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Cooper v. Union Bank: Common Law Surviced the UCC

George W. Tenney

NOTES

Cooper v. Union Bank: Common Law Survives the UCC

During the period of approximately a year and a half, Bernice Ruff, a secretary and bookkeeper of a law firm, falsely appropriated a number of checks payable to the order of her employer and forged the necessary indorsements thereon. She cashed some of the checks and deposited the remainder to her personal account, but subsequently withdrew the entire amount of the deposits prior to the discovery of the forgeries. The employer brought an action in conversion under the Uniform Commerical Code section 3-419[1] against the collecting banks to recover the amounts of the forged checks which they had handled.[2] The collecting banks successfully defended the action on the basis of section 3-419(3), which, under certain circumstances, limits liability to the proceeds remaining in the banks' hands when the bank has acted in good faith and in accordance with a reasonable commercial standard. The lower court held that the defendant banks had acted in good faith and in accordance with reasonable commercial standards, and that since all checks had been cashed or deposited and subsequently withdrawn, the banks had no proceeds remaining in their hands. Therefore, in accordance with section 3-419(3), the lower court held that the defendant banks did not hold funds which could be recovered by the plaintiff. The plaintiff-employer appealed. *Held, reversed*: Uniform Commercial Code section 3-419(3) is inapplicable in a suit by a true ower (payee) against a bank which has converted a forged check. In contrast to the lower court's view, a collecting bank does not part with the proceeds of a check when it cashes and pays the check on a forged indorsement. The collecting bank, therefore, does have funds that a plaintiff may recover. *Cooper v. Union Bank*, 9 Cal. 3d 123, 507 P.2d 609, 107 Cal. Rptr. 1 (1973).

I. PRE-CODE COMMON LAW

The majority of cases litigated prior to the promulgation and adoption of the Uniform Commercial Code supported the rule that a collecting bank which honors a check with a forged or unauthorized indorsement and pro-

1. CALIF. COMM. CODE § 3419 (West 1964).

2. Suit was also brought against two of the payor banks, but they were absolved from liability on the common law defense of plaintiff's negligence in failing to discover the misappropriations. This defense is based on the theory that a reasonably prudent man would have discovered the wrongdoing after a period of time and failure to do so constitutes negligence. The trial court set this period of time at approximately six months. The particular checks drawn on the defendant payor banks were handled after this point. The defense of plaintiff's negligence was also available to the collecting banks, but the court found that seven of the twenty-nine checks were cashed prior to this date, *i.e.*, before the plaintiff was negligent. Since the collecting banks had no common law defense to an action brought for these seven checks, they attempted to invoke the statutory defense of § 3-419(3).

cures the proceeds thereof from the drawee is liable to the true owner of the check, unless he is barred from recovery by negligence, laches, or estoppel.[3] The courts have allowed recovery in both tort and contract, but regardless of which theory was utilized the end result has been consistent with this rule.[4] The court in *Jackson v. National Bank*,[5] after enunciating the principle that a bank is responsible to the named payee when it pays on a forged indorsement, explained that:

> No equitable considerations can be invoked to soften seeming hardships in the enforcement of the laws and rules fixing liability on persons handling commercial paper. These laws are the growth of ages, and the result of experience, having their origin in necessity. The inflexibility in these rules may occasionally make them seem severe, but in them is found general security.[6]

In *Buena Vista Oil Co. v. Park Bank*[7] an oil company's secretary secured possession of a check made payable to the corporation and, using a rubber stamp, indorsed the corporation's name on the check, signing his own name as secretary. The secretary deposited the check in his own bank and the bank credited it to his personal account. When the corporation discovered the loss, it brought suit against the collecting bank which had collected the amount of the check from the drawee bank. Although the employee later made withdrawals from his account, the court held the bank liable to the corporation for the full amount of the check for money had and received.[8]

Most of the pre-Code cases were decided upon the rationale that a forged or unauthorized indorsement is wholly inoperative to pass ownership of the check, and, therefore, a collecting bank cashing a forged check does not acquire ownership by virtue of its possession.[9] Nor is a claim to ownership aided by describing the transaction as a purchase with consideration paid, since the payee remains the true owner.[10] Thus, when the collecting bank

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3. *See, e.g.*, Washington Mechanics Sav. Bank v. District Title Ins. Co., 65 F.2d 827 (D.C. Cir. 1933); Merchants Bank v. National Capitol Press, 288 F. 265 (D.C. Cir. 1922); Saf-T-Boom Corp. v. Union Nat'l Bank, 236 Ark. 518, 367 S.W.2d 116 (1963); Morgan v. Morgan, 220 Cal. App. 2d 665, 34 Cal. Rptr. 82 (1963); Buena Vista Oil Co. v. Park Bank, 39 Cal. App. 710, 180 P. 12 (1919). *See also* Annot., 100 A.L.R.2d 670 (1965).

4. Proceeding on a theory of money had and received, the court in Fidelity & Deposit Co. v. Fort Worth Nat'l Bank, 65 S.W.2d 276, 278 (Tex. Comm'n App. 1933), *judgment adopted*, stated that a collecting bank which accepts a check on an unauthorized indorsement acquires no title thereto and, upon collection from the drawee bank, holds the proceeds for the rightful owner who may recover from the collecting bank in an action for money had and received. Compare this to the court's argument in Zidek v. Forbes Nat'l Bank, 159 Pa. Super. 442, 48 A.2d 103, 104 (1946): "[W]here a bank receives a check bearing the forged indorsement of the payee, collects it and accounts for it to the depositor (not the payee) it is guilty of conversion for which it is liable directly to the payee . . . ."

5. 92 Tenn. 154, 20 S.W. 802 (1893).

6. 20 S.W. at 803.

7. 39 Cal. App. 710, 180 P. 12 (1919).

8. 180 P. at 15.

9. Washington Mechanics Sav. Bank v. District Title Ins. Co., 65 F.2d 827 (D.C. Cir. 1933); Walsh v. American Trust Co., 7 Cal. App. 2d 654, 47 P.2d 323 (1935); *see* Kessler, *Forged Indorsements*, 47 YALE L.J. 863 (1938).

10. Washington Mechanics Sav. Bank v. District Title Ins. Co., 65 F.2d 827 (D.C. Cir. 1933); Lindsley v. First Nat'l Bank, 327 Pa. 393, 190 A. 876 (1937).

submits the check to the drawee for collection, the money it receives is held for the true owner and can be recovered in an action at law.[11]

The forged indorsement which is inoperative to convey title to the collecting bank is also inoperative as a proper order on the drawee to pay out the drawer's funds. Thus, in *Morgan v. Morgan*[12] the collecting bank argued that the money it received from the drawee on a forged check was the drawee bank's own money and not the proceeds from the check. The consequent argument was that the collecting bank held no funds on account for the payee. The court found the collecting bank liable on the general bank collection theory of ratification.[13] According to this principle, the true owner, in bringing an action against the collecting bank, is deemed to have ratified the collection of the proceeds from the payor bank. This ratification transforms the former remittance of funds by the payor bank into an authorized act for which it may debit the drawer's account. Thus, the collecting bank is deemed to have received the proceeds of the check. Ratification of the collection, however, does not ratify the forgery or delivery of the proceeds to the wrong person. Hence, the payee may treat the collection as one for his own use and benefit.

The pre-Code law did not, however, leave the collecting banks absolutely liable. Common law provided the defenses of negligence, laches, and estoppel.[14] The practical result is that although the collecting bank does not acquire the ownership of the check or its proceeds, the true owner will be denied recovery if his actions could have prevented the forgery or prevented continued unauthorized indorsements.[15] While two of these defenses are legal in form, all were applied under equitable considerations.[16] While equities generally favor the true owner as against the collecting bank that handles a forged instrument,[17] the equities shift in favor of the bank when such forgery could have been prevented had it not been for the negligence of the true owner. Where these common law defenses are inapplicable, the true owner is entitled to full recovery from the collecting bank which handled the check.[18]

II. THE IMPACT OF UNIFORM COMMERCIAL CODE SECTION 3-419

The common law causes of action available to the true owner of a forged

11. Henderson v. Lincoln Rochester Trust Co., 303 N.Y. 27, 100 N.E.2d 117, 120 (1951).

12. 220 Cal. App. 2d 665, 34 Cal. Rptr. 82 (1963).

13. *Id.* *See also* Jones v. Bank of America, 49 Cal. App. 2d 115, 121 P.2d 94 (1942); Independent Oil Men's Ass'n v. Fort Dearborn Nat'l Bank, 311 Ill. 278, 142 N.E. 458 (1924); 8 CAL. JUR. 2D REV. § 273 (1968).

14. R. Mars, The Contract Co. v. Massanutten Bank, 285 F.2d 158 (4th Cir. 1960); Saf-T-Boom Corp. v. Union Nat'l Bank, 236 Ark. 518, 367 S.W.2d 116 (1963); People v. Bank of North America, 75 N.Y. 547 (1879). *See also* Annot., 87 A.L.R.2d 638 (1963).

15. Where the indorsor had apparent authority, the court in Walsh v. American Trust Co., 7 Cal. App. 2d 654, 47 P.2d 323, 325 (1935), stated: "A person whose check was indorsed without authority may be estopped to deny such want of authority by his negligence in allowing another to clothe himself or be clothed with apparent authority to so indorse."

16. Kessler, *supra* note 9, at 868.

17. *Id.*

18. *See* note 2 *supra.*

check were codified under UCC section 3-419 as an action in conversion. While the statute broadened the remedies available in some jurisdictions,[19] the statute also provided a poorly worded defense in subsection (3) which appears to alter the common law by introducing a new defense heretofore unknown in the payee's suit against a collecting bank for conversion. As previously noted, a collecting bank's defenses were limited to negligence, laches, or estoppel.[20] Subsection (3) provides that:

> Subject to the provisions of this code concerning restrictive indorsements a representative, including a depositary or collecting bank, who has in good faith and in accordance with the reasonable commercial standards applicable to the business of such representative dealt with an instrument or its proceeds on behalf of one who was not the true owner is not liable in conversion or otherwise to the true owner beyond the amount of any proceeds remaining in his hands.[21]

Thus, this section seems to relieve a depositary or collecting bank of liability if the bank complies with the statutory standard—a radical departure from the prevailing common law.

Subsection (3) focuses on three elements: (a) acting in good faith, (b) acting in accordance with reasonable commercial standards applicable to the business, and (c) holding proceeds from the converted instrument. The section is applicable to representatives, including depositary or collecting banks. Litigation of section 3-419 has been limited and courts have handled subsection (3) in different ways. Some courts have merely ignored the subsection.[22] Others have avoided a direct interpretation of subsection (3) by holding that the collecting bank did not qualify for its use. In *Belmar Trucking Corp. v. American Trust Co.*[23] the issue was whether a collecting bank was liable to a corporate payee of a check for its face amount where they had cashed the check on a forged indorsement. The bank raised section 3-419(3) as a defense. Apparently the bank acted in good faith, but the issue was whether it had acted in accordance with reasonable commercial standards applicable to its business. The court held that the bank had not met this standard, and, therefore, the defense was not available and the bank was liable in conversion.[24]

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19. CALIF. COMM. CODE § 3419, comment 3 (West 1964) explains:
> Subdivision (1)(C) is new statutory law and reverses the rule in California. Under the NIL, there was a split of authority on whether the drawee bank paying on a forged indorsement is liable to the holder whose indorsement was forged. In those jurisdictions which gave the payee a right of action against the drawee bank, the theory was upon constructive acceptance or conversion . . . California adopted the rule that the drawee in this situation was not liable upon the ground that there was no privity.

Thus, in states like California, the payee may now proceed directly against the drawee bank with an action for conversion.

