CONSTITUTIONAL LAW—CIVIL LIBERTIES—POLITICAL ACTIVITIES OF PUBLIC EMPLOYEES

The law has progressed a long way since the days when it was assumed the "privilege" of public employment could be conferred or withheld for any reason chosen by the employer. The Fifth Circuit Court of Appeals in *Hobbs v. Thompson*[1] ruled that a portion of the Macon, Georgia City Charter and a city ordinance[2] which substantially limited the political activities of firemen were unconstitutional.[3]

The case arose as a class action by members of the Macon Fire Department. The plaintiff, Hobbs, along with other firemen displayed bumper stickers on their automobiles which evidenced their support of particular political candidates. These men were ordered to remove the advertisements and only after two individuals had been relieved from duty did all the firemen remove the stickers under protest. The plaintiffs then filed a complaint in federal district court alleging that they were being deprived of their first amendment rights. Seeking declaratory and injunctive relief, they contended that the ordinance was unconstitutional, both on its face and as applied. The district court heard the case and ruled that the ordinance was constitutional, in both substance and application.[4] The Fifth Circuit reversed the lower court and held that the municipal ordinance was unconstitutional.[5] The court found that the law was not only vague, but also overbroad. The court, referring to the vagueness, said, "It is simply inconceivable to us that one acting in good faith under this regulatory scheme would readily know what conduct was prohibited and what conduct was permitted."[6] Furthermore, as pertains to the idea of overbreadth, the court said, "[I]t seems patently obvious to us that the Macon charter and ordinance provisions sweep too broadly and proscribe a great deal of political activity which is unrelated

1. 448 F.2d 456 (5th Cir. 1971).

2. Rule Number 2 of section 79 of the Macon City Charter (Ga. Laws, 1927, p. 1317) and section 2-127 of the Code of Ordinances of the City of Macon, Georgia which provides:

> No member or employee shall take an active part in any primary or election; and all employees and probationers are hereby prohibited from contributing any money to any candidate, soliciting votes, or *prominently identifying* themselves in a political race with or against any candidate for office. (Emphasis added).

3. 448 F.2d at 458.

4. Hobbs v. Thompson, Civil No. 2577 (M.D. Ga., decided Sept. 18, 1970).

5. 448 F.2d at 458, 476.

6. *Id.* at 471.

to the effective workings of the fire department."[7]

The appellate court's decision involved two main issues. The first dealt with federal intervention in cases involving municipal and state statutes. The district court, relying on *Dombrowski v. Pfister*,[8] found that it could hear the case.[9] At the time of the district court's decision this was clearly a proper ruling especially in light of the holdings of the Fifth Circuit.[10] Subsequent to the district court's opinion, however, the Supreme Court handed down its decisions in the *Younger v. Harris*[11] sextet and *Askew v. Hargrave*.[12] These cases altered the Court's previous stand on federal intervention in cases involving state and municipal statutes and the infringement of first amendment rights.[13] The court of appeals, however, concluded that these new cases did not preclude federal consideration of the issues presented in this case through the abstention doctrine.

Upon deciding that the federal court was the proper forum, the court addressed itself to the constitutionality of the city's charter and ordinance. The two areas with which the court concerned itself were vagueness and overbreadth. The words, "prominently identifying," particularly troubled the court and it concluded these two words were not properly defined by the ordinance.[14]

The United States Supreme Court and the Congress have provided and maintained restrictions on various political activities of public employees.[15] The Court in *Ex parte Curtis*[16] upheld an Act of Congress[17]

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7. *Id.*

8. 380 U. S. 479 (1965).

9. Civil No. 2577.

10. LeFlore v. Robinson, 434 F.2d 933 (5th Cir. 1970); Davis v. Francois, 395 F.2d 730 (5th Cir. 1968).

11. 401 U. S. 37 (1971). The other cases in the "February sextet" were Samuels v. Mackel, 401 U. S. 66 (1971); Boyle v. Landry, 401 U. S. 77 (1971); Perez v. Ledesma, 401 U. S. 82 (1971); Dyson v. Stein, 401 U. S. 200 (1971); and Byrne v. Karalexis, 401 U. S. 216 (1971).

12. 401 U. S. 476 (1971).

13. The *Younger* case involved federal intervention while there was litigation proceeding in the state court. Even though the *Askew* case limited some older Supreme Court decisions, *i.e.*, *Dombrowski*, the court of appeals ruled that there can still be relief under 42 U.S.C. § 1983 (1970) without exhaustion of state remedies and that abstention is to be applied narrowly in a section 1983 case. *See* 448 F.2d at 467.

