a person employed to supervise the construction of private projects—such as driveways—related to highways, the Commission has held that the relationship is too collateral to satisfy the “in connection with” requirement. Although this latter decision is a welcome indication that the Commission will impose limits on its jurisdiction, the difficulty of predicting when a sufficient relationship exists to subject an employee to coverage still remains.

The only judicial indication of the limits of the connection requirement came in a case where the state, in dismissing an employee, defended its action in part on the ground that the employee had from time to time worked on federally funded projects and his political activity therefore violated the Hatch Act.\textsuperscript{142} The court rejected the defense in part because the plaintiff had not worked on such projects for seven months prior to the political activity. An additional factor the court might have considered was the intermittent nature of the connection. Nevertheless, the determination is correct—no state or local employee should be held to have a connection with a federally funded activity unless it is a regular incident of his employment.

What constitutes an activity funded in whole or in part with federal moneys may in some situations also be a problem. Federal programs offering financial aid to state and local units of government were at one time limited to relatively few areas. Today, however, federal funds are available in virtually all fields, and few state agencies or local units of government receive no federal funds.\textsuperscript{143} A greatly expanded coverage of the Hatch Act resulting from the pervasive availability of federal aid was, however, rejected by the court in \textit{Brooks v. Nacrelli},\textsuperscript{144} where voters sought an injunction against election day political activities of the local police on the ground, \textit{inter alia}, that the police department received federal moneys. In denying relief the court noted that of the department's total annual budget of over one million dollars, only $252 or one-fortieth of one percent had come from the federal government. It stated that the de minimus rule applied in such a situation.\textsuperscript{145}

The definition of activity is also a problem when the federal funds are given to the state, which in turn allocates them among various communities and state agencies. Since these funds from the federal government are for restricted, identifiable programs and are distributed pursuant to federally approved schemes, the Commission has held the programs supported with these funds

\textsuperscript{144} 331 F. Supp. 1350 (E.D. Pa. 1971).
\textsuperscript{145} The de minimus rule is discussed in text accompanying notes 126-28 \textit{supra}.
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to be activities whose employees are subject to the Hatch Act.\textsuperscript{146}

Another variation on the problem of whether an employee works in connection with a federally assisted program occurs when federal funds are used to reimburse the state or local agency for expenses already incurred. The Civil Service Commission has taken the position that political activities by persons employed in connection with projects so financed are subject to the Hatch Act only after the federal commitment to reimburse has been made.\textsuperscript{147}

With the advent of revenue sharing\textsuperscript{148} it is questionable whether under the present statutory scheme there will remain any limit on the coverage of the Act. It would seem that since the programs that benefit from revenue sharing would be neither designated by nor identified with the federal government, the need to apply the Hatch Act to state and local governments would be lacking. The Civil Service Commission is, however, evidently planning to enforce the Act with respect to employees who work in programs financed with revenue sharing funds.\textsuperscript{149}

D. Exceptions

There are several exceptions to the restrictions imposed by the Hatch Act. The implicit exclusion of individuals employed by the legislative or judicial branches of government has already been noted.\textsuperscript{150} Also noted was the exception for persons working in educational and research institutions or agencies.\textsuperscript{151} This exception is understandable. Educational and research institutions have traditionally been run on a merit system and free from partisan political influence. It has, however, been

\begin{itemize}
\item \textsuperscript{147} \textit{In re Bollettieri}, 2 Pol. Act. Rptr. 674, 681-82 (1962) (citing other decisions).
\item \textsuperscript{148} State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, 86 Stat. 919.
\item \textsuperscript{149} Letter from L. Collins, Office of General Counsel, United States Civil Serv. Comm'n to author, Dec. 11, 1972.
\item \textsuperscript{150} See text accompanying notes 131-37 supra.
\item \textsuperscript{151} 5 U.S.C. § 1501(4)(b) (1970), 18 U.S.C. § 595 (1970). The exception also applies to employees of religious, philanthropic and cultural institutions. This, however, seems to be surplusage since the Act never purported to cover such institutions or their employees regardless of their source of funding. \textit{See In re Cook}, 2 Pol. Act. Rptr. 516, 520 (1955). An exception to this exception for employees of educational and research institutions apparently exists for those educational and research employees administering programs funded under the Emergency Employment Act of 1971. \textit{See} note 114 supra.
\end{itemize}
suggested that the exception is unduly broad in excepting all educational agencies, since this includes state departments of education which perform no instructional functions and which may be politicized as easily as any other state department.\textsuperscript{152}

A partial exception to the coverage of the Act is available to the following:

1. the Governor or Lieutenant Governor of a State or an individual authorized by law to act as Governor;
2. the mayor of a city;
3. a duly elected head of an executive department of a State or municipality who is not classified under a State or municipal merit or civil service system; or
4. an individual holding elective office.\textsuperscript{153}

Such officials are excepted only from the general restrictions of section 1502(a)(3) regarding taking "an active part in political management or in political campaigns."\textsuperscript{154} Thus, any such named official may not (1) use his official authority to influence elections or (2) solicit political contributions from other state or local employees in any overbearing manner.\textsuperscript{155} The former restriction is not so much a limitation on voluntary political activity as a prohibition against abuse of the employment position for the benefit of a candidate for office. The latter proscribes any type of coercive solicitation of state and local officers and employees. Its application would seem to be mainly to those holding positions where they can affect subordinates or others because of their powers. The effect of the application to and enforcement of these restrictions against elected officials is, however, unclear. Theoretically, they would prohibit a governor whose contacts with federally financed programs are more than de minimus from either using the powers of his office to affect the political process or indirectly advising another state official or employee to make a contribution. That such acts take place seems certain. With one exception, however, the Civil Service Commission has not taken any steps which indicate such activities violate the Hatch Act.\textsuperscript{156}

\textsuperscript{152} See testimony of J. Ecker, Regional Representative, Office of State Merit Systems, Dept. of H.E.W., 3 Commission, \textit{supra} note 1, at 307.

