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In the

Supreme Court of the United States

UNITED STATES CIVIL SERVICE COMMISSION, et al.,

Appellants,

vs.

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, et al.,

Appellees.

No. 72-634

Washington, D. C.
March 26, 1973

Pages 1 thru 47

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES CIVIL SERVICE COMMISSION, et al., Appellants,	
v.	No. 72-634
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, et al., Appellees.	

Washington, D. C.,

Monday, March 26, 1973.

The above-entitled matter came on for argument at 11:47 o'clock, a.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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice.

APPEARANCES:

ERWIN N. GRISWOLD, ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C. 20530; for the Appellants.

THOMAS C. MATTHEWS, JR., ESQ., 1320 Nineteenth Street, N. W., Washington, D. C. 20036; for the Appellees.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 72-634, United States Civil Service Commission against the National Association of Letter Carriers.

Mr. Solicitor General.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. GRISWOLD: May it please the Court:

This case is here on a direct appeal from a decision of a three-judge district court in the District of Columbia. A majority of that court has held unconstitutional the basic provision of the Hatch Act enacted by Congress nearly 34 years ago, and held to be constitutional by this Court in its decision in United States v. Mitchell, in 330 U. S., decided in 1947.

The present form of the statute, as it now appears in the United States Code, appears in the opening portion of the government's main brief on pages 2 and 3.

In some ways I hesitate to put those pages before the Court, because I think that the statute as it now appears in the Code is somewhat misleading in the light of its legislative history; and I will develop that legislative history in my argument.

But in order to get the setting of the case, I call attention to the statute as it now appears in the United

States Code, it forbids two sorts of activities in these terms, and this is about the middle of page 2:

"An employee in an Executive agency or an individual employed by the government of the District of Columbia may not:

"(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or

"(2) take an active part in political management or in political campaigns."

Now, it is the second which is primarily involved in this case, and I would then call attention to further provisions in the statute on page 3 -- well, before I turn to page 3, let me go ahead with the following portion on page 2, immediately following what I just said:

"For the purpose of this subsection, the phrase 'an active part in political management or in political campaigns' means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil SCrvice Commission under the rules prescribed by the President."

The further portions of the statute on page 3 contain qualifications and limitations, such, for example, as it does not apply to nonpartisan elections, and there are

provisions to the effect that an employee retains the right to vote as he chooses and to express his opinion on political subjects and candidates.

The plaintiffs in this case, in the court below, are a federal employees' postal union, certain individual federal employees who assert that they want to do various things or have done certain things and fear prosecution, and local Democratic and Republican committees.

The suit was brought as a class action, and sought a declaration that the Act is unconstitutional and an injunction against its enforcement.

This was granted by the district court, in an opinion by Judge Gesell, with Circuit Judge MacKinnon dissenting.

The majority accepted the appropriateness of the governmental objective of the Hatch Act, but felt that the statute was defective in the way it sought to reach this objective. In particular, the court focused on the portion of the statute which referred to the determinations of the Civil Service Commission made prior to the date that provision was enacted; that is July 19th, 1940.

The court held that this definition required federal employees to consider, as a guide to their political conduct, the entire body of pre-1940 administrative rulings, which the court said, and I quote, "were rigidly incorporated into the Act."

Now, we would suggest that that was a wooden and indeed a perverse construction of the Act. The Court felt that these rules often proscribe constitutionally permissible conduct and were inconsistent with each other and with language in the Hatch Act itself.

The court further concluded that no constitutionally acceptable mechanism was provided for reconciling the inconsistencies, and it rejected the administrative construction placed on the statute by the Commission's decisions and regulations, holding that Congress conferred no power on the Commission to clarify or define the statutory prohibition.

On this basis, the court concluded that the statute was both overly broad and impermissibly vague, with the consequence that it had a chilling effect, thus bringing in all three of the phrases which always come into these cases, which was not permissible under the First Amendment.

The majority recognized that this Court had upheld the statute in the Mitchell case. It said, however, that the Court had left open the question raised by the incorporation-by-reference provision of the statute, and it held that the Mitchell decision was, quote, "inconsistent with subsequent decisions delineating First Amendment freedoms," close quote; and these decisions, it said, coupled with changes in the size and complexity of the public service, place Mitchell among

other decisions outmoded by passage of time.

Now, Judge MacKinnon in dissent concluded that the statutory reference to Civil Service Commission decisions did not incorporate all pre-1940 decisions but only those not inconsistent with the other provisions of the Act, and with evolving concepts of First Amendment rights. On this basis, he concluded that the federal employee could ascertain, with reasonable precision what sorts of activities are prohibited, with the result that the statute is not impermissibly vague in the constitutional sense.

The problems arising from political activities of government employees have been a matter of concern since the adoption of the constitution. Brief summaries of this historical background are found in the appendices to both main briefs in this case.

In summary, experience has shown that there are at least three types of problems in addition to the desire and effort to have a merit system rather than a spoil system of government employment.

Now, first, the question of the employee's time, of his using his working time to work for the government and not for something else. I don't think that that is really the most important aspect of the statute.

Second, the problem of the development of political machines through the use of government employees in political

campaigns. We've had a great deal of history of that.

And finally, there is the question of the protection of the employee against coercion and exploitation by his governmental and political superiors.

Out of this background, the Civil Service Act was passed in 1883, ninety years ago. Within a few months after the statute was passed, President Arthur promulgated the original Civil Service Rules, of which the principal one has ever since been known as Civil Service Rule I.