20. *See* note 14 *supra*, and accompanying text.

21. UNIFORM COMMERCIAL CODE § 3-419(3).

22. *See, e.g.*, Salsman v. National Community Bank, 102 N.J. Super. 482, 246 A.2d 162 (1968).

23. 65 Misc. 2d 31, 316 N.Y.S.2d 247 (1970).

24. 316 N.Y.S.2d at 254. *See also* White Lumber Co. v. Crocker Citizens Nat'l Bank, 253 Cal. App. 2d 368, 61 Cal. Rptr. 381 (1967).

Ervin v. Dauphin Deposit Trust Co.[25] is the first case that actually interpreted subsection (3). The Dauphin Deposit Trust Co. had acted in good faith and in accordance with reasonable commercial standards. Since the initial qualifications to raise the defense were met, it was necessary for the court to consider the previously unadjudicated question of whether a collecting bank which cashed a forged check is acting as a representative within the meaning of the statute. The court held that a collecting bank cashing a forged check is not acting in a representative capacity to the true owner. Consequently, subsection (3) which only applies to a representative was held to be unavailable as a defense in a suit by the true owner against the collecting bank for conversion of his check.[26]

The Uniform Commercial Code comment, however, indicates that subsection (3) is intended to adopt the rule of decisions which hold that a representative that deals with a negotiable instrument in good faith is not liable in conversion.[27] *Ervin* suggests that the line of cases codified by subsection (3) deal with a true agent-principal relationship, as in *First National Bank v. Goldberg*,[28] where an attorney in good faith assisted his client in the sale of bonds that were subsequently found to have been stolen.[29] Hence, the court in *Ervin* defused the subsection (3) defense by its interpretation of the term representative. Rendering the entire subsection (3) defense inapplicable to a collecting bank which had cashed a forged check, the court did not develop an analysis of the other statutory terms. In particular, the term "proceeds" was yet to be explained by judicial decision.

III. COOPER V. UNION BANK

In *Cooper v. Union Bank*[30] the court, as in *Ervin*, was also faced with a bank that had acted in good faith and in accordance with the reasonable commercial standards applicable to the business of banking. Accordingly, the bank had fulfilled the initial prerequisites for raising the section 3-419(3) defense. The court in *Cooper*, however, reached its decision by pursuing a careful analysis of the statutory term "proceeds."[31] The court initially faced two issues: first, whether the collecting banks had received any proceeds, and second, if the banks had received proceeds, whether they had parted with any proceeds received.[32] It was reasoned that the proceeds of a check originate in the drawer's account with the payor bank, and, therefore, the collecting bank has no proceeds unless the payor bank forwards them.[33] The court distinguished between forwarding the proceeds and forwarding the amount of the forged instrument. Because the payor bank can

25. 38 Pa. D. & C.2d 473, 3 UCC Rep. Serv. 311 (1965).
26. 3 UCC Rep. Serv. at 317-18.
27. UNIFORM COMMERCIAL CODE § 3-419, comment 5.
28. 340 Pa. 337, 17 A.2d 377 (1941).
29. *See also* Gruntal v. National Sur. Co., 254 N.Y. 468, 173 N.E. 682 (1930).
30. 9 Cal. 3d 123, 507 P.2d 609, 107 Cal. Rptr. 1 (1973).
31. 507 P.2d at 613, 107 Cal. Rptr. at 5. It must be noted that the decision is limited to collecting banks. The court found it unnecessary to undertake an analysis of § 3-419(3) for payor banks. *See* note 2 *supra*.
32. 507 P.2d at 613, 107 Cal. Rptr. at 5.
33. *Id.*

only debit the customer's account upon a valid instrument,[34] any amounts a payor bank remits to the collecting bank upon a forged instrument must necessarily be from the bank's own funds and not the proceeds of the check. At this point, the collecting bank has no proceeds and, thus, assuming UCC section 3-419(3) is applicable, no attachable funds under the Code. The payor bank's funds formerly remitted to the collecting bank on the forged instrument may, however, be legally changed into the proceeds by use of the common law theory of ratification.[35] This occurs when the true owner, in bringing an action against the collecting bank for conversion of a check collected on a forged indorsement,[36] transforms the remittance of bank funds by the payor bank into an authorized debit of the drawer's account.[37]

Having thus determined that the collecting bank did hold proceeds of the forged checks, the court next considered whether the collecting bank had paid out any of these proceeds.[38] When the forged checks were initially cashed, the bank could pay over the counter only its own funds, since it had not yet submitted the check to the payor bank. The court stated that upon collection of the instrument, the proceeds became mingled with the banks general funds and were, therefore, retained by the bank for the true owner. This conclusion was reached by analogy to the general law of constructive trusts.[39] It seems that another court more disposed to the letter of the UCC could reason that the cash paid over the counter when the forged instruments were cashed was a substitute for the proceeds which is transformed into the actual proceeds when the proceeds are obtained from the payor bank. This interpretation would leave no mingled cash in the bank and give the Code its literal effect by limiting a collecting bank's liability through subsection (3).

Slightly different problems arise when the court discussed the forged checks that were deposited and, at a later date, withdrawn before the discovery of the forgery.[40] In contrast to the situation where the checks were immediately cashed, the collecting bank here had an opportunity to receive the proceeds from the payor bank prior to paying out funds over the counter. It could be argued that when the collecting bank pays out money from an account which had been credited with the proceeds of a forged instrument, it then parts with the proceeds.[41] Although this argument is logical, it creates the inequitable result of providing the true owner with a remedy where the forger cashes the check and immediately takes the cash payment, while denying the check owner a remedy under section 3-419 if the forger first

34. *Id.*
35. *See* note 13 *supra.*
36. UNIFORM COMMERCIAL CODE § 3-419(1)(c).
37. 507 P.2d at 614, 107 Cal. Rptr. at 6.
38. *Id.*
39. "The mere fact that the cash of the claimant is indistinguishably mingled with the cash of the bank does not cut off the claimant's interest, but he acquires an equitable lien upon the whole of the mingled cash in the bank." 5 A. SCOTT, LAW OF TRUSTS 3734 (1967).
40. 507 P.2d at 614, 107 Cal. Rptr. at 6.
41. Indeed, commentators have suggested the *Ervin* case may stand for this rule. ADVANCED ALI-ABA COURSE OF STUDY ON BANKING AND SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE 54-57 (1968).

deposits the forged check. The court in *Cooper* avoids this inequitable result by finding that a bank that accepts an instrument for deposit retains the proceeds of the instrument upon withdrawal.[42] This conclusion was reached by the argument that a bank which acts upon a forged instrument for its depositor is in an agency status during the collection process. The depositor is given a provisional credit for the proceeds.[43] Upon remittance of the proceeds, the funds generally become co-mingled with the bank's cash and are not held apart from the depositor. The agency status is terminated, the depositor is given full credit for the amount, and the relationship is changed into that of debtor-creditor. When the depositor finally withdraws its funds, it is withdrawing money out of the general bank cash and not the proceeds. This is significant because section 3-419(3) provides that a representative's liability will only extend to the amount of proceeds remaining in its hands when the other subsection (3) requirements are met. Since, according to *Cooper*, the collecting bank does not part with the proceeds of a forged check, it cannot avail itself of the section 3-419(3) defense. The bank's liability continues to extend over the check's full proceeds.

The court sought to strengthen its interpretation of section 3-419(3) by alluding to the expressed purpose of the UCC as stated in section 1-102: "to simplify, clarify, and modernize the law governing commercial transactions."[44] In accordance with this section, the simplest remedy at law by an aggrieved payee is a direct suit against the collecting bank that will be ultimately liable. If the subsection (3) defense were available to a collecting bank, contrary to common law and the holding in *Cooper*, the direct action by the payee against the collecting bank would be blocked. The payee would be forced into a circuitous round of suits first by the payee against the drawee, then by the drawer bank against the collecting bank.[45] As the court points out, it is difficult to believe the Uniform Commercial Code would modify the direct action available at common law, an approach which has served to expedite recovery by the payee.

IV. CONCLUSION

It could be argued that the courts in *Ervin* and *Cooper* have ignored the clear statutory language of section 3-419(3) which provides a defense to collecting banks, and have fashioned the law to their own preference. But the only two courts that have had squarely to interpret the subsection have

42. 507 P.2d at 614, 107 Cal. Rptr. at 6.
43. UNIFORM COMMERCIAL CODE § 4-201.
44. The UNIFORM COMMERCIAL CODE § 1-102 (the purposes and rules on construction section) comment states: "The act should be construed in accordance with its underlying purposes and policies. The text of each section should be read in light of the purpose and policy of the rule or principle in question, as also of the Act as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved."
45. The payee can sue the payor bank under § 3-419 and the payor bank has a direct cause of action against the collecting bank under § 4-207. Note, it appears that the subsection (3) defense would be unavailable to the payor bank if it is not also a depositary bank, for this subsection specifically mentions only depositary or collecting banks.

rendered it inapplicable to collecting banks that have cashed forged checks. This, at least, indicates that the language is susceptible to interpretation. The court in *Cooper* chose to base its holding on the statutory term "proceeds." Since "proceeds" is not defined in the Code, the court was within its judicial province to interpret this term. Pursuing this approach, the court in *Cooper* was on firmer ground than the court in *Ervin* that rendered an interpretation of "representative," a term with which the Code had already dealt. While it is certainly the prerogative of the drafters to change the common law, *Cooper* follows the more commercially reasonable approach. This approach recognizes that the collecting bank is ultimately liable for converting a forged check under the Code,[46] that the equities favor placing this liability on the collecting bank rather than the payee,[47] and that the common law has followed this rule for almost 200 years.[48] Section 3-419(3) needs uniform amendment to clarify the application of this subsection.

Kenneth A. Braun

Harsher Sentencing by Jury on Retrial Is Permissible: Chaffin v. Stynchcombe

The petitioner was found guilty by a jury in Georgia of robbery by open force or violence,[1] and was sentenced by the jury[2] to a term of fifteen years imprisonment. After his writ for habeas corpus was granted in federal court, petitioner was retried, before a different judge and a new jury, and was again convicted, the jury increasing the punishment to life imprisonment. Because he believed the increased sentence to be unconstitutional,[3] petitioner again sought habeas corpus relief, but was unsuccessful. Review was sought in the United States Supreme Court, where petitioner contended that the increased sentence violated the double jeopardy clause of the fifth amendment and deprived him of due process of law under the fourteenth amendment. The Supreme Court granted certiorari. *Held*: The imposition of a harsher sentence by a jury upon retrial does not violate the double jeopardy clause, nor does it deprive a defendant of due process of law, so

46. *See* note 45 *supra*, and accompanying text.
47. *See* note 17 *supra*, and accompanying text.
48. *See, e.g.*, Mead v. Young, 4 T.R. 28 (1790).

1. No. 229, [1957] Ga. Laws 261. This statute was revised in 1968. *See* GA. CODE ANN. § 26-1902 (1968).
2. Georgia is one of eight states which permit jurors to impose the sentence in felony cases. *See* ARK. STAT. ANN. § 43-2307 (1947); GA. CODE ANN. § 27-2502 (1935); KY. REV. STAT. § 9.84 (1970); MO. R. CRIM. P. 27.02; OKLA. STAT. ANN. tit. 22, § 926 (1958); TENN. CODE ANN. § 40-2704 (Supp. 1973); TEX. CODE CRIM. PROC. ANN. art. 37.07 (Supp. 1973); VA. CODE ANN. § 19.1-291 (1950).
3. The petitioner based his claim on the holding in North Carolina v. Pearce, 395 U.S. 711 (1969). See notes 11-17 *infra*, and accompanying text.

long as the jury is not informed of the prior sentence and the second sentence is not otherwise a product of vindictiveness. *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973).

