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The Merit System -- An Essential of Good Government

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THE MERIT SYSTEM—AN ESSENTIAL OF GOOD GOVERNMENT

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Burke, in the trial of Warren Hastings, observed, "Law and arbitrary power are in eternal enmity." The same irreconcilable conflict exists, in this country, between professional politicians and sponsors of the merit system. This is because the aims of the two camps are completely antagonistic. In no other place where the two party system obtains, is the filling of offices and positions on the basis of vote-getting service and strength and political contributions made or secured for the party, so predominant a part of political activity. Patronage is the backbone in the United States of the political parties in federal, state and local political operations.[1] There is, in this country, no other effective party discipline. Thus, members of the Congress, state legislators and municipal officers holding important positions openly oppose legislation or policies recommended by their chief executive. Here patronage is the most effective pressure an executive can exert on members of his party. The immense number of offices and positions created during the terms of the late President Roosevelt enabled him to fill them in a way that pleased those who favored his objectives and that punished those who did not. Burke's definition of "party"

> ". . . a body of men for promoting by their joint endeavors the national interest upon some particular principle to which they are all agreed."

is inapplicable to politics as practiced with us.[2]

Not too exaggerated is Ambrose Bierce's biting aphorism:

> "Politics is a struggle of interests masquerading as a contest of principles. The conduct of public affairs for private advantage."[3]

If a boss or machine politician is frank, he will tell you the merit system is the ruination of his business. "How," he queries plaintively, "are we to get the boys to work when we have no jobs to give them?"

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1. See Worthy, *The Problem of Patronage*, 72 GOOD GOVERNMENT No. 2 (March-April 1955) (publication of National Civil Service League, 315 Fifth Avenue, New York).

2. Seasongood, *George Washington and Political Parties*, 1 THE AMERICAN SCHOLAR 265 (No. 3, May 1932).

3. Quoted in Seasongood, *Public Service By Lawyers In Local Government*, 2 SYRACUSE L. REV. 210, 218 (1951).

A partial answer is, that he dispenses illicit special favors. But these are numerically inadequate. Jobs and the promise of jobs are what produce, by means fair or foul, a large vote for the organization.

Hence, the regular politician spreads false reports of poor workings of the merit system and resorts to various ruses to thwart its most effective operation. Where some civil service is mandatory, what is furnished is often not the true merit system, but a perversion of it. The beginnings of any real civil service in this country date from about eighty years ago. They received impetus from the Pendleton Federal Civil Service Bill of 1883.[4] But even now, civil service, in any thing approaching genuineness, does not exist in perhaps half the states of the Union.[5]

Civil Service is an example of the truism that no constitution or statute, however excellent, will measurably achieve its aims if administered by persons hostile to it with minds desirous of erring. Most of the constitutional provisions for the merit system, as contrasted with those for home rule for local subdivisions, are not self-executing, but require legislation to implement them. This is the Achilles' heel of the system, where the spears of insufficient appropriations and restrictive and crippling legislation inflict mortal wounds.

Enemy Efforts to Impair Workings of the Merit System

To make assurance of injuries to the system doubly sure, various devices are employed to hamstring its forward movements. Thus, for example:

1. The set-up of a bipartisan two-member commission appointed by the executive is a poor one. The appointed member of opposite politics to that of the executive is often a friendly Indian who goes along with his more vigorous colleague. Like as not, these appointments will be made on recommendation of the governing parties of the two machines and may be of persons who have been and continue to be intensely partisan, with little sympathy for, or even with hostility toward the system they are supposed to administer. Even if the commission is composed of three or more members, the appointments to it can be of such character as to make it unworkable. In Cincinnati, before 1926, the Civil Service Commission, appointed by the mayor, was a sham. Its examinations were dishonest and it was well known to be an instrumentality for getting into and keeping in positions those desired by

4. 22 STAT. 403 (1883).

5. THE SURVEY 603 (November 1949); SEASONGOOD, LOCAL GOVERNMENT IN THE UNITED STATES 112 *ff.* (1933). Constitutional merit system provisions have multiplied slowly since beginning in New York (1894), Ohio (1912), Colorado (1919), California (1934), Michigan, Kansas and Louisiana (1940), Georgia and Missouri (1945). 64 GOOD GOVERNMENT 21 (November-December 1947).

the boss, and preventing appointments not desired by the machine, no matter how meritorious the unwanted applicant might be.[6]

The provisions in the amended charter of Cincinnati,[7] adopted about thirty years ago, for the set-up of the Civil Service Commission and of its secretary, well administered, changed all this and furnished a sound formula for effective workings of the merit system. There are three members "of recognized character and ability," each serving for a term of six years. One is appointed by the Board of Directors of the University of Cincinnati, one by the Board of Education of the Cincinnati School District, and one by the mayor. The city manager appoints the secretary of the Commission who also acts as the personnel officer of the city government and must be a person experienced in personnel work. He also acts as chief examiner and superintends the examinations subject to the direction of the Commission and he appoints all of his subordinates.