A few years later, Theodore Roosevelt became the Civil Service Commissioner, an office which he held from 1889 to 1895. And some ten years later, when he was President, he issued Executive Order No. 642, in which the basic language with which we are now concerned appears in an official document having some legal force for the first time.

I may say that this language, which is quoted at the bottom of page 14 and top of page 15 of our brief, had appeared in a report of the Civil Service Commission in 1894, when Theodore Roosevelt was the Commissioner, and when he became President he put it into an Executive Order.

"No person in the Executive Civil Service shall use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. Persons who, by the provisions of these rules are in the competitive classified service, while retaining the right to

vote as they please and to express privately their opinions on all political subjects, shall take no active part in political management or in political campaigns."

And that was been in effect, in one form or another, under the Executive Order and later by Act of Congress, now for two-thirds of the century.

Civil Service Rule I was immediately amended to contain this language, and this continued in effect without change until the Hatch Act was passed in 1939.

From 1886 until the enactment of the Hatch Act, the Commission decided more than 2600 cases involving alleged political activity in violation of Civil Service Rule I.

Thus, when the Hatch Act was enacted, Civil Service Rule I had a well-defined and generally understood meaning, although there were, of course, borderline situations where there could be uncertainties.

MR. CHIEF JUSTICE BURGER: We will resume at that point.

[Whereupon, at 12:00 o'clock, noon, the Court was recessed, to reconvene at 1:00 o'clock, p.m., of the same day.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General, you may resume.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

ON BEHALF OF THE APPELLANTS - Resumed

MR. GRISWOLD: I had been dealing with, very concisely with the history under the Civil Service Act, for the 55 years preceding the enactment of the Hatch Act in 1939.

Prior to the enactment of the Hatch Act the prohibition against political activity had applied to persons in the competitive classified service. What the Hatch Act did was to extend these restrictions to all federal employees, with a few exceptions.

Now, the Hatch Act, as congressional statutes go, is a fairly short and simple one. It is about two and a half pages long in the statutes at large, it's title is "An Act to prevent pernicious political activities." And section 9(a) of the Act, as passed in 1939, and I think it is very important to get in mind the chronological progression by which the present statute developed, including the progression within Congress by which the provisions got into the statute as the various parts were enacted.

We customarily talk about "the" Hatch Act, as if it was one thing; whereas there were two separate primary

enactments, one in 1939 and one in 1940, and there have been amendments since.

Now, Section 9(a) of the Hatch Act, enacted in 1939, and this is quoted below the middle of page 17 of our brief, provided that "no officer or employee in the executive branch of the Federal Government" -- now, that's not limited to the competitive service -- "or any agency or department thereof, shall take any active part in political management or in political campaigns."

And the same section also made a further change in the prior existing rule, in that it struck out the word "privately" as it had appeared before then. And this is quoted at the top of page 18 of our brief. It read, from the time the Hatch Act was enacted, "All such persons shall retain the right to vote as they may choose and to express their opinions" -- and it used to say "privately", but "privately" is now taken out -- "to express their opinions on all political subjects."

When President Franklin Roosevelt signed the bill, he suggested that it be extended to cover certain State and local government employees. And, as a result, in less than a year, Congress took up amendments to the Hatch Act. This is a rather more extensive act, it's some five pages long in the statutes at large. Much of it is given over to provisions which made the Act applicable to State employees who were paid

out of federal funds. And in connection with that, Senator Hatch said in the Senate, and this is quoted on page 20 of our brief, "In approaching that task we have tried to follow as nearly as possible the exact language of the act we passed last year, which, in turn, was the exact language of the rule of the Civil Service Commission which has been in effect more than 50 years; and that language was originally chosen because it had been in effect in this country so long and was so thoroughly understood."

In other words, the objective was to avoid vagueness, to project a provision which was thoroughly understood.

The bill as it was introduced, that is, this is the bill for the 1940 Session, included a provision in Section 15 of the bill which authorized the Civil Service Commission to make regules and regulations defining the phrase "active part in political management or in political campaigns".

However, this encountered resistance, in substantial part, I may say, from Senator Minton. There was apparently some fear that the Commission, by exercising rulemaking powers, would extend the provisions of the statute. And as a result of this criticism, Senator Hatch submitted a substitute, and this was eventually enacted.

This appears at the bottom of page 21 of our brief, and I would like to read it because in many ways this is the heart of this case.

QUESTION: Is the 1940 Act the one that extended this to the States?

MR. GRISWOLD: Yes, Mr. Justice. The 1939 Act did not apply to the States; the 1940 Act extended it to the States and also made some further amendments of which this provision in Section 15 is one which is very important here.

QUESTION: Would that Act, the 1940 amendment, reach people primarily such as those working under the Social Security Act, Unemployment Compensation, where there are federal grants?

MR. GRISWOLD: Yes, Mr. Justice. I think -- I'm not sure about Social Security, because I think they are federal employees; but the Unemployment Insurance is State-administered but federally financed, and it reached a sizable number of State employees who were paid under federal appropriations or federal grants.

QUESTION: But the welfare programs are under State supervision generally, aren't they, under Social Security --

MR. GRISWOLD: Yes, but it's largely paid for out of the federal money.

Now, Section 15, which was enacted in 1940, says:

"The provisions of this Act which prohibit persons to whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed to prohibit the same activities on the part of such persons as

the United States Civil Service Commission has heretofore determined" -- and here are the crucial words; and, incidentally, on the following line "of the passage of this act" should have been in italics too -- "heretofore determined are at the time of the passage of this act prohibited on the part of employees in the classified civil service of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns."

Now, this language is verbally different from what is now found in the United States Code, and that I think has led to misunderstanding and is a considerable part of the explanation of the decision below.