I. DUE PROCESS AND HARSHER SENTENCING

In early cases presented before the United States Supreme Court concerning harsher sentences on retrial, defendants unsuccessfully argued that the more severe sentence was prohibited because of the double jeopardy clause of the fifth amendment. Subsequently, however, defendants turned to the contention that harsher sentencing violated the due process clause of the fourteenth amendment. Some lower courts were receptive to this argument and placed restrictions on harsher sentences imposed at retrial after the reversal of the original conviction.[4]

In *Stroud v. United States*[5] the Supreme Court held that the double jeopardy provision did not protect a defendant from receiving a harsher sentence on retrial. The Court reasoned that the protection afforded was against a second trial after previous conviction or acquittal for the same offense, where the defendant had not taken an appeal.[6] Thus, it was permissible to impose a harsher sentence upon a successful appellant if he was reconvicted,[7] notwithstanding the double jeopardy protection.[8] After *Stroud* the Court uniformly rejected the application of the double jeopardy protection to sentencing.[9]

With time, however, lower federal courts limited harsher sentencing on retrial upon the basis of the due process and equal protection clauses.[10] The

4. *See* note 10 *infra*, and accompanying text.
5. 251 U.S. 15 (1919).
6. *Id.* at 18.
7. *Id.* It is settled law that a defendant may be retried for the same offense where his first conviction was reversed because of trial court error. Numerous theories have been stated by the courts to uphold this contention. *See, e.g.*, Brewster v. Swope, 180 F.2d 984 (9th Cir. 1950) (appellant is placed in second jeopardy but he waives his plea of former jeopardy by asking that the conviction be set aside); State v. Aus, 105 Mont. 82, 69 P.2d 584 (1937) (continuous jeopardy which does not end until conviction or acquittal is final). The Supreme Court, in North Carolina v. Pearce, 395 U.S. 711 (1969), stated that "the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." 395 U.S. at 721.
8. Green v. United States, 355 U.S. 184 (1957), is often cited in support of a prohibition against increased sentence on retrial. But in *Green* the defendant could have been convicted by the jury at the original trial of either first or second degree murder. The jury convicted him of second degree murder, and, therefore, on retrial he could not be convicted of first degree murder, a crime of which he had been impliedly acquitted at the first trial. It is obviously distinguishable from cases in which the defendant was reconvicted of a crime of which he had already been convicted. The proponents of the *Green* argument assert, however, that by way of analogy a defendant is "acquitted" of any higher punishment than that he received at the first trial, and therefore, the imposition of a harsher sentence at retrial is a violation of the double jeopardy provision. *See* North Carolina v. Pearce, 395 U.S. 711, 726-28 (1969) (Douglas, J., concurring), *noted in* 19 AM. U.L. REV. 290, 292-93 (1970).
9. *See, e.g.*, North Carolina v. Pearce, 395 U.S. 711 (1969); Robinson v. United States, 324 U.S. 282 (1945). For discussion of the application of double jeopardy to sentencing, see Steele, *The Doctrine of Multiple Prosecution in Texas*, 22 SW. L.J. 567, 576 (1968).
10. *See, e.g.*, Rice v. Simpson, 274 F. Supp. 116 (M,D. Ala. 1967) (on retrial defendant not given credit for time served under original sentence); Patton v. State, 256 F. Supp. 225 (W.D.N.C. 1966), *cert. denied*, 390 U.S. 905 (1968) (absent reasons for doing so, harsher sentence on retrial violates due process).

United States Supreme Court recognized the validity of the due process argument in *North Carolina v. Pearce*,[11] that "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence [the judge imposes] after a new trial."[12] In other words, a defendant cannot be punished by a more severe sentence merely because he obtained a new trial as the result of a successful appeal.[13] The Court restricted judges from imposing a more severe sentence at retrial except in cases where the reasons for doing so "affirmatively appeared . . . based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding."[14]

The petitioner in *Pearce* also argued that a harsher sentence on retrial was prohibited because of the equal protection clause of the fourteenth amendment. He asserted that those who appealed were placed in an invidious classification because they risked the imposition of greater sentences on retrial while those who did not appeal or did not otherwise succeed in getting their convictions set aside did not risk the harsher sentencing.[15] The Court rejected this claim, stating that "[t]o fit the problem of [*Pearce*] into an equal protection framework is a task too Procrustean to be rationally accomplished."[16] The Court observed that the result of a defendant's appeal was dependent "upon a particular combination of infinite variables peculiar to each individual trial" and that the petitioner was no more invidiously classified than one whose appeal is rejected and is thus denied the opportunity of acquittal.[17] Another fallacy in petitioner's argument which was emphasized by the Court was that if the crime had not been committed in the first place, petitioner would not have been on trial risking punishment. By petitioner's reasoning, those accused of crime, and on trial, would be placed in an invidious classification [against which the law protects] simply because those who have not been accused of crime do not face the risk of conviction and sentence. Although the Court rejected the petitioner's equal protection argument, *Pearce* became the first Supreme Court decision to limit the prerogative of imposing a harsher sentence on retrial, a prerogative which the Court had recognized, with no restrictions, since 1919 in *Stroud*.

The Second Circuit extended the *Pearce* holding in *United States v.*

11. 395 U.S. 711 (1969).
12. *Id.* at 725.
13. The term "appeal" is used to mean either an appeal *per se* to the appellate courts following a conviction, or a collateral attack on the conviction through application for writ of habeas corpus in the federal district court. For the purposes of the rule announced in *Pearce*, it makes no difference which route the defendant takes in order to obtain a new trial. *See* Robinson v. United States, 144 F.2d 392, 396, 397 (6th Cir. 1944), *aff'd on other grounds*, 324 U.S. 282 (1945).
14. 395 U.S. at 726. The term "identifiable conduct . . . occurring after the time of the original sentencing proceeding" refers to activities of the defendant after the first trial which are a reflection on his character and his intentions of living within the boundaries of the law. It has been suggested that examples of such conduct would include antisocial acts committed while in prison or on bail and attempted escapes from prison. *See* Note, *Harsher Sentence on Retrial*, 38 TENN. L. REV. 562 (1971).
15. 395 U.S. at 722.
16. *Id.* at 723.
17. *Id.* at 722-23.

Barash by limiting not only increased prison sentences, but also increased fines, suspended sentences, and probation periods.[18] The question of harsher sentencing inevitably evolved to that of whether a sentencing jury was subject to the same or similar restrictions. The Court of Appeals for the Fifth Circuit answered this question in the negative. In affirming the denial of habeas corpus relief to the petitioner in *Chaffin v. Stynchcombe*,[19] following his second trial, that court stated that the possibility of jury vindictiveness was remote, and it placed the burden of proving vindictiveness squarely on the defendant.[20] It emphasized the fact that in *Pearce*, "[t]here was no denunciation of increased sentences as such."[21] In *Casias v. Beto*, another Fifth Circuit case involving harsher sentencing, the court stated that "the *Pearce* factor of retaliation or vindictiveness does not apply where a jury sets the penalty and where, as here, the record reflects no knowledge by the jury of the earlier trial which might engender a desire for retaliation."[22]

In other circuits defendants contended that harsher sentencing impaired the choice whether to appeal after conviction. In other words, the exercise of the right to appeal was chilled by the possibility of a harsher sentence on retrial. The Fourth and Sixth Circuits responded to the question in *Levine v. Peyton*[23] and *Pendergrass v. Neil*,[24] cases which were clearly contrary to the Fifth Circuit holdings.[25] The Fourth Circuit in *Levine* emphasized that a defendant's right to appeal should not be chilled by the fear of a harsher sentence on retrial.[26] Similarly, in *Pendergrass* the Sixth Circuit outlined several possibilities of jury vindictiveness,[27] and both it and *Levine* concentrate on the "chilling effect" on the defendant's right to appeal.[28] In *Pendergrass*, the Sixth Circuit stated: "The existence of [a 'chilling effect'] places an unjustly convicted defendant in the anomalous and unfair predicament of having to run the risk of a harsher sentence merely to obtain that to which he was constitutionally entitled at the beginning—*viz.*, a fair and error-free trial."[29]

The Supreme Court has recognized the invalidity of a federal statute which places a "chilling effect" on the defendant's right to a jury trial. In

18. 428 F.2d 328, 331 (2d Cir. 1970), *cert. denied*, 401 U.S. 938 (1971), *noted in* 5 GA. L. REV. 194 (1970).
19. 455 F.2d 640 (5th Cir. 1972).
20. *Id.* at 643.
21. *Id.* at 642.
22. 459 F.2d 54, 55 (5th Cir. 1972).
23. 444 F.2d 525 (4th Cir.), *cert. denied*, 404 U.S. 995 (1971).
24. 456 F.2d 469 (6th Cir. 1972), *vacated*, 412 U.S. 935 (1973) (vacated because of the Supreme Court's decision in *Chaffin v. Stynchcombe*).
25. Casias v. Beto, 459 F.2d 54 (5th Cir. 1972); Chaffin v. Stynchcombe, 455 F.2d 640 (5th Cir. 1972).
26. 444 F.2d at 526.
27. The court noted several factors which would arouse suspicion in jurors or make difficult selection of uninformed jurors. For example, disparity between date of criminal events and the date of retrial, use of the first trial record for impeachment purposes on cross-examination at the second trial, and the probable public notoriety of the defendant where the crime occurred in a rural area, are all factors which may indicate to jurors that defendant is being retried after appeal. 456 F.2d at 470-71.
28. 456 F.2d at 471; 444 F.2d at 526.
29. 456 F.2d at 471.

United States v. Jackson[30] the defendant was indicted under the Federal Kidnaping Act,[31] which provided that only upon recommendation of the jury could the death sentence be imposed. If the defendant waived his right to a jury trial, he was assured that under the statute the death sentence could not be imposed by the judge. The Court held unconstitutional that portion of the statute which made the "risk of death" the price for asserting the right to a jury trial. In so concluding, the Court stated that "[i]f the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional."[32] The decision in *Jackson* is important to *Chaffin* because the questions presented in both cases are similar, that is, whether a governmentally imposed choice should be prohibited because it chills the exercise of a basic constitutional right. The difference lies only with the specific right involved in each case.

II. CHAFFIN V. STYNCHCOMBE

In *Chaffin v. Stynchcombe* petitioner's double jeopardy claim was rejected by the Court on the basis of *Stroud v. United States*.[33] The Court did not consider the equal protection claim advanced by the petitioner, that a defendant who received close to the minimum sentence (as petitioner did) faces a far greater risk than the defendant who received near the maximum.[34] The decision of the Court concentrated on two key issues: vindictiveness and the "chilling effect" on the right to appeal.[35]

The petitioner in *Chaffin* attempted to extend the holding in *Pearce* to the area of jury sentencing. Stating that the *Pearce* decision was based on "the hazard of vindictiveness,"[36] the Court held that "there is no basis for holding that jury resentencing poses any real threat of vindictiveness."[37] The Court observed that the jury has no "personal stake in the prior conviction and no motivation to engage in self-vindication."[38] This is because the jury, unlike the judge, has not been reversed by the appellate court. Safeguards are needed to protect the defendant only when the judge is to impose sentence.[39]

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30. 390 U.S. 570 (1968).
31. Ch. 645, 62 Stat. 760 (1948), *as amended*, 18 U.S.C. § 1201 (1972).
32. 390 U.S. at 581.
33. 251 U.S. 15 (1919). In *Pearce*, however, the unwaivering rule with regard to harsher sentencing and double jeopardy was perhaps best stated. *See* note 7 *supra*.
34. Brief for Petitioner at 9. The argument more fully given was that the defendant who received close to the maximum sentence would have little or nothing to lose by appealing, since a sentence increase would be less severe on him than on a defendant who received a lighter sentence at the original trial. The latter is compelled to make the choice whether to appeal, for if he is successful he faces the risk of receiving a more severe sentence.
35. Although the Court's decision is based upon constitutional grounds, the arguments set forth by Mr. Justice Powell in the majority opinion indicate that policy factors were influential in the decision.
36. 412 U.S. 17, 25 (1973).
37. *Id.* at 28.
38. *Id.* at 27.
39. For a pre-*Chaffin* discussion of the distinction between a judge and jury imposing a harsher sentence at retrial, see Note, *supra* note 14, at 570.

