

In the

Supreme Court of the United States

WILLIAM M. BROADRICK, et al.,)
)
 Appellants,)
)
 v.)
)
 STATE OF OKLAHOMA, et al.,)
)
 Appellees.)

No. 71-1639

Washington, D. C.
March 26, 1973

Pages 1 thru 50

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 WILLIAM M. BROADRICK, et al., :
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 Appellants, :
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 v. : No. 71-1639
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 STATE OF OKLAHOMA, et al., :
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 Appellees. :
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Washington, D. C.,

Monday, March 26, 1973.

The above-entitled matter came on for argument at
2:03 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
 WILLIAM O. DOUGLAS, Associate Justice
 WILLIAM J. BRENNAN, JR., Associate Justice
 POTTER STEWART, Associate Justice
 BYRON R. WHITE, Associate Justice
 THURGOOD MARSHALL, Associate Justice
 HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

JOHN C. BUCKINGHAM, ESQ., Suite 1213, 100 Park
 Avenue Building, Oklahoma City, Oklahoma 73102;
 for the Appellants.

MICHAEL DENNIS MARTIN, ESQ., Assistant Attorney
 General of Oklahoma, 212 State Capitol, Oklahoma
 City, Oklahoma 73105; for the Appellees.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in 71-1639, Broadrick against Oklahoma.

Mr. Buckingham, you may proceed whenever you're ready.

ORAL ARGUMENT OF JOHN C. BUCKINGHAM, ESQ.,
ON BEHALF OF THE APPELLANTS

MR. BUCKINGHAM: Mr. Chief Justice, and may it please the Court:

This case is on appeal from a three-judge Federal Court decision, denying appellants civil class action for injunctive relief to enjoin the deprivation of the civil rights of the appellants and all classified employees of the State of Oklahoma.

The appellees, the State Personnel Board, initiated proceedings against the appellant seeking to dismiss that appellant from employment by the State Corporation Commission for alleged political activities under Title 74 Oklahoma Statutes, Section 818.

This action by the State Personnel Board precipitated the filing of the suit in Federal Court.

The questions presented in this appeal may be briefly stated as follows:

May a State by statute proscribe in broad and general terms First Amendment rights of State employees?

And, two, may a State constitutionally classify the employees of some but not all of its State agencies and broadly prohibit the employees of those agencies from enjoying First Amendment rights while permitting the unclassified employees of the State, all other public employees, and the citizenry at large to freely enjoy the same.

Now, we urge to this honorable Court that such proscriptions by State statute are wanting in constitutional acceptability of the First, Fifth and Fourteenth Amendments to the Constitution.

If the political activities prohibition provisions of the Hatch Act, in the previous case, are found to be subject to successful challenge as being vague and overbroad, a fortiori the political activities prohibition provisions of the Oklahoma Merit Act should be determined constitutionally wanting.

If, however, the political activities prohibition provisions of the Hatch Act are found to be constitutionally sound, it does not necessarily follow that the political activities proscriptions of the Oklahoma Merit Act are constitutionally well-founded. As said proscriptions are inherently distinguishable from prohibition provisions of the Hatch Act.

QUESTION: Which would you regard as more lenient to the two items?

MR. BUCKINGHAM: I would suggest that the Hatch Act is more lenient.

QUESTION: Let me ask you another question, while I have you interrupted. When this action was begun, whether or not State disciplinary proceedings were pending?

MR. BUCKINGHAM: There were, sir.

QUESTION: Could one then say that the Federal Court should have abstained?

MR. BUCKINGHAM: No, sir. We feel in this particular instance, because ~~of~~ facially the statutes involved, which predicated the action against the State employees, are both so vague and broad as to permit the Federal Courts, under 1983, because of the civil rights question involved, to rule specifically on that statute. Abstention, to make all additional employees who may have conduct ~~of~~ the State Personnel Board feels should warrant some kind of action, a prosecutory action, under these two sections.

We feel that it is untenable when you read the two statutes.

QUESTION: Well, but didn't Younger v. Harris involve a claim of over-facial, overbreadth, too, didn't it? Isn't really the only distinction between that and this is that this is civil and that was criminal?

MR. BUCKINGHAM: No, sir. We feel in our particular case and this particular statute, as you know in the Hatch Act

and further Acts, there are some proscribed permitted activities, political activities; perhaps not non-partisan activities. The Oklahoma statute does not describe any permitted political activities of any kind, other than a private expression and the right to vote.

Where they use such terms as "you may not take part in any affairs" --

QUESTION: But in the proceedings that were pending, what were they, administrative proceedings?

MR. BUCKINGHAM: No, sir. They are administrative proceedings insofar as the determination under the Oklahoma Merit Act, or the charges are valid and they will be discharged from their jobs.

In addition, under the particular Act, if they are discharged, criminal actions in the nature of misdemeanor can also be brought against them.

QUESTION: Well, what I'm not clear about is, what proceedings were pending when this action was brought?

MR. BUCKINGHAM: The proceedings that were pending were an action by the State Personnel Board to, in effect, have the Corporation Commission show cause why these employees and these employees should not be dismissed from their jobs.

QUESTION: Brought where?

MR. BUCKINGHAM: By the State Personnel Board -- before the State Personnel Board.

QUESTION: Well, that's what I say. It was pending, then, before an agency.

MR. BUCKINGHAM: That's right.

QUESTION: There was no court proceeding at that time.

MR. BUCKINGHAM: That is correct, sir.

QUESTION: So I gather, if this is a 1983 suit, your thought would be that there's no requirement --

MR. BUCKINGHAM: Yes, sir.

QUESTION: -- in actions under that section --

MR. BUCKINGHAM: Yes, sir.

QUESTION: -- without administrative remedy?

MR. BUCKINGHAM: That is correct, sir.

QUESTION: Now, what's the basis of that?

MR. BUCKINGHAM: Well, sir, because it --

QUESTION: I thought normally there had to be an exhaustion of administrative remedies.