\textsuperscript{153} 5 U.S.C. § 1502(c) (1970).


\textsuperscript{155} Id. § 1502(a)(1), (2), set forth in text following note 14 \textit{supra} and discussed at length in Friedman & Klinger, \textit{The Hatch Act: Regulation by Administrative Action of Political Activities of Governmental Employees (Part II)}, 7 Fed. B.J. 138, 141-44 (1945).

\textsuperscript{156} See In re Huet, 2 Pol. Act. Rptr. 100 (1942) where, although an elected state Commissioner of Labor was held subject to the Civil Serv-
enforce broad limits on the political actions of high elected officials, serious problems in intergovernmental relations would develop.

A ticklish problem of statutory construction is presented when a person employed in connection with a federally aided activity is also employed in a capacity or elected to an office exempt from the Act. In two cases, the executive director of a park authority and an employee of a local housing authority, both of which received federal moneys, held second positions as a state legislator and an alderman respectively. In both cases the courts refused to exempt them from the Hatch Act as elected officials in the legislative branch of government. It was pointed out that in the original 1940 version of the Hatch Act a section had allowed candidates for office as of the date the Act was passed to continue to be candidates and retain their positions with federally assisted agencies provided that they would have to resign if elected. Furthermore, the courts observed, persons holding nonpartisan office "hold elected office," but no one could contend that they are thus entitled to engage in any partisan activities free from Hatch Act restrictions. These two points were felt to indicate a lack of congressional intent to exempt totally everyone holding elected office from the restrictions of section 1502(a)(3). Thus, it was held that persons whose principal employment was in connection with federally aided activities were not exempt simply because they had concurrent incidental employment as holders of elective office. Presumably, anyone who was incidentally employed in the legislative or judicial branches of government or by an educational or research institution would similarly be subject to the Hatch Act if his principal employment was in the executive branch in connection with a federally assisted activity.

ice Commission's jurisdiction, the Commission decided that the evidence was not sufficient to warrant a finding of violation of either restriction. It appears that subordinates, sometimes using overbearing tactics, collected funds for Mr. Huiet's campaigns. It was disputed, however, whether he knew these collections were anything other than wholly voluntary.


Assuming the need for restrictions on political candidacy and activities, this construction limiting the exceptions is correct. Any other approach would allow otherwise covered employees to evade coverage by simply having an incidental connection with an exempt position. It should, however, be recognized that this construction renders the section 1502(b)(4) exception for "an individual holding elective office" virtually meaningless. In addition, persons holding excluded offices, such as lieutenant governors and mayors who may be part-time office holders, could be held subject to all the restrictions of the Act if their principal employment was in connection with a federally assisted activity in another level or agency of government. Although a compromise such as allowing political activity only in connection with the named elective office would be possible, such a solution assumes that a person can segregate his political life from his principal employment—an assumption that the Hatch Act rejects.

One recurring criticism of the Act is that it does not except state officials appointed by the governor who hold cabinet level positions. Since such officials are usually political appointees directly responsible to the governor, it is unrealistic to expect them to divorce themselves from political activity and virtually impossible to shield them from political pressures. Further, since some states may appoint officials that other states elect, it

160. In dealing with this problem the courts have assumed that the fourth exception was created for elected state officers who may head agencies receiving federal funds. See cases in note 157 supra. However, such an approach ignores the third exception which is obviously available for such employees.

161. In several states lieutenant governors receive nominal salaries necessitating other employment. See, e.g., N.D. CENT. CODE § 54-08-03 (1971 Supp.) ($2,000 per year); S.D. COMPIL. LAWS ANN. § 2-4-3 (1972 Supp.) ($7,000 per biennium).

162. See, e.g., Welsh, The Hatch Act and the States, 37 STATE GOV'T 8 (1964). It is interesting to note that as initially drafted and reported from the Senate Committee, the 1940 amendments to the Hatch Act excepted Officers . . . appointed by the Governor of any State by and with the advice and consent of the legislature of either house thereof, and who determine policies to be pursued by such State in the State-wide administration of State laws. 86 CONG. REC. 2566 (1940) (remarks of Senator Clark).

is contended that the Act arbitrarily discriminates against the employees of some states. The exclusion of heads and assistant heads of federal departments and all persons in the Office of the President from that part of the Hatch Act applying to federal employees evidences a double standard. The Commission on Political Activity of Government Personnel has recommended that this disparity be corrected by excluding from coverage persons holding such positions at the state level.

Finally, it should be noted that the Civil Service Commission has rejected attempts by employees to evade the restrictions of the Act. Ploys such as taking a leave of absence to engage in political activities, reductions in responsibilities so as to acquire a different principal employment, and temporary stoppage of federal funds to avoid coverage have not been successful. The one ploy that does succeed is for the state or local government to allocate the responsibilities among departments or agencies so as to leave certain ones with no activities that are federally financed. The political employees can then work in such departments free from the restrictions of the Act, a situation that apparently exists in at least one jurisdiction. However, for the employee who works in connection with federally financed activities, the only way to avoid the restrictions is to resign.

IV. ENFORCEMENT

All determinations of violations of the Hatch Act by state and local employees are made by the United States Civil Service Commission. Neither the federal agencies administering the programs nor the states participate in these determinations. If a violation is found, the Commission must further determine whether it warrants removal of the offender from his position.