Underlying the Court's reasoning is the presumption that a jury is not aware of its capacity for vindictiveness.[40] When a trial judge is reversed, he, of course, is aware of his capacity to punish the defendant for his appeal.[41] The reversal indicates error on the judge's part at the original trial, and the dissatisfaction accompanying a reversal might manifest itself in the form of a harsher sentence upon retrial. Conversely, even in a situation where the reversal is based on lack of evidence upon which a conviction could be sustained, there will be a new and different jury at the second trial. In a majority of cases, the jurors will have never heard of the defendant, nor will they be aware of anything concerning the prior trial, conviction, or sentence.

This reasoning, however, is replete with exceptions, not all of which can be said to be rare occurrences. For example, the wide publicity given a particularly notorious crime may cause difficulty in finding an uninformed juror. Judge Edwards of the Sixth Circuit in *Pendergrass* pointed to many ways in which jury vindictiveness may be produced by knowledge of the original trial.[42]

If the absence of jury vindictiveness is assumed, the retaliatory motives of the prosecutor and judge can nevertheless produce a harsher sentence by the jury. The Court dismissed as remote the possibility that vindictiveness in the jury may be produced by the prosecutor and the judge.[43] Mr. Justice Stewart pointed out in his dissent that although the Court was quite correct in assuming that the prosecutor may have innocent reasons for requesting a harsher sentence, nevertheless the possibility for vindictiveness is very real, and that, in any event, the defendant will have an extremely difficult time in proving a retaliatory motive.[44] The judge, on the other hand, may charge the jury in such a manner that they are influenced to impose a higher sentence at the second trial.[45]

As Mr. Justice Marshall recognized in his dissent, the issue is not just vindictiveness: "For, by establishing one rule for sentencing by judges and another for sentencing by juries, the Court places an unnecessary burden on the defendant's right to choose to be tried by a jury after a successful appeal."[46] If the defendant does not elect to have a jury trial, in states where the jury sentences, the judge will impose the sentence and will, therefore, be subject to the limitations set forth in *Pearce*. As the Court held in *United States v. Jackson*, a sentencing structure is unconstitutional when it requires an election by the defendant which impairs his right to a jury trial.[47] A defendant on retrial would be foolish to elect a jury when the

40. This is, of course, subject to the limitation, as the Court recognized, that the jury not be told the length of the original sentence. 412 U.S. at 28.
41. *Id.* at 27.
42. 456 F.2d at 470-71; *see* note 27 *supra*, and accompanying text.
43. 412 U.S. at 27 n.13.
44. *Id.* at 36 (Stewart, J., dissenting).
45. *Id.* Mr. Justice Stewart does not elaborate on just how the judge might so influence the jury. It is submitted, however, that the judge, prompted by his distaste for what he feels to have been a meritless appeal, will portray the defendant as a person worthy of long imprisonment.
46. *Id.* at 43-44 (Marshall, J., dissenting).
47. 390 U.S. at 582.

jury will be free to administer a longer and more severe sentence.[48]

Assuming the absence of jury vindictiveness, the question becomes whether the possibility of a harsher sentence on retrial in itself will chill the exercise of the defendant's right to appeal. The Court, while not explicitly denying the existence of a "chilling effect," reasoned that any defendant involved in the criminal justice process will inevitably face "government imposed choice[s] that [have] the effect of discouraging the exercise of constitutional rights."[49] This is seen as an "inevitable attribute"[50] of the system. Thus, in every case the defendant must balance his interest in the exercise of his rights, such as the right to a jury trial or the right to appeal, with the risk he will face if he decides to exercise the right. The Court in *Jackson* recognized that when the defendant realizes that he faces the death penalty only with a jury trial, he will be highly reluctant to exercise that right. The question presented in *Chaffin* was whether the risk of a harsher sentence on retrial will impair to an appreciable extent the defendant's choice to appeal. The Court determined that the petitioner himself was not chilled in the exercise of his right to appeal,[51] and that in any case, the chill factor will often not be a deterrent of any significance.[52]

The Court dealt at some length with petitioner's claim that *Jackson* was applicable by analogy to the present case. The essence of petitioner's argument was that if the Government could not compel a defendant to choose between a jury and non-jury trial where the imposition of the death penalty could be only on the recommendation of a jury, then it could not compel him to take or not to take his constitutional right to appeal where by so doing he exposes himself to the risk of an increased sentence if a new trial is granted. The Court distinguished *Jackson* by stating that not every choice imposed upon the defendant is forbidden, even if it has the effect of discouraging the exercise of constitutional rights.[53] The inquiry must be made on a case-by-case basis to determine whether the rights involved will be appreciably impaired by compelling the defendant to make a choice.[54]

Admittedly, the question presented in *Chaffin* makes it clear that a "chilling effect" on the right to appeal does exist, although the Court feels that the defendant in most cases will not be aware of its existence when he de-

48. The effect of the defendant's decision to elect a jury trial was well illustrated in *Jackson*. While under the federal statute involved the jury was free to recommend the death penalty, a judge sentencing under the same statute could impose no more than a life sentence.

49. 412 U.S. at 30. *See* North Carolina v. Alford, 400 U.S. 25 (1970), Parker v. North Carolina, 397 U.S. 790 (1970), and Brady v. United States, 397 U.S. 742 (1970), all cases in which the defendants pleaded guilty to lesser charges in order to avoid possible death sentences by a jury had they been convicted on the original charges. The cases are to be distinguished from *Jackson* because in each either the judge or jury was free to impose the death penalty had the defendant been found guilty on the original charge.

50. 412 U.S. at 31.

51. Petitioner appealed each conviction to the Georgia appellate courts and sought habeas corpus relief after each appeal was unsuccessful. *See* 225 Ga. 602, 170 S.E.2d 426 (1969); 227 Ga. 327, 180 S.E.2d 741 (1971). However, on each appeal, he was not aware of the possibility of a harsher sentence if retried.

52. 412 U.S. at 33.

53. *Id.* at 30.

54. *Id.* at 32.

cides whether to appeal. The Court is correct in its conclusion that the criminal justice process imposes many compelled choices on defendants,[55] and that each of these presents, to an extent, a "chilling effect" on the exercise of a right. An obvious example is the plea bargain. By promising the defendant a lighter sentence or lesser charge in return for his guilty plea, the defendant is impliedly, if not expressly, told that an insistence on a plea of innocence and a jury trial will expose him to a more severe charge and, if he is found guilty, sentence. In deciding whether to accept the bargain, the defendant's exercise of his right to plead not guilty and to be granted a full trial with jury is chilled. As the recent decision in *Santobello v. New York*[56] demonstrated, however, plea bargaining is a legitimate practice in criminal justice administration. The overriding interest with the plea bargain is expedition of the judicial process to avoid an overload which the present courts could not bear.

By analogy, in *Chaffin* the overriding interest compelling the choice is the prerogative of the jury to impose a harsher sentence on retrial, based upon its evaluation of the evidence and the character of the defendant. "Jury sentencing, based on each jury's assessment of the evidence it hears and appraisal of the demeanor and character of the accused, is a legitimate practice."[57] Different juries will inevitably assess an individual defendant differently. The sanctity of the jury being what it is in our system of justice, the question is essentially whether jury prerogative should be limited by a chill factor imposed on the defendant in his decision whether to appeal. The Court answered this in the negative, but the question is not as clear-cut as the Court has indicated. A defendant on retrial has been exposed to jury prerogative at least once. Should he be exposed a second time to the risks involved because he chooses to appeal from what to him was not an error-free trial?[58] The risks would not be imposed had the defendant been given an error-free trial in the first instance, so that imposition of a harsher sentence at retrial not only chills the right to appeal, but also punishes the defendant for the trial court's error, which caused the reversal. Those two considerations, when added to the fact that the defendant has once been exposed to jury prerogative, override any conclusion that the jury's right to impose a harsher sentence at the second trial should not in some way be limited.

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55. *See, e.g.*, Crampton v. Ohio, 402 U.S. 183 (1971), where defendant unsuccessfully contended that allowing the jury to determine guilt and punishment in a single trial compelled him to forego his fifth amendment right to remain silent, whereas in a bifurcated trial of guilt and punishment, defendant retained his right to remain silent in the "guilt trial," but at the punishment stage he could argue his case for mitigation of punishment. *See also* Parker v. North Carolina, 397 U.S. 790 (1970).

56. 404 U.S. 257 (1971). *Santobello* intimates, however, that while the prosecutor is bound to perform the bargain, the defendant is not. This protects the defendant to a certain extent and lessens the "chilling effect" presented by a plea bargain situation.

57. 412 U.S. at 32.

58. The argument in Green v. United States, 355 U.S. 184 (1957), that exposure to limitless sentencing (at least as between the minimum and maximum in the particular statute) is prohibited by the double jeopardy clause is applicable here, in that defendant had run the gauntlet of possible sentences once, had risked conviction once, and, thus, should not be subject to that risk again.

Although the Court did not deal with issues of equal protection in *Chaffin*, as did earlier cases,[59] a consideration of this concept is important.[60] In *Pearce* the petitioner argued that the possibility of a harsher sentence on retrial placed him in an invidious classification comprised of those who succeeded in getting their convictions set aside, as compared with those who either chose not to appeal or those who appealed unsuccessfully. The Court in *Pearce* rejected this argument.[61] In *Chaffin* the petitioner did not raise any contention that he was placed in an invidious classification because he committed a crime in a state where jury sentencing is practiced. Because the judge does not sentence, the *Pearce* protections are unavailable. This results in certain protection being afforded one in a locality where judge sentencing is practiced. In the jury-sentencing jurisdictions, however, the defendant receives no protection against a jury which can be just as vindictive as a judge. Nevertheless this contention must be rejected because each state has province over its criminal justice system and the Constitution authorizes sentencing by the judge or jury. Thus, it cannot be asserted that equal protection is denied when the state uses one mode of sentencing or the other. A defendant in one state is not required to receive all the rights of a defendant in another state, so long as no rights guaranteed by the Constitution are withheld.

III. CONCLUSION

The United States Supreme Court in *Chaffin* placed no restriction on harsher sentencing by juries on retrial, so long as the sentence is not a product of vindictiveness. As a result, defendants tried in states where juries sentence do not receive the protection afforded defendants in states where judges sentence. But it is clear that a defendant in a jury sentencing state requires just as much protection as any other defendant. The jury can be vindictive because the actions of the judge or prosecutor can achieve that result, or because members of the jury know about the defendant or his case history.

As a remedy, Mr. Justice Stewart suggested that the trial judge be compelled to reduce the sentence imposed by the jury at retrial, if it exceeds the original sentence, to the length of the original sentence, unless he sets forth affirmative reasons for allowing the increased sentence to stand, under the requirements set forth in *Pearce*.[62] This suggestion would result in no undue restriction of the defendant's right to choose a jury trial because the possibility of vindictiveness as well as the "chilling effect" would be substantially reduced, although the jury might still be biased as to guilt. This would put defendants in jury-sentencing states on an equal footing with defendants

59. *See* North Carolina v. Pearce, 395 U.S. 711 (1969); Griffin v. Illinois, 351 U.S. 12 (1956).

