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REPEALING CERTAIN PROHIBITIONS AGAINST POLITICAL RECOMMENDATIONS RELATING TO FEDERAL EMPLOYMENT, RE-ENACTING CERTAIN PROVISIONS RELATING TO RECOMMENDATIONS BY MEMBERS OF CONGRESS, AND FOR OTHER PURPOSES

R E P O R T

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

S. 253

REPEALING CERTAIN PROHIBITIONS AGAINST POLITICAL RECOMMENDATIONS RELATING TO FEDERAL EMPLOYMENT, RE-ENACTING CERTAIN PROVISIONS RELATING TO RECOMMENDATIONS BY MEMBERS OF CONGRESS, AND FOR OTHER PURPOSES

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JUNE 19, 1996.—Ordered to be printed

Mr. STEVENS, from the Committee on Governmental Affairs, submitted the following

REPORT

[To accompany S. 253]

The Committee on Governmental Affairs, to which was referred the bill (S. 253) to repeal certain prohibitions against political recommendations relating to Federal employment, to reenact certain provisions relating to recommendations by Members of Congress, and for other purposes, reports favorably thereon and recommends that the bill do pass.

I. PURPOSE AND SUMMARY

S. 253 as reported from the Governmental Affairs Committee would repeal current law and reinstate previous law with regard to letters of recommendation from Members of Congress.

Under the provisions of S. 253 as reported, Members of Congress, state and local officials, officials of political parties, and other individuals or organizations would once again be allowed to write letters of recommendation for citizens seeking Federal jobs. Agency officials would no longer be required to return letters of recommendation. Citizens would once again be allowed to request such letters of recommendation from their Congressional representatives.

Under the provisions of S. 253 as reported, it would be a prohibited personnel practice for an agency official to consider a recommendation on behalf of an applicant for a Federal job unless it deals with personal knowledge of the applicant's work performance,

ability, aptitude, or general qualifications, or contains an evaluation of the character, loyalty, or suitability of the applicant.

II. Background and Need for Legislation

During hearings before the Governmental Affairs Committee on Hatch Act reform legislation in early 1993, the Director of the Office of Personnel Management, Mr. James B. King, observed that agency hiring officials were prohibited from considering letters of recommendation from Members of Congress, but that Members of Congress were not prohibited from writing such letters. At that time, he suggested that the law be strengthened to protect employees from what he called "encroachment of political influence", not only in the merit selection process but with regard to other personnel actions as well.

The Hatch Act reform legislation which was reported from the Governmental Affairs Committee and which was subsequently signed into law by the President on October 6, 1993 (Public Law 103–94), contained the provisions recommended by OPM. The Committee at that time felt that if Federal employees were to be allowed to become politically active off the job, there should be additional restrictions on political influence for matters on the job.

Under the new Hatch Act law, which went into effect on February 3, 1994, letters from Members of Congress determined by agency officials to be political recommendations for career civil service jobs are to be returned to the sender, marked as being in violation of the law. However, disparate enforcement of this provision has resulted in some confusion and concern. Members of Congress have complained that even general inquiries, which are perfectly legitimate under current law, have been returned by some agencies as inappropriate communications.

Language similar to S. 253 to repeal the current restrictions was discussed as a possible amendment to the regulatory reform bill on July 17, 1995, during the Senate debate. Subsequently, on July 20, 1995, repeal language was one of five amendments agreed-to en bloc immediately prior to Senate passage of the FY '96 Legislative Branch appropriations bill; however, that provision was dropped during conference.

On February 7, 1996, the Governmental Affairs Committee held a hearing on the issue of recommendations by Members of Congress relating to Federal employment. Witnesses included Senator Trent Lott, Senator Paul Simon, and OPM Director James B. King.

Senator Lott and Senator Simon testified in support of repeal of current law. Senator Lott shared his opinion that it is unconstitutional for any Member to be restricted in his or her ability to assist constituents, and that it is unconstitutional for constituents to be prohibited from even asking for such assistance.

Senator Simon expressed the view that Members should be able to write letters of recommendation for anyone seeking a Federal civil service job, including current and former staff members. Under current law, letters on behalf of current or former staff can be submitted only in response to a request from the agency selecting official.

OPM Director King testified in support of the existing restrictions, but acknowledged that there may have been some inappro-

priate implementation of the provision by some agencies. Mr. King agreed to work with the Committee to find a solution to the problems cited by Senator Lott during the course of the hearing.

III. LEGISLATIVE HISTORY

S. 253 was introduced by Senator Trent Lott on January 20, 1995, and was referred to the Committee on Governmental Affairs. The bill was subsequently referred to the Subcommittee on Post Office and Civil Service for consideration.

A hearing of the Governmental Affairs Committee was held on the issue of letters of recommendation from Members of Congress on February 7, 1996. On April 15, 1996, the Subcommittee Members agreed to a unanimous consent request to discharge the Subcommittee from further consideration of S. 253.

The Committee on Governmental Affairs met on April 18, 1996, to consider S. 253. The bill was ordered reported without amendment by voice vote. Senator Hank Brown asked that he be recorded as voting "no" on the question of favorably reporting the bill.