As excellent appointments were made, the new Civil Service Commission speedily brought about a real merit system. However, in the course of time, with the domination of the appointing authorities by the patronage-hungry Hamilton County Republican machine, appointments have not been equal to the original appointees and vicious, unfounded attacks have been made on the Commission and its admirable secretary. The local head of the American Federation of Labor was named as a member of the Commission. To appoint representatives of special interests to such a Commission is of doubtful propriety.[8]

2. The director or executive secretary of the Commission is a key official. The Model State Civil Service Law, prepared by the National Civil Service League and the National Municipal League suggests[9] the director be appointed on recommendation of the Civil Service Commission by the governor. If the director is a machine politician or otherwise out of sympathy with the merit system, he can easily sabotage its operations.

3. A favorite method of undermining the merit system is by disparaging it and curtailing appropriations. Even the best commission, if it has no strong public support and is denied adequate funds, may lose spirit and become so discouraged as merely to go through the mo-

6. Mosher, "Personnel Policies," in THE GOVERNMENT OF CINCINNATI AND HAMILTON COUNTY 149 *ff.* (1924).

7. CHARTER AND CODE OF ORDINANCES OF CINCINNATI, Art. V. §§ 1 and 2, pp. 17-18 (1945).

8. The *Good Government Newsletter* 2 (April 1955), of the National Civil Service League, takes credit for the League in helping to defeat reorganization of the Vermont Civil Service Commission which would have added a representative of the State Employees Association and a state department head. The view of the League is that the Commission's members should represent the public as a whole, not special interests.

9. NATIONAL CIVIL SERVICE LEAGUE, A MODEL STATE CIVIL SERVICE LAW 8 (1953).

tions of administering the system. Although, as before mentioned, a constitutional grant of the merit system is supposed to be established in Ohio, actually it has existed and exists only to a limited degree in the state and many municipal administrations, and practically not at all in any real sense within the eighty-eight counties of the state. Examinations for creation of an eligible list for various positions are not requested and are not held on the often specious ground of lack of funds to hold them, and provisional appointees fill positions for years, sometimes for life.[10] The Model Law[11] provides that no such provisional employments may continue longer than six months.

4. Another favorite stratagem to get away from the merit system is for the appointing officer to classify many or even all of his employees as deputies, holding a fiduciary relation to him, no matter how menial and routine their duties may be.[12] Such deputies are almost always exempt by statute from the classified service.[13]

5. While it is illegal[14] through threats, inducements or otherwise to attempt to bring about resignations, abstention from taking examinations, or waiver of right resulting from being certified among the first three in the original employment eligible list, or first in a promotional examination, appointing officers or their accomplices frequently exert such unlawful pressures.[15] Anyone eligible for appointment knows that if he is unwanted his situation can, by a variety of expedients, be made intolerable. He may be discriminated against, rated low, assigned to territory or duties for which he is not fitted or which are disagreeable in character, suspended for supposed disciplinary purposes without pay, or subjected to the risk, indignity and expense of dismissal on trumped-up charges. On one occasion, a machine politician holding the

10. State *ex rel.* Lagedrost v. Beightler, 135 Ohio St. 624 21 N.E. 2d 992 (1939). And where the authorities are coerced into holding an examination, the test may be rigged and weighted to give undue advantage to the provisional appointee who is taking the examination. SCHULZ, AMERICAN CITY GOVERNMENT 59 (1949).

11. *Supra* note 8, at 15.

12. State *ex rel.* Emmons v. Guckenberger, 131 Ohio St. 466, 3 N.E.2d 502 (1936); Townsend v. Berning, 135 Ohio St. 31, 19 N.E.2d 155 (1939).

13. *E.g.*, OHIO REV. CODE § 143.08(A) (9).

14. *E.g.*, OHIO REV. CODE §§ 143.42 to 143.45.

15. The horrendous penalties and sanctions for such misconduct, as, *e.g.*, those provided in OHIO REV. CODE §§ 143.46 to 143.99, inclusive, are not terrifying to them, especialy if the prosecuting officials are of their same political machine and under the same leadership or bossism sympathetic with the objectives of the appointing authority.

As the Duke said of non-use of "strict statutes and most biting laws"

> "in time Rod becomes more mock'd than fear'd;
> . . . and liberty plucks justice by the nose; . . ."
> MEASURE FOR MEASURE, Act. I, Sc. 3

And in Vienna he said:

> ". . . the strong Statutes stand like the forfeits
> in a barber's shop,
> As much in mock as mark."
> *Id.*, Act V, Sc. 1.

Hamilton County, Ohio, office of Auditor told a civil service employee who had been appointed to a position, after fair, competitive examination, by the reform predecessor in the same office, that he did not like the employee's wife's politics and so the employee would have to resign. He refused, and the present writer appealed for him from his dismissal to the State Civil Service Commission. That Commission, weak and partisan as it was, ordered the employee reinstated. The appointing officer still balked at reappointing the employee. He had been advised the only remedy against him for his recalcitrancy would be mandamus to compel reinstatement. But, it happened the governor was of opposite politics from this county official; and it was delicately conveyed to the latter there was a statute that permitted removal of any officer not complying with a lawful order of a civil service commission. Actually, the then governor would not have removed him in a hundred years. But the county officer feared removal and so the employee was reinstated and given back pay. However, the official directed all in his office to give the reinstated employee the silent treatment and he had his desk placed next to a steam radiator where, during working hours, he was grilled like St. Lawrence. Before proceedings were instituted against the offender for this patent infraction of the Civil Service Commission order, the discharged employee obtained a better and higher paying position in private employment and resigned his county position.