60. The petitioner presented an equal protection argument to the Court, but the Court failed to treat this argument in its opinion. *See* Brief for Petitioner at 8-11, Chaffin v. Stynchcombe, 412 U.S. 17 (1973).

61. 395 U.S. at 722-23.

62. 412 U.S. at 37 (Stewart, J., dissenting).

elsewhere. Jury prerogative having been exercised at the original trial, there is no benefit to the state which outweighs the harm of chilling the right to appeal and to a jury trial which may result from the possibility that the defendant may receive a harsher sentence at retrial.

Michael E. Alexander

The Hatch Act's Prohibitions Against Political Activity by Government Employees Are Constitutional

The National Association of Letter Carriers, six federal employees, and certain Democratic and Republican political committees desired to campaign for candidates for public office, participate as delegates in political conventions, and seek desirable individuals to become members of certain political committees. Due to the threatened and actual enforcement of section 9(a) of the Hatch Act,[1] which prohibits federal employees from taking "an active part in political management or in political campaigns," plaintiffs sought an injunction against the Civil Service Commission, alleging that section 9(a) is vague, overly broad, and in conflict with the first amendment of the United States Constitution.[2] The district court granted the requested injunction and held section 9(a) to be "unacceptable when measured by the need to eliminate vagueness and overbreadth in the sensitive area of free expression."[3] The Government appealed, and the United States Supreme Court noted probable jurisdiction.[4] *Held, reversed*: Congress can constitutionally prohibit federal employees from engaging in certain clearly identifiable acts of political management and campaigning if the prohibitions are set out in terms that an ordinary person using common sense can sufficiently understand and observe. *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973).

I. Early Restraints on the Political Activity of Government Employees

The first amendment of the United States Constitution proclaims that "Congress shall make no law . . . abridging the freedom of speech, or the

1. 5 U.S.C. § 7324(a)(2) (1970).

2. Plaintiffs made the same allegation with regard to 5 U.S.C. § 1502(a)(3) (1970), the provision taken from § 12(a) of the Hatch Act, Act of Aug. 2, 1939, ch. 640, § 1, 54 Stat. 767, which imposes similar restrictions on various state employees working on projects that are federally funded. However, the district court held that plaintiffs were not proper representatives of the class of state employees covered by the Hatch Act and could not bring the action on their behalf. National Ass'n of Letter Carriers v. United States Civil Serv. Comm'n, 346 F. Supp. 578, 579 n.1 (D.D.C. 1972).

3. 346 F. Supp. at 583.

4. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 409 U.S. 1058 (1972).

press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances." There is widespread agreement that a major purpose of the first amendment is to protect the free discussion of governmental affairs[5] and the right of the citizenry to associate politically.[6] While first amendment rights are not absolute and may be regulated within reasonable limits,[7] they have traditionally been viewed as "supremely precious in our society,"[8] for the right to associate politically and the right to speak on public affairs amount to "more than self-expression";[9] they are the "essence of self-government."[10] Therefore, first amendment rights occupy a preferred position in our constitutional scheme and only the existence of very rare and serious circumstances can justify placing restrictions on them.[11]

Various restraints have been imposed by both the executive[12] and the legislative[13] branches on the exercise of first amendment rights by government employees. The purposes of these restraints have been either to protect these employees from excessive political pressures[14] or to promote efficiency and integrity in government.[15] The earliest attempts to restrict the first amendment rights of government employees involved restrictions on policemen, firemen, or others involved in "police power" activities where discipline of a quasi-military nature was involved.[16] However, the growth of the spoils system following the Civil War stimulated a drive for the expansion of such restrictions to cover other types of government employees.[17] In 1883 Congress passed the Civil Service Act[18] which provided that "no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service,"[19] and that "no person in said service has any right to use his official authority or in-

5. Mills v. Alabama, 384 U.S. 214, 218 (1966).
6. Williams v. Rhodes, 393 U.S. 23, 30 (1968); UMW v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967).
7. Dunn v. Blumstein, 405 U.S. 330, 336 (1972); Williams v. Rhodes, 393 U.S. 23, 30-31 (1968).
8. NAACP v. Button, 371 U.S. 415, 433 (1963).
9. Garrison v. Louisiana, 379 U.S. 64, 75 (1964).
10. *Id.*
11. Thomas v. Collins, 323 U.S. 516, 530 (1945); West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943); Thornhill v. Alabama, 310 U.S. 88, 104 (1940).
12. *See, e.g.*, President Jefferson's executive order of 1801 which made it improper for any executive employee to attempt to influence the voting of any citizen as described in 10 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 98-99 (1899), quoted and cited by the Court in *Letter Carriers*, 413 U.S. at 557; President T. Roosevelt's executive order of 1907, Exec. Order No. 642, which is cited at note 23 *infra*; President Truman's executive order of 1947 that prescribed the procedures necessary for the administration of a loyalty program for members of the executive branch, Exec. Order No. 9835, 3 C.F.R. 627 (1957).
13. *See, e.g.*, the Civil Service Act of 1883, ch. 27, § 2, 22 Stat. 403; the Hatch Act, 5 U.S.C. §§ 1501-08 (1970).
14. Note, *The Public Employee and Political Activity*, 3 SUFFOLK U.L. REV. 380, 383 (1969).
15. Nelson, *Public Employees and the Right To Engage in Political Activity*, 9 VAND. L. REV. 27, 42 (1955).
16. Sherman, *Loyalty and the Civil Servant*, 20 ROCKY MT. L. REV. 381, 387 (1948).
17. *Id.*
18. Civil Service Act of 1883, ch. 27, § 2, 22 Stat. 403.
19. *Id.* at 404.

fluence to coerce the political action of any person or body."[20] The Act gave the President the authority to promulgate rules to carry out the purposes of the Act and established the Civil Service Commission to administer it.

Judicial approval of these restrictions on the first amendment rights of government employees was first evidenced in the 1892 decision of *McAuliffe v. Mayor*.[21] Justice Holmes, speaking for the Supreme Court of Massachusetts, enunciated what has become known as the "privilege doctrine": The doctrine asserts that because a person is not forced to accept government employment, he can be required to surrender certain constitutional rights as a condition of such employment. In the words of Justice Holmes, "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[22]

Further restrictions were placed on the first amendment rights of certain government employees when on June 3, 1907, President Theodore Roosevelt issued an executive order that revised and expanded Civil Service Rule I to read: "Persons who . . . 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."[23]

II. THE HATCH ACT AND SUBSEQUENT CASES

After much debate,[24] Congress in 1939 passed the Hatch Act[25] in an effort to eliminate corruption and partisan politics from the federal civil service system.[26] Section 9(a) of the Hatch Act generally incorporated Civil Service Rule I and extended its prohibitions so as to make them applicable to all federal employees, not just classified service employees. Prohibitions against taking "an active part in political management or in political campaigns"[27] were defined in section 15 as "those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 9, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President."[28]

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20. *Id.*

21. 155 Mass. 216, 29 N.E. 517 (1892). *See also* Adler v. Board of Educ., 342 U.S. 485, 492 (1952); Garner v. Board of Pub. Works, 341 U.S. 716, 721 (1951).

22. 155 Mass. at 220, 29 N.E. at 517.

23. Rule I, U.S.C.S.C. (1907), *cited in* Buckley, *Political Rights of Government Employees*, 19 CLEV. ST. L. REV. 568, 568-69 (1970). *See also* 1 PRESIDENTIAL EXECUTIVE ORDERS 61 (1944) for a brief synopsis of Exec. Order No. 642 (1907).

24. While most Senators and Congressmen agreed that the prevention of pernicious political activity was a worthy goal, the widespread disagreement concerned whether Senator Hatch's act was unnecessarily, and possibly unconstitutionally, restrictive. *See* 84 CONG. REC. 9594-639 (1939) (remarks of Messrs. Dempsey, Celler, Healey, Rees, Springer, Gwynne, Robinson, McLean, Guyer, Creal, Hobbs, and Michener).

25. Act of Aug. 2, 1939, ch. 410, § 2, 53 Stat. 1147 (codified at 5 U.S.C. §§ 7321-27 (1970)). In 1940 the Hatch Act was amended in order to extend its provisions to state and local agencies whose principle employment is in regard to activities financed by the United States. Act of July 19, 1940, ch. 640, § 2, 54 Stat. 767 (codified at 5 U.S.C. §§ 1501-08 (1970)).

26. *See* 84 CONG. REC. 4303, 9603-04, 9610 (1939) (remarks of Messrs. Hatch, Springer, and Michener).

27. 5 U.S.C. § 7324(a)(2) (1970).

28. *Id.*

By the early 1940's the Supreme Court had developed the practice of balancing competing interests when ruling on the constitutionality of a statute which controls activities in such a way as to indirectly infringe upon first amendment rights.[29] Where first amendment rights are restricted or regulated to further a governmental interest, the Court stated that its duty was to determine which of the two conflicting interests deserved greater protection. The Court also held that whenever a statute restricts or regulates first amendment rights it must be narrowly drawn,[30] and its constitutionality should be viewed in the light of the statute's total scope and effect rather than simply in light of its isolated effect on the particular individual before the Court.[31] Furthermore, the Government was required to show that no less offensive alternatives existed to promote the governmental interest advanced by the statute.[32]

In 1947 the Supreme Court considered and upheld the constitutionality of section 9(a) of the Hatch Act in *United Public Workers v. Mitchell*,[33] a case considered by many as being outside the mainstream of first amendment case law.[34] Recognizing that first amendment rights are not absolute, the Court professed to be balancing the constitutional rights of federal employees to associate politically and to discuss freely governmental affairs against the supposed evil of political partisanship on the part of government employees.[35] By saying that "[f]or regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service,"[36] the Court simply required that restrictions imposed on the constitutional rights of federal employees need only be reasonably necessary for the promotion

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29. The language that came to be cited as the authority for the practice of balancing may be found in Schneider v. State, 308 U.S. 147, 161 (1939), where Justice Roberts, speaking for the Court, stated:

> In every case, therefore, where legislative abridgement of [freedom of speech and of the press] is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.

For a comprehensive discussion of the balancing practice, see Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962); Frantz, *Is the First Amendment Law? A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729 (1963).

30. Cantwell v. Connecticut, 310 U.S. 296, 311 (1940); *accord*, NAACP v. Button, 371 U.S. 415, 433 (1963); Shelton v. Tucker, 364 U.S. 479, 488-89 (1960).

31. Thornhill v. Alabama, 310 U.S. 88, 96-98 (1940).

32. *See* Schneider v. State, 308 U.S. 147, 161-62 (1939).

33. 330 U.S. 75 (1947).

34. Mosher, *Government Employees Under the Hatch Act*, 22 N.Y.U.L.Q. 233, 240-54 (1947); Nelson, *supra* note 15, at 33-50; Note, *Political Sterilization of Government Employees*, 47 COLUM. L. REV. 295 (1947); Note, *Statute Prohibiting Political Activity by Public Employees Held Unconstitutional for Overbreadth*, 42 N.Y.U.L. REV. 750, 751 (1967).

35. 330 U.S. at 95-96.