I would point out that the respondents always quote the Code language and never quote this language; whereas, my argument is that this language, which Congress enacted in 1940, is and remains the controlling language in determining what Congress actually meant and how the statute should be construed.

Now, the difference is simply that what Congress enacted was "as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited", and what the editors of the United States Code, in 1966, and I believe that they are esteemable employees of the West Publishing Company in Chicago -- in St.

Paul, they do a very fine job but they don't make the policy determinations by Congress.

What Title 5 says, and as quoted on pages 2 and 3 of our brief is that it means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940. Now that means anything that was at any time prohibited, whereas what Congress said was those things "which are now prohibited" on the date of the enactment of the Act.

Now, there are two significant elements in the legislative history in connection with the adoption of Senator Hatch's amendment. You remember, his purpose was to make it definite rather than giving an open-ended rulemaking power to the Commission. Senator Hatch had prepared and circulated and printed in the Congressional Record a card which contained a concise summary of specific political activities which the Commission then considered to violate Civil Service Rule I.

I wish we had a copy of the card, but no one of them seems to have survived, but it is printed in the Congressional Record in about six inches of the Record. In a colloquy with Senator Brown, Senator Hatch agreed that the Senate was writing into the statute the interpretation of the Civil Service Commission, and shortly thereafter he clarified this by saying that the interpretation of Rule I, which was

incorporated into the statute was, quote, "the interpretations which appear on the card", close quote.

And following this discussion, Senator Hatch's version of Section 15 was passed.

Senator Hatch also introduced into the Congressional Record a section of the Commission's then current Political Activity pamphlet, entitled, Particular Types of Prohibited Activities. This is a portion of the item which appears in the Appendix, beginning at page 89 and running through page 116, thus the material was available to the Senate when it approved the entire bill. Section 15 was not disturbed by the House. It then came before the Senate again on the conference report, and was enacted without further change.

QUESTION: Mr. Solicitor General, I gather from your brief that in 1966 the codification substituted the July 19th, 1949; that wasn't done by West, was it?

MR. GRISWOLD: The editing was done by West, Mr. Justice. It was passed by Congress, of course. But this has been the history of these provisions. They are enacted in various parts and then finally they're consolidated into a provisional law which can be shown to be different from the real, and then they're finally enacted into positive law. And I -- it's off the record and I thought it was common knowledge; I think the preface to the volume actually says so, that the editorial work was done by the West Publishing Company.

QUESTION: Isn't that done under --

MR. GRISWOLD: Or Edward Thompson Company, which I think is a subsidiary of West.

QUESTION: But isn't that done under a contract? They're employed by the Federal Government.

MR. GRISWOLD: Yes. Yes, Mr. Justice.

QUESTION: And they aren't working in independent entity?

MR. GRISWOLD: No, Mr. Chief Justice. They do it by arrangement with the, I believe the Committee on the Judiciary of the, of both houses of Congress. It's -- I'm not suggesting anything inappropriate or --

QUESTION: For all practical purposes they're federal employees while they're doing it, aren't they?

MR. GRISWOLD: No, Mr. Justice, Mr. Chief Justice, I --

QUESTION: Under contract.

MR. GRISWOLD: -- I don't think so.

QUESTION: Well, I don't mean federal employees --

MR. GRISWOLD: Even if they were, I don't think it makes a great deal of difference. They are not members of the House or Senate.

QUESTION: But, put it this way: they're comparable to staff members employed by the Congress.

MR. GRISWOLD: They are very closely comparable to

the staff members, no doubt about that. And it was in 1966, 26 years after Section 15 was enacted, that the present form of the statute first appeared.

But in that connection I would like to call attention to the Senate Committee Report at the time, and here again this is standard in these provisions, this is at the bottom of page 26 of our brief,

"Like other recent codifications which have been previously enacted into law and which will eventually result in the enactment of all 50 titles of the United States Code, there are no substantive changes made by this bill enacting title 5 into law."

It's perfectly plain that Congress did not contemplate, when that was passed, that they changing the law, Indeed, if they were changing the law, it would mean, I think, that Congress was then enacting into the law, by incorporation by reference, provisions of the Civil Service Commission decisions before 1939, before 1940, 26 years previous, which were inconsistent with the law which Congress had passed and there seems to be no reason this Congress would have taken such action.

Now, that's the legislative picture. But Congress didn't legislate in a vacuum. Both prior and subsequent to the passage of the Hatch Act, the Civil Service Commission has carried out extensive administrative activities and has made

numerous publications.

In 1939 they published a pamphlet on Political Activity, and it was a portion of that which Senator Hatch placed in the Congressional Record. There were several subsequent editions. In 1970 the Commission issued regulations, acting under the Administrative Procedure Act, which specified in detail particular activities which the Act permits and which it prohibits.

These specifications are a summary of the agency's interpretations of porhibited political activity contained in the pamphlets. They are set forth on pages 71 to 74 of the Appendix to our brief. They list 13 specific kinds of activity in which an employee may engage and 13 types of activity which are prohibited.

Congress has made no significant change in the Hatch Act since its enactment.

In 1966 Congress established a Commission on Political Activity of Government Personnel, and this committee made a report in 1967, with a number of recommendations. Several bills have been introduced in Congress, but none has been enacted. And these developments are summarized at the close of the Appendix to our brief, on pages 76 to 78.

It should be noted that Congress has three times, in the past ten years, extended the Hatch Act to new groups of employees, most recently in 1971; thus making it fairly

plain that Congress finds no problem with the general tenor of the Hatch Act as it exists.

