

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 76-03
(September 8, 1976)

**Campaign Contributions to Non-Judicial
Political Candidates**

Issue

Does a judge "actively" take part in a political campaign if he or she makes a contribution to a non-political candidate?

Answer: No.

Discussion

This opinion relates to an inquiry whether the portion of Canon 7A(1)(c) of the Arizona Code of Judicial Conduct (1976), which provides, in part, that a judge should not "make contributions to a political party or organization or to a non-judicial candidate in excess of a total of One Hundred Dollars per year," is in conflict with Article 6, § 28, Arizona Constitution, which provides, in part, that "[n]o justice or judge of any court of record shall practice law during his continuance in office, nor shall he hold office in a political party or *actively take part in any political campaign* other than his own for his reelection or retention in office" (requester's emphasis). [**Note: The Supreme Court increased the limit to \$250 per year in the 1985 version of the Code of Judicial Conduct.**]

The threshold problem of whether any limitation upon the amount which a person may contribute to a candidate for public office is forbidden by the First Amendment to the U.S. Constitution has been answered by *Buckley v. Valeo*, 421 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), in which the Supreme Court of the United States held that a proscription imposing a \$1,000 limitation on contributions to individuals to any single candidate for a federal elective office does not violate First Amendment rights of freedom of speech and association. Accordingly, it is the opinion of this committee that Canon 7A(1)(c) does not violate the First Amendment to the U.S. Constitution and is within the rule-making power of the Supreme Court of Arizona, Article 6.1, §5, Arizona Constitution.

A secondary problem is whether Canon 7A(1)(c) violates the provisions of Article 6, § 28, Arizona Constitution. More succinctly, does a contribution to a non-judicial candidate by a justice or judge of a court of record in Arizona mean that he or she has "actively take[n] part in any political campaign" of the non-judicial candidate?

A search for the origin of the phrase "actively take part in any political campaign" has led the committee to §1 of Rule I of the U.S. Civil Service Commission, which provided *inter alia*, that,

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No person in the Executive Civil Service shall use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. Persons who, by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, shall take no active part in political management or in political campaigns. Executive Order No. 655, June 15, 1907.

This limitation of political activity was thereafter incorporated in § 12(a) of the Hatch [Political Activity] Act, Act of July 19, 1940, c. 640, § 4, 54 Stat. 767, adding a new § 12 (a) to the Act of August 2, 1939, c. 410, 53 Stat. 1147, entitled "An Act to prevent pernicious political activities." 18 U.S.C. § 61 *et seq.*, later 5 U.S.C. § 118 *et seq.* (Note that § 12(a) includes a sentence which reads as follows: "No such officer or employee [of any state or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal Agency] shall take any active part in political management or in political campaigns.")

Examples of activities which have been held to be prohibited by the Hatch Act are: (1) acting as a chairman of the Democratic State Central Committee and as a member of the "Victory Dinner" committee for the purpose of raising funds for the Democratic Party, *State of Oklahoma v. United States Civil Service Commission*, 330 U.S. 127, 67 S.Ct. 544, 91 L.Ed. 794 (1947); (2) service as a ward executive committeeman on a political committee, *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S. Ct. 556, 91 L.Ed. 754 (1947); (3) soliciting funds in connection with a Democratic fund-raising dinner by the office manager of the Harlan and Middlesboro offices of the Kentucky Department of Economic Security from the employees of the office, *Jarvis v. U.S. Civil Service Commission*, 382 F.2d 339, (6 Cir. 1967); and (4) fund raising by employees of the Utah Road Commission who coerced or attempted to coerce, commanded or advised other officers or employees "to pay or contribute part of their salaries or compensation to the Republican Party organization of Utah for political purposes." *State of Utah v. U. S.*, 286 F.2d 30, 31(10 Cir. 1961), *cert. denied*, 366 U.S. 918, 81 S.Ct. 1093, 65 L.Ed.2d 240 (1961).