MR. BUCKINGHAM: Well, sir, in this particular instance we feel that under the -- although this question was not the one in issue that was raised in this particular case, it was agreed by the --

QUESTION: Is this a jurisdictional matter or --

MR. BUCKINGHAM: No, sir; this is not a jurisdictional --

QUESTION: So you don't -- you think the State, if it

had a defense in this regard, or somehow, it just isn't --

MR. BUCKINGHAM: It isn't before the Court in this case; yes, sir.

If it was, it was a -- that question as to whether or not 1983 was appropriate was not raised in the District Court. The case is up here on the question involving the curtailment of First Amendment rights.

QUESTION: But it came from the Federal Court to here.

MR. BUCKINGHAM: Yes, sir.

QUESTION: And they could notice it if it were plain error.

MR. BUCKINGHAM: I would assume you probably could --

QUESTION: But you brought it under 1983, didn't you?

MR. BUCKINGHAM: Pardon?

QUESTION: Was that your jurisdictional ground, 1983?

MR. BUCKINGHAM: Yes, sir. That's correct.

QUESTION: Well, haven't we in many cases held that in actions under 1983 there's no requirement to exhaust administrative remedies?

MR. BUCKINGHAM: Yes, sir, you have.

QUESTION: And that's your answer?

MR. BUCKINGHAM: Yes, sir. It is.

QUESTION: Do you know of any case that an administrative proceeding like this was disregarded?

MR. BUCKINGHAM: Do I --

QUESTION: In any decisions of this Court?

MR. BUCKINGHAM: No, sir, we have not -- I think insofar as the State Personnel Board is concerned, if you're talking about Oklahoma, Mr. Justice, I think this may be the first case that the State Personnel Board has brought under the so-called political prohibition section.

QUESTION: Mr. Buckingham, you've never had an authoritative decision from your State courts?

MR. BUCKINGHAM: Sir, we have two decisions involving the Oklahoma Merit Act, and this simply were questions raised as to the validity of the Merit Act, and essentially whether or not they could delegate certain rule-making functions to the State Personnel Board.

But insofar as the question of First Amendment rights, and the particular Section 818, which is before this Court, there have not been any substantive rules.

QUESTION: Mr. Buckingham, are you challenging the Oklahoma statute because of vagueness?

MR. BUCKINGHAM: And overbreadth, both, sir.

QUESTION: I've read what counsel has presented, both in the Jurisdictional Statement and in your Brief, and I don't find a mention of the word, of vagueness anywhere. Your opposition argues it.

I wondered whether you had conceded to this, that the

statute was not vague?

MR. BUCKINGHAM: No, sir, we have not, Your Honor. I thought I had used the phrase "vagueness and overbreadth", and I specifically direct your attention to -- if I may, and I think it would assist the Court, if I could read these two short provisions that are involved, the sections that we're actually complaining of. Then I think I can point out the problem.

Supra, unnumbered paragraph six states:

"No employee in the classified service, and no member of the Personnel Board shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose;" -- "or other political purpose" -- "and no state officer or state employee in the unclassified service shall solicit or receive any such assessment, subscription or contribution from an employee in the classified service."

Next, unnumbered paragraph seven:

"No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party or in any

political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote."

I respectfully suggest, sir, that what -- you could not hardly get more vague than the use of the phrase "the affairs of a political party".

QUESTION: That may be, but I was worried if that question was presented; and I find nothing like that in your brief.

QUESTION: Which of your Questions Presented? Perhaps we can get at it more specifically. Which of the Questions Presented, as you read them, do you think presents that issue?

MR. BUCKINGHAM: Well, I could very honestly state to the Court, I think that the Court is probably correct, insofar as I have not in any way, in either the brief that I filed or the Jurisdictional Statement, used, utilized and specifically pointed out that word of the statute. I have used generalities in terms of referring to the statute being overbroad and vague, the vagueness.

I humbly submit to you that by virtue of --

QUESTION: Well, in the third Question, on page 5 of your Jurisdictional Statement, there is "Taking part in the management or affairs of any political party".

MR. BUCKINGHAM: Yes, sir.

QUESTION: But, in any event, you're not conceding

that?

MR. BUCKINGHAM: No, sir.

We feel that it is patently obvious that the political activity proscription of the Oklahoma Merit Act impairs First Amendment rights of Oklahoma State employees in the classified service.

QUESTION: Here, your No. 3 is almost precisely the language of the Hatch Act, is it not?

Or at least its thrust is precisely the same: "management or affairs".

MR. BUCKINGHAM: Yes, sir; that is correct.

QUESTION: So in that sense you do not think it is either more broad or less broad than the preceding case?

MR. BUCKINGHAM: Well, I would have to agree, Your Honor, that if it's about the same language, it could not be either one way or the other.

QUESTION: Well, but this line is taken directly from the unnumbered paragraph seven.

MR. BUCKINGHAM: Yes, sir.

QUESTION: It's an exact quotation of the language, isn't it?

MR. BUCKINGHAM: That's correct, yes, sir.

QUESTION: Well, I suppose your State courts might give those words a different reach than what a Federal court can reach in the Federal statute, might it not?

MR. BUCKINGHAM: Yes, sir. That is a possibility, also.

QUESTION: The identity of the words don't mean that much, do they?

MR. BUCKINGHAM: No, sir.

QUESTION: Did the three-judge District Court before whom your case went in Oklahoma have to construe this statute in order to reach the determination that it did?

MR. BUCKINGHAM: In --

QUESTION: It's hard to tell from their opinion, I would think.

MR. BUCKINGHAM: Yes, sir.

From their order, I -- insofar as the construction is concerned, the Jurisdictional Statement has attached to it the opinion of the three-judge Federal Court, and I can't go beyond what they state there as to what they did, as far as construing it.

Additionally, it is obvious that the political activities proscription of the Oklahoma Merit Act affecting only those State employees who are in the classified service is repugnant to the Equal Protection Clause of the Fourteenth Amendment to the Constitution.

