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Opinion No. 07-58

Constitutionality of proposed legislation limiting political activities of state public officials

QUESTIONS

1. Whether Senate Bill 1079/House Bill 544, which prohibits the comptroller, treasurer, secretary of state, commissioners and assistant commissioners from appearing at campaign events for any candidate in this state, is constitutional.

2. Whether Senate Bill 1622/House Bill 924, which prohibits the comptroller, treasurer and secretary of state from engaging in political activities for state and local candidates, is constitutional.

3. Whether Senate Bill 300/House Bill 172, which prohibits the comptroller, treasurer and secretary of state from making campaign contributions to or campaigning for candidates for the general assembly, is constitutional.

OPINIONS

1. While Senate Bill 1079/House Bill 544 is constitutionally defensible, the lack of a definition of what constitutes appearing in an "official capacity" might lead a court to find the legislation to be impermissibly vague.

2. The types of restrictions contained in Senate Bill 1622/House Bill 924 have, in general, been upheld by state and federal courts and, therefore, in our opinion are constitutionally defensible.

3. We believe that a court would uphold the restriction on political activities of the officials in Senate Bill 300/House Bill 172; however, we think that the bill should contain an explicit statement making it clear that these officials are not prohibited from "full participation in political decisions at the ballot box."

ANALYSIS

You have asked whether three separate proposed bills, all of which would limit the political activities of certain state officials (the secretary of state, the comptroller of the treasury, the state treasurer, commissioners and assistant commissioners), are constitutional. This Office has previously opined that proposed legislation prohibiting the three constitutional officers (secretary of state, comptroller and treasurer) from serving as an officer of a committee which must file a report under the Campaign Financial Disclosure Act and from soliciting funds on behalf of any member of the General Assembly would be constitutional. *See* Op. Tenn. Atty. Gen. 90-41 (March 27, 1990) (copy attached). Our opinion relied upon a line of cases in which the United States Supreme Court had held that governments may impose significant restrictions upon the political activities of their officers and employees that could not be placed upon the citizenry at large, provided that such restrictions are, of course, tailored to serve a compelling interest of the government. *See United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947); *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

In the first case, *United Public Workers v. Mitchell*, the United States Supreme Court addressed the constitutionality of the Hatch Act, which prohibited federal employees from taking an active part in political management or political campaigns. The *Mitchell* court upheld the Act, stating:

> It leaves untouched full participation by employees in political decisions at the ballot box and forbids only the partisan activity of federal personnel deemed offensive to efficiency. With that limitation only, employees may make their contributions to public affairs or protect their own interests, as before the passage of the act.

330 U.S. at 99, 67 S.Ct. at 569.

This decision was reaffirmed in the companion cases, *United States Civil Service Commission v. National Association of Letter Carriers* and *Broadrick v. Oklahoma*. In *National Association*, the Supreme Court recognized that

> the government has an interest in regulating the conduct and "the speech of its employees that differ(s) significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the (employee), as a citizen, in commenting upon matters of public concern and the interest of the (government), as an employer, in promoting the efficiency of the public services it performs through it employees."

413 U.S. at 564, 93 S.Ct. at 2890 (quoting *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968)). The Court went on to identify several of those important governmental interests sought to be served by limitations on political activities of government employees.

> A major thesis of the Hatch Act is that to serve this great end of Government--the impartial execution of the laws--it is essential that federal employees, for example, not take formal positions in political parties, not undertake to play substantial roles in partisan political campaigns, and not run for office on partisan political tickets.
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> There is another consideration in this judgment: it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.
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> A related concern, and this remains as important as any other, was to further serve the goal that employment and advancement in the Government service not depend on political performance, and at the same time to make sure that Government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs.

Id. at 565, 93 S.Ct. at 2890-91. After noting that the right to participate in political activities is not absolute, the Court stated, "We agree with the basic holding in *Mitchell* that plainly identifiable acts of political management and political campaigning on the part of federal employees may constitutionally be prohibited." *Id*. at 567, 93 S.Ct. at 2891.