164. See Welsh, supra note 162, at 10.
166. 1 COMMISSION, supra note 1, at 42.
167. See note 129 supra.
170. See Testimony of W. Collins, Director, Institute of Government, University of Georgia in 3 COMMISSION, supra note 1, at 312.
172. 5 U.S.C. § 1505 (1970). Mitigating factors in deciding whether removal is warranted include the nature of the offense, the importance
If the Commission finds that removal is warranted, it makes such a recommendation to the state or local employer. The employing unit of government then has the choice of either removing the offender and not re-employing him for a period of 18 months or losing federal funds equal to the amount the offender would earn in two years. Since the employee cannot be re-employed for 18 months if the Act is violated and removal is recommended, his resignation before any determination does not make matters moot. Judicial review of a determination is available at the request of any aggrieved party, a term that has been construed to include both the employee and the entity of government employing him.

In the event the employee is removed, he may not be re-employed by any part of the executive branch or any political subdivision of the same state whether it receives federal funds or not. Thus, employment of a former state official by a municipality would probably trigger a withholding of funds.

of the violator's position, actions taken by violator after charges are made, advice of legal counsel, job record and whether violation is voluntary act or directed by superior. See Friedman & Klinger, supra note 155, at 161-63. See also Utah v. United States, 286 F.2d 30 (10th Cir.), cert. denied, 366 U.S. 918 (1961). These factors in mitigation of penalties should not be confused with defenses to the charge of violation itself. None of the factors apparently constitutes such a defense. See Utah v. United States, id. See also Friedman & Klinger, supra note 155, at 160-61.

Both this penalty and the proceeding are considered to be civil, not criminal, in nature. See Wages v. United States Civil Serv. Comm'n, 170 F.2d 182 (6th Cir. 1946); cf. Pfiziniger v. United States Civil Serv. Comm'n, 96 F. Supp. 1 (D.N.J.), aff'd per curiam, 192 F.2d 934 (3d Cir. 1951).

174. Id. § 1506(a). The only exception to the withholding requirement is when it would jeopardize the payment of the principal or interest on obligations of the recipient governmental entity. Id. § 1506(c).
178. 5 U.S.C. § 1506(a) (1970). Ohio v. United States Civil Serv. Comm'n, 65 F. Supp. 776 (S.D. Ohio 1946). That the initial employer no longer maintains the position the errant employee had filled or that the employer no longer receives federal funds for his position is also no excuse for subsequent reemployment. Id.
179. Funds would be withheld from the second employer. 5 U.S.C. § 1506(a) (1970). If, however, the second employer received no fed-
Employment within the legislative or judicial branch would, however, presumably be permissible since they are not "agencies" as defined by the statute. Whether election to public office in the executive branch at any level would constitute an impermissible re-employment is uncertain. However, since it involves no voluntary employing action by a state or local agency, withholding of funds would be an unreasonable punitive step.

Since it began enforcing the Act in 1940, the Commission has received over one thousand complaints; it has found that in 162 cases violations occurred, and that in 80 of these the violation warranted removal. Compliance with the Commission's recommendations of dismissal has been less than complete. In the last 10 years the Commission has ordered funds withheld in eight cases—approximately 30 per cent of the cases in which violations were found to warrant removal.

The effectiveness and fairness of the results of these proceedings may be questioned. It is difficult to believe that only 162 state and local employees have violated the Hatch Act in thirty-two years. Even in those cases in which violations are
reported and found, many states are evidently willing to forfeit the equivalent of two years salary rather than dismiss a valued employee.\(^{186}\) Proposals that the penalty be increased to as much as twenty-five times the annual salary of the offending employee have been advanced to remedy this situation.\(^{187}\) Although the most effective manner of enforcement would be to give the Civil Service Commission the power to remove employees who violate the Hatch Act, doubt regarding the power of Congress to do any more than authorize the withholding of federal funds is the probable reason for the lack of such action.

The procedure may also be criticized as unfair because the Commission's authority is limited to withholding funds \textit{vel non}, there being no provision for sanctions more or less severe as may be appropriate in a particular case. Recommendations of suspension for shorter periods, or on the other hand, total removal, should be available to the Commission in cases involving state and local employees just as they are in cases involving federal employees.\(^{188}\)

In enforcement proceedings, the Commission assumes the burden of proving both the applicability of the statute and the fact of violation.\(^{189}\) If, however, the Commission establishes that an individual is employed in connection with a federally assisted activity, it expects him to produce evidence showing that the employment is not his principal one.\(^{190}\) The Commission has also taken the position that employees are responsible for ascertaining whether they are subject to the Act—ignorance of coverage problem results from the lack of an adequate budget. It recommended a tenfold increase in funds for this purpose. \textit{1 Commission} \textit{supra note 1, at 26.} Recently, however, there is some indication that enforcement may be becoming more effective. \textit{See} \textit{Wall Street Journal, supra note 181.}

\(^{186}\) \textit{See} \textit{3 Commission, supra note 1, at 357.} The fact that funds had to be cut off in 30\% of the recent cases supports this conclusion.