In this regard, we'd like to request respectfully that the Court direct its attention to page 29 of the Answer Brief of the Attorney General, which seems to suggest that the

difference between classified and unclassified employees coincides with the classification of ministerial and policy-forming officers.

In other words, it seems to indicate that the Attorney General feels that the policy-forming officers are generally unclassified.

Then if you go to the Merit Act involved, which sets forth the unclassified employees, I respectfully submit that these are some of the unclassified employees, subsection (8) "patient and inmate help in the state charitable, penal, mental and correctional institutions;"

Subparagraph (13) "temporary seasonal farm laborers, or other farm help engaged in a single phase of agricultural production or harvesting, not to exceed one hundred twenty calendar days in any year;"

Sub (15) "laborers, semiskilled or skilled craftsmen temporarily engaged for purposes of building, renovation, or remodeling and paid on an hourly, or piecework basis, provided the request if made by the appointing authority and is approved by the State Personnel Board."

QUESTION: Well, doesn't that mean that the impact, as he's reading the statute, is that the people on the very top and the people on the very bottom are not covered, for totally different reasons?

MR. BUCKINGHAM: Well, sir, I read it a little

differently, insofar as unclassified --

QUESTION: Well, you excluded part-time farm labor for policy reasons, which is a matter of --

MR. BUCKINGHAM: I couldn't -- I would have to agree, I can't see that that is a policy that --

QUESTION: You might want to cover the man who's head of the agricultural department, as a policy maker.

MR. BUCKINGHAM: Yes, sir.

QUESTION: The question is whether they've done that as precisely as they should.

MR. BUCKINGHAM: Well, under the Act there are certain designated agencies which are designated as classified, certain employees are classified; then the Governor may select certain classified employees. I think, as you will note in the Jurisdictional Statement, and see these sections on unclassified employees, there are some 22 different, various exemptions under the statute for unclassified employees.

Now, it's hard for us to conceive how a secretary working in the Corporation Commission as a typist, wearing a political button endorsing a candidate, how this is relevant to some governmental purpose where she should be deprived of her rights to wear this button, as opposed to a secretary in the Attorney General's office.

QUESTION: Does the term "classified" in your statute connote job tenure of some sort?

MR. BUCKINGHAM: Well, I would assume, sir, that classified would connote some kind of tenure insofar as connection with the Oklahoma Merit Act, some kind of a permanency in that regard.

QUESTION: And so what the Legislature has basically done, in saying that employees who have that kind of tenure are barred from this type of political activity, and employees who don't have that kind of tenure aren't barred?

MR. BUCKINGHAM: That would be a rationale.

QUESTION: Incidentally, your named plaintiffs were employees of the Corporation Commission?

MR. BUCKINGHAM: That is correct, sir.

QUESTION: Is this a partisan office in Oklahoma?

MR. BUCKINGHAM: No, sir, it's an elected office. There are three different Commissioners who constitute the State Corporation Commission, each is elected every two years, and they have a race, just like any other race, there are nominations of Democrats and Republicans or other parties. It usually draws numerous amount of candidates, and then a party, a person is elected to that office.

QUESTION: Then it is partisan?

MR. BUCKINGHAM: Yes, it is a part of the -- the Commissioners are, yes. If you say partisan in reference to that they are a Democrat or a Republican, I can't think of a time when an Independent has been elected, which are non-Party

members.

QUESTION: You say they run under Party labels?

MR. BUCKINGHAM: Well, it's an open race, sir. Independents can run, and Democrats and Republicans can, in the Primary.

QUESTION: And what are they, four-year terms or six-year --

MR. BUCKINGHAM: Six-year terms, sir.

QUESTION: Six-year terms. There are three of them. What's the salary of the office, do you know?

MR. BUCKINGHAM: \$19,500.

QUESTION: \$19,500?

MR. BUCKINGHAM: Yes, sir, for the Chairman.

QUESTION: For the Chairman; and \$19,000 for the members.

MR. BUCKINGHAM: Yes, sir.

QUESTION: And what are the functions of the office -- of the Commission?

MR. BUCKINGHAM: The Corporation Commission itself has rather broad and extensive functions, generally regulating public utilities and such, and next they're regulating various oil companies, that we refer to in the area of oil and gas conservation and related matters. Transportation --

QUESTION: It has some of the same functions as the Railroad Commission does in --

MR. BUCKINGHAM: Yes, sir, very similar.

QUESTION: Mr. Buckingham.

MR. BUCKINGHAM: Yes, sir?

QUESTION: I think I understood you to say that you would consider the Oklahoma Act more restrictive than the Federal Act.

MR. BUCKINGHAM: Yes, sir.

QUESTION: Did you say because the word "privately" is in the Oklahoma Act?

MR. BUCKINGHAM: No, sir. If I did, I'm sorry, I misled the Court, Your Honor.

QUESTION: Well, I'm sure you didn't mean --

MR. BUCKINGHAM: Yes. The Hatch Act does recognize certain political activity, which they recognize that employees could engage in. In other words, there is an affirmative provision in the Hatch Act; if it's non-partisan political activities.

There is no such language in the Oklahoma statute.

Now, there is no recognition of any kind of activity, political activity, that you can engage in, other than if you would consider the right to vote and to privately hold an opinion as being a political activity that you can engage in.

In this respect we're saying that the Oklahoma Act is more restrictive.

QUESTION: In the opinion of the three-judge court, paragraph 9, Conclusions of Law, there is an interpretation of your Act, to the effect that it does not restrict "public and private expressions on public affairs and personalities so long as the employee does not channel his activity towards party success."

Assuming for the moment that the Court had authority to interpret Oklahoma law, would you accept that as a fair interpretation?

MR. BUCKINGHAM: No, sir. I think recently the Attorney General who's in this case, actually we're referring not towards party success, there was a candidate involved in the city election, which was non-partisan, where an activity was taking part by, as I understand, a Corporation Commission employee, and the charges were found invalid of the political prohibition section of the Oklahoma Merit Act.