While the *Mitchell* and *National Association* cases both dealt with the constitutionality of the Hatch Act as applied to federal employees, *Broadrick v. Oklahoma* specifically addressed the constitutionality of a state statute the prohibited civil service employees from "tak(ing) 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." 413 U.S. at 606, 93 S.Ct. at 2912. The Supreme Court held that this statute was not impermissibly vague, stating:

> Words inevitably contain germs of uncertainty and, as with the Hatch Act, there may be disputes over the meaning of such terms in [the state statute] as "partisan," or "take part in," or "affairs of political parties." But what was said in *Letter Carriers* is applicable here: "there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although

> the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest."

413 U.S. at 608, 93 S.Ct. at 2913-14 (internal citations omitted).

Since these decisions in *Mitchell, National Association* and *Broadrick*, both state and federal courts have upheld a number of statutes, ordinances and regulations regulating the political activity of state, county and city government employees. *See International Brotherhood of Electrical Workers v. St. Louis County*, 117 F.Supp.2d 922 (E.D.Mo. 2000) and cases cited therein. For example, in *Randall v. City of Cookeville*, the Sixth Circuit Court of Appeals addressed the constitutionality of a city ordinance that proscribed certain political activity of city employees:

> Employees may individually exercise their right to vote and privately express their views as citizens. However, no employee shall solicit political campaign contributions or engage in or actively participate in any City Council election or an[y] City political campaign.

991 F.2d 796 (6th Cir. 1993). The Court found that the this policy was "not so vague that 'men of common intelligence must necessarily guess at its meaning.'" *Id*. (citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

In our previous opinion, this office determined that, due to the nature of the responsibilities of the three constitutional officers and the fact that they are elected by the General Assembly, the involvement of these officials in the campaigns of a member of general assembly could be asserted as giving rise to a public perception of impropriety. The office further concluded that the need to avoid such a perception constituted a sufficiently compelling interest to support the narrow limitations on political activity proposed by the bill in question. As discussed above, research on developments since the release of our earlier opinion has not disclosed any reason to change this conclusion. Thus with respect to the three bills at issue, the question is whether they are narrowly tailored to support this compelling state interest.

Senate Bill 300/House Bill 172 provides that the three constitutional offices "shall not make campaign contributions in support of or in opposition to any candidate for general assembly or participate in any way in any election campaign for any candidate for general assembly." This language is very similar to the language of the statute found not to be impermissibly vague by the Supreme Court in *Broadrick*, as well as the language of the city ordinance upheld by the Sixth Circuit in *Randall*, with one exception. Both of those regulations contained an explicit statement that the government employees were not restricted from exercising their right to vote or from privately expressing their views as citizens. While Senate Bill 300/House Bill 172 does not expressly prohibit the three constitutional officers from exercising these rights, we think that bill would be more constitutionally defensible if it contained an explicit statement making it clear that

these officials are not prohibited from "full participation in political decisions at the ballot box." *See Mitchell*, 330 U.S. at 99, 67 S.Ct. at 569.

Senate Bill 1622/House Bill 924, which is applicable only to the three constitutional officers (secretary of state, comptroller of the treasury and the state treasurer), provides that these public officials shall not:

> (1) Be an officer of any political party or political committee;
> (2) Offer or make any campaign contribution to any candidate for election to any office of state government or any political subdivision thereof;
> (3) Knowingly engage in any activity to directly or indirectly generate, collect or distribute campaign contributions for the benefit of any such candidate;
> (4) Permit the [official's] name to be used in support of or opposition to any such candidate; or
> (5) Otherwise participate in the election campaign of any such candidate.

The bill further provides that these prohibitions shall not be construed to prevent an incumbent constitutional officer from: "1) Casting a ballot in any election in which the . . . [incumbent officer] is a qualified voter; or (2) Requesting the members of the general assembly to vote for the incumbent's reappointment."

Unlike Senate Bill 300/House Bill 172, this bill does contain an express statement that it is not to be construed as preventing the officials from exercising their right to vote. Moreover, the types of restrictions contained in Senate Bill 1622/House Bill 924 have, in general, been upheld by the courts.