\(^{187}\) \textit{See S. 3417, 92d Cong., 2d Sess. § 1633(d) (1972), 1 Commission, supra note 1, at 43.}

\(^{188}\) \textit{See} \textit{5 U.S.C. § 7325 (1970).} Section 1634(a) of the legislation proposed by the Commission on Political Activity would give the Civil Service Commission much greater flexibility. \textit{See 1 Commission, supra note 1, at 54.}

\(^{189}\) \textit{Smyth v. United States Civil Serv. Comm'n, 291 F. Supp. 568 (E.D. Wis. 1968).} Of course, in judicial review the Commission's determinations are not to be reversed unless unsupported by substantial evidence. \textit{Jarvis v. United States Civil Serv. Comm'n, 382 F.2d 339 (6th Cir. 1967).}

\(^{190}\) \textit{Smyth v. United States Civil Serv. Comm'n, 291 F. Supp. 568 (E.D. Wis. 1968).}
is no defense.\textsuperscript{191} Similarly, as noted above, a mistake as to whether the Hatch Act proscribes certain activity is no defense.\textsuperscript{192} Such positions are harsh in those situations where coverage is uncertain and the restrictions vague. Although the Commission will, if requested advise a state or local employee whether he is covered, just as it will give such advice on whether contemplated activity is permissible,\textsuperscript{193} the formalities of securing a ruling undoubtedly discourage many from engaging in political activity. This chilling effect is of particular concern because of the special importance and protection the freedom of political activity is generally accorded in this country.\textsuperscript{194}

V. FEDERAL STANDARDS FOR A MERIT SYSTEM

The provisions of the Hatch Act apply to state and local employees irrespective of whether they are part of or subject to any civil service system. To qualify for certain federal grant programs, however, states are required to establish merit systems for personnel administration and to adhere to standards promulgated by the Secretary of Health, Education and Welfare.\textsuperscript{195} The standards thus promulgated\textsuperscript{196} include the following provision regarding political activity:

Participation in partisan political activity by an employee subject to these standards will be prohibited with respect to activity prohibited in federally grant-aided programs under the Federal Hatch Political Activities Act, as amended, 5 U.S.C. 1501-1508.\textsuperscript{197}

Thus, the federal standard for political activity of state and local employees subject to merit systems is duplicative of substantive provisions of the Hatch Act. The existence of this standard has, however, given rise to greater limitations on political activity. Although the Hatch Act restrictions must, at a minimum, be applied by the states, some jurisdictions in drafting statutes or regulations for their merit system have gone beyond the Hatch Act restrictions to restrict that the United States Civil Service

\textsuperscript{191} In re Lyle, 2 Pol. Act. Rptr. 413 (1951). See also cases cited in note 112 supra.
\textsuperscript{192} See text accompanying note 112 supra.
\textsuperscript{193} See State Employee Pamphlet, supra note 27, at Contents Page.
\textsuperscript{194} See notes 207-17 infra and accompanying text.
\textsuperscript{195} See, e.g., 42 U.S.C. § 602(a) (1970), relating to aid to families with dependent children. Programs required to observe the standards are indicated by statutory reference in 45 C.F.R. Part. 70 (1972) under the heading "Authority." Twenty such references are given.
\textsuperscript{196} 45 C.F.R. §§ 70.1-16 (1972).
\textsuperscript{197} Id. § 70.6.
Commission would permit.\textsuperscript{108}

The states' merit systems are not only responsible for drafting their own restrictions, but also for enforcing them.\textsuperscript{109} Thus a second enforcement procedure exists. One important difference in the case of state enforcement is the penalties available. The United States Civil Service Commission's ultimate weapon is the withholding of federal funds for refusal to dismiss the employee involved.\textsuperscript{200} The states, on the other hand, can suspend or dismiss offenders. Such dual systems of enforcement present questions of priority. Those responsible for the administration of the standards have taken the position the state should wait until the United States Civil Service Commission has acted.\textsuperscript{201}

\section*{VI. CONSTITUTIONALITY}

The constitutionality of the Hatch Act and its application to state and local employees were respectively upheld in 1947 by the United States Supreme Court in the cases of United Public Workers \textit{v. Mitchell},\textsuperscript{202} and \textit{Oklahoma v. United States Civil Service Commission.}\textsuperscript{203} In \textit{Mitchell} an employee of the United States Mint who had served as a ward executive committeeman, an election day worker at the polls, and a party paymaster for other election day workers, was charged with violating the Hatch Act and was faced with dismissal from his job. The employee challenged the Commission's proceedings on the ground that the Act was unconstitutional. He alleged that it abridged his first amendment freedoms and the ninth and tenth amendments, which reserve political rights to the people. Over two sharp dissenting opinions by Justices Black and Douglas, the Court upheld the Act. It said that

\begin{itemize}
\item 198. See, \textit{e.g.}, Mont. Merit System Rules, § 2, para. 3 (1971) (the right to express one's opinion found in 5 U.S.C. § 1502(b) (1970) is qualified by the word “privately”). \textit{See also} testimony before Commission on Political Activity of Governmental Personnel, 3 \textit{COMMISSION}, \textit{supra} note 1, at 330.
\item 199. 45 C.F.R. § 70.1(b) (1972). Although establishment and maintenance of the required standards is a condition to the receipt of federal moneys, it is rare, if ever, that the federal government has withdrawn or threatened to withdraw aid because of laxness in enforcing the standard regarding political activity. \textit{See} testimony of A. Aronson, Director of Office of State Merit Systems, Dep't of H.E.W., 3 \textit{COMMISSION}, \textit{supra} note 1, at 57.
\item 200. \textit{See} note 174 \textit{supra} and accompanying text.
\item 201. \textit{See} testimony of Aronson, \textit{supra} note 199, at 58.
\item 202. 330 U.S. 75 (1947).
\item 203. 330 U.S. 127 (1947).
\end{itemize}
Congress may regulate the political conduct of government employees "within reasonable limits," even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the generally existing conception of governmental power. That conception develops from practice, history, and changing educational, social and economic conditions.\footnote{330 U.S. at 102.}