Now, that seems to negate that determination in the Federal Court's Finding No. 9. At least the State Personnel Board didn't feel that that would be a prohibition against them bringing charges against an employee who perhaps indicated a preference for a candidate if he's running for a city office, not on a partisan, political basis.

The Attorney General, throughout his brief, infers that the object and/or aim of the Oklahoma Merit Act was directed at the evils of partisan politics, equating partisan

politics with evil.

Now, the appellant in this case strongly dissents to that type of a conclusion. The evils the Act were directed against were the coercion, intimidation, and misuse of authority which might exploit the employees by governmental superiors.

We respectfully suggest the Act was not directed against a voluntary participation in partisan political activities by a classified State employee. And in this regard we point out that the purpose clause of the Merit Act simply sets forth what you would expect a purpose clause to provide, to provide all citizens a fair and equal opportunity for public service, to establish conditions of service which will attract officers and employees of character and ability.

QUESTION: Well, isn't there another factor that the Legislature takes into account, that is that they don't want to put a premium on having a man enlarge his staff of any particular department so in order to have that many more people to work on political activities?

MR. BUCKINGHAM: Oh, I believe --

QUESTION: That's a legitimate factor?

MR. BUCKINGHAM: Yes, sir. I have to agree with you, yes. That most certainly, undoubtedly, is in the mind of many Legislators, insofar as enacting prohibitions.

But what we're saying in this case very simply is

that there is a suggestion, well, what can you do? Just strike on this particular provision, political prohibition provision, that's a rather drastic step.

Isn't there an easier way? Wouldn't it be difficult to draft a statute?

I suggest to you that it would be difficult to draft a statute, but you could have drafted a statute where you positively set forth what particular political activities could be enjoyed by all employees. As opposed to proscribing a blanket prohibition of those acts which they cannot do.

This seems as a possibility as an answer. And I suggest that it appears to me, with the vast number of State employees that we have, both in Oklahoma and throughout the country, that they offer to give them the opportunity to voluntarily exercise political expression.

I think this is without a doubt a foundation of our system of government. And you could --

QUESTION: You seem to place some emphasis, and I'm not sure in what respect, on people wearing buttons saying, "I'm for" this man or that man.

MR. BUCKINGHAM: Oh, yes, sir.

QUESTION: Now, you think that is First Amendment rights which the Legislature cannot prohibit.

MR. BUCKINGHAM: I think the printing on a button is an expression of political opinion. I would say that's

more closely akin to a private expression of political opinion as opposed to being an act that should be curtailed. The State Personnel Board has enacted a particular provision interpreting the prohibition section of the Oklahoma Merit Act, where they say that is partisan political activity. Bumper stickers, partisan political activity.

QUESTION: Well, let's just take that in the office now, wearing a button, "I'm for Governor Jones for re-election" or whatnot, or I'm for the other man.

MR. BUCKINGHAM: Yes, sir.

QUESTION: You say a Legislature is constitutionally barred from saying that that kind of display during working hours in the office has a tendency to provoke disputes and arguments and divisiveness and disputation among the employees, to the disparagement of their work and their duties; you say the Legislature cannot do that?

MR. BUCKINGHAM: If they can show that there is a compelling need to do that, if there is some legitimate --

QUESTION: Now, I've stated --

MR. BUCKINGHAM: Yes, sir.

QUESTION: I've stated all we need. Now, do you say that need, as I've outlined it, is not a legitimate State interest?

MR. BUCKINGHAM: Well, I think it possibly could be, under your hypothetical, where you said "during office hours".

But, you see, the prohibitions included in the Oklahoma statutes are not restricted to "during office hours".

QUESTION: But they might be construed that way by the State courts in a particular case, might they not?

MR. BUCKINGHAM: Well, they haven't been construed by the only other --

QUESTION: Or --

MR. BUCKINGHAM: -- which is the State Personnel Board, which is an adopted rule. They have put such a restriction --

QUESTION: But you concede that it would be a valid exercise of judicial power for the courts of Oklahoma to say, that's valid as a limitation during office hours and in the building where you work, but it is invalid outside of office hours and outside of the building?

MR. BUCKINGHAM: If they determine that there was actually something that divisive about it, Your Honor, --

QUESTION: Well, I thought you conceded that during office hours this would be divisive?

MR. BUCKINGHAM: Well, it seems, Your Honor, correctly or incorrectly, that taking your presentment, that that determination, that it was divisive, no, I personally do not find that that is divisive.

QUESTION: But do you think -- in your view of it, do you think a Legislature is constitutionally barred from

thinking that it is divisive and legislating on that assumption?

MR. BUCKINGHAM: My personal opinion, insofar as the provision in our case, is, sir, that that is going too far. I think that --

QUESTION: Even during office hours?

MR. BUCKINGHAM: Even during office hours. I think the fact that you have a car sitting out on your parking lot, with a bumper sticker on it, that "I'm for X", and they said well, that car is sitting out in that parking lot with that bumper sticker on it, that's so divisive that we're going to prohibit that. That does not -- I think the expression of the curtailment of that activity is going too far.

QUESTION: Do you think a Federal Court has the power, has the duty constitutionally to say that the Legislature of Oklahoma can't think otherwise?

MR. BUCKINGHAM: That's all right. I think the Federal Court has a duty of looking at what the State Legislatures are trying to accomplish and at the same time weighing those rights against the First Amendment rights, which this Court has so jealously protected, and saying there are going to be times, and there are going to be situations where we should establish guidelines of what should be permissible and should not be permissible insofar as the impairment of those rights.

And that's where I think we are here.

In conclusion, appellants pray this Court reverse the judgment of the trial court, with instructions to enter an order enjoining appellees from proceeding further in the dismissal action against the named appellants.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Martin.

ORAL ARGUMENT OF MICHAEL DENNIS MARTIN, ESQ.,

ON BEHALF OF THE APPELLEES

MR. MARTIN: Mr. Chief Justice, and may it please the Court:

In 1947 this Court upheld the Mitchell case, and a companion case, Oklahoma vs. Civil Service Commission; you applied the Federal Hatch Act prohibitions to State employees that are federally funded.