6. Mark Twain observed that the works of Shakespeare were not written by Shakespeare, but by someone of the same name. A device that has sometimes succeeded is to abolish for supposed economy an office or position or positions filled by unwanted incumbents and then, within as short a time as is safe, create a new office differing very little, save in name, from the office erased.[16] Or, the appointing officer will lay off or dismiss unwanted employees as no longer needed and suddenly discover that he was mistaken and that somewhat similar positions must be filled; and, of course, chosen ostensibly by the nominal appointing authority, but actually the patronage committee of the local machine.

7. Examinations are sometimes rigged and standards for qualifications arbitrarily weighted to favor not merely a provisional appointee, as before shown, but, as well, all those whom the appointing authority wants to be the successful contenders. So, subjective standards may be employed to an extent out of all proportion to a fair, open and impartial examination.[17]

16. State *ex rel.* McGann v. Evatt, 138 Ohio St. 421, 35 N.E.2d 576 (1941).

17. Cohen v. Fields, 298 N.Y. 235, 82 N.E.2d 23 (1948); Sloat v. Examiners of Bd. of Education of New York, 274 N.Y. 367, 9 N.E.2d 12 (1937).

8. In recent times, security checks and unsubstantiated aspersions on the loyalty of the employee to the Government are convenient excuses for getting him out.[18]

9. The machine, through control of the legislature or under pressure of powerful groups wanting special, unwarranted favors, will cause to be enacted laws and regulations severely hampering a true merit system and preventing good results in its operation. Then, in the words of Milton, "They who have put out the people's eyes reproach them of their blindness." The veterans' preferences accorded ex-members of the Armed Forces by the Congress and various legislatures restrict fair and free competition in examinations and opportunities for career service and advancement in the civil service.[19] The Congress especially has been over-favorable to the veteran. A percentage credit for service was allowed in original examinations even to those not making a passing grade. If this credit, added to his mark, enabled him to obtain a passing grade, he was then automatically placed at the head of the eligible list.[20] And in the matter of lay-offs, veterans were the last to be included no matter how short their term or how poor their performance, in the civil service, as against long-time employees who had served with fidelity and excellence. In the matter of dismissals, vet-

18. Cole v. Young, 125 F. Supp. 284 (D.D.C. 1954); Roth v. Brownell, 215 F.2d 500 (D.C. Cir. 1954), *reversing* 107 F Supp. 362 (D.D.C.), *cert. denied*, 75 Sup. Ct. 89 (1954). See Note, 5 CATHOLIC U. L. REV. 108-10 (1955); 11 BULL. OF THE ATOMIC SCIENTISTS No. 4 (April 1955) (Special issue on "Secrecy, Security, and Loyalty.").

19. Chairman Philip Young, United States Civil Service Commission, when questioned about retention preference for veterans when lay-offs are necessary, called such retention preference "an increasingly serious situation which will have to be dealt with," because veterans are now a majority of the total federal population, a factor which sponsors of veterans' preference legislation apparently did not envisage. GOOD GOVERNMENT NEWSLETTER (April, 1955). *Blue Print for a Federal Personnel System*, 72 GOOD GOVERNMENT 23, 24 (May-June 1955).

20. *Mirabile dictu*, the 83d Congress summoned up enough fortitude to amend Sections 3 and 7 of the Veterans' Preference Act of 1944, 58 STAT. 387, 5 U.S.C.A. §§ 851 *et seq.* (Cum. Supp. 1950), and passed Public Law 271, August 14, 1953, 1 U.S. CODE CONG. & ADM. NEWS 654 (83d Cong. 1st Sess. 1953). By this they limited to those "who have received a passing grade" the ten points to be added to the earned ratings of certain applicants and five points to others, and limited the names of preference eligibles ahead of all others having the same rating to those who had received a passing grade. For the legislative history of this excellent enactment, see 2 U.S. CODE CONG. & ADM. NEWS 2391 (83d Cong., 1st Sess. 1953). New procedures were instituted for appeals by preference eligibes under Veterans' Preference Act of 1944 by the Civil Service Commission, amended April 22, 1955. 23 U.S.L. WEEK 2557 (May 3, 1955).

As showing the special treatment afforded veterans, the United States Court of Claims on April 5, 1955, ruled a "Federal agency has no authority to place preference eligible on involuntary annual leave during 30-day notice period preceding his removal for cause." The court held that Section 14 of the Veteran's Preference Act means that the veteran is to have 30 days' notice in advance of his discharge, which means in advance of his being separated from the payroll, and that the Civil Service Commission's regulation (5 CODE FED. REGS. § 22.2(c)) would permit separation from the payroll at once, rather than only after 30 days' notice, and is in conflict with the act and is invalid. Taylor v. United States, 23 U.S. L. WEEK 2519 (April 19, 1955) (Ct. Claims, April 5, 1955; Laramore and Madden, JJ., dissenting).

erans received greater protection from unjust separations, in a right to appeal to the Civil Service Commission, not accorded to non-veteran employees. While the grant of veterans' preference credits has generally been sustained as constitutional, such credits have usually been allowed only in original, not promotional, examinations and the Pennsylvania Supreme Court has ruled that to allow the credit to one not attaining a passing grade in order to enable him to pass and qualify is an impermissible assault on the merit system.[21]

The police and firemen's unions have successfully promoted legislation giving them and the chief of police or chief of the fire department a right, not enjoyed by other civil service employees, to appeal from an adverse decision of the Civil Service Commission to the courts to determine the sufficiency of the cause of their removal.[22] Why these two classes of civil service employees should have these special privileges is not apparent. Curiously, the constitutionality of granting them does not seem to have been attacked. Other legislation pushed through at the instance of these unions, restricts the group eligible to take promotional examinations, so that the contenders are sometimes limited to a very small number.[23] Why should not a promotional examination for, say, an assistant chief of detectives be open to the whole police force? They should have the privilege of competing for the position, whether they can succeed or not. But, in practice, as before stated, the qualifications are restricted, as *e.g.*, limiting applicants to those already detectives, so as to limit the number of contenders sometimes to three or four.