Although with one exception the Mitchell decision has been followed in all subsequent challenges to the Hatch Act,\footnote{Northern Va. Reg. Park Auth. v. United States, 437 F.2d 1346 (4th Cir.), cert. denied, 403 U.S. 936 (1971); Palmer v. United States Civil Serv. Comm'n, 297 F.2d 450 (7th Cir.), cert. denied, 369 U.S. 849 (1962); Fishkin v. United States Civil Serv. Comm'n, 309 F. Supp. 40 (N.D. Calif. 1969), appeal dismissed, 396 U.S. 278 (1970); Gray v. Macy, 239 F. Supp. 658 (D. Ore. 1965), rev'd on other grounds, 358 F.2d 742 (9th Cir. 1966); Engelhardt v. United States Civil Serv. Comm'n, 197 F. Supp. 806 (M.D. Ala. 1961), aff'd per curiam, 304 F.2d 882 (5th Cir. 1962); see Democratic State Cent. Comm. v. Andolsek, 249 F. Supp. 1009, 1018-19 (D. Md. 1966) (expressly approving the use of the rational basis test); cf. Kearney v. Macy, 409 F.2d 847 (9th Cir. 1969); Dingess v. Hampton, 305 F. Supp. 169 (D.D.C. 1969). For an excellent analysis of the area see Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).} there is good reason to doubt its vitality. First, the Mitchell Court's approach in resolving the constitutionality issue has apparently been abandoned. As the quoted language indicates, the Mitchell decision used the reasonableness or rational nexus test to determine the validity of the Hatch Act. Great deference was paid to Congressional judgment; any restriction on political activities that could be justified with plausible arguments would presumably be valid.\footnote{See discussion in text accompanying notes 32-33 supra and note 220 infra.} Since 1947 the Supreme Court has established a policy of closely scrutinizing limitations on fundamental rights.
such as those protected by the first amendment.²⁰⁷ Although a precise formula for predicting the validity of restrictions on first amendment rights is difficult to determine,²⁰⁸ such close scrutiny usually involves two steps. First, the state is expected to show that some compelling or significant state interest is served by the restriction.²⁰⁹ Second, the state is expected to show that the restriction in question constitutes less of a limitation on fundamental liberties than alternative methods of protecting the compelling interests.²¹⁰ Restrictions that are vague or broadly worded are usually considered to have a chilling effect on rights and thus have been held unconstitutional with some regularity.²¹¹

Aside from Mitchell and its progeny, there is no apparent reason for not subjecting restrictions on political activity of public employees to such close scrutiny. The Supreme Court has, in the interim, recognized that voluntary political activity is a fundamental right protected by the first amendment.²¹² The recent case of National Association of Letter Carriers v. United States Civil Service Commission²¹³ has in fact utilized the newer approach to invalidate the definition of political activities contained in that part of the Hatch Act relating to federal employees on the ground that the incorporation by reference of 3,000 pre-1940, unpublished civil service decisions in the definition was so vague and overbroad as to have the impermissible chilling effect prohibited by the first amendment. In addition, since 1964, nine cases have closely scrutinized restrictions of state and local governments on the political activities of their own employees and found them unconstitutional,²¹⁴ each expressly rejecting the def-


²¹³. See text accompanying notes 32-33 supra.

eral "reasonableness" approach of the Mitchell case. Other cases have rejected the approach in the Mitchell case even though they upheld restrictions.\textsuperscript{215} Although with the exception of the Letter Carriers case all of these cases carefully avoided opining on the constitutionality of the Hatch Act itself, and several courts took pains to show why the restrictions before them were more severe than the Hatch Act,\textsuperscript{216} the future of the Act under this newer approach is far from certain. Even two of the recent decisions upholding the Hatch Act and following the Mitchell approach concede that the area is in a state of flux.\textsuperscript{217}

Furthermore, the passage of time and developments in public employment have undermined the validity of the assumptions in the Mitchell case. As will be noted below, restrictions on political activity that were once popular and championed by the civil service reform movement are falling into disfavor.\textsuperscript{218} The need for these restrictions has been re-evaluated, and much less


\textsuperscript{218} See text accompanying notes 234-39 infra.
restrictive limitations are thought to be adequate. The result may be that the reasonableness of restrictions today is not what it was 25 years ago when *Mitchell* was decided.

Finally, the United States Supreme Court is apparently going to re-examine the *Mitchell* decision. It has agreed to hear arguments in two recent cases, *Broadrick v. Oklahoma*219 and *National Association of Letter Carriers v. United States Civil Service Commission*.220 The *Broadrick* decision upheld state restrictions on political activities that are more confining than the Hatch Act. The *Letter Carriers* decision, as noted, invalidated the definition by reference in the Hatch Act. Although the court that decided the *Letter Carriers* case carefully attempted to demonstrate that its decision was not inconsistent with the narrow holding in *Mitchell*, it did note the recent developments in connection with state restrictions and the emergence of the compelling interest test.

In view of the apparent pending Supreme Court decision in the *Broadrick* and *Letter Carriers* cases, a comprehensive analysis of the constitutionality issue is untimely and, in any case, has been attempted elsewhere.221 Suffice it to say that the reasonableness test in *Mitchell* is inconsistent with the current state of the law in the area, and the conclusion is out of step with conditions in public employment. Most of the courts that have followed it have done so out of devotion to stare decisis. Although the Court could decide the *Letter Carriers* and *Broadrick* appeals on grounds other than the merits or, in the *Letter Carriers* case, on the extremely narrow grounds used by the district court, hopefully it will take the opportunity to clarify what has come to be an uncertain matter of constitutional law.