It might be pointed out at this time that the question of federal abstention raised in this case is very important and may have great ramifications. However, an indepth analysis of this issue is beyond the scope of this article.

14. 448 F.2d at 471.

15. *See Ex parte* Adler v. Board of Educ., 342 U.S. 485 (1952); Garner v. Board of Pub. Works, 341 U. S. 716 (1951); Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947); United Pub. Workers v. Mitchell, 330 U. S. 75 (1947); *Ex parte* Curtis, 106 U.S. 371 (1882); and 5 U.S.C. § 7324 (1970).

16. 106 U. S. 371.

17. 19 Stat. 143, 2 U.S.C. § 49 (1876).

which prohibited certain federal officials from soliciting political contributions from fellow employees. Subsequently, the Civil Service Commission made various attempts to regulate other political activity ultimately leading to the passage of the Hatch Act in 1939 and 1940.[18] The purpose of this legislation, however, was never intended to restrict the public servant in his expression of political opinions.[19] The Supreme Court ruled on the constitutionality of the act and in two opinions upheld it.[20] The Court in *United Public Workers v. Mitchell*[21] recognized that the regulation was valid because it was imposed within reasonable limitations.[22]

The power of the government to restrict the political activities of public employees was extended to the state and local level in *Garner v. Board of Public Works*.[23] The idea that employment by a municipality was a privilege was recognized by the Court in this case. Justice Frankfurter stated in a concurring opinion that "[t]he Constitution does not guarantee public employment."[24] This privilege idea was further exemplified the following year in *Adler v. Board of Education*.[25] The Court reiterated its previous position that an individual did not have the right to work for the state on his own terms.[26] They went on to say that if a person does not want to work under the conditions which are reasonably imposed then that person is free to retain his rights and find employment elsewhere.[27]

This mode of thinking by the court was of short duration for the very same year in *Wieman v. Updegraff*[28] the Supreme Court withdrew from its previous privilege idea and began to recognize that public employment could not be conditioned on the surrender of constitutional rights. While the Court did not hold that there was a constitutional right to public employment it did recognize that the government did not have a

18. 53 Stat. 410 (1939); 53 Stat. 1148 (1939); 54 Stat. 640 (1940); 54 Stat. 767 (1940); and 54 Stat. 771 (1940). The portion of the Hatch Act which is relevant to this article may be found currently in 5 U.S.C. § 7324 (1970).

19. *See* 84 Cong. Rec. 10746-47 (1939) and 86 Cong. Rec. 2870-1 (1940).

20. Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947).

21. 330 U. S. 75.

22. *Id.* at 102; *see also* 106 U. S. at 373.

23. 341 U. S. 716 (1951).

24. *Id.* at 724.

25. 342 U. S. 485 (1952).

26. *Id.* at 492, *citing* United Pub. Workers v. Mitchell.

27. *Id.*

28. 344 U. S. 183 (1952).

right to deprive a person of their constitutional rights as a condition of this employment.[29]

This thinking progressed through a long line of cases[30] in which the Supreme Court continually struck down state statutes which restricted the first amendment rights of public servants. Many of these statutes involved the taking of loyalty oaths and the filing of affidavits which disclosed all organizations with which a person was affiliated.[31] Again and again the Court ruled that these regulations were unconstitutional.

The thinking of the Court culminated when Justice Marshall speaking for the majority in *Pickering v. Board of Education* said, "[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly, from those it possesses in connection with regulation of the speech of the citizenry in general."[32]

The Court has maintained the position that a person cannot be barred from public employment nor can he be removed from his job arbitrarily and in disregard of his constitutional rights.[33] The Court, in addition, has held that it is the right of every citizen to engage in political expression and in the exchange of political opinions.[34] There is, according to the Court, a public interest in having free and unhindered debate on matters of public interest and importance.[35] "Debate on public issues should be uninhibited, robust, and wide-open."[36] The Supreme Court furthermore has expanded the idea of speech and expression beyond mere words.[37]

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29. *Id.; see also* Slochower v. Board of Higher Educ., 350 U. S. 551 (1956).