The Oklahoma Legislature, in 1959, in enacting the Oklahoma Merit System Act of Personnel Administration, incorporated in that Act political activity prohibitions against classified employees of the Merit System.

This Act is modeled after the Federal Hatch Act. In fact, the Act provides in one of the sections that the State Personnel Board is required and directed to alter any rules or regulations it has that conflict with standards or conditions of federal grants, recognizing that the federally funded employees that work for the State are subject to the prohibitions of the Federal Hatch Act.

There are some differences between the Federal Hatch Act and our State's political activity prohibition. Basically it's a matter of degree.

I believe that the State took the prophylactic approach that was upheld in Mitchell as a method for proscribing political activity on behalf of State employees.

In doing so, they did not incorporate by reference any case decisions, as there were none in Oklahoma. They did, however, provide that the Personnel Board could, by rule, enact rules and regulations to carry out the effect and purposes of the Act.

The State Personnel Board has done so, and they continue to enact rules and regulations regarding not only the entire Merit System but the political activity prohibitions.

In addition, the language, the facial language of Section 818, has some differences which are not contained in the current Federal Hatch Act. There are references to "privately expressing his opinion and casting his vote", which I believe has been raised by my brother counselor.

We would urge that --

QUESTION: I would agree it's difficult to define "private expression"; how do you do that? You tell yourself?

MR. MARTIN: Well, Your Honor, I might first state that this prohibition is related only to an employee who is taking part in the "management or affairs of a political party

or political campaign", that it is not restricted to his voicing his opinion on matters of public personality or affairs.

QUESTION: Well, the only explanation I'm asking for is my "private expression of my opinion"; what does that mean?

MR. MARTIN: This is not defined in the Act, there has been no --

QUESTION: What do you think it means?

MR. MARTIN: What do I think it means?

That's a good question, Your Honor. I could not answer that.

QUESTION: Well, doesn't it mean that if he's at a party with his friends at home, he can express it, and if he's out on a platform he can't?

What's so difficult about that?

MR. MARTIN: Well, I think it's a matter of degree, because you can --

QUESTION: Well, isn't Bell Hunter a degree?

MR. MARTIN: Yes, that is, Your Honor. But I don't believe that is --

QUESTION: It would depend on the size of the party, wouldn't it?

MR. MARTIN: This is true, Mr. Justice. This is my point. You can certainly view a fact situation where it would be a private expression, but I think you could certainly

find one where it would be a borderline case.

QUESTION: This legislation was enacted in 1959, wasn't it?

MR. MARTIN: Yes.

QUESTION: And before that time was there any similar legislation in your State?

MR. MARTIN: No, there was none.

QUESTION: And this legislation came along at the same time as the creation of a classified service came along?

MR. MARTIN: Yes, it did.

QUESTION: Prior to that time had there been any category of public employment in your State that was equivalent to Federal Civil Service?

MR. MARTIN: No --

QUESTION: Non-political?

MR. MARTIN: No, there was not.

QUESTION: So it all came along together in 1959.

MR. MARTIN: Yes, it did.

QUESTION: And none of it, really, has been -- that is the meaning of these two paragraphs we have before us here, these have never been the subject of construction or interpretation by the courts in the State, have they?

MR. MARTIN: No, the only authoritative interpretation that has been made has been made in regard to Attorney General's opinions that have been issued over the years.

And there have been a number of those.

QUESTION: Has he ever purported to explain what was meant by "private expression of opinion"?

MR. MARTIN: No, that question has not been asked. I might add that the State Attorney General's opinions have force and effect as law until overturned by a court of competent jurisdiction; and State employees and State agencies are required to adhere to those opinions.

QUESTION: Who can request an Attorney General's opinion?

MR. MARTIN: The Attorney General's opinion can be requested itself by -- it's usually requested by the State Legislature, an agency head; cannot be requested by a private citizen.

QUESTION: Can not be?

MR. MARTIN: No.

QUESTION: By an agency head; by the Legislature as a whole or can any member --

MR. MARTIN: Member.

QUESTION: -- of the Legislature?

MR. MARTIN: Any member of the Legislature.

QUESTION: Is there any practice in your State, as there was in Arizona, where I came from, where a private citizen wanted an Attorney General's opinion, he would ask his Legislator who would in turn ask the Attorney General?

MR. MARTIN: Yes, it's done quite often.

I think what the issues --

QUESTION: You mean no one really cares what that -- at least nobody has asked, is that it?

MR. MARTIN: No one has asked. We cannot, on our own, issue Attorney General's opinions, we have to be asked questions, and this question has not been asked.

QUESTION: I gather from what you said earlier, you're not unhappy it hasn't been asked.

MR. MARTIN: Well, I would hate to have to write it, Your Honor.

QUESTION: Well, you don't object to the subject that the District Court ruled, in fact, except that --

MR. MARTIN: No, I do not object to that.

QUESTION: Do you think that that court opinion, that that's a reasonable construction of the Act?

MR. MARTIN: Yes, I do.

QUESTION: Has the Oklahoma court ever decided it?

MR. MARTIN: No, the Oklahoma court has never construed either of these two paragraphs.

I believe what we have before the Bench today is an issue of the prophylactic approach adopted by this political activity prohibition set forth in Mitchell. The alternatives to setting up the prohibitions, in terms of the vagueness test, would amount to setting out all types of conduct that

could possibly be prohibited; a task which would seemingly be impossible.

The prophylactic approach of Mitchell is the current approach that the State has used, and is currently adopted.

Another approach would be perhaps to narrow the language of the statute and set out specific prohibitions that would not be as broad a prophylactic.

QUESTION: Is the record clear as to what the gentleman was accused of, knowing how he was accused of violating the Act?

MR. MARTIN: Yes, it is, Mr. Justice.

In the original record, it contains charges by letter, certified letter to each individual, specifying with particularity what conduct he was accused of violating, in terms of the political activity statute.