The text of S. 253, as reported, is as follows:

A BILL to repeal certain prohibitions against political recommendations relating to Federal employment, to reenact certain provisions relating to recommendations by Members of Congress, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. PROHIBITIONS AGAINST POLITICAL RECOMMENDATIONS RELATING TO FEDERAL EMPLOYMENT.

(a) IN GENERAL.—Section 3303 of title 5, United States Code, is amended to read as follows:

"§ 3303. Competitive service; recommendations of Senators or Representatives

"An individual concerned in examining an applicant for or appointing him in the competitive service may not receive or consider a recommendation of the applicant by a Senator or Representative, except as to the character or residence of the applicant.".

(b) TECHNICAL AND CONFORMING AMENDMENTS.—(1) The table of sections for chapter 33 of title 5, United States Code, is amended by amending the item relating to section 3303 to read as follows:

"3303. Competitive service; recommendations of Senators or Representatives.".

(2) Section 2302(b)(2) of title 5, United States Code, is amended to read as follows:

"(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of—

"(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

"(B) an evaluation of the character, loyalty, or suitability of such individual;".

(c) EFFECTIVE DATE.—This Act shall take effect 30 days after the date of the enactment of this Act.

IV. Summary of the Legislation

S. 253 would repeal section 3303 of title 5, United States Code, and reinstate section 3303 as it existed prior to enactment of the Hatch Act Reform Amendments Act of 1993. In addition, the bill reinstates former 5 USC 2302(b)(2) which makes it a prohibited personnel action for an agency official to consider a recommendation unless it is based upon the personal knowledge of the writer and speaks to work performance or character, loyalty, or suitability of the individual.

V. Agency Views

At the request of the Minority, OPM was asked to review the text of S. 253 and prepare appropriate comments for inclusion in this report. A copy of the response follows:

U.S. Office of Personnel Management,
Washington, DC, May 23, 1996.

Hon. Ted Stevens,
Chairman, Committee on Governmental Affairs, U.S. Senate, Washington, DC.

Dear Mr. Chairman: This is in response to your request for the views of the Office of Personnel Management on S. 253, a bill "To repeal certain prohibitions against political recommendations relating to Federal employment, to reenact certain provisions relating to recommendations by Members of Congress, and for other purposes."

The Hatch Act Reform Amendments of 1993, which broadened the rights of most Federal employees to participate in political activities, also broadened and restructured the protections against political influence in Federal personnel decisions. While a long-standing provision of law had barred Federal examining and appointing officials from receiving or considering recommendations from Members of Congress as to applicants for the competitive service, the new law prohibits Members of Congress and certain other categories of political officials from making recommendations to Executive Branch agencies about any specific personnel actions, with certain exceptions. This new law was closely patterned after a similar prohibition in the Postal Reorganization Act of 1970 with respect to Postal Service employment. S. 253 would repeal the 1993 prohibition on political recommendations and reinstate the previous, narrower law.

We are very concerned by this proposed change. We believed in 1993, and continue to believe, that the greater opportunity provided by the Hatch Act Reform Amendments for Federal employees to become politically active, while a much-needed change in and of itself, carries with it a potential danger for the politicization of the Federal career service. As some employees exercise their rights to become politically active and become known as partisan adherents, it is very important that personnel decisions with respect to the career service be free of any political taint, and that not even the appearance of political influence be allowed.

All this being said, we would certainly agree that it may well be possible to achieve this same objective with statutory protections

that differ from the 1993 Reform Amendments' prohibitions on political recommendations. S. 253, however, goes too far, in our opinion.

The pre-1993 law that S. 253 would reinstate was part of the original Civil Service Act of 1883, and the Federal personnel system has become vastly more complicated in the intervening years. While that law was concerned only with appointments to the competitive service, there are many other types of personnel actions—promotions, reassignments, disciplinary actions, and many others—where it is equally essential to guard against political influence, and many agencies in the Government where employees, while not in the competitive service, do serve under career-type employment arrangements where political influence would be fundamentally wrong. Further, in guarding against political influence in personnel decisions, we think it is important to spell out where it *is* appropriate for a Member of Congress' views on an employee or applicant to be considered, such as where the employee or applicant previously worked for a Member.

While we cannot, therefore, support S. 253, we would certainly be ready to work with the Committee to craft any appropriate changes in the 1993 law that eliminate any restrictions that are not essential to the central purpose of preserving the nonpartisan integrity of the Federal career service.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the submission of this report.

Sincerely,

JAMES B. KING, *Director.*

VI. ESTIMATED COST OF LEGISLATION

A copy of the cost estimate by the Congressional Budget Office follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 25, 1996.

Hon. TED STEVENS,
Chairman, Committee on Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 253, a bill to repeal certain prohibitions against political recommendations relating to federal employment, to reenact certain provisions relating to recommendations by Members of Congress, and for other purposes, as ordered reported by the Senate Committee on Governmental Affairs on April 18, 1996. CBO estimates that enacting this bill would result in no significant cost to the federal government. Enacting S. 253 would not affect direct spending or receipts; therefore, pay-as-you-go procedures would not apply to the bill.