30. Pickering v. Board of Educ., 391 U. S. 563 (1968); Keyishian v. Board of Regents, 385 U. S. 589 (1967); Elfbrandt v. Russell, 384 U. S. 11 (1966); Baggett v. Bullitt, 377 U. S. 360 (1964); Sherbert v. Verner, 374 U. S. 398 (1963); Torcaso v. Watkins, 367 U. S. 488 (1961); Shelton v. Tucker, 364 U.S. 479 (1960); and Speiser v. Randall, 357 U.S. 513 (1958).

31. *See especially* Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U. S. 11 (1966); Baggett v. Bullitt, 377 U. S. 360 (1964); and Shelton v. Tucker, 364 U.S. 479 (1960).

32. 391 U. S. at 568.

33. Cramp v. Board of Pub. Instruction, 368 U. S. 278 (1961); Torcaso v. Watkins, 367 U. S. 488 (1961); and Wieman v. Updegraff, 344 U. S. 183 (1952). *See* Sherbert v. Werner, 374 U. S. 398 (1963).

34. New York Times v. Sullivan, 376 U. S. 254 (1964) and Sweezy v. New Hampshire, 354 U. S. 234 (1957).

35. St. Amant v. Thompson, 390 U.S. 727 (1968); Time v. Hill, 385 U. S. 374 (1967); Bond v. Floyd, 385 U. S. 116 (1966); Garrison v. Louisiana, 379 U.S. 64 (1964); New York Times v. Sullivan, 376 U.S. 254 (1964); and Wood v. Georgia, 370 U.S. 375 (1962).

36. 376 U. S. at 270.

37. Tinker v. Des Moines Independent Community School Dist., 393 U. S. 503 (1969). In *Tinker*, the Court held that the wearing of black armbands was a form of speech and as such entitled to the protection of the first amendment. This case exhibited that acts and objects can be used to

At the same time the Supreme Court was retreating from the privilege idea of public employment and upholding the constitutional rights of public servants, it was also holding that a state can infringe on first amendment rights only where there is a compelling state interest to limit those rights.[38] Furthermore, the Court has maintained that if there is a compelling state interest present to limit constitutional rights then the statute restricting these rights must be drawn narrowly and specifically.[39] The Court stated in *NAACP v. Button* that "[b]road prophylactic rules in the area of free expression are suspect."[40]

Several state courts have rendered decisions pertaining to the political activities of public employees. The California Supreme Court in *Fort v. Civil Service Commission*[41] held a state statute unconstitutional which dealt with the prohibition of state employees in political campaigns. The court recognized that the first amendment gives *every* citizen the right to engage in political expression and association.[42] The court went on to say that there is a need to limit some political activity but it questioned whether there was a sufficient need to restrain employees in elections outside the city, county, or state as the case may be and to restrict activity in partisan and non-partisan elections alike.[43] They stated that the statute in question was drawn so that the only activity available was "the right to vote and to express opinion 'privately.' "[44] The Supreme Court of Oregon and the Supreme Court of New Jersey have likewise

express one's ideas and their use is entitled to constitutional protection. It is important to bring attention to this case because the expression in the *Hobbs* case was, of course, a similar type, that being the use of a bumper sticker to express one's opinion.

38. Sherbert v. Verner, 374 U. S. 398 (1963); Gibson v. Florida Legislative Investigation Comm'n, 372 U. S. 539 (1963); NAACP v. Button, 371 U. S. 415 (1963); and Bates v. Little Rock, 361 U. S. 516 (1960).

39. United States v. Robel, 389 U. S. 258 (1967); NAACP v. Button, 371 U. S. 415 (1963); Shelton v. Tucker, 364 U. S. 479 (1960); Talley v. California, 362 U. S. 60 (1960); Cantwell v. Connecticut, 310 U. S. 296 (1940); Schneider v. New Jersey, 308 U. S. 147 (1939); and Lovell v. Griffin, 303 U. S. 444 (1938).

40. 371 U. S. at 438. The Court had earlier recognized that even in cases where there was a legitimate government purpose the prohibition could not be accomplished by a broad statute which stifled fundamental personal rights if the same end could be reached in a narrower manner. Shelton v. Tucker, 364 U. S. 479 (1960). *See also* Cantwell v. Connecticut, 310 U. S. 296 (1940); Schneider v. New Jersey, 308 U. S. 147 (1939); and Lovell v. Griffin, 303 U. S. 444 (1938). It was stated in *Cantwell* that "the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." 310 U. S. at 304. The Court thus adopted the practice of striking statutes which were overbroad and vague.