Each individual was charged alternatively with soliciting campaign funds, receiving campaign funds, attempting to secure other classified employees to work in the campaign, and I believe there is one charge of hauling campaign materials.

QUESTION: That was for the re-election of an incumbent Commissioner, wasn't it; Commissioner Jones?

MR. MARTIN: Yes, it was, Mr. Justice.

QUESTION: Was he elected?

MR. MARTIN: Yes, he was.

I might add that the question of exhaustion of administrative remedies, that the Personnel Board issued a stay of their proceedings pending a determination of the constitutionality of these prohibitions in the Federal Courts. They were --

QUESTION: Couldn't that be a State court decision, under that stay?

MR. MARTIN: Well, a stay was issued after a complaint had been filed in the Federal Court.

QUESTION: Well, does Oklahoma have a declaratory judgment proceeding?

MR. MARTIN: Yes, they do, Your Honor.

QUESTION: Would there be any way any of these affected people could go directly into the Oklahoma courts without having first to go through all of the administrative proceedings?

MR. MARTIN: I believe it's possible, that they could have gone into Federal Court.

QUESTION: No, State court.

MR. MARTIN: State court, and challenged the validity of the statute.

QUESTION: Without waiting the outcome of the administrative proceedings?

MR. MARTIN: I think the Personnel Board would have issued a stay in that event, also.

QUESTION: Well, was there a -- in the administrative proceedings that were pending, was there provision for an answer from the party? Were the issues made up?

MR. MARTIN: At the time the --

QUESTION: Were there questions of coverage or violations that were going to be involved, or --

MR. MARTIN: Well, there were specific charges that were made. At the time the stay was granted, there were a number of motions pending before the Board in relation to those charges by the attorneys representing them. We had not progressed to the point of having a hearing, or even starting to have a hearing. We were still in the discovery stage, when the complaint was filed in Federal District Court.

QUESTION: The disposition by the Commission, is that done immediately subject to judicial review or is there some administrative appeal?

MR. MARTIN: In regard to the administrative hearing, there is a ten-day provision for a request for rehearing, and the party then has thirty days in which to appeal to State court.

QUESTION: To the State court.

MR. MARTIN: On the record.

QUESTION: Does something -- is he suspended, or does the court have power to stay his suspension, or does the law say nothing will happen to him until he's completed the --

MR. MARTIN: Both the Board and the Court has the power to stay any order of the agency.

QUESTION: And what does it do? Go into an Oklahoma trial court or into an Oklahoma appellate court?

MR. MARTIN: It goes into an Oklahoma trial court.

QUESTION: And then where is it -- is there an intermediate appellate court before you get to the supreme court?

MR. MARTIN: Yes, there is.

QUESTION: Is it de novo in the trial court, or is it on the record?

MR. MARTIN: It's on the record.

QUESTION: What's the standard they use?

MR. MARTIN: Substantial evidence.

QUESTION: Could this Commissioner who benefitted by the work presumably of these people have asked the Attorney General for an opinion about these matters?

Is he one of the State officers who has that power?

MR. MARTIN: Yes, he could have asked for an opinion.

I believe that the vagueness test, as set out in Grayned vs. City of Rockford, is controlling in our case. The notice that the State employees had in regard to the prohibitions is given not only by the facial language of the statute itself, but also from rules and regulations set forth by the Personnel Board, circulars that are issued by the Personnel Board to each

employee proscribing and setting forth what activities he can be involved in and what activities he cannot be involved in.

In addition, there are Attorney General's opinions which, as I indicated earlier, have force and effect of law, and which employees and agencies are required to follow. These opinions have alternatively, down through the years, interpreted the prohibition to be prohibitions against partisan activity.

The standards which the Personnel Board has to enforce this political activity prohibition is sufficient to meet the test in Grayned. They themselves have set forth rules, and they also guide themselves by the Federal Hatch Act prohibitions, through the Oklahoma vs. Civil Service Commission case, and a provision in the statute itself which requires them to alter any rules or regulations which conflict with those standards that apply to federal grants.

So they, themselves, adhere to standards which they set themselves, and which are set through the Federal Hatch Act.

The employees themselves have access to advisory opinions from the Personnel Board, which is indicated to them in a circular that is distributed. They have access to the rules and regulations of the Board which further define the prohibitions set out in the statute.

And, under certain conditions, they can ask for

Attorney General's opinions if they get someone to ask it who has authority to.

The broadness test, overbreadth test, that's applied to this case, in particular in relation to the language of the statute itself, appellants contend that it prohibits constitutionally protected speech, as well as non-protected.

The three-judge panel correctly held that the prohibitions were against partisan political activities, and were not overbroad. While the specific language itself does not, with perhaps as much certainty as appellants would like, connote that it is only partisan political activity that is prohibited, the particular wording of the statute gives that connotation.

In addition, the Attorney General ruled in 1968, in an Attorney General's opinion, that those prohibitions were against partisan political activity only. The enforcement of those provisions by the Personnel Board and the circulars that they issued to State employees also specified that they are partisan political activity prohibitions.

QUESTION: Well now, what does that mean?

We were told earlier that in these election races for the job of Commissioner, sometimes independents run; and if employees work for that independent candidate, would that be partisan political activity, or wouldn't it?

MR. MARTIN: Well, I don't believe --

QUESTION: It wouldn't be on behalf of a party.

MR. MARTIN: I don't believe we've had an independent run -- yes, we have; I take that back. We have had,

QUESTION: We were told that some have.

MR. MARTIN: Yes, in the last race.

I think that if an independent is running as an independent and has, through his resources, a -- I won't say party, but a --

QUESTION: Organization.

MR. MARTIN: -- an organization that espouses his particular beliefs, that --

QUESTION: That leads his candidacy.

MR. MARTIN: Yes. Someone working for that organization would be very similar to working for a party, that they are attempting to espouse to others the beliefs of that individual through his organization and his platforms.