36. *Id.* at 101.

of a legitimate governmental interest, while at the same time leaving the ultimate determination of reasonableness and balancing of the interests involved to Congress.[37]

In a barrage of decisions following *Mitchell* the Supreme Court abandoned the privilege doctrine,[38] required the Government to prove that any restrictions imposed on first amendment rights did indeed advance a compelling governmental interest,[39] and subjected legislation infringing on such rights to a strict standard of review.[40] The Government was required to show that no "less drastic means"[41] existed for safeguarding the compelling governmental interest than those contained in the challenged legislation. In addition, the Court closely examined all statutes brought before it involving first amendment rights and determined them to be unconstitutional if vague[42] or overbroad.[43] At the same time, the Court once again examined the challenged statute in light of its total scope rather than merely its effect on the particular individual before the Court.[44] While these first amendment cases did not express a totally new body of constitutional law, they certainly suggested that the case law ignored by the Court in *Mitchell* had been revitalized. This development led many commentators,[45] several state

37. Note, *Statute Prohibiting Political Activity by Public Employees Held Unconstitutional for Overbreadth*, 42 N.Y.U.L. REV. 750, 751 (1967).

38. Pickering v. Board of Educ., 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966); Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961). In Keyishian v. Board of Regents, *supra*, at 605-06, the Court said that "the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Accord*, Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

39. Sherbert v. Verner, 374 U.S. 398, 406 (1963).

40. *See, e.g.*, Coates v. City of Cincinnati, 402 U.S. 611 (1971); Keyishian v. Board of Regents, 385 U.S. 589 (1967). *See also* the additional cases cited in Note, *Section 15 of the Hatch Act Is Impermissibly Vague and Overbroad in Violation of the First Amendment*, 26 VAND. L. REV. 355, 360 n.28 (1973).

41. Aptheker v. Secretary of State, 378 U.S. 500, 512-13 (1964); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

42. Quoting NAACP v. Button, 371 U.S. 415, 432-33, 438 (1963), and Speiser v. Randall, 357 U.S. 513, 526 (1958), the Supreme Court in Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967), summarized the Court's position in regard to statutory vagueness when first amendment rights are involved:

> [S]tandards of permissible statutory vagueness are strict in the area of free expression . . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity . . . . When one must guess what conduct may lose him his position, one necessarily will steer far wider of the unlawful zone . . . [because] [t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions.

For a good discussion of the void-for-vagueness doctrine, see Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

43. Grayned v. City of Rockford, 408 U.S. 104 (1972); United States v. Robel, 389 U.S. 258 (1967); NAACP v. Button, 371 U.S. 415 (1963). A statute will generally be declared unconstitutionally overbroad if it includes both legal and illegal activity within the activities it prohibits. *See* Coates v. City of Cincinnati, 402 U.S. 611 (1971). For a brief discussion of overbreadth and vagueness as applied to cases involving first amendment rights, see Hobbs v. Thompson, 448 F.2d 456, 459-60 (5th Cir. 1971).

44. NAACP v. Button, 371 U.S. 415, 432-33 (1963).

45. Buckley, *supra* note 23, at 574-75; Note, *Statute Prohibiting Political Activity by Public Employees Held Unconstitutional for Overbreadth*, 42 N.Y.U.L. REV. 750 (1967); Note, *The Public Employee and Political Activity*, 3 SUFFOLK U.L. REV. 380 (1969).

courts,[46] and one federal district court[47] to ignore or expressly question the validity of the *Mitchell* decision as a part of contemporary constitutional law.

III. UNITED STATES CIVIL SERVICE COMMISSION v. NATIONAL ASSOCIATION OF LETTERS CARRIERS

By "unhesitatingly reaffirm[ing]" *Mitchell*, the Supreme Court in *Letter Carriers*[48] held section 9(a) of the Hatch Act to be a legitimate exercise of congressional authority to restrict first amendment rights in an effort to promote an important governmental interest: the elimination of both partisan influences on federal employees and the polical influence of federal employees on others. In rejecting the claim that section 9(a) is unconstitutionally vague and overbroad, the Court stated that the Act's prohibitions are set out in terms that an ordinary person exercising ordinary common sense can understand and adhere to.[49]

The Court stated that its task was "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 its employees."[50] By declaring that Congress and the executive branch believed that federal employees should not be able to engage in partisan political activities, and refusing to question the validity of these beliefs,[51] the Court, as it apparently has done in no other case except *Mitchell*, seems to have left the important balancing of interests to the "joint judgment of the Executive and Congress."[52] As indicated by Justice Douglas in a dissent in *Letter Carriers* in which he was joined by Justices Brennan and Marshall, while the standard of interest balancing adopted by the Court in *Mitchell* and apparently once again by the majority of the Court in *Letter Carriers* would suffice "[o]n the run of social and economic matters,"[53] it cannot do so where basic first amendment rights are involved and deserving of a stricter standard of review.

Justice Douglas also stated that the obviously vague and overbroad prohibitions of the Hatch Act create a "chilling effect" on the exercise of first

46. *See, e.g.*, Bagley v. Washington Township Hosp. Dist., 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966); De Stefano v. Wilson, 96 N.J. Super. 592, 233 A.2d 682 (1967); Minielly v. State, 242 Ore. 490, 411 P.2d 69 (1966).

47. National Ass'n of Letter Carriers v. United States Civil Serv. Comm'n, 346 F. Supp. 578 (D.D.C. 1972).

48. 413 U.S. 548 (1973).

49. *Id.* at 579.

50. *Id.* at 564, quoting Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

51. The Court seems simply to have assumed that widespread participation by federal employees in political activities would pose a significant danger to the federal Civil Service System by relying heavily on the various reasons advanced and accepted by Congress for the passage of the Hatch Act. 413 U.S. at 564-67; *see* 84 CONG. REC. 9598, 9603-06, 9610 (1939) (remarks of Messrs. Taylor, Springer, Dempsey, Gwynne, and Michener). It is difficult to understand how any of these reasons, expressed in 1939, can be used to indicate that stringent restrictions on the political activities of federal employees is necessary today, especially in light of the fact that most government workers are presently employed in nonsupervisory positions. Note, *supra* note 40, at 364.

52. 413 U.S. at 566.

53. *Id.* at 596.

amendment freedoms by federal employees.[54] The majority of the Court, however, disagreed with all contentions that the Hatch Act's prohibitions were unconstitutionally vague and overbroad, and stated that the prohibited activities, as defined in section 15 of the Act, were not open-ended but were limited to those rules and proscriptions that had been developed under Civil Service Rule I prior to the passage of the Act.[55] The Court ignored the fact that a statute need not be open-ended to be unconstitutionally vague, as it is enough that it be "capable of sweeping and uneven application."[56] While maintaining that the activities prohibited by section 9(a) of the Hatch Act are set out in terms that an ordinary person exercising normal judgment and common sense can sufficiently understand and observe, the Court ignored the fact that there were in excess of 3,000 determinations of prohibited activities[57] that were incorporated by reference into section 9(a) by section 15, and that even those responsible for enforcing the Act's provisions had expressed doubts as to exactly what acts it prohibited.[58]

The Court stated that an administrative restatement of the prohibitions of Civil Service Rule I, Form 1236,[59] rather than the more than 3,000 activities prohibited by the Civil Service Commission prior to 1940, was what Congress intended to serve as its definition of prohibited partisan activities.[60] The Civil Service Commission's Regulations on Permissible Activities,[61] a listing of thirteen categories of permissible activities in which federal employees may engage under the Hatch Act, and Regulations on Prohibited Activities[62] are the successors of Form 1236. According to the Court, federal employees should look to these regulations to determine in what activities they are permitted to engage. This supposition of congressional intent, in addition to being based on very questionable evidence,[63] ignored the express language of section 15, which defines the prohibited activities outlined in section 9 to be those "prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President."[64]

Assuming, *arguendo*, that federal employees can rely on the Civil Service Commission's Regulations on Permissible and Prohibited Activities, these regulations are themselves unconstitutionally vague and overbroad. The

54. *Id.* at 596-600.
55. *Id.* at 576.
56. National Ass'n of Letter Carriers v. United States Civil Serv. Comm'n, 346 F. Supp. 578, 583 (D.D.C. 1972).
57. Rose, *A Critical Look At The Hatch Act*, 75 HARV. L. REV. 510, 511 (1962).
58. *See* Statement by John Macy, Jr., Chairman of the Civil Service Commission, before the Commission on Political Activity of Government Personnel, May 15, 1967, in 3 THE COMMISSION ON POLITICAL ACTIVITY OF GOVERNMENT PERSONNEL, A COMMISSION REPORT 15 (1968), as quoted and cited in National Ass'n of Letter Carriers v. United States Civil Serv. Comm'n, 346 F. Supp. 578, 582 n.8 (D.D.C. 1972).
59. For pertinent portions of Form 1236, see 86 CONG. REC. 2938-40 (1940).
60. 413 U.S. at 574.
61. 5 C.F.R. § 733.111 (1973).
62. *Id.* §§ 733.121, .122.
63. During the Senate debates on the Hatch Act in 1939, it was pointed out that none of the Senators knew what was said in the rulings of the Civil Service Commission which were incorporated into Form Number 1236. *See* 86 CONG. REC. 2940 (1940) (remarks of Mr. Minton).
64. 5 U.S.C. § 7324(a)(2) (1970).

regulations state that a federal employee may "[e]xpress his opinion as an individual privately and publicly on political subjects"[65] while also declaring that a federal employee "may not take an active part in political management or in a political campaign, except as permitted by this subpart."[66] The subpart referred to states, among other things:

> Activities prohibited by . . . this section include but are not limited to . . . [e]ndorsing or opposing a partisan candidate for public office or political party office in a political advertisement, a broadcast, campaign literature, or similar material . . . [and] [a]ddressing a convention, caucus, rally, or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office . . . .[67]

Because the acts prohibited are not limited by the Civil Service Commission's regulations, the federal employee is faced with thirteen categories of specifically prohibited activities and an indefinite number of activities that are susceptible of being prohibited at the Commission's discretion. Therefore, the regulations can arguably be considered to be open-ended and more vague than the more than 3,000 pre-1940 prohibitions. In either event, the federal employee "must guess what conduct or utterance may lose him his position"[68] and he likely "will 'steer far wider of the unlawful zone . . .' [f]or '[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions.' "[69]

The Court in *Letter Carriers* admitted that "[t]here might be quibbles about the meaning of taking an 'active part in managing' or about 'actively participating in fund-raising' or about the meaning of becoming a 'partisan' candidate for office" as such phrases are found in the Civil Service Commission's Regulations on Permissible and Prohibited Activities.[70] The standard developed by the Court in previous cases[71] that a statute touching first amendment rights must be narrowly drawn seems to indicate that a lengthy but specific statute regulating such rights would be tolerated while a short but vague statute would not. The Court ignored this by stating that the quibbles are permissible, as they are attributable to the "limitation in the English language with respect to being both specific and manageably brief . . . ."[72] The Court also admitted that there might be problems in distinguishing those activities permitted from those prohibited by the Civil Service Commission's Regulations on Permissible and Prohibited Activities.[73] Indeed, there are problems which might well confuse a reasonably prudent man of ordinary intelligence, such as being permitted to "[e]xpress his opin-

65. 5 C.F.R. § 733.111(a)(2) (1973).
66. *Id.* § 733.122(a).
67. *Id.* §§ 733.122(b)(10), (12).
68. Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967); *see* note 42 *supra.*
69. Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967), quoting NAACP v. Button, 371 U.S. 415, 433 (1963), and Speiser v. Randall, 357 U.S. 513, 526 (1958).
70. 413 U.S. at 578.
71. Keyishian v. Board of Regents, 385 U.S. 589 (1967); NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960).
72. 413 U.S. at 578-79.
73. *Id.* at 579.

ion as an individual privately and publicly on political subjects and candidates"[74] while not being allowed to address a "gathering of a political party in support of or in opposition to a partisan candidate for public office . . . ."[75] In support of its decision to declare section 9(a) of the Hatch Act constitutional in spite of the quibbles about the meaning of key phrases contained in the Commission's regulations and the problems involved in distinguishing between those activities permitted and those prohibited by the regulations, the Court stated that it was important that the Civil Service Commission had established a procedure whereby federal employees might seek a ruling on whether or not a certain activity was permissible before engaging in it.[76] Such a procedure is really not helpful because an employee will have to "guess what conduct or utterance may lose him his [job]"[77] if he has no time to seek a ruling, and may, indeed, avoid going through the procedure because of the bother involved. Thus, it appears clear that the Court abandoned, or at least ignored, the principle that government may regulate in the area of first amendment rights only with narrow specificity.