Now, as is well-known, this Court upheld the constitutionality of the Hatch Act in the Mitchell case, decided 26 years ago, involving federal employees, and in Oklahoma v. Civil Service Commission, decided at the same time, involving State employees.

In the opinion in the Mitchell case, the Court referred specifically to the contention that the Hatch Act violated the First and other Amendments on the ground that its prohibition was so vague and indefinite as to prohibit lawful activities as well as activities which are properly made unlawful. The Court refused to reach a facial attack on the statute for vagueness, holding that the conduct in question in the particular case before it was clearly constitutionally sanctionable.

In other words, the Court chose to proceed on a case-by-case basis. We think that approach was sound, and should be applied here.

Our contention is that the district court misconstrued the Hatch Act in holding it unconstitutional. We suggest that it was erroneous to construe the statute as incorporating willy-nilly all pre-1940 decisions of the Commission. If this is done, then it may not be too hard to move on to the positions of vagueness and overbreadth.

But this is not really a fair or practical construction of what Congress did and understood that it was doing when it enacted the statute which it did enact in 1940.

The intent of Congress was to incorporate only those rules that continued to represent viable interpretations of the restriction as of 1940, and this is the way the Commission has consistently administered the Act.

What the Congress did was to enact the common law of political activity.

Here it is important to examine the exact language, to which I've already made reference,"as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited." This, it seems to me, we have numerous parallels in our laws, the Assimilative Crimes Act incorporates criminal statutes of State, and that would include necessarily all the State decisions which construe those statutes and limits and modify or qualify or even hold them unconstitutional under some provisions; and a variation vintage in our laws are the statutes universally adopted to the effect that the law of this State consists of the common law of England as of a certain date, as thereafter modified.

Now, this means that no one, to this day, can be sure what the rule is right here in the District of Columbia, where the law of Maryland as it existed on a certain date has

been incorporated without going and using a lawyer's skills to find out what that common law is. He may be willing to take a chance and say, Well, it's all been changed since then and I don't have to worry about it.

But this is not an unusual type of provision.

The decisions of the Commission were summarized on the card which had been prepared by Senator Hatch; they were also covered by the report which the Commission has put out, and has continued to put out. The statute, including the 1940 amendments, gave certain rights to employees which had not previously been in effect. Surely Congress did not, by its incorporation provision, intend to enact into law any previous rulings which were inconsistent with these new provisions.

Finally, we suggest that the district court erred in failing to give effect to the long continuing construction of the statute by the Civil Service Commission.

The Commission has not only made decisions under the Act, as it has been required to do in administering the Act, thousands of them, but it has also continuously put out pamphlets giving its interpretation of the Act, and finally, in 1970, in a somewhat more formal way, it issued Regulations which have been published in the Code of Federal Regulations.

The Civil Service Commission is constantly operating in this area. Any employee may obtain an advisory opinion

from the general counsel of the Civil Service Commission; by publishing regulations giving its interpretation of the statute, the Commission has imposed standards on itself from which it is not free to deviate in particular cases. The Commission has specifically listed common political activities in which federal employees may engage.

No doubt there remains some uncertainties, but they are confined to a relatively few, uncommon or borderline situations. And these arise out of the nature of the subject matter.

Now, one of the areas where a problem has arisen is with respect to Letters to the Editor. The Commission first ruled that Letters to the Editor violated the Act. A district court in the District of Columbia overturned that, or decided in favor of the claimant. Our friends on the other side cite this as a situation where the Commission has not complied with the decisions of the Court.

My interpretation is to the contrary. My interpretation is that the Commission has sought very hard to recognize that the writing of a Letter to the Editor does not violate the Act, but that the writing of a Letter to the Editor along with other activities or in such a way that it amounts to a campaign does violate the Act.

Now, the places in between can be very close, but the law is full of line-drawing problems.

We contend that the statute is neither vague nor overbroad, and that in these circumstances the district court erred in striking the statute down on its face.

Even if there is uncertainty in the Hatch Act in some parts, it does not follow that the proper remedy is facial invalidation, which results in wholesale elimination of much that is clearly valid and necessary to the maintenance of an impartial civil service.

If there are constitutionally objectionable aspects to this statute, they may be eliminated without striking down the entire statute in every application.

When the Hatch Act was passed in 1939, it included a comprehensive separability clause, applicable not only to each provision but to each application of the statute. And this found its way into the United States Code. But here again, when Title 18 of the United States Code was enacted into positive law in 1948, the separability provision was repealed as unnecessary.

But the congressional intent reflected by the original provisions should be respected.

And finally, we contend that the basic holding of the Mitchell case, that Congress may constitutionally prohibit active partisan campaigning by government employees should not be reconsidered in this case. The Mitchell case has become part of the fabric of our constitutional law. I think it can fairly

be said that it is -- has proven itself by reason of the fact that it has worked.

If there are matters of detail which were not decided in the Mitchell case, if there are particular portions of the Commission's regulations or particular applications of the prohibition which raise undecided questions, those matters are best left to resolution on a case-by-case basis in the context of specific alleged violations.

The Court should leave Congress some room to move around, in this important and difficult area.

For these reasons, we submit that the judgment of the district court should be reversed, and the complaint dismissed.

MR. CHIEF JUSTICE BURGER: Mr. Matthews.

ORAL ARGUMENT OF THOMAS C. MATTHEWS, JR., ESQ.,

ON BEHALF OF THE APPELLEES.

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

The real question in this case is the impact on ordinary, intelligent government employees of a ban against their active political management and campaigning.