QUESTION: Of course, it's reasonable to assume that the Democratic candidate and the Republican candidate would consider that partisan political activity, since its aims are against them?

MR. MARTIN: Yes, I would think so. I would think that the definition of party politics is broadly that which is aimed at instigating in State government a particular belief or espousing a particular platform. We currently have the

two-party system, but there are independents and other parties, such as the American Party, which are parties because they espouse a particular belief or attempt to set forth particular policies in State government, which are unique unto themselves.

So I think in that regard it would be a prohibition against someone working for an independent candidate, if he had such an organization.

QUESTION: The Attorney General's rulings in your State, don't they --

MR. MARTIN: Yes.

QUESTION: Are these published rules available?

MR. MARTIN: Yes, they are. They are published --

QUESTION: From the reading, I think it is.

MR. MARTIN: They are published and distributed to all agencies.

QUESTION: Well, are there any Attorney General's opinions in this case?

MR. MARTIN: Yes, there are. There is the '68 opinion, which interpreted the political activity prohibitions and held that they were partisan political activities. There have also been other opinions down through the years --

QUESTION: Have you got some other citations --

MR. MARTIN: Other citations?

QUESTION: Yes.

MR. MARTIN: I have a listing of some of the opinions and what they dealt with.

QUESTION: Are they in your brief?

MR. MARTIN: No, they aren't, Your Honor.

QUESTION: Well, are they available in some way?

MR. MARTIN: Yes, we can make them available.

As an addendum to the record.

QUESTION: Well, are they -- they're published, they're not just part of --

MR. MARTIN: No, they're published.

They're issued, they're issued to the individual requesting the opinion, and they are also sent to State agencies to distribute and to inform the employees.

QUESTION: You don't happen to know whether or not they're in our library, do you?

MR. MARTIN: I don't believe we -- we are now putting in a bound volume; but I don't believe in 1968 that they were put in a bound volume. I believe that just occurred several years ago.

They did start in '68; excuse me. Yes, we do have a bound volume. I don't know if you have access to it in your library, though.

QUESTION: Would you, with the Chief Justice's permission, make available copies of the Attorney General's opinion, opinions that do bear on the construction of these --

MR. MARTIN: Yes. Yes.

There are three that are in the record, but they are not inclusive of all that were issued. There are a number of more that were issued. Now, I will make available as part of the record those opinions.

Of the State's 22,000 employees, approximately 20,000 are under the Merit System as classified employees. The prohibitions specifically apply only to classified employees. They do apply to unclassified employees to the extent that unclassified employees cannot attempt to solicit funds from classified employees or get them involved in partisan politics.

The distinction for the prohibitions are related to the enactment of the Merit System of Personnel Administration. When the Personnel Act was put into effect in 1959, these prohibitions were placed in there and applied only to classified employees.

The rationale of the Merit System is to allow the employee to progress in his work, free from outside influence, including politics.

The decision to exempt certain agencies and employees from the classified system was based primarily on the decision that the populace needs some State individuals to express their will. In addition, the unclassified employees are not protected by the Merit System nor subject to the whims

and caprices of their employer, so to speak. They have no recourse in the event that they are terminated, as do the classified employees.

Not only are specific individuals exempted from the Merit System classification, but agencies as a whole are also exempted.

While the decision of the Legislature to allow the populace to express their will through certain individuals was expressed in the Act, they also felt that it was necessary for entire agencies, because of the nature of their work, to also be exempted. And in this regard the application of the prohibitions is limitedly applied to them.

We think this is a valid distinction, that under the prophylactic approach of Mitchell the decision to include some State employees under the prohibitions and exclude others is a judgment that has to be weighed by the State in its experience over the years of the political activity that they're attempting to prohibit.

The Governor in the State of Oklahoma can, by Executive Order, place new agencies under the Merit System or existing agencies that are not under the Merit System. So there is the flexibility, as time goes by, for the State to continue to combat the evils of partisan politics by placing those unclassified employees and agencies under the prohibitions.

QUESTION: Does the Governor have unrestricted power at any time to place any or all categories of State employees under the system?

MR. MARTIN: He's given authority by the Personnel Act to place agencies --

QUESTION: Agencies.

MR. MARTIN: -- under the Merit System. And that authority does not exceed the exemptions that are already placed in the statute itself.

There are certain statutory exemptions, but as far as newly created agencies, he has the authority to place them under the Merit System by Executive Order.

QUESTION: To do so or not to do so?

MR. MARTIN: Yes.

QUESTION: You say that the reason for banning political activities by the classified employees is to insulate the employee from political pressure; is that the aim of it, or --

MR. MARTIN: I think that's one of the reasons. The obvious reason for the enactment of the Merit System is to insulate him from outside influence, including politics.

QUESTION: Yes.

MR. MARTIN: I think the prohibitions applying only to classified employees --

QUESTION: Well, but why apply it to anybody? Why

prohibit political activity by any State employee? What's the purpose of that?

MR. MARTIN: Well, the State, unlike the Federal Government, did not until 1959 make prohibitions against political activities; and during this long period of years since 1907, since we have become a State, it's been apparent to the Legislature that the political activity control of State employees was something which was not good for the State.

QUESTION: So it was to insulate the employees from political pressure?

MR. MARTIN: It was to insulate the employees and to prohibit a party from controlling the State and making its desires and wishes that of the State, instead of having a neutral State government which was not controlled by a party.

QUESTION: And once an employee becomes a classified employee, he gets certain job protections?--

MR. MARTIN: Yes, he does.

QUESTION: -- does he not? And what are they?

MR. MARTIN: He is in a retirement system; he is not subject to dismissal except for cause, set out in the statute; if he is dismissed he has a hearing before the Personnel Board. And there are specific prohibitions against using influence against him, either discriminatory or favorable,

to effect his promotion or his non-promotion.

QUESTION: Non-promotion, yes.

MR. MARTIN: So there are basic --

QUESTION: So he gets basically tenure, and can be discharged only for cause --

MR. MARTIN: That's right.