Then, too, legislation has been enacted requiring in promotional examinations written examinations only[24] or proscribing, except in a few professional positions, educational requirements.[25]

And, occasionally, a brazen General Assembly will take positions out of the classified service after they have been put in it and employees

21. Maurer v. Commonwealth *ex rel.* O'Neill, 368 Pa. 369, 83 A.2d 382 (1951); Commonwealth *ex rel.* Graham v. Schmid, 333 Pa. 568, 3 A.2d 701 (1938); *cf.* McNamara v. Directors of Civil Service, 110 N.E.2d 840, 843 (Mass. 1953).

22. OHIO REV. CODE § 143.27. Properly interpreted this Section affords only a limited review and not a trial de novo. Kearns v. Sherrill, 137 Ohio St. 468, 22 N.E.2d 468 (1940). There is pending in the General Assembly of Ohio now, however, Senate Bill 134 which would expressly permit a full trial de novo on appeal from an adverse decision of the Civil Service Commission. Cincinnati Enquirer, April 29, 1955. The police and fire chiefs have the sole right to appeal to the courts from suspensions. OHIO REV. CODE § 143.30.

23. OHIO REV. CODE § 143.34. A state two-platoon law for firemen was held superior, in the home rule state of Ohio, to a conflicting city ordinance. State *ex rel.* Strain v. Houston, 138 Ohio St. 203, 34 N.E.2d 219 (1941).

24. OHIO REV. CODE § 143.16. In State *ex rel.* Ethel v. Hendricks, 56 Ohio L. R. #9, p. 93 (May 9, 1955), pending on appeal, No. 34422, in the Ohio Supreme Court, it was held that this Section sets forth the public policy relating to promotional examinations that these shall be written, and the Civil Service Commission has no power to change that policy by enacting a rule requiring oral examinations in addition to written ones. See also State *ex rel.* O'Driscoll v. Cull, 138 Ohio St. 516, 37 N.E.2d 49 (1941).

25. OHIO REV. CODE § 143.15 (former OHIO GEN. CODE § 486-9a).

have qualified and are serving in that service; and at the same time will fix salaries at a high figure without reference to the salaries of other similar employees and with no consideration of the budgeting requirements of the city affected.[26]

The activities of the International Association of Fire Fighters, AFL, and its constituent Fire Fighters Locals are illustrated by *Heidtman v. City of Shaker Heights*.[27] Shaker Heights Fire Fighters Association, Local No. 516, International Association of Fire Fighters, AFL, were active in circulating an initiative petition seeking an enactment by ordinance of the three-platoon system for firemen. The circulators were employees of the City of Shaker Heights, Ohio, employed in the classified service of that city as firemen in its fire department. The council of the city decided not to certify the petition and rejected it on the ground that, although there were sufficient valid signatures, the ordinance was not properly proposed by the circulators for the reason that the separate part petitions were submitted by members of the fire department of the city and that in doing so the circulators violated the Code of Ohio, which reads as follows:

> "Political activity prohibited. No officer, employee, or subordinate in the classified service of the state, the several counties, cities and city school districts thereof, shall directly or indirectly, orally or by letter, solicit or receive, or be in any manner concerned in soliciting or receiving any assessment, subscription or contribution for any political party or for any candidate for public office; nor shall any person solicit directly or indirectly, orally or by letter, or be in any manner concerned in soliciting any such assessment, contribution or payment from any officer, employee or subordinate in the classified service of the state, the several counties, cities or city school districts thereof; nor shall any officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof be an officer in any political organization or take part in politics other than to vote as he pleases and to express freely his political opinions."[28]

In a suit brought by some of the circulator firemen and the Local for a declaration of rights, the common pleas court ruled that the action of the plaintiffs and fifty-four other firemen in the classified service of the city constituted a taking part in politics in violation of the statute, but neither the initiative petition nor the proposed ordinance was rendered illegal or void by the action of the plaintiffs and other members of the fire department, and that the council could not refuse to recognize the validity of the initiative petition and that the council improperly failed to process and continue proceedings on the petition.

The Court of Appeals reversed only that portion of the judgment of the common pleas court which held firemen had engaged in political

26. Ellis v. Urner, 125 Ohio St. 246, 181 N.E. 22 (1932).
27. 163 Ohio St. 109, 126 N.E.2d 138 (1955).
28. OHIO REV. CODE § 143.41 (former OHIO GEN. CODE § 486-23).

activity in violation of Section 486-23, and affirmed the rest of the judgment.