All three judges below read Section 15 as incorporating all three thousand pre-1940 rulings. And to that I would cite for the majority page 4a of the Jurisdictional Statement, and for the dissent page 38a of the Jurisdictional Statement.

The judges below disagreed only as to whether so read the statute was vague and overbroad.

As to the vagueness issue, we readily accept the formulation in the government's reply brief that the question is, quote, "whether individuals can with reasonable facility inform themselves of the principles that regulate their conduct", end quote. That appears on pages 10 and 11 of the government's reply brief.

The shifting positions taken by the Commission over the nearly 35 years since passage of the Hatch Act underscored the immense difficulties of this task. Indeed, we find it highly significant that three days after congressional passage of the Act in 1939, and before the Act was signed into law, Senator Hatch wrote the Civil Service Commission and asked what they thought the Act meant.

That appears in the Appendix to the government's reply brief.

QUESTION: Would you agree, Mr. Matthews, that this type of statutory exercise is filled with inherent difficulties, the very problem is filled with difficulties?

MR. MATTHEWS: Yes, Your Honor, it is a difficult area in which to legislate, and a very delicate one, because of the rightsto expression and association that are at stake here. I agree that it is a difficult area. Not one that it would be easy to write a statute.

However, I think that there are alternatives to this, which are readily available and readily looked at by the Court. I wouldn't pick any one as being the right one, because that is the legislative function. But one was suggested in 1967 by the Commission on Political Activity of Government Personnel.

Now, 35 years after the Act is passed, for the first time in its reply brief the government tells us that -- and they use the word "interface" -- between the prohibition that lies at the core of the constitutional problem here, the prohibition against soliciting votes, quote -- and I am again quoting from the government's reply brief -- "is perhaps not as clear in some details as it would be, and the Commission is presently attempting to draft clarifying amendments to the regulation", end quote. That comes from page 9 of the government's reply brief.

When and how will we know what freedom of speech and association the Hatch Act forbids?

Turning to the incorporated determination, the government has filed with the Court ten copies of these determinations. These are they. They have also filed with the Court ten copies of a 1971 work called Political Activity Reporter; that Reporter did not contain a single pre-1940 decision. That only has the post-'40 decisions in it; the pre-'40 decisions are in a separate three-volume set that has

been filed with the Court.

Now, the government says that only those determinations which were effective on July 19, 1940, were what were incorporated. Yet there has been no mechanism for any employee to determine which of these determinations were in effect on July 19, 1940, and which were not. The Commission, prior to that time, never overruled a single determination. Subsequent to that time, it has never systematically gone through these determinations and said, This one is incorporated, This one is not incorporated.

We have no way of telling which ones are and which ones are not.

It is also highly significant that these determinations were made under a prohibition that is in the identical language of Section 9(a) of the Hatch Act. These were determinations made by the Civil Service Commission as to the meaning of the term "take an active part in political management or in political campaigns".

And when the Congress then interpreted, incorporated them by reference, they thought that they were defining and made no distinction -- there is no distinction at all in the legislative history of this Act as to which of these determinations are incorporated and which ones are not.

The Solicitor General closed by saying that there might be a few borderline situations where employees did not

know what they could do or what they could not do. Yet these borderline situations again lie at the core of political speech and association, the heart of the First Amendment guarantees.

The Solicitor General tells you that the interpretations of the Commission have been consistent, but he said that, in fact, incorporated determinations were consistent but only those that were viable were incorporated; he compared it to the common law incorporation-by-reference provision. But the question comes back to: How does the employee know? If an employee were to read through these 3,000 incorporated determinations, understand and memorize them all, he still wouldn't know what he could do and what he could not do.

One reason for that is that all of these incorporated determinations are prohibitions. There's not one ruling in there that a certain activity is permissible; all they published was when they took action against an employee.

Subsequent to 1940, in the Political Activity Reporter, there are a few scattered cases of permissible activity, but I have not found, in my study of the incorporated determinations, a single instance of a permitted activity.

The Solicitor General again used as an example one that he used, and only as an example, writing a letter to a newspaper on political subjects. We say that this is a

constitutionally very significant activity, and the Commission says that it did follow Judge Youngdahl's opinion in the Wilson case, which is cited in our brief, to the effect that the isolated writing of a signle letter to a newspaper urging or soliciting votes is permitted. Yet the Commission's 1971 regulation prohibits soliciting of votes.

There is nothing in the permitted list that says you can write a letter to a newspaper. In the prohibited list, it says that you cannot put an advertisement in a newspaper.

And they have distinguished, as our brief points out, in one dramatic case that we cite, the Massingham case, where a man urged voters to vote for his father for sheriff, where the Commission found that he had done it solely out of admiring affection for his father and not as part of any campaign. And they distinguished Judge Youngdahl's opinion in the Wilson case, and they criticized it, because, they said, it had not taken account of the incorporated determination.

There are other examples where the Commission has acted, not only in borderline cases but in other cases without going to the group activity concept which Judge Youngdahl, in the Wilson case, said was king.

One very good example of this is in the matter of Clarence L. Strong, which is found at Volume 1 of the Political

Activity Reporter, which has been filed with the Court, at page 893. This is a publication of 1971, in connection with the attempt to tell people what is prohibited and what is not prohibited.

In that opinion, the Commission held that the respondent, a city carrier at the Littleton, New Hampshire, post office, was charged with having participated in a political demonstration in front of the local Democratic Headquarters by carrying and displaying a large political sign, reading, "LBJ for the USA".

Respondent contended in his answer to the charges that he had never been active in politics, and that the incident involving the political sign was prompted only by his intent to annoy his wife who was a staunch Republican.

[Laughter.]