The Court devoted only two rather short paragraphs of its opinion to the issue of overbreadth.[78] In giving such little attention to this issue, the Court failed to view the breadth of the legislative abridgment of first amendment rights in the light of less drastic means available for achieving its purpose, as had been its previous practice.[79] In fact, as already pointed out, the Court never questioned, but merely assumed, the necessity for any restrictions on the first amendment rights of federal employees.

IV. CONCLUSION

By ignoring a substantial body of first amendment case law, the Court's holding in *Letter Carriers* should either stimulate Congress to pass more far-reaching restrictions on the exercise by federal employees of their first amendment rights or, hopefully, to review the policy reasons advanced for the Hatch Act's broad restrictions in the light of the composition of today's Civil Service.[80]

More important than its effect on the Civil Service, however, is the fact that the decision leaves the field of first amendment constitutional law in a state of uncertainty. The Court delegated to Congress the task of balanc-

74. 5 C.F.R. § 733.111(a)(2) (1973).
75. *Id.* § 733.122(b)(12).
76. In an affidavit filed in the district court, the General Counsel for the Civil Service Commission stated that "[t]he Information Unit [in the office of General Counsel] answers inquiries, from whatever source, concerning the application of the Hatch Act, Rule, and regulations." 413 U.S. at 580 n.22.
77. Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967).
78. 413 U.S. at 580-81.
79. *See* Aptheker v. Secretary of State, 378 U.S. 500, 512-13 (1964); Shelton v. Tucker, 364 U.S. 479, 488 (1960).
80. A major reappraisal of the Hatch Act is already underway. Congress created the Commission on Political Activity of Government Personnel in 1966 which recommended major relaxations of the Act's restrictions. *See* Note, *Hatch Act Prohibition on Federal Employee Political Activity Held Unconstitutional for Overbreadth*, 6 IND. L. REV. 544, 556-57 (1973).

ing the interests involved in a matter concerning first amendment rights, rather than performing that crucial function itself. In addition, the Court did not require the Government to prove that a substantial governmental interest was being advanced by the imposition of restrictions on first amendment rights, or to demonstrate that no less drastic means existed to promote the governmental interest involved. By the above, together with the Court's refusal to require that section 9(a)'s restrictions on first amendment rights be narrowly drawn, the Court may have set a dangerous precedent. Because of this failure to rely on many of the important first amendment cases of recent years, it is questionable if the Court's "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open"[81] still exists.

Jeffrey C. Londa

Kern County Land Company v. Occidental Petroleum Corporation: An Approach to 16(b)

In a tender offer made to acquire control of Kern County Land Company (Old Kern),[1] Occidental Petroleum Corporation purchased more than ten percent of Old Kern's outstanding stock. Occidental's efforts were thwarted, however, by a defensive merger between Old Kern and Tenneco Corporation. In the planned merger Old Kern stockholders were to exchange their shares of Old Kern for Tenneco preferred stock on a share-for-share basis. Within a month of its original tender offer Occidental granted a finding option to sell to Tenneco the Tenneco shares it received as a result of the merger, the sale to take place at least six months after the tender offer expired. Occidental subsequently exchanged its Old Kern stock for Tenneco stock, pursuant to the merger, and immediately sold the new stock to Tenneco and reaped a $19 million profit. New Kern, a corporation formed by Tenneco, instituted an action under section 16(b) of the Securities and Exchange Act of 1934.[2] The district court entered summary judgment for New Kern,[3] and was reversed by the court of appeals.[4] The Supreme Court granted certiorari. *Held, affirmed*: Where the transaction contained no

81. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

1. Old Kern became known as the 600 California Corporation after the reorganization described in the text. The name Old Kern is used to distinguish it from New Kern, its successor as the Kern County Land Company.

2. 15 U.S.C. § 78p(b) (1970): "For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner . . . any profit realized by him from any purchase and sale . . . of any equity security of such issuer . . . within any period of less than six months . . . shall inure to and be recoverable by the issuer, *irrespective of any intention* on the part of such beneficial owner, director, or officer . . . ." (Emphasis added.)

3. Abrams v. Occidental Petroleum Corp., 323 F. Supp. 570 (S.D.N.Y. 1970).

4. Abrams v. Occidental Petroleum Corp., 450 F.2d 157 (2d Cir. 1971).

possibility of speculative abuse of inside information, an involuntary exchange will not constitute a sale for purposes of section 16(b). Nor will an option without the possibility of such abuse be treated as a sale in this context. *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582 (1973).

I. APPROACHES TO APPLICATION OF SECTION 16(b)

Section 16(b) was originally designed as a prophylactic measure, a crude rule of thumb,[5] meant to prevent insider profits from short swing transactions.[6] The statute applies to any "purchase and sale" or "sale and purchase"[7] of any equity security[8] by a statutory insider within a six-month period. The term "insider," for purposes of this section, includes one who owns more than ten percent of any class of any equity security, an officer, or director.[9] The statute presumes that such owners have inside information which is subject to abuse. The rule was to be applied mechanically, requiring no actual showing of inside information or abuse.[10] Profits from any such "purchase and sale" are recoverable by the issuer[11] of the security regardless of the owner's intent.

All courts have mechanically applied the rule to the orthodox cash purchase and sale transaction. However, the statutory definition of purchase and sale does not clearly cover the non-cash or "unorthodox" purchase and sale.[12] There have developed two distinctly different interpretations of how the statute should be applied to these unorthodox transactions. These are the "objective" or mechanical approach and the "subjective" or pragmatic ap-

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5. The phrase "crude rule of thumb" was first used by Thomas Corcoran in testimony before the Senate Committee on Banking and Currency to describe how the statute should be applied.

> You hold the director [liable for short swing profits] irrespective of any intention or expectation to sell within 6 months after, because it will be absolutely impossible to prove the existence of such intention or expectation and you have to have this crude rule of thumb, because you cannot undertake the burden of having to prove that the director intended, at the time he bought, to get out on a short swing.

S. REP. No. 1455, 73 Cong., 2d Sess. 6557 (1934).

6. A short swing transaction is one in which the purchase and sale both take place within a 6-month period.

7. Within the context of this statute, the terms "buy" and "purchase" include any contract to buy, purchase, or otherwise acquire any equity security, the terms "sale" or "sell" include any contract to sell or otherwise dispose of any equity security. 15 U.S.C. §§ 78c(a)(13), (14) (1970).

8. An "equity security" is: "any stock or similar security; or any security convertible . . . into such a security . . . ; or any other security which the Commission shall deem to be of similar nature and consider necessary . . . for the protection of investors, to treat as an equity security." 15 U.S.C. § 78c(a)(11) (1970).

9. 15 U.S.C. §§ 78p(a), (b) (1970).

10. S. REP. No. 1455, *supra* note 5.

11. The corporation is allowed to recover upon the theory that inside information is a corporate asset and profits derived from misuse of it should be returned to the corporation. H. MANNE, INSIDER TRADING AND THE STOCK MARKET 24 (1966).

12. The term is from 2 L. LOSS, SECURITIES REGULATION 1069 (2d ed. 1961). It has been applied to non-cash purchases and sales of stock. *See* Bershad v. McDonough, 428 F.2d 693 (7th Cir. 1970) (options); Newmark v. RKO Gen. Inc., 425 F.2d 348 (2d Cir.), *cert. denied*, 400 U.S. 854 (1970) (merger); Roberts v. Eaton, 212 F.2d 82 (2d Cir.), *cert. denied*, 348 U.S. 827 (1954) (reclassification); Park & Tilford, Inc. v. Schulte, 160 F.2d 984 (2d Cir.), *cert. denied*, 332 U.S. 761 (1947) (conversions).

proach.[13] Until the last decade most courts applied the objective approach to any transaction that came within the purview of the statute.[14] No attempt was made to determine if the opportunity for actual abuse of inside information existed; the fact that the court found that the transaction was a purchase and sale or a sale and purchase within six months was all that was necessary for the defendant to be held liable. No distinction was drawn between the orthodox or unorthodox transactions.

Smolowe v. Delendo Corp.[15] was the first major case to adopt the mechanistic approach. Two directors of Delendo Corporation had purchased and sold common stock of the corporation within a six-month period. It was conceded that there was no abuse of inside information. The court held that section 16(b) was to be applied to the operative facts of the transaction regardless of any lack of unfair use of inside information. Finding the defendants liable, the court wrote:

> It is apparent . . . from the language of § 16(b) itself, as well as from the Congressional hearings, that the only remedy which its framers deemed effective for this reform was the imposition of a liability based upon an objective measure of proof . . . .
>
> A subjective standard of proof, requiring a showing of an actual unfair use of inside information, would render senseless the provisions of the legislation limiting the liability period to six months . . . .[16]

In *Park Tilford, Inc. v. Schulte*[17] the objective approach was applied to a more unorthodox transaction and this case became the basis for the application of the objective approach to all types of transactions. Involved was a conversion of preferred for common stock when within six months of the conversion the defendants sold the common stock. The court limited the issues to whether the two transactions had taken place within six months and if they could be interpreted as a purchase and sale. If both of these questions could be answered in the affirmative then the defendants were automatically liable.

In finding for the plaintiffs, the court held that *Smolowe* forbade the use of any criteria other than those set forth in the statute. The strict application of these criteria and disgorging of any profits acquired was supposed to give the statute a deterrent effect.[18] This approach, void of consideration

13. For a discussion of these two approaches and their application, see Gadsby & Treadway, *Recent Developments Under Section 16(b) of the Securities Exchange Act of 1934*, 17 N.Y.L.F. 687 (1971); Lowenfels, *Section 16(b): A New Trend in Regulating Insider Trading*, 54 CORNELL L.Q. 45 (1969).

14. Exceptions to this application of the rule are found in Ferraiolo v. Newman, 259 F.2d 342 (6th Cir. 1958), *cert. denied*, 359 U.S. 927 (1959), where the court refused to apply the *Park & Tilford* test to an involuntary conversion, without any chance of insider abuse, and Roberts v. Eaton, 212 F.2d 82 (2d Cir.), *cert. denied*, 348 U.S. 827 (1954), where a reclassification affected all shareholders equally and afforded no speculative advantage to the insider defendants, although the court did suggest that a reclassification could be a § 16(b) transaction if it lent itself to speculative abuse.

15. 136 F.2d 231 (2d Cir.), *cert. denied*, 320 U.S. 751 (1943).

16. *Id.* at 235-36.

17. 160 F.2d 984 (2d Cir. 1947).

18. *Id.* at 988.

of any subjective elements, was employed by the majority of courts for thirty years.[19]

While decisions that strayed from this harsh interpretation were a rarity until the early 1960's,[20] *Ferraiolo v. Newman*[21] provided the standard for what was to become the subjective approach. This was the first case in which a court reviewed all of the facts subjectively and decided that section 16(b) would apply to this unorthodox transaction only if a real possibility of abuse of inside information existed.[22]

Rejecting the objective approach of applying the rule to any transaction that might broadly be termed a purchase and sale, the courts began to fashion a new approach to unorthodox transactions.[23] The subjective approach requires the court to consider the facts of the case in order to determine if the transaction presented the possibility of abuse which Congress intended to prevent.[24] If it was one open to speculative abuse of inside information, then the rule was to be applied; if not, then the case was outside of the rule. Determination of whether the transaction was a purchase and sale within the rule was to be made after the possibility for abuse was determined.[25] The courts using this approach are less concerned with strict (objective) statutory application than with the intent of the rule. Since the mid-1960's the majority of decisions have adopted this approach.