As noted previously, the companion case to *Mitchell*, *Oklahoma v. United States Civil Service Commission*,222 upheld the application of the Hatch Act restrictions to state and local em-

ployees working in connection with federally aided projects. The Oklahoma decision did not assert that Congress could regulate such political activities directly; it only upheld the withholding of federal funds upon proof of defined activities. This application of the Hatch Act has not been questioned since that decision. In fact, with the great increase in federal grant programs the power of Congress to fix the terms on which federal funds are granted has become axiomatic. 223

VII. AN EVALUATION WITH SUGGESTIONS

At one time it seemed clear that restrictions on political activity of public employees were appropriate. The civil service reform movement considered such activity one of the evils of the spoils system and machine politics that had to be severely limited for the efficiency and integrity of the service, the welfare of the employees themselves, and the best interests of the political process. 224 Politically active employees were more dedicated to the parties that gave them the jobs than to the jobs themselves. Promotions and assignments were apt to be based on political efforts rather than merit. Employees might be forced to pay political assessments 225 and work the precincts at election time. In addition, that part of the public that depended upon government services, contracts, or licenses was particularly susceptible to exploitation by politically active government employees. Finally, a political organization manned by politicized “civil servants” does not promote openness in the political process or the development of a strong two party system. 226

The Hatch Act and other restrictions were drafted to cope with these problems. It was decided that, to be effective, these

223. See, e.g., Arizona State Dep't of Pub. Welfare v. Department of HEW, 449 F.2d 456, 470 (9th Cir. 1971).
224. See O. Stahl, Public Personnel Administration 301 (6th ed. 1971). For an indication of the problems and the goals of the reformers see C. Dunbar, Jr., Memorandum Explaining the Vital Necessity of Provisions in a Civil Service Law of a Little “Hatch Act” (La. Civil Serv. League, New Orleans, La. 1958); Catherwood, Political Activity by Civil Service Employees, 7 Ill. L. Rev. 160 (1912); Irwin, Public Employees and the Hatch Act, 9 Vand. L. Rev. 527 (1956); Kaplan, Political Neutrality of the Civil Service, 1 Pub. Per. Rev. 10 (1940). The arguments in the rest of this paragraph are a summary of the major points made by these and others who urged and justified the Hatch Act and comparable state legislation.
restrictions must be severe. In fact, the Hatch Act provisions are broader than those of any comparable country in the western world.\textsuperscript{227} The prohibition against taking “an active part in political management and in political campaigns”\textsuperscript{228} eliminates virtually all meaningful voluntary political activity. This breadth also exists in the sense that the Act applies to employees regardless of the sensitivity of their positions. Manual laborers and personnel administrators are subject to the same broad restrictions. Experience in Great Britain has shown that restrictions which differentiate between employees on the basis of the sensitivity of their positions are workable.\textsuperscript{229} Finally, as noted above, because state and local employees are confused by the Hatch Act restrictions, they apparently refrain from engaging in permitted activities because of an improper understanding of the Act, giving the Act an even broader effect.\textsuperscript{230}

Although these restrictions protect the employee from political exploitation and perhaps promote the integrity and efficiency of the public service and the interests of the political process, they do so at a significant cost. The freedom of political action taken for granted by the general public exists in only diluted form for the state and local employees subject to the Hatch Act. This is a dehumanizing condition that tends to make the public employee politically indifferent and less responsive to the needs of society. For some prospective public employees, the requirement of political celibacy may be too great a price to pay.\textsuperscript{231} The result is that the civil service probably loses persons who would make excellent public servants. The political process also loses; it is denied the contribution that the restricted employees could make. In view of the number of employees so affected and the extent of their knowledge of and interest in

\begin{itemize}
\item \textsuperscript{227} Only the Union of South Africa and Japan have equally severe restrictions—Japan’s apparently as a result of the United States occupation. The Scandinavian countries have the least restrictive policies; other European countries have minor restrictions. Although Canada has comprehensive restrictions, it does grant public servants leaves of absence to stand for election to legislative bodies. \textit{Can. Rev. Stat. c. 8-32, 32} (1970). \textit{See generally 2 Commission, supra} note 1, at 158-71; \textit{Senate Hearings, supra} note 4, at 222-24; \textit{Massachusetts Legislative Research Council, Report Relative to Political Activities of Public Employees 25-30} (Dec. 21, 1964).
\item \textsuperscript{228} 5 U.S.C. § 1502(a) (3) (1970).
\item \textsuperscript{230} \textit{See text accompanying notes} 104-09 \textit{supra}.
\item \textsuperscript{231} \textit{See testimony of H. Weisbroad, President, Nat’l Council of Field Labor Lodges, AFL-CIO, in 3 Commission, supra} note 1, at 401.
\end{itemize}
the problems of government, this loss is of no small significance.\textsuperscript{232} The emergence of a body of case law invalidating restrictions on political activity as being too broad and too vague reflects the growing feeling of courts that the need for the restrictions is no longer sufficient to justify them.\textsuperscript{233} This feeling is in accord with the conclusions of those students of public administration and others who have studied the problem.\textsuperscript{234} Patronage, spoils, and machine politics are no longer the rule. With a few exceptions, the public and the political process have accepted the merit system of civil service.\textsuperscript{235}

The National Civil Service League recognized these developments in its recently drafted Model Public Personnel Administration Law.\textsuperscript{236} The previous Model Law severely restricted political activity.\textsuperscript{237} The 1970 edition dramatically reduces the scope of the restrictions, the introduction explaining that the new law is designed for the "needs of the responsible majority."\textsuperscript{238} The comment on the section dealing with political activity emphasizes the contribution the public employee can make to the political process.\textsuperscript{239} Although not a model of clarity, the new Model Law reflects a fundamental change in philosophy.

\textsuperscript{232} Although the exact extent of the loss to the political process in terms of public employee participation cannot be quantified, it appears to be substantial. Studies have found that approximately 30\% of the federal employees—more likely those with a better education—would have participated in political activities but for the Hatch Act. A slightly greater percentage of state and local employees surveyed were similarly affected by the Hatch Act. See 2 Commission, supra note 1, at 18, 28–32, 77. There was, however, a split of opinion among state employees surveyed on whether a relaxation of the restrictions would hinder the merit system. Id. at 78.