The Commission found that the respondent had violated the Act.

QUESTION: Was that Littleton, New Hampshire?

MR. MATTHEWS: Littleton, New Hampshire, Your Honor.

As to the legislative history of what was incorporated, we rely primarily on a colloquy with Senator Barkley, who was the Majority Leader at that time, and a staunch supporter of the bill.

At page 28 of our brief, we cite a colloquy between Mr. Barkley and a strenuous opponent of the Act, Senator Brown.

Mr. Barkley said, "Mr. President, the Senator has objected to section 15 in substance --"

Mr. Brown answered, "Strenuously."

Mr. Barkley said, "On the ground that we undertake to write into law all the hundreds and thousands of interpretations of the Civil Service Commission on all the cases they have had before them. In order to meet his objection, as I thought, I was suggesting that we do not write into the law their interpretations but write into the law their rule, which is almost identical with the rule which we set up in the law itself."

The context of this colloquy was that very shortly before it Senator Barkley had suggested that instead of the present language of section 15 they define the prohibition of section 9(a) by reference to the language of Civil Service Rule I and the existing card of Senator Hatch.

Senator Barkley's suggestion was never formalized into a motion. Instead, section 15 was passed in the form which he, a staunch supporter and Majority Leader, understood to incorporate, quote, "all the hundreds and thousands of interpretations of the Civil Service Commission on all the cases they have had before them."

Again, Senator Barkley had no way of distinguishing between those hundreds of thousands of interpretations which were viable on July 19, 1940, and those which were no longer

viable.

QUESTION: Mr. Matthews, do you think that the average working man knows all the ramifications of what are unfair labor practices, what is prohibited activity and that sort of thing under the whole amalgam of labor legislation?

MR. MATTHEWS: No, I don't, Your Honor. I think, though, that there there are -- most of that activity, as I understand it; and I am not expert in the field of labor law -- involve union activity, and you have ready-available guides through the union. We have a well-known body of precedent from this Court, which is available to lawyers, and these determinations, Your Honor, are -- until this case, were never available to anyone. They were produced in this case, in response to an order of the district court to produce all of those determinations which are incorporated.

That order did not ask the Commission to produce determinations which were not incorporated. That's the first time that they have ever been available, outside of the archives of the Civil Service Commission in Washington.

A second distinction I would make with the labor cases is that here we are dealing with the core of political speech, we are dealing with a sweeping prohibition on any active political management and campaigning, that was enacted by a Congress that I do not believe really knew what all these determinations were, but where, in the labor field, they made

a calculated decision to the extent that there are infringements of speech and association in labor law.

QUESTION: Well, are you suggesting that with the ninety-year history of this, that has various statutes that were considered, were enacted from time to time, that the members through their committees and committee reports were not familiar with the impact of the existing limitations?

MR. MATTHEWS: The only evidence on that, Your Honor, is the Sheppard Committee report. In 1938, the Congress appointed a Select Committee to investigate election abuses by government employees. This committee was chaired by Senator Sheppard of Texas, and it engaged in investigations all over the country and came out with a two-part report in January of 1939, that was Senate Report No. 1 of the 84th Congress [sic; 76th] and that report contained only three mentions of voluntary partisan activity by government personnel. And in each one of those three instances, it found it to be above criticism.

It recommended the other prohibition on pernicious political activity, which are contained in sections 1 through 8 and the first sentence of section 9 of the Hatch Act. It made no recommendation regarding any ban on voluntary partisan activity by government personnel.

QUESTION: On this point, the Solicitor General says if you want opinions, you just write to the General Counsel of

the Civil Service Commission and you get an advisory opinion.

MR. MATTHEWS: Yes, Your Honor, but what if he gives you the wrong one? Are you going to put your job at stake -- if he tells you you can't do it, and if he is wrong, the only way that you could test that would be to violate his opinion and go to court, at the risk of losing your job.

QUESTION: Your whole argument is that nobody knows what the Commission is thinking. That's one way of finding out, isn't it?

MR. MATTHEWS: Yes, Your Honor.

QUESTION: Now, this book here, you say is not available?

MR. MATTHEWS: These books, I assume now, I do not know, that if you ask the Civil Service Commission, they might give you a copy; although, in our case, we had to pay for the copy.

QUESTION: And what was it? How much did you pay?

MR. MATTHEWS: I think it was 10 or 15 cents a page; I'm not quite sure, Your Honor.

QUESTION: Mr. Matthews, you say "these books", which book are you referring to?

MR. MATTHEWS: I tried to make that clear, Your Honor. There are two sets, ten copies of which have been filed with the Court. One is a blue-bound Political Activity Reporter, that contains within it post-1940 decisions of the

Commission. They have also filed mimeographed -- or I haven't seen the condition they actually filed with the Court, a set of the so-called Incorporated Determinations.

QUESTION: How about the availability of this blue book?

MR. MATTHEWS: I assume that's available in any library; I don't know. I've never checked into its availability, but it's published by the Government Printing Office, and I assume it's readily available.

The government also relies very heavily on a 1970 regulation, which contains 13 permitted activities and a list of 13 prohibited activities. And it says this is the authoritative construction of the Act, look at the regulation and you can find what's prohibited and what's permitted.

But if you look at that regulation, in the first instance you find that the list of prohibited activity is introduced by the clause, "include but are not limited to"; and if you look at the list of permitted activity, it says they're permitted "except as otherwise prohibited by law".

So that these two listings return you again right to the face of the statute. Nobody can rely on those lists, they do not purport to be exhaustive, they do not purport to be all-inclusive; they are simply illustrations of certain prohibited and permitted activity.