The first Supreme Court decision in this area, *Reliance Electric Co. v. Emerson Electric Co.*,[26] came in 1972. In a split decision, the court applied a strict, objective interpretation of the rule to a transaction designed to limit section 16(b) liability by splitting the sale of stock. The beneficial owners of a corporation held 13.2 percent of the stock. Within six months of acquisition of the stock they sold 3.24 percent, and two weeks later they sold the remaining 9.96 percent.[27] The Supreme Court, relying on previous cases applying the objective approach, found the beneficial owner liable only for that portion of profits on the first sale. The Court reviewed the opera-

19. *See* Reliance Elec. Co. v. Emerson Elec. Co., 404 U.S. 418 (1972); Newmark v. RKO General, Inc., 425 F.2d 348 (2d Cir.), *cert. denied*, 400 U.S. 854 (1970); Heli-Coil Corp. v. Webster, 352 F.2d 156 (3d Cir. 1965).

20. *See* cases cited note 14 *supra*.

21. 259 F.2d 342 (6th Cir. 1958), *cert. denied*, 359 U.S. 927 (1959).

22. The court held the transaction (an involuntary conversion) would be considered a purchase only if "the transaction is of a kind that can possibly lend itself to the speculation encompassed by section 16(b)." 259 F.2d at 345. The court based its holding on the premise that the conversion was involuntary, there was no chance for speculative abuse, and, therefore, a § 16(b) purchase had not taken place.

23. For the past decade the weight of judicial authority has supported the subjective approach to application of § 16(b). Bershad v. McDonough, 428 F.2d 693 (7th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971); Petteys v. Butler, 367 F.2d 528 (8th Cir. 1966), *cert. denied*, 385 U.S. 1006 (1967); Blau v. Lamb, 363 F.2d 507 (2d Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967); Blau v. Max Factor & Co., 342 F.2d 304 (9th Cir.), *cert. denied*, 382 U.S. 892 (1965). In the preceding cases the courts looked first as to whether there was any opportunity for speculative abuse before applying § 16(b). *See also* notes 18, 19 *supra*, 28 *infra*, and accompanying text.

24. Newmark v. RKO General, Inc., 425 F.2d 348 (2d Cir.), *cert. denied*, 400 U.S. 854 (1970).

25. *Id.* at 351.

26. 404 U.S. 418 (1972).

27. At the time of the second sale the owners held only 9.96% of the stock and were no longer "beneficial owners" under a strict reading of the statute and therefore were not subject to § 16(b) prohibitions.

tive facts and refused to look at the possibility of abuse inherent in the situation. Construing the statute strictly, the Court expressly found the objective standards of the statute controlling.[28] The holding by the Supreme Court in *Reliance* was heralded by many commentators as a return to the objective approach.[29] The subsequent decision in *Kern County*, however, limits the scope of application of the objective approach.

II. KERN COUNTY LAND CO. V. OCCIDENTAL PETROLEUM CORP.

In *Kern County Land Co.* the Supreme Court explicitly chose the subjective over the objective approach to section 16(b).[30] The Court found that "the prevailing view is to apply the statute only when its application would serve its goal"[31] of preventing abuse of inside information. The Court determined its duty to be to decide whether the sale within the scope of the statute took place, either when Occidental became bound to exchange its shares of Old Kern as a result of the merger, or when Occidental gave the option to Tenneco to purchase the Tenneco shares so acquired.[32]

The Court repeatedly pointed out that at no time did Occidental have access to insider information, and that in fact Old Kern vigorously opposed Occidental's efforts to gain control. The exchange of Occidental's Old Kern stock for Tenneco was claimed to be a "sale" under section 16(b). The Court held that the critical fact was that the exchange took place pursuant to a merger between Old Kern and Tenneco,[33] a merger over which Occidental had no control and which was in fact consummated to thwart Occidental's plans. The merger made the exchange irrevocable and involuntary; Occidental could not avoid the exchange unless it sold its Old Kern stock prior to the closing of the merger. Because this sale would clearly have given rise to liability under section 16(b),[34] it was not a reasonable alternative. The Court held that since the exchange was involuntary and the merger was not engineered by Occidental, there was an absence of the "speculative abuse of inside information," and thus section 16(b) should not apply and no liability should arise.

The second question to be answered was whether the option agreement between Occidental and Tenneco was a sale for purposes of section 16(b). The Court pointed out the mutual advantages to both parties of the option arrangement. Occidental wanted to avoid being tied into an unfavorable minority stockholder position and Tenneco had no desire to have a "potentially troublesome minority stockholder."[35] Applying the subjective criterion

28. 404 U.S. at 422. "The only method Congress deemed effective to curb the evils of insider trading was a flat rule taking the profits out of a class of transactions in which the possibility of abuse was believed to be intolerably great." *Id.*

29. Gadsby & Treadway, *supra* note 13; Note, *Reliance Electric Co. v. Emerson Electric Co.: A Mechanistic Application of Section 16(b)*, 26 SW. L.J. 792 (1972); Note, *Reliance Electric and 16(b) Litigation: A Return to the Objective Approach?*, 58 VA. L. REV. 907 (1972).

30. *Id.* at 594, 595 n.26.

31. *Id.* at 595.

32. *Id.*

33. *Id.* at 596.

34. *Id.* at 599.

35. *Id.* at 601.

of whether the possibility of speculative abuse existed, the Court found it did not; Occidental had given a fixed-price option under which it could not share in a rising market, and Tenneco had the right to buy although Occidental could not force it to do so. The Court indicated that these are not the types of arrangements or motivations that give rise to speculative abuse.

The Court pointedly mentioned that even if Occidental had inside information at the time of the option it was in respect to Old Kern, not Tenneco.[36] Occidental had no inside information as to what the future value of Tenneco stock would be. Moreover, the Court noted that the opinion was not exercisable until after six months in the future and that the rule presumed any advantage that existed would dissipate by that time. The Court also found that the premium Tenneco paid for the option was not so large as to make its exercise inevitable.[37]

Accordingly, the majority held that neither the exchange of stock nor the option agreement were sales within the meaning of section 16(b) because of the lack of opportunity for speculative abuse.[38] Justice Douglas, dissenting, argued that the rule should be applied strictly and not in an ad hoc fashion. Relying on the decision in *Reliance Electric* and the language of the statute itself, Douglas claimed that this transaction was clearly a sale and that the rule does not allow any inquiry into whether there was actual abuse of inside information.[39] Justice Douglas said, "It's one thing to interpret the terms 'purchase' and 'sale' liberally in order to include those transactions which evidence the evil Congress sought to eliminate; it is quite another to abandon the bright-line test of section 16(b) for these transactions which clearly fall within its literal bounds."[40]

The Court rejected the traditional objective approach. That is, they refused to apply the rule to an unorthodox transaction because there was no opportunity for abuse of inside information. But the Court did not reject the necessity of having the objective statutory criteria set forth in the statute met before liability arose. While the Court in this case embraced the subjective approach to unorthodox transactions, in making this determination the Court also related the facts in the case to a strict reading of the statute. Applying the subjective approach, the Court found that there was no opportunity for the abuse of inside information and that the transaction was not a sale within the meaning of section 16(b).

Reading the *Kern* case in conjunction with *Reliance Electric*, a new standard for the application of 16(b) is formed. A closer examination of *Reliance* shows that the subjective approach was not rejected, but rather was not needed for a determination of the issue in that case. Because of the orthodox nature of the transaction in *Reliance Electric*, the Court never arrived at the point where a subjective decision was necessary. The sales were mere brokerage transactions, and therefore it was not necessary to employ

36. *Id.* at 603.
37. *Id.* at 596, 603, 604.
38. *Id.*
39. *Id.* at 605, 606.
40. *Id.* at 613.

the subjective approach which is used when unorthodox transactions are encountered. Simply stated, the factual situation did not necessitate the use of the subjective approach. Since the seller in *Reliance* was not a beneficial owner at the time of the second sale the case did not fit the objective statutory criteria of section 16(b).[41] However, in *Kern County*, because the statutory criteria of the rule were met and because of the unorthodox nature of the transaction, the question progressed to whether the transaction was one that was open to the speculative abuse of inside information. This was necessary to determine whether the transaction was within the scope of section 16(b).

Taken together, *Reliance Electric* and *Kern County* exemplify the application of the two tests and affirm the subjective approach to application of section 16(b) in unorthodox transactions. The present test for application of section 16(b) would seem to consist of: (1) whether the transaction was orthodox or unorthodox; if orthodox then the objective approach is applied; if the transaction is unorthodox then the following is considered; (2) whether this transaction is one that lends itself to the possibility of unfair use of inside information; and (3) if it does, whether it was a purchase and sale or sale and purchase within the meaning of section 16(b). For both orthodox and unorthodox transactions, all of the strict objective criteria of the statute must be met before liability will arise.

The dissents in both *Reliance* and *Kern* were written by Justice Douglas, who argues for a broad interpretation of what transactions the 16(b) rule covers and a strict objective approach to the application of the rule. In *Reliance* he would have held the seller liable by interpreting the two sales as one for purposes of the rule, and in *Kern County* he would advocate strict application of the rule regardless of the opportunity for abuse. Therefore, applying a stricter test, Justice Douglas would have found the defendants liable in both cases.

III. CONCLUSION

The approach espoused by the Court allows the greatest maximum flexibility in determining whether the transaction is one which Congress intended to prevent, while at the same time requiring that the objective statutory criteria be met before liability can attach. While not yet entirely clear, the Court's basic approach to the application of section 16(b) appears to be formed. The uncertainty as to which test to apply should disappear as the lower courts begin to apply this standard to section 16(b) cases.[42] The courts will be able to combine the equity of the subjective approach with

41. 15 U.S.C. § 78p(b) (1970); *see* note 2 *supra*.

42. In Gold v. Sloan, 486 F.2d 340 (4th Cir. 1973), the court relied on the *Kern County* case in holding that an exchange of common stock pursuant to a merger does not constitute a "purchase" for purposes of determining the applicability of § 16(b) liability when no opportunity for abuse of inside information existed. The court declared that under *Kern County* the question was "not whether there was 'actual abuse of insider information' or 'intent to profit on the basis of such information.' These considerations are irrelevant. It is specifically whether the defendant 'had or was likely to have access to inside information, * * * so as to afford it [or him] an opportunity to reap speculative, short-swing profits' from the unorthodox transaction."

the prophylactic effect desired by Congress when the rule was written. Although the *Kern-Reliance* approach will continue to dictate liability in cases such as *Smolowe* and *Park & Tilford*, the difference will be felt in those unorthodox transactions where the objective criteria are met but there is no chance for abuse. Congress has allowed the separate approaches to divide the courts at various times without taking any legislative action. In view of this, the Supreme Court's only choice was to take the most equitable approach available while still following the statute's basic language. If Congress is unhappy over the Supreme Court's resolution of the problems inherent in the rule, then the rule should be amended so as to define more clearly the terms and methods of application Congress prefers. The Court itself has twice suggested that if it has misinterpreted congressional intent then Congress should dictate a different result.[43]

George W. Tenney

43. *See* Kern County Land Co. v. Occidental Land Corp., 411 U.S. 582, 595 (1973); Reliance Elec. Co. v. Emerson Elec. Co., 404 U.S. 418, 425 (1972).