The Supreme Court of Ohio ruled, as shown by the second paragraph of the syllabus:

> "2. The word, 'politics,' as used in Section 486-23, General Code, Section 143.41, Revised Code, must be defined as politics in its narrower partisan sense, and activities of municipal employees in the classified service in circulating an initiative petition seeking enactment of an ordinance relating to their employment do not constitute a taking part in politics as that term is used in such section."[29]

and affirmed the judgment of the Court of Appeals. In interpreting the above section, the court did not sufficiently consider the last clause of the section:

> "or take part in politics other than to vote as he pleases and to express freely his political opinions."

That appears to be a comprehensive prohibition of taking part in politics except to the extent specifically permitted, namely, to vote as he pleases and to express freely his political opinions. The use of the initiative or referendum on behalf of one class of employees to establish their wages or conditions of work is most unfortunate. The voter is not fully informed as to the real problems of municipal finance, nor of what injustices may result to other employees or hardships on the municipal authorities. Whether the firemen taking the part they did in circulating the initiative petition was illegal, as violating Section 486-23, as held by the common pleas court, or not, as held by the Court of Appeals, did not call for decision regarding the meaning of the word "politics." Whether the circulators violated the law respecting their participation in politics should not have legally prevented submission of the initiative petition to the voters. If they violated the law, they were personally punishable for it, and their violation should have had no consequence as to the validity of the initiative petitions. If, contrary to the above, the violation of law by the circulators could be a ground for invalidation, the question of validity for that reason should have been postponed until after vote was had by the electors.

10. If a political organization in power has appointed numbers of its janizaries to positions without their being or having qualified under the merit system, and so not secure under its protection, and the administration is defeated for re-election, it suddenly disguises itself as a great friend of the merit system, and vouches in or covers in its incumbents by various plans, such as, *e.g.*, non-competitive examinations. Sometimes these machinations succeed and sometimes they do not.[30]

29. 126 N.E.2d 138, 139 (1955).

30. 5 CIVIL SERVICE LAW REPORTER 17-21 (issued by National Civil Service League, March-April 1955).

11. A rather clumsy and crude expedient for eliminating a classified civil servant without ordinary civil service procedures of charges, suspension, dismissal and employee appeal to the Civil Service Commission, is to pass a resolution taking the unwanted employee out of the classified service and placing him in the unclassified service, sometimes on the assigned ground that he should never have been placed in the classified service and so is subject to dismissal at will.[31]

Common Political Objections to the Merit System

Coming now to stock objections, adduced by its enemies, that are made to the merit system, it is said that:

1. Once an incumbent comes under the protection of the classified civil service, he feels secure in his position, becomes bureaucratic, uncooperative, mechanical in his operations or slothful, since he knows it is very difficult to get rid of him. The incorrectness of this fault-finding is apparent by reference to the standing of British civil service public employees. They may often be somewhat rigid, technical and unimaginative in the performance of their duties. But their traditional, long time standards of character, efficiency and fidelity to duty are the highest. They hold an honored position, and enjoy a lifetime career with good opportunities for advancement in the public service.[32]

Aside from this, the fact is, removal of an unfit or disloyal employee in the classified service is not too difficult, if the appointing officers utilize their right to grade the performance of the incumbent below a figure that must be attained for retention in office,[33] or to file charges and dismiss.[34] Actually, the employee, in the classified service, is at a disadvantage in trying to stay in when the employer wants him out. The employee's tenure is (R.C. 143.27), for example, in Ohio,

31. Deering v. Hirsch, 146 Ohio St. 288, 65 N.E.2d 649 (1946); Roth v. Brownell, 215 F.2d 500 (D.C. Cir. 1954).

32. SWISHER, THE THEORY AND PRACTICE OF AMERICAN NATIONAL GOVERNMENT 396, 412 (1951). 25 POLITICAL QUARTERLY 308-09 (1954), a special number on "The Civil Service," carries an up-to-date evaluation of the British civil service, which began about 1854, by British officials, educators and top civil servants themselves, including Clement R. Attlee's testimonial of their serving with equal fidelity under Conservative or Liberal governments. See GOOD GOVERNMENT NEWSLETTER (April 1955).

33. If the statutes do not expressly authorize removal through cause of grading by the superior of inefficiency, such provision can be made by ordinance or by rule of a good civil service commission. See, *e.g.*, CHARTER AND CODE OF ORDINANCES OF CINCINNATI, 1945, §§ 306-5 and 303-6, the latter section as amended by Ordinance No. 89-1955, City Bulletin, March 22, 1955, p. 7. Paragraph (b) of the amended § 306-6 reads:

"(b) Penalty for Low Efficiency. Any employee who has two successive low service ratings shall automatically be referred by the department or division head to the appointing authority for such action as he deems fit under the existing laws."

For federal rating procedures, see 5 U.S.C.A. §§ 2001-2007 (Supp. 1954).

See Hagerty, *Why Not Take the "Rating" Out of Performance Rating?*, 16 PUB. PERSONNEL REV. 39 (January 1955).

34. Lloyd-Lafollette Act, as amended, 37 Stat. 555 (1912), 5 U.S.C.A. § 652 (1927).

> "during good behavior and efficient service; but any such officer or employee may be removed for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office."[35]

This section, like charity, "covers the multitude of sins,"[36] but in other than the Biblical sense. Not only can the appointing authority think up charges under such comprehensive words, as, for example, "insubordination," but the appointing officer may suspend employees, without pay, for purposes of discipline for a reasonable period not exceeding thirty days without any right of appeal of the employee from the suspension,[37] except in the case of chiefs of police or fire departments or any member of a police or fire department of a city.[38] Although "successive suspensions" are not allowed,[39] appointing officers have been known to utilize plural suspensions with short restorations after the supension periods of time intervening.