And as to one now, the soliciting of votes in support

of or in favor of the candidate, the government, for the first time, in its reply brief, now concedes that this may be confused and may bar people from expressing their opinion publicly and privately on political subjects and candidates; and they say they're rewriting the regulation now.

Thirty-five years is too long for this Court to sit and let them find what form of political expression and association shall be forbidden to millions of citizens of this nation.

Turning from the void for vageuness argument --

QUESTION: Is this, do you think, very, very different from the strictures that are put on licensees under the Federal Communications Act, for example? Can any radio or television station know in any absolute sense, in advance, what proportion of what particular type of program is going to be getting them into problems when they come up for renewal? Is there any clear body of law that defines that, is what I'm driving at.

MR. MATTHEWS: Well, --

QUESTION: Other than the fairness doctrine and decided cases?

MR. MATTHEWS: The fairness doctrine, and I believe there's one section, again of the Communications Act, that relates to --

QUESTION: The length of time; the equal time pro-

vision.

MR. MATTHEWS: The equal time provision, the fairness doctrine. But I would think that -- and again I'm not that familiar with all of the decisions of the Federal Communications Commission -- that a licensee could rest fairly assured that if he makes a good-faith effort to comply, that his license will be renewed. Perhaps I'm speaking out of turn, because I'm not an expert in this field of law; and I really cannot address myself well to your example.

QUESTION: But even the definition of the doctrine is -- leaves something to be desired in terms of absolute clarity, doesn't it? The fairness.

MR. MATTHEWS: Yes. But --

QUESTION: They must be fair.

MR. MATTHEWS: True. But there you have room for administrative interpretation. Here, with the Hatch Act, the Congress defined in Section 15 what was prohibited, it did not leave that open to the Civil Service Commission. Indeed, it unequivocally withheld from the Commission rulemaking authority.

Senator Hatch said, after two weeks of debate on the original rulemaking version of Section 15, remember the Solicitor General mentioned it, Senator Hatch first introduced a version of Section 15 that would have conferred rulemaking authority on the Civil Service Commission. After two weeks of

debate, he withdrew this in face of very strong opposition, much of it based on the ground that it would be an unconstitutional delegation of authority without sufficient limits to the Commission. It then enacted its own definition. This definition is binding. It is the determinations that are binding, not the Commission's regulation which bind it, "except as prohibited by law" or "include but are not limited to" really returns the employee to this whole body of incorporated determinations.

QUESTION: Mr. Matthews, I am not entirely clear as to your position with respect to the validity of regulations that are set forth on pages 4, 5, and 6 of your brief; they are 5 C.F.R. 733.111 and 122.

Do you accept those as valid, or do you challenge them?

MR. MATTHEWS: We challenge them only as void for vagueness and overbroad, as we challenge the statute. We do not challenge directly, because it is unnecessary to the decision in this case, the authority of the Civil Service Commission to have issued these regulations, Your Honor.

QUESTION: Overbroad and vague.

MR. MATTHEWS: Yes, Your Honor, because of the "includes but are not limited to" language, because of the overlaps, because of the permitted language which says, "except as prohibited by law". We say that these regulations do

nothing to cure the vagueness or overbreadth of the underlying statute; and well they couldn't, because the [Congress] Commission withheld rulemaking authority from the Commission.

These are simply, as I see it, a benign assurance of a prosecutor. It's his statement of his intent of future prosecutory intent, and nothing more; and as long as the basic statute is overbroad and void for vagueness, the regulations must be.

QUESTION: So that no regulation of the Commission, under your view, would have the force and effect of law?

MR. MATTHEWS: That is right, because of the history of Section 15, the Commission could do no more than say how they intend to apply the statute. It's powerless to do anything more. And I have not heard the -- my brother argue to the contrary.

QUESTION: It has no rulemaking authority whatever?

MR. MATTHEWS: It has no rulemaking authority whatever. I think that is crystal-clear from the legislative history. They wanted to give it to them. Two weeks went by, Senator Hatch said we're not going to give it to them, we don't give them any more powers to interpret further in the future.

Those are the words of Senator Hatch; they're quoted in our brief.

So that they have no rulemaking authority. This Congress defined the prohibition, they defined it by reference

to this mass of material, and they bound the Commission into that. The Commission has so stated.

I would like to -- the Commission's own and consistent view is best given, I think, in a book written by a Commission Hearing Examiner in 1949, which is quoted at page 25 of our brief. I will not read it now, but I do invite your attention to it. He talks about a "mandatory principle of stare decisis". He says that but for Section 15 there would have been opportunity for logically reasoned conflicting arguments as to what falls within the scope of the prohibition.

But no such leeway exists in face of the mandatory Section 15.

QUESTION: Mr. Matthews, what if the Court interpreted whatever it was that Congress sought to proscribe the activity within the major product. Suppose the Court said, Well, what kind of example to not particularize all these things on pages 4 and 5, but it was necessary to proscribe the things on pages 5 and 6?

MR. MATTHEWS: Your Honor, I think you would be running right into the teeth of Section 15, because in Section 15 Congress said, We mean to proscribe everything that has been proscribed heretofore.

QUESTION: But let's assume you read everything that they intended to proscribe, and summarized it all like this. Let's just assume you did, whether you're right or wrong,

would there be anything technically wrong with that? It may be an erroneous reason of the past, but --

MR. MATTHEWS: I think that it would be invading the area left open to Congress. I think that in order to do that, you would have to be legislating rather than simply construing what the Congress has enacted.

QUESTION: Well, let's assume the Court had looked over everything that we think Congress was referring to, and we are now issuing an interpretative ruling, we are just going in and sweep up everything prior to 1940, and here's the way we do it.