41. 61 Cal.2d 331, 392 P.2d 385 (1964).

42. *Id.* at ____, 392 P.2d at 387.

43. *Id.* at ____, 392 P.2d at 389.

44. *Id.*

decided this issue and held similar statutes to be unconstitutional.[45] The Supreme Court of Utah, however, upheld a statute prohibiting engagement by public employees in political campaigns in certain areas.[46]

Certain political activity can be and in fact must be restricted.[47] The federal government restricts an employee from entering the management of political campaigns.[48] But this is a far-cry from the blanket immunity which the words "prominently identifying" connote. The court of appeals queried how far these words could go.[49] Does this deprive an individual of all electioneering practices except the silent vote? May one go to a political rally? May one go to a candidate's barbecue? May one discuss political issues and candidates with a friend at home? May one tell his wife who he plans to vote for? May one eat lunch with a friend who is a political candidate? Is there any distinction between partisan and non-partisan elections? What level elections? Local? State? National? These two words if carried far enough could and in fact did render the firemen politically impotent. It made him as the court said a political "enuch."[50]

Where first amendment freedoms are abridged, tight standards must be imposed.[51] The courts, in striking down statutes restricting public employee's political activities, have resorted to the use of vagueness and overbreadth tests. The essential task which remains for the courts in the future is to decide exactly how far they will allow legislatures to go in their regulations of the political activities of public employees. This is especially true when the activity is during off-duty time. It has been recognized that the government may, when circumstances warrant, impose conditions upon the public employment of individuals even when

45. De Stefano v. Wilson, 96 N.J. Super. 592, 233 A.2d 682 (1967); Minielly v. Oregon, 242 Or. 490, 411 P.2d 69 (1966). *See also* Bagley v. Washington Township Hosp. Dist., 65 Cal.2d 499, 421 P.2d 409 (1966); Kinnear v. San Francisco, 61 Cal.2d 341, 392 P.2d 391 (1964); and Miami v. Sterbenz, 203 So.2d 4 (Fla. 1967).

46. Salt Lake City Fire Fighters Local v. Salt Lake City, 22 Utah 2d 115, 449 P.2d 239 (1969). The Utah Supreme Court rejected *Bagley* cited above. This statute called for no person to use his political position in an election.

47. 61 Cal. 2d at ____, 392 P.2d at 389. *See* United Pub. Workers v. Mitchell, 330 U. S. 75 (1947); *Ex parte* Curtis, 106 U. S. 371 (1882); *see also* 391 U. S. at 568 where Justice Marshall said, "The problem in any case is to arrive at a balance between the interest of the . . . citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

48. 80 Stat. 525, 5 U.S.C. § 7324 (1970).

49. 448 F.2d at 472.

50. *Id.* at 471.

51. *See* Cantwell v. Connecticut, 310 U. S. 296 (1940); Schneider v. New Jersey, 308 U. S. 147 (1939); and Lovell v. Griffin, 303 U. S. 444 (1938).

these conditions constitute a deprivation of constitutional rights.[52] At this time no standards have been firmly established.[53]

The California Supreme Court has gone so far as to say that "[t]he freedom of the individual to participate in political activity is a fundamental principle of a democratic society and is the premise upon which our form of government is based."[54] We shall have to wait for future litigation to see if these restrictions will be held to be unconstitutional per se or if overbreadth and vagueness will continue to be the judicial implements used to limit these restrictions.

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52. *See* 5 U.S.C. § 7324 (1970). *See also generally* Annot., 28 A.L.R.3d. 717 (1969).

53. There are various other articles which have been published that deal with this problem; *see generally* Buckley, *Political Rights of Government Employees*, 19 CLEV. ST. L. REV. 568 (1970); *Political Activity and the Public Employee: A Sufficient Cause for Dismissal?*, 64 NW. U.L. REV. 736 (1970); 38 FORDHAM L. REV. 801 (1970); Shartsis, *The Federal Hatch Act and Related State Court Trends—A Time for Change?*, 25 BUS. LAW. 1381 (1970); Rose, *A Critical Look at the Hatch Act*, 75 HARV. L. REV. 510 (1962); Nelson, *Public Employees and the Right to Engage in Political Activity*, 9 VAND. L. REV. 27 (1955); and Esman, *The Hatch Act—A Reappraisal*, 60 YALE L.J. 986 (1951).

54. 61 Cal. 2d at ____, 392 P.2d at 387.