As a generalization, the salaries of public employees are not large. The dismissed employee is usually suspended without pay, sometimes for a period of months pending the outcome of his appeal to the Civil Service Commission. The difficulties in this situation are manifest, including often inability to pay a lawyer and to obtain and compensate witnesses, almost always fearful themselves of attendance at the trial. The employee is in an unenviable position. If he hopes to be reinstated within a reasonably short time, he will not seek private employment of a permanent sort; and the difficulties of obtaining temporary positions, even those of a character inferior to the position he has filled, are grievous. If reinstatement is eventually ordered, the employee's right to recover the full salary lost during enforced separation from his position is not certain.[40] He will not be reimbursed or receive any income tax credit for his legal and other expenses.[41] Moreover,

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35. OHIO REV. CODE § 143.27.
36. Neal v. State Civil Service Comm'n, 147 Ohio St. 430, 72 N.E.2d 69 (1947). *But cf.* Indiana State Personnel Bd. v. Diven, 118 N.E.2d 367 (Ind. 1954).
37. Maghan v. Board of Commissioners, 141 F.2d 274 (D.C. Cir. 1944).
38. OHIO REV. CODE § 143.26.
39. *Ibid.*
40. Borak v. Biddle, 141 F.2d 278, 281, 6th par. of syllabus (D.C. Cir. 1944). Siskind v. Morgenthau, 152 F.2d 287 (D.C. Cir. 1945); Nadelhaft v. United States, 23 U.S.L. WEEK 2662 (Ct. Cl.) (June 28, 1955). *But see* Borak v. United States, 78 F. Supp. 123 (Ct. Cl.), *cert. denied*, 335 U. S. 821 (1948); Kaufman v. United States, 93 F. Supp. 1019 (Ct. Cl. 1950); Burns v. McCrary, 130 F. Supp. 908 (E.D.N.Y. 1955).
41. State *ex rel.* Conway v. Taylor, 136 Ohio St. 174, 24 N.E.2d 591 (1939). General Accounting Office, Comp. Gen. Dec. B-122555, Feb. 15, 1955, 23 U.S. L. WEEK 2432 (Mar. 1, 1955), and Act of August 26, 1950, 5 U.S.C.A. § 22-1 (Cum. Supp. 1950). Often, too, the same court which orders his reinstatement will not grant him money redress in the same action or perhaps at all, for want of jurisdiction. State *ex rel.* Shriver v. McCort, 149 Ohio St. 338 78 N.E.2d 731 (1948). *But cf.* Goodwin v. United States, 118 F. Supp. 369 (Ct. Cl. 1954).

actions to compel reinstatement and recovery of lost salary may be barred by laches[42] or by the often burdensome requirement of exhausting administrative procedures before bringing suit.[43]

In the federal service, the employee has even fewer rights. All that is necessary is for the appointing officer to file charges good in law, allow the employee a reasonable time to reply in writing and then, without any hearing, find the charges established and dismiss him. Except in the case of veterans, he has no right of appeal to the Civil Service Commission. Such dismissal is supposed to be final without court or other review. For the employee to go into court, nevertheless, under such conditions on a claimed legal insufficiency of the charges or gross abuse of discretion or fraud is a forlorn chance.[44]

2. It is often asserted by those wanting to pick employees on a political basis or to discriminate for other reasons against open examinations, that it is not practicable to make appointments on the basis of such examinations; and so, as an example, selection of lawyers in the public service should not be under the merit system. The lawyer's loyalty is to the law and to his client[45] and there is no tenable reason why lawyers in public employment should not be placed under the merit system. If they are employed on the basis of merit and not because of political influence, better appointments will be made and the sound lawyer will apply himself, as in the private practice, unremittingly to the law without the necessity of time-consuming deflections incident to doing political work and the fear of rendering opinions or conducting legal matters in a way that a political superior might not favor, even though legally sound and proper.[46]

3. Another favorite argument of the unfriendly is that under the merit system implemented by the prohibitions of the Hatch Political Activity

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42. Sawyer v. Stevens, No. 571 (10th Cir. 1954), *cert. denied,* March 7, 1955, 23 U.S. L. WEEK 3216. Hicks v. United States Radiator Co., 127 F. Supp. 429 (E.D. Mich. 1955). Russell v. Thomas, 129 F. Supp. 605 (S.D. Cal. 1955).

43. Cuiffo v. United States, 23 U.S. L. WEEK 2440 (Mar. 8, 1955) Ct. Cl.; Fitzpatrick v. Snyder, 220 F.2d 522 (1st Cir. 1955), *cert. denied,* 349 U.S. 946 (1955); Young v. Higley, 220 F.2d 522 (D.C. Cir. 1955).

44. Benenati, Jr. v. Young, 220 F.2d 383 (D.C. Cir. 1955); Mulligan v. Andrews, 211 F.2d 78 (D.C. Cir. 1954); Knotts v. United States, 121 F. Supp. 630 (Ct. Cl. 1954), noted, *Freedom From Arbitrary Removal in Classified Civil Service—Real or Illusory,* 49 NW. U. L. REV. 816 (1955). *But cf.* Crocker v. United States, 127 F. Supp. 568 4th par. syllabus (Ct. Cl. 1955); State *ex rel.* Desperz v. Board of County Comm'rs, 47 Ohio App. 1, 189 N.E. 665 (1933); Indiana State Personnel Bd. v. Diven, 118 N.E.2d 367 (1954).

45. COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, LEGAL SERVICES AND PROCEDURE 1 (1955). See, *Personnel and Civil Service Recommendations of the Second Hoover Commission,* 16 PUB. PERSONNEL REV. 92 (April 1955); *The Second Hoover Commission on Position Classification and Pay,* 16 PUB. PERSONNEL REV. 98 (April 1955).

46. Seasongood, *Should the Merit System Be Used in Making Appointments of Lawyers For Public Service,* 15 U. OF CIN. L. REV. 209 (1941).

Act[47] the public employee is deprived of his rights as a citizen freely to participate in political affairs and that such insulation is against public policy. But, as before indicated, the classified civil service employee is not forbidden to vote as he pleases or freely to express his political opinion,[48] and all civil service laws, it is believed, allow that much political activity to the public employee. The wisdom of forbidding political work, especially sometimes on the public's time, campaign contributions and retention or loss of position depending on the political warcry "to the victor belong the spoils" is manifest. If the employee's retention of position is dependent upon the fiat of the boss or the governing political committee's success in the election, only the hardy and exceptionally high-minded employee will pay no attention to the wishes, legal or illicit, of the authority on whose decision depends continuance of employment.

4. The merit system properly applied would prevent strikes of public employees;[49] but the requirement of the giving up of all right to strike in public employment, classified or unclassified, has often been declared and approved by those said to be among the most ardent friends of labor.[50]

It is a fact, though, that employees not infrequently have legitimate grievances that should be presented and presented strongly in some way. Compulsory arbitration has sometimes been suggested. But it appears such may be an improper delegation of authority[51] and for this reason and others is not the right solution to their problem. Anyway, as respects these limitations on the right of the public employee, the merit system incumbent is in no different situation than that of any other in government service.

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47. 5 U.S.C.A. §§ 118i, j, k, *et seq.* (Cum. Supp. 1950). The constitutionality of this Act was sustained in United Public Workers of America, CIO v. Mitchell, 330 U.S. 75 (1947). For an interpretation of "principal employment" within the meaning of Section 12(a) of the Hatch Act (5 U.S.C.A. § 118k(a,c)), see Anderson v. United States Civil Service Comm'n, 119 F. Supp. 567 (D. Mont. 1954), and Matturi v. United States Civil Service Comm'n, 23 U.S. L. WEEK 2551 (April 19, 1955).

48. *E.g.*, OHIO REV. CODE § 143.41.

49. Carey v. Water Dep't of East Orange, 108 A.2d 21 (N.J. 1954); Opinion of New York Civil Service Commission, In the Matter of Hatton: "the acceptance of the right to strike by civil service employees would nullify the civil service law itself with all its beneficial effects." Seasongood and Barrow, *Unionization of Public Employees*, 21 U. OF CIN. L. REV. 327, 381 n.141 (1952).

50. Seasongood and Barrow, *supra* note 35, at 339, citing the oft-quoted opinion of Judge Holmes in McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892):

> "The petitioner may have a Constitutional right to talk politics, but he has no Constitutional right to be a policeman."

And see *id.* at 381, n.141. A practical difficulty sometimes results from holding by a Civil Service Commission that absence from duty because of a strike forbids employment and civil service status, namely, that there are not available others to fill the places vacated, *e.g.*, by police, firemen, machinists.

51. State of Washington *ex rel.* Everett Fire Fighters v. Johnson, 278 P.2d 662 (Wash. 1955).

Finally, conceding there can be sometimes valid objections to the workings of the merit system (not a large concession, really, since the same could be said of any human institution), any such must be weighed against the counter evils of the political patronage formula. An elaboration will not be attempted. The damage resulting, though, directly and indirectly, from the spoils system is incalculable, debasing and needlessly takes untold millions from the taxpayers' resources. Thus, as one example, in the months between February and December, 1951, more than fifty political appointees in the Internal Revenue Department resigned under fire or were dismissed; many were indicted and a number were subsequently convicted. Appointed under patronage procedures, the Assistant United States Attorney General in charge of the Tax Division of the Department of Justice was dismissed. The Commissioner of Internal Revenue, the Assistant Commissioner and the Deputy Commissioner in Charge of the Alcohol Tax Unit resigned. Six of the country's sixty-four collectors resigned or were dismissed—the bureau heads in Manhattan, Brooklyn, Boston, St. Louis, Nashville and San Francisco—and two of these were indicted. Six Deputy Collectors resigned. A Chief Field Agent in Charge of thirty-two tax collecting offices in northern California resigned and was indicted. A Chief Field Agent in Nevada was dismissed and was indicted. The Chief of the Alcohol Tax Unit in New York resigned.[52] Seemingly, however, the ordinary citizen is not easily shocked and has no great capacity for sustained indignation or strong resolution to deracinate demonstrated evils, and especially where his convenience or imagined advantage is interlaced with them.