Now, maybe it isn't law, maybe it isn't a regulation, but at least it would be the Commission's attempt to explain what all these things meant.

MR. MATTHEWS: Well, I think --

QUESTION: It may be wrong.

MR. MATTHEWS: It may be wrong, and I think that it also --

QUESTION: But that wouldn't mean that it was vague or overbroad.

MR. MATTHEWS: It might mean it was overbroad, Your Honor, because as --

QUESTION: Well, I mean not because it was -- not just because they attempted to explain what something meant.

MR. MATTHEWS: No, it wouldn't be overbroad just for

that reason.

QUESTION: It might be overbroad just on its face.

MR. MATTHEWS: Yes. I think it might be overbroad on its face, and I think that you overlook the principle that was stated by this Court last term in Grayned vs. City of Rockford, particularly footnote 5, where it says the Legislature must focus on the First Amendment rights that are to be proscribed, and the Legislature must determine --

QUESTION: Well, I said I wasn't -- what if the Court said this? What if the Court said, Well, we think that perhaps the law is overbroad, but we're going to narrow it so they can here interpret the law, here's what it means, here's what is proscribed and here is what is permitted.

MR. MATTHEWS: My first answer to you -- maybe I'm not understanding your question, Your Honor. My first answer to you would be I think you would be acting as a legislature rather than a court in doing so. Because you would not be expressing the intent of the legislature. The legislature here said, we want to --

QUESTION: So you really express it by striking it down. You are going to carry out the intent so faithfully that you are going to call it unconstitutional.

MR. MATTHEWS: The intent of the Framers of the Bill of Rights, there is what has to be carried into --

QUESTION: Not the intent of Congress?

MR. MATTHEWS: No, the intent of the Framers of the Constitution; when the Congress has not followed the mandate of the Constitution, then it becomes the Court's duty to strike it down.

QUESTION: This technique that Mr. Justice White was suggesting to you is one familiar in the tax field, for example, is it not?

Authoritative rulings.

MR. MATTHEWS: But there Congress has authorized. There is rulemaking authority in the Internal Revenue Service.

QUESTION: Well, I'm not talking about rulemaking, the Internal Revenue Service does a lot of things short of rulemaking that people pay quite a bit of attention to, do they not?

MR. MATTHEWS: Yes. But they have full power to interpret. It hasn't been withheld from them. The Congress didn't --

QUESTION: Well, has the power to interpret the Act been withheld, in that sense, from the Civil Service Commission?

MR. MATTHEWS: On that I would only have to quote to you what Senator Hatch said at that time. He said, We --

QUESTION: Well, then how can the Commission ever adjudicate cases? It has to have some standard to adjudicate by, it has to interpret the Act in order to make a judgment on

it.

It's bound to have authority to interpret the Act.

MR. MATTHEWS: True, and I perhaps --

QUESTION: It's bound to, by the process of making concrete decisions, to accumulate a body of law; right?

MR. MATTHEWS: Yes. But it is also able to change those interpretations tomorrow. It can adjudicate one case one way today and another case another way tomorrow. The only authority that the employee, the average employee can go to are the Incorporated Determinations, because that's what Congress said the Act meant. And the Commission is bound to follow out the will of the Congress.

QUESTION: Well, you're assuming that all cases that might arise are fungible and that the Commission, on your theory, would be denied making fine distinctions and drawing fine lines?

MR. MATTHEWS: I don't believe I go that far, Your Honor. I'm saying that if this is simply a guide to their interpretation, it binds them to the extent that there is something close or prototype there. But until you know what's there, you don't know what the fine distinction is going to be. You say, talk about the fine distinction, yes, I think they can make that. But in order to do it, the employee has to know, if there hasn't been this fine distinction made, he has to return to the basic source.

He is thrown back again on the Incorporated Determinations, because that was the way the Congress did it.

On the overbroad point, we've been discussing void for vageuness, they obviously are interrelated, as Mr. Justice Marshall saw last year in Grayned. But the real question on overbreadth is whether or not there is a compelling governmental interest that necessitates this deep and broad restriction on the exercise of political speech and association by this enormous and growing body of our citizens.

And we point out that the, both as to the legislative history at the time the Act was passed, Congress did not make the type of determination that more recent decisions of this Court has required it to make today, when it legislates in this delicate area.

Moreover, times have changed radically since 1939. As the Commission itself has found. And we consider it highly significant that the Commission itself, in 1967, in testimony before the Commission on Political Activity of Government Personnel, said that the statute was uncertain, it said that the statute was broad.

QUESTION: A committee of Congress said that?

MR. MATTHEWS: No, the Civil Service Commission said that, Your Honor.

QUESTION: I see.

MR. MATTHEWS: They said that in testimony before --

it's printed at pages 48 and 49 of our brief. I would like to emphasize the key paragraph, which begins at the top of page 49 of our brief.

"In essence, notwithstanding the present qualifying provision, the present language is somewhat broad and somewhat uncertain. It is broad in the sense that it could be construed to prohibit certain actities that may not be sufficiently detrimental to the neutrality, efficiency, or integrity of the civil service as to justify the infringement of individual political rights. It is uncertain in that it fails to define with clarity and precision the types of activities which are prohibited."

I say that that's the very test that the Court should apply to the statute; the Commission is here saying that they think, the Administrator thinks it fails those tests.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Matthews.

I think your time is used up, Mr. Solicitor General.

The case is submitted.

[Whereupon, at 2:03 o'clock, p.m., the case in the above-entitled matter was submitted.]