\textsuperscript{233} See cases cited in note 214 supra.


\textsuperscript{235} O. Stahl, supra note 224, at 37–38. For a discussion of one of the exceptions see testimony of Alderman Despres, Chairman, City Council of Chicago, 3 Commission, supra note 1, at 468 et seq., indicating need for Hatch Act restrictions in Cook County, Illinois.

\textsuperscript{236} National Civil Service League, supra note 234, at § 7.

\textsuperscript{237} National Civil Service League & National Municipal League, A Model State Civil Service Law § 19 (1953).

\textsuperscript{238} National Civil Service League, supra note 234, at 3.

\textsuperscript{239} Id. § 7.
Another development that affects the need for restrictions on political activity is the growth of public employee labor unions. At hearings held by the Commission on Political Activity of Government Personnel and a Senate Committee, it was repeatedly asserted that these organizations can be effective checks on the exploitation of public employees for political purposes and the spoils system. Although unions could align themselves with political officials to exploit their members, there is no indication that such abuses have occurred or would be a serious problem.

As a result of the acceptance of the merit concept of public employment, and the emergence of the public employee labor movement, it seems clear that the broad, vague restrictions of the Hatch Act have outlived their usefulness. The fact that the Hatch Act constitutes a uniform federal restriction on more than 50 per cent of the state and local employees not involved in education magnifies its undesirability. Public employees in areas with well developed merit systems of public employment and open political processes—areas where there is little need for restrictions on political activities—are compelled to adhere to federal restrictions. In several such jurisdictions, the courts or legislatures have significantly reduced the scope of state and local restrictions. In California, for example, state and local employees working in connection with federally assisted programs are faced with the anomalous situation that state and local restrictions have, in highly publicized decisions, been held violative of the United States Constitution, but the more restrictive provisions of the Hatch Act are still in effect. State and local em-

241. See 3 COMMISSION, supra note 1, at 351, 456, 620, 735; Senate Hearings, supra note 4, at 166, 196, 241. An excellent example of how this works is a recent incident where subordinates were encouraged by agency officials to purchase tickets to a fund raising dinner. Union protests of this solicitation led to action by the United States Civil Service Commission against the officials in question. Id. at 88-137.
242. See note 4 supra.
243. For the judicial action see note 214 supra. Legislative changes to less restrictive provisions have occurred recently in at least five states. See FLA. STAT. ANN. § 110.092 (Supp. 1972); IOWA CODE ANN. § 365.29 (Supp. 1972); MINN. STAT. § 43.28 (1971); ORE. REV. STAT. § 260. 432 (1971); WIS. STAT. ANN. § 16.35 (1972). See also Mich. Civil Serv. Rule 7 (Rev. of Mar. 8, 1971).
244. See generally testimony of W. Shea, Legal Adviser, League of County Employees Ass'ns and of J. Slater, General Manager, Alameda County Employees' Ass'n, 3 COMMISSION, supra note 1, at 613-28.
ployees in all jurisdictions may find themselves in the confusing situation that they are subject to different restrictions than those imposed upon fellow employees performing similar functions, the difference depending upon the absence or presence of federal funds.

Finally, the appropriateness in our federal system of central control of state and local personnel matters in general, and employee political activity in particular, is doubtful. Even though Congress has a legitimate interest in seeing that its appropriations are not used to build political empires, this interest is subject to the interest of the state or its political subdivision, as the actual employer, in the political activities of its employees. Moreover, since it involves questions concerning participation in the political process at even the state and local level, the subject is sensitive and raises issues relating to the integrity and role of the states in the federal system. In fact, one report concluded that

the Hatch Act is probably the most unpopular Federal legislation ever imposed on our State and local governments and their employees.

It is the recommendation of the author that the federal government abandon this matter to the states. The danger of misuse of federal moneys for political purposes has been significantly reduced in the 33 years since the Hatch Act was made applicable to state and local employees. During that time the

245. For a brief discussion of the problem of appropriate federal requirements in grant programs, see Commission on Intergovernmental Relations, Report to the President for Transmittal to Congress [Kestnbaum Report] 136-39 (1955). It is worth noting that the application of the Hatch Act to state and local employees is rigid. It has none of the flexibility or co-operative federalism that apparently characterizes federal-state relations. This difference is most obvious in the federal standards for a merit system. Only the standard regarding political activity is detailed. Compare 45 C.F.R. § 70.6 (1972) with §§ 70.3-.5, 70.7-.16. See generally D. Elazar, American Federalism: A View from the States 1-4, 161-63 (2d ed. 1972).

246. The application of the Hatch Act to the governor of a state could present such questions. This is in fact possible. See text accompanying notes 154-56 supra. Arguably, the legal issues involved are comparable to those raised by federal taxation of interest on indebtedness of state and local government.

247. H.R. REP. NO. 2707, 85th Cong., 2d Sess. 32 (1959). The Special Committee to Investigate and Study the Operation and Enforcement of the Hatch Political Activities Act that issued this report conducted an opinion survey of state and local officials on the Act. The results, which are overwhelmingly negative, are tabulated in P. Ford, supra note 185, at 44-47.

248. Id. at 42-43 and authorities cited in note 234 supra.
states have shown concern with the political activities of their employees by adopting provisions to limit abuses. Although some states have no effective laws or perhaps do not enforce the laws they have, it is not clear that this gap is large enough to justify continued federal concern with voluntary political activity of state and local employees. National uniformity with respect to political activity of public employees is not a necessity. It would be preferable to allow the lowest responsible level of government to impose restrictions on its employees within constitutional limits. If some federal legislation is necessary, prohibition on abuse of official authority or position for political purposes and on coercive solicitation should suffice.