The officers and governing bodies of the American Bar Association are fairly representative of the more successful general elements of our population. On July 1, 1938, the House of Delegates adopted a resolution:

> "Resolved: It is the duty of the Bar to uphold the merit system in public employment, to seek its wider adoption and better enforcement in national, state and local governments, to demonstrate its applicability to legal positions in the public service to attract young lawyers to a career of holding legal positions in such service and to increase confidence in administrative agencies on the basis of such agencies being officered and staffed by persons appointed because of merit and divorced from suspicion of political influence."

In September, 1940, they adopted another resolution:

> "Resolved, that in the opinion of this Association it is desirable that lawyers in public positions, including examiners and staffs of administrative agencies, but not including elective and policy determining heads, be

52. *The Senate's One-Man FBI*, READER'S DIGEST (February 1952) 140, is a story of how John J. Williams, freshman Senator from Delaware, discovered coast-to-coast corruption in the federal tax offices.

> employed, so far as practicable, under the merit system, with the aid of competitive examinations, and that this Association further such method of selection."

The Federal Bar Association in October, 1938, approved, by a vote of its Executive Council, and then by a referendum vote of the members, the extension of the merit system to lawyers in the federal service. The bound volume of proceedings and the *Journal* of the American Bar Association since then contain many instances of support of the above resolutions. But, they also show reports of Civil Service Committees, some members of which had no understanding of the merit system and some who were actually opposed to it, and they show defeat of a resolution asking for the merit system instead of the politically appointed Internal Revenue officials. Indeed, the American Bar Association has in the past two or three years recanted its pronouncements in favor of the merit system and has either voted down, tabled or referred to research committees, for embalming, resolutions of its Committee on Civil Service to extend it to lawyers, marshals, postmasters and Internal Revenue officials, for example.[53]

Likewise, the attitude of the present national administration is, as respects the merit system, mixed and spotty. On the bad side is a Personnel Procurement Procedure of October 1954 ukase seemingly issued from the White House purporting to impose on all departments and agencies a requirement that vacancies be referred through the Republican National Committee to Senators and Congressmen.[54]

> "The prestige of the Civil Service Commission has been greatly impaired by the confused handling of the security issue. The political issue of this serious problem has contributed greatly to undermining the prestige and morale of the public service."[55]

The Commissioners' action in removing nine hundred deputy marshals from the competitive service is

> "viewed with suspicion as to political motives especially as the Hoover Commission recommended placing not only such deputy marshals but marshals as well in the competitive system, to remove them from the political arena."[56]

On the good side, the President's Executive Order No. 10577 of

53. 72 PROCEEDINGS OF THE AMERICAN BAR ASSOCIATION 38 (1947); 75 *id.* 116-17, 186, 187-88 (1950); 76 *id.* 189-91 (1951); 77 *id.* 124, 180, 442 (1952). For a few references in the *Journal*, see 28 A.B.A.J. 684-85 (1942), quoting the resolution creating a Special Committee on Civil Service and defining its duties; 32 *id.* 238 (1946); 34 *id.* 79 (1948); 38 *id.* 433 (1952). See also 15 U. OF CIN. L. REV., *supra* note 46, at 209; 2 SYRACUSE L. REV., *supra* note 3, at 210.

54. *The Federal Balance Sheet*, 72 GOOD GOVERNMENT 9 (March-April 1955)

55. *Id.* at 10.

56. *Ibid.*

November 22, 1954, amended the civil service rules and authorized a new appointing system for the competitive service.[57]

The report of the Task Force on Personnel and Civil Service, of February, 1955, recommends: "12. Improvements in the Merit System":

> *"(d) Bringing within the career civil service certain positions still more or less reserved for patronage* (a hangover from the mid-nineteenth century)—attorneys, first-, second- and third-class postmasterships, rural carriers, United States marshals, certain posts in the Bureau of Customs, and a few posts in the United States mints. This patronage is more trouble than advantage to the party organizations and the Congress; it introduces a disturbing element at critical points in the civil service; and it does not supply the executive, administrative, or professional talents needed."[58]

On this Task Force are distinguished administrators and well-known friends of the merit system, including two who had served on the United States Civil Service Commission. On the Commission itself are at least two well-known "practical politicians" of opposite politics and a "regular" executive secretary.[59] The views of the Task Force, therefore, should be regarded as having greater weight than the report of the committee itself.[60]

In conclusion, the battle will continue to be waged between the spoilsmen and the friends of good government supporting the merit system, between the professionals and the amateurs. Only public spirit, unselfishness, persistence and the creation of an overwhelming public sentiment through dissemination of facts will make manifest the menace to the Republic of the spoils system and the advantages of higher type employees and the savings resulting in greater efficiency under a genuine merit system. These, in the long struggle, will resolve the contest in substantial degree favorably towards better and more democratic processes of government.

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57. *Id.* at 11. See also 71 GOOD GOVERNMENT 51-52 (Sept.-Oct. 1954).

58. See comment in support of the recommendation at pp. 130-37 of the Report of the Task Force.

59. For the dissents and separate statements of Commissioners Clarence J. Brown and James A. Farley, see REPORT TO THE CONGRESS OF THE TASK FORCE ON PERSONNEL AND CIVIL SERVICE 89-91 (1955).

60. For a short summary of the recommendations of the Commission, released April 11, 1955, see 23 U.S. L. WEEK 2516 (April 12, 1955). See also, *Personnel and Civil Service Recommendations of the Second Hoover Commission,* 16 PUB. PERSONNEL REV. 92-97 (April 1955).