Additionally, this bill extends the restrictions on the political activities of the constitutional officers to local elections. Thus, there is an issue of whether there is also a compelling state interest with respect to the involvement of these state officials in the campaigns of local public officials. These officials all have statutory duties that can have a significant impact upon local elected officials and candidates for local office. For example, Tenn. Code Ann. § 2-11-201 (a) provides that the secretary of state shall appoint the coordinator of elections, who shall serve at the pleasure of the secretary of state and for such compensation as the secretary of state determines. The state coordinator of elections is then charged with, among other things, the duty of generally supervising all elections, advising election commissions, primary boards and administrators of elections as to the proper methods of performing their duties and authoritatively interpreting the election laws for all persons administering them. *See* Tenn. Code Ann. § 2-11-202 (a). Pursuant to Tenn. Code Ann. § 9-4-704, the state treasurer is given control of all funds in the local government investment pool, which was established by the General Assembly to provide maximum investment opportunities for idle public funds, "thereby reducing the need for imposing additional taxes." *See* Tenn. Code Ann. § 9-4-701. Finally, the comptroller of the treasury is authorized to "[a]udit the accounts of all

county and other local governments," as well as "monitor the performance of school boards, directors of schools, school districts, schools and school personnel in accordance with the performance standards set out in the Education Improvement Act or by regulations of the state board of education." *See* Tenn. Code Ann. § 4-3-305(a)(5) and § 4-3-308(a).

In light of these and other duties of these public officials, we think that their involvement in the campaigns of local public officials could also be asserted as giving rise to a public perception of impropriety. *See also Reeder v. Kansas City Board of Police Commissioners*, 733 F.2d 543, 547 (8th Cir. 1984) (Court upheld state statute prohibiting officers or employees of Kansas City Police Department from making political contributions to candidates for local, state and federal office, suggesting that "a contribution to a congressional candidate well might benefit the local politicians who have made common cause with that candidate."). Accordingly, the need to avoid such public perception would similarly constitute a sufficiently compelling state interest to otherwise support the restrictions on their political activities set forth in Senate Bill 1622/House Bill 924 with respect to both state and local campaigns.

The third bill, Senate Bill 1079/House Bill 544 provides that the secretary of state, the comptroller of the treasury, the state treasurer, as well as commissioners and assistant commissioners, "shall not appear in an official capacity at any campaign event for any candidate for office in this state." Of the three proposed bills, this bill places the narrowest restriction on the political activities of state officials and only prohibits them from appearing at campaign events for both state and local candidates "in an official capacity." For the reasons discussed above with respect to Senate Bill 1622/House Bill 924, the need to avoid a public perception of impropriety would constitute a sufficiently compelling state interest to otherwise support this restriction with respect to both state and local campaigns. We would note, however, that the bill does not define what constitutes appearing in an "official capacity." This might lead a court to find the legislation to be so vague that "men of common intelligence must necessarily guess at its meaning." *Randall, supra*.

Finally, this bill would extend the prohibition against "appear[ing] in an official capacity at any campaign event for any candidate for office in this state" to commissioners and assistant commissioners. Commissioners are appointed by the Governor and serve as the administrative heads of the departments to which they were appointed. *See* Tenn. Code Ann. §§ 4-3-112 and 4-3-121(a)(1). The officers and employees of the various departments are under the supervision, direction and control of the commissioners of their respective departments and are required to perform such duties as the commissioners may prescribe. Tenn. Code Ann. § 4-3-121(a)(2). These departments are charged with the administration, execution and performance of such laws as the General Assembly may enact. Clearly in the performance of these statutory duties, commissioners and assistant commissioners have significant interaction with both state and local elected officials. Thus, their involvement in the campaigns of state and local candidates could also be asserted as giving rise to a public perception of impropriety. It is, therefore, our opinion that the need to avoid any such public perception is a sufficiently compelling state interest to support application of the narrow prohibition in Senate Bill 1079/House Bill 544 to commissioners and assistant commissioners.

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