QUESTION: -- and he gets to participate in a retirement system and so on, that the other employees, who are employees at will, I guess --

MR. MARTIN: The employees at will, non-classified employees also have access to retirement system; but they have no tenure in terms of their dismissal.

QUESTION: On job security.

MR. MARTIN: That's true.

QUESTION: Can an employee say, I'm sorry, I don't want to be a classified employee?

He has no choice, the individual employee, does he?

MR. MARTIN: He has a choice in terms of where he applies to work.

QUESTION: Yes. But only that.

MR. MARTIN: Yes.

QUESTION: Mr. Martin, I understand it's agreed that the Personnel Board has the authority to promulgate regulations --

MR. MARTIN: Yes, they do.

QUESTION: -- and in the Appendix you have, as I read it, only one regulation, that's 1641, that deals with the substance of the issue here today. Does this mean that counsel are in agreement that no other regulation is relevant to this case?

MR. MARTIN: No, I don't believe so, Mr. Justice. Specifically, at the three-judge panel level, it was brought out that this constitutional attack included only the statutory language, that the rules enacted by the Board were not included in this attack. And on that point, since we're dealing with the facial invalidation problem, the rules that have been enacted by the Board in regard to this area were not looked at or included in terms of the record.

QUESTION: Are they published and available generally?

MR. MARTIN: Yes, they are. There is a publication of the, of all the rules of the Board, which are issued to all the agencies and employees.

QUESTION: Well, aren't the rules some evidence of what the Act means?

MR. MARTIN: Yes, they are.

QUESTION: Well, how could you deal very sensibly with constitutionality without knowing what the Act means, and looking at the evidence about what it means?

MR. MARTIN: Well, the Personnel Board, even though they have supported the national rules and regulations in

further defining the prohibitions in the Section 818, they have not extensively done so. The Act has only been in effect 14 years, --

QUESTION: Well, they've had to pass on it, you'd think they would be relevant. The adjudication is on constitutionality.

MR. MARTIN: We can make those available to the Court, if they desire to look at it.

MR. CHIEF JUSTICE BURGER: That might be useful; would you do that?

MR. MARTIN: Yes, I will.

QUESTION: Well, the three-judge court didn't have access to that, did they?

MR. MARTIN: They had access to the one that was in the record. But they did not have access to all of them, since the plaintiffs, appellants here, particularly noted that they were not contesting those rules or regulations, just the prohibitions.

In conclusion, I'd like to point out to the Court that Oklahoma has taken the prophylactic approach of Mitchell. And we feel that this is the only practical way of combatting the evil that is sought to be prohibited. An all-inclusive approach of setting out all the conduct that is to be prohibited by statute is impossible; a narrowing construction of the statute would not have the effect of combatting the evils

that are sought to be prohibited.

Now, if the prophylactic approach of Mitchell is valid, whether it's based upon a rational test, vagueness test, or the compelling governmental interest test with the least alternative restrictive test. And we feel that the Court should sustain the lower court's holding that said prohibitions are constitutional.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Buckingham, I have a question or two if you have a moment longer.

REBUTTAL ARGUMENT OF JOHN C. BUCKINGHAM, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. BUCKINGHAM: Yes, Your Honor.

QUESTION: I suppose it can be assumed, or at least let's assume it anyway, that although there were some employees who assisted this Commissioner, under whose general jurisdiction they worked, there were these people who helped him get re-elected, there may have been others who did not help him get re-elected; that's a reasonable assumption, isn't it?

MR. BUCKINGHAM: Yes, sir, it is.

QUESTION: Is it a reasonable assumption for the Legislature to think that they want to protect employees from being urged by the Commissioner to engage in political activity?

MR. BUCKINGHAM: Very reasonable. Very reasonable,

Your Honor.

QUESTION: And perhaps those who are requested and declined might not be so favored if the Commissioner got re-elected. It's a possibility; I'm not suggesting it is a fact. It's merely a possibility that the Legislature might have taken into account, is that right?

MR. BUCKINGHAM: Yes, sir. I'll agree with you, yes.

QUESTION: So that that would tend to sustain the Attorney General's view that the purposes were prophylactic, or, to take Mr. Justice White's term, to insulate them from this kind of an influence?

MR. BUCKINGHAM: Yes. We do not contest the purpose and the aim and the object. What we're saying is, how it was accomplished. What we're saying is that in the particular statutes that are involved, they are too broad --

QUESTION: Well, are you challenging it as applied here to people who solicited money, received campaign contributions, and distributed campaign material?

MR. BUCKINGHAM: What I'm saying, sir, that with regard to the statute that is involved, itself, since the jurisdiction of the court was aimed at the statute itself, insofar as its overbreadth and vagueness were concerned,

QUESTION: Should anybody who is able to read have had any doubt that this statute prohibited the kind of activity involved in this particular case?

MR. BUCKINGHAM: Well, if we are to assume that we're talking about subscriptions and receipt of money, then I would say that you have to agree with them.

QUESTION: That is what's involved in this case?

MR. BUCKINGHAM: Yes. So far as the charges, I believe, if the Court please, that these are charges that go a long way, or insofar as having action on those charges, these are the allegations that are named against the employees. Now, I don't want the Court to feel that by virtue of us arguing the case that we have at all admitted at all there is --

QUESTION: No, no. We're merely talking about allegations, which you concede would be proper grounds for a State to establish prohibitions, and that if they were found guilty of them, they could properly be disciplined.

MR. BUCKINGHAM: Yes, sir. Most certainly. We think that that type of conduct is what was obviously aimed at, and what we're trying to do, insofar as any kind of proscription of these rights; but what we're saying is, let's not take all the rights that they have away, with regard to political expression. The statute -- a statute could be enacted and could be drafted, let's say, from the positive point of view, permitting them to engage in certain partisan political activity on a voluntary basis, which would give them an exercise of those rights guaranteed to them by

the First Amendment.

We're saying that under our statute they're not granted these rights.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:04 o'clock, p.m., the case in the above-entitled matter was submitted.]