Even if Congress determines that reliance on the states to deal adequately with the excesses of political activities of their employees is too bold a move, and that some significant federal involvement must continue, basic changes should still be made. Most importantly, the broad, vague limitations of the Hatch Act must be replaced with legislation that generally recognizes the right to participate in political activities subject to narrow, specific exceptions. It is suggested that only five such exceptions would be appropriate:

1. Prohibit political activity during working hours, on premises where employed or in uniform.
2. Prohibit use of official authority or influence for political purposes such as inducing contributions, affecting personnel decisions or encouraging subordinates to participate in political activity.
3. Prohibit political activity that constitutes a clear conflict of interest with employment responsibilities.
4. Prohibit any solicitation of subordinate employees.
5. Require a leave of absence for candidates for a state or national office that would constitute a full-time position.

These restrictions are intended to prevent the employee's political activity from being associated with or detracting from his job. They are minimal and do not interfere with the employee's basic political rights. Since the third suggestion referring to conflicts of interest is open-ended, it should be strictly lim-

249. See 2 COMMISSION, supra note 1, at 92-104.
250. Id. at 103-04. With regard to enforcement, see discussion in P. Ford, supra note 185, at 12-13. In any event, it is by no means clear that the United States Civil Service Commission does an adequate job of enforcing the Hatch Act. See note 185 supra and accompanying text.
POLITICAL ACTIVITIES

It might also provide the basis for a code of ethics for public employees in the area of political activities. Such a code would not prohibit activities, but rather act as a guide to warn when an activity is inappropriate. Violations of the third suggestion or a code based upon it should not result in any punitive action unless the violation constituted a flagrant conflict or if it was persisted in after a body with responsibility for interpreting the code had advised the employee he was in violation.

This approach is designed for those jurisdictions that have avoided or overcome the need for severe restrictions on political activity. To be sure, there are some jurisdictions which have not reached that stage. The existence of such jurisdictions does not, however, justify limitations on the political activities of all state and local employees. Rather, it is suggested that if more severe restrictions are thought necessary, they be applicable only to the areas that need them and only to the extent needed to protect the interests of the public service, the civil servants and the political process. Admittedly, such an approach is vague, requires many decisions about what is appropriate, and thus might be cumbersome as well as offensive in those areas singled out for special treatment. This Article recommends it only as a lesser evil than uniformly applicable severe restrictions. Since guidelines have, in fact, been proposed to determine when restrictions on political activity are necessary and what those restrictions ought to be, administration of such a flexible approach is conceivable.

Two other problems remain if some significant federal involvement is to continue. First, which state and local employees should be subject to the federal restrictions? As has been seen, the coverage provisions of the Hatch Act have been a source of problems and, with the mushrooming of federal aid, the Hatch Act restrictions are pre-empting the area. It is suggested that the coverage provisions be changed in three respects:

1. Eliminate the qualification of “executive branch” in defining local units of government whose employees are subject to the Act. This simply recognizes the realities of government organization at the local level.

2. Except from coverage appointive state officials who hold cabinet level positions. This has been an abrasive point


254. See text accompanying notes 134-35 supra.
in the past and is a change that is widely recommended.\textsuperscript{265}

3. Limit coverage to state and local employees who work in programs closely identified with the federal government. Such programs would include those subject to the federal standards for a merit system and would remove the ambiguities of coverage that exist with the proliferation of recently developed minor programs and with revenue sharing. Since coverage is tied to federal funds, the problems with principal employment are inevitable. In any event, the Civil Service Commission appears to have achieved a working definition of the concept.

The second problem is to determine what method should be used for enforcing federal restrictions. Under the Hatch Act, the United States Civil Service Commission has had this responsibility while, under the federal standards for a merit system, the states are responsible for enforcement. Such a division seems unnecessary. It is suggested the states have enforcement responsibility.\textsuperscript{256} So long as their enforcement practices are acceptable, dual enforcement could be avoided.\textsuperscript{257} Further, with only minimal federal restrictions states could even incorporate them in their own pattern of restrictions. Thus, dual sets of restrictions—one for all state or local employees and a second, and usually more severe set, for those working in connection with federally aided activities—could be avoided. If more severe restrictions are felt necessary for certain areas, they might have to be enforced by a federal agency if the state or local governmental entity proved to be incapable of enforcing them. Although this delegation of enforcement to state and local government and the encouragement to develop their own restrictions would not promote uniformity or ease of administration at the federal level, these disadvantages would be more than offset by the uniformity of enforcement procedures within the state, by the possibility of a single set of substantive restrictions within the state, and by the step toward creative federalism that such a delegation would represent.

\textsuperscript{255} See text accompanying notes 162-66 supra.

\textsuperscript{256} This is one of the recommendations of the Commission on Political Activity of Government Personnel. See 1 Commission, supra note 1, at 29-30.

\textsuperscript{257} A collateral benefit of state enforcement would be the availability of a range of penalties that could be applied directly against the offending employee. Under the Hatch Act, the ultimate weapon is the withholding of funds from the employing agency. See text accompanying note 174 supra.
VIII. CONCLUSION

As a result of the Hatch Act, several million state and local employees have been made political eunuchs. It is the conclusion of this Article that, irrespective of their constitutionality, the Hatch Act restrictions are not necessary to prevent the misuse of federal funds or to protect the best interests of the public service, state and local employees or the political process. Congress ought to leave the problem of pernicious political activity of state and local employees to the states. If, however, federal involvement is to continue, the restrictions ought to be minimal and enforcement responsibilities ought to be delegated to the states.