On the other hand, it was held in *Wages v. U. S. Civil Service Commission*, 170 F.2d 182, 183 (6 Cir. 1948), that the Hatch Act provisions "do not penalize the payment of money nor make it a criminal act to make a political contribution. The statute neither expressly nor impliedly prohibits contributions either by individuals or by groups."

The opinion in *Wages* then narrows, *supra* at 183, in on the issue to be decided herein as follows:

Nor are we impressed by the contention that a contribution is made criminal by the provision that "No such officer or employee shall take any active part in political management or in political campaigns." This plainly includes and refers to executive direction of political campaigns and to such activities as making speeches, distribution of literature, house-to-house canvasses, etc.

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The holding in *Wages* is consistent with the interpretation of § 1 of Civil Service Rule I and the Act of August 2, 1939, as amended by the Act of July 19, 1940, with respect to contributions by federal employees as it appears in (*Political Activity and Political Assessments of Federal Officeholders and Employees*, U.S. Civil Service Commission (1944) at 11,) as follows:

20. Contributions.-Employees may make voluntary contributions to a regularly constituted political organization for its general expenditures, subject to the limitation laid down in section 13 of the act. The term "contribution" includes a gift, subscription, loan, advance, or deposit of money or anything of value, and includes a contract, promise, or agreement, whether or not legally enforceable, to make a contribution.

...

The Commission has held that voluntary contributions may be made at any time, even subsequent to a general election, so long as they are made to a regularly constituted political organization for its general expenditures.

The current U.S. Civil Service Commission regulations specifically state that, among permissible activities of state and local employees subject to the Hatch Act, is the retained right of each employee to "[m]ake a financial contribution to a political party or organization." 5 CFR § 151.111(a)(8). There is a similar provision concerning the retained rights of federal employees. 5 CFR § 733.111(a)(8)

It has been stated that a judge does not give up all of his rights as a citizen when he accepts appointment or election to office as a judge. Thode, *Reporter's Notes to Code of Judicial Conduct* (1973), at 95. It is the opinion of this committee that making a contribution to a non-judicial candidate is not actively taking part in a political campaign. It is an expression of a citizen, who is a judge, of his or her desire to support, as a citizen and voter, a particular candidate and does not constitute actively taking part in the non-judicial candidate's campaign. The word "actively" as used in Article 6, § 28, Arizona Constitution, is construed to mean "active participation" in a political campaign other than the judge's campaign for reelection or retention in office. It is the committee's opinion that a judge's financial contribution is not active participation in the non-judicial donee's campaign and Canon 7A (1)(c) is not unconstitutional because of the provisions of Article 6, § 28.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canon 7A(1)(c) (1975).

Legal References

Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L.Ed.2d 659 (1976).

Jarvis v. U.S. Civil Service Comm., 382 F.2d 339 (6 Cir. 1967).

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State of Utah v. U.S., 286 F.2d 30, 31 (10 Cir., 1961), *cert. denied*, 366 U.S. 918, 81 S. Ct. 1093, 65 L.Ed.2d 240 (1961).

Wages v. U.S. Civil Service Commission, 170 F.2d 182 (6 Cir. 1948).

State of Oklahoma v. U.S. Civil Service Comm., 330 U.S. 127, 67 S.Ct. 544, 91 L.Ed. 794 (1947).

United Public Workers v. Mitchell, 330 U.S. 75, 67 S. Ct. 556, 91 L.Ed. 754 (1947).

Other References

Arizona Constitution, Article 6, § 28 and Article 6.1, § 5.

E. Wayne Thode. *Reporter's Notes to Code of Judicial Conduct*, American Bar Association (1973).

Hatch [Political Activity] Act, Act of July 19, 1940, c. 640, § 4, 54 Stat 767, adding a new § 12(a) to the act of August 2, 1939, c. 410, 53 Stat. 1147, 18 U.S.C. § 61 *et seq.*, later 5 U.S.C. § 118 *et. seq.*

U.S. Civil Service Commission. *Political Activity and Assessments of Federal Officeholders and Employees* (1944).

5 Code of Federal Regulations § 151.111(a)(8) and § 733.111(a)(8).