S. 253 would repeal certain provisions of the Hatch Act Reform Amendments of 1993 (Public Law 103–94), thereby allowing Members of Congress to provide personal recommendations as to the character of an applicant applying for federal employment, as well as allowing potential employers to consider such recommendations.

We expect these changes to result in no significant cost to the federal government.

S. 253 contains no intergovernmental or private sector mandates as defined in Public Law 104–4, and would impose no direct costs on state, local, or tribal governments.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Mary Maginniss (for federal costs), Theresa Gullo (for the state and local impact), and Matthew Eyles (for the private sector impact).

Sincerely,

JUNE E. O'NEILL, *Director*.

VII. REGULATORY IMPACT OF LEGISLATION

Pursuant to the requirements of paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory and paperwork impact of S. 253.

The only regulation issued pursuant to 5 U.S.C. 3303 is found at 5 CFR 300.801 and 802. These two paragraphs require agencies to notify employees and applicants of the provisions of section 3303 and suggest methods that may be used for notification. These two paragraphs would simply be eliminated.

The Office of Personnel Management has issued guidelines to agencies that would have to be revised, as would any agency guidelines that were based on the OPM guidance. Most agencies have included a brief statement concerning the prohibitions contained in section 3303 on their standard vacancy announcement format; these references would have to be eliminated.

Passage of S. 253 would reduce paperwork by eliminating the requirement for agencies to return to Members of Congress and other political officials recommendations deemed to be in violation of the prohibition on political recommendations. Thus, after the initial effort to rescind 5 CFR 300.801 and 802 and revise the guidelines, the removal of the requirement to notify an official who might have violated section 3303 should result in a net paperwork reduction.

VIII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of Rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 253, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

2302. Prohibited personnel practices

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

* * * * * * *

[(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action except as provided under section 3303(f);]

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is

under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of—

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

* * * * * * *

[3303. Political recommendations

[(a) For the purposes of this section—

[(1) "agency" means—

[(A) an Executive agency; and

[(B) an agency in the legislative branch with positions in the competitive service;

[(2) "applicant" means an individual who has applied for appointment to be an employee;

[(3) "employee" means an employee of an agency who is—

[(A) in the competitive service;

[(B) a career appointee in the Senior Executive Service or an employee under a similar appointment in a similar executive service; or

[(C) in the excepted service other than—

[(i) an employee who is appointed by the President; or

[(ii) an employee whose position has been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character; and

[(4) "personnel action" means any action described under clauses (i) through (x) of section 2302(a)(2)(A).

[(b) Except as provided under subsection (f), each personnel action with respect to an employee or applicant shall be taken without regard to any recommendation or statement, oral or written, with respect to any employee or applicant who requests or is under consideration for such personnel action, made by—

[(1) any Member of Congress or congressional employee;

[(2) any elected official of the government of any State (including the District of Columbia and the Commonwealth of Puerto Rico), county, city, or other subdivision thereof;

[(3) any official of a political party; or

[(4) any other individual or organization making such recommendation or statement on the basis of the party affiliation of the employee or applicant.

[(c) Except as provided under subsection (f), a person or organization referred to under subsection (b) (1) through (4) is prohibited from making or transmitting to any officer or employee of an agency, any recommendation or statement, oral or written, with respect to any employee or applicant who requests or is under consideration for any personnel action in such agency. Except as provided under subsection (f), the agency, or any officer or employee of the agency—

[(1) shall not solicit, request, consider, or accept any such recommendation or statement; and

[(2) shall return any such written recommendation or statement, appropriately marked as in violation of this section, to the person or organization transmitting the same.

[(d) Except as provided under subsection (f), an employee of applicant who requests or is under consideration for a personnel action in an agency is prohibited from requesting or soliciting from a person or organization referred to under subsection (b) (1) through (4) a recommendation or statement.

[(e) Under regulations prescribed by the Office of Personnel Management, the head of each agency shall ensure that employees and applicants are given notice of the provisions of this section.

[(f) An agency, or any authorized officer or employee of an agency, may solicit, accept, and consider, and any other individual or organization may furnish or transmit to the agency or such authorized officer or employee, any statement with respect to an employee or applicant who requests or is under consideration for a personnel action, if—

[(1) the statement is furnished pursuant to a request or requirement of the agency and consists solely of an evaluation of the work performance, ability, aptitude, and general qualifications of the employee or applicant;

[(2) the statement related solely to the character and residence of the employee or applicant;

[(3) the statement is furnished pursuant to a request made by an authorized representative of the Government of the United States solely in order to determine whether the employee or applicant meets suitability or security standards;

[(4) the statement is furnished by a former employer of the employee or applicant pursuant to a request of an agency, and consists solely of an evaluation of the work performance, ability, aptitude, and general qualifications of such employee or applicant during employment with such former employer; or

[(5) the statement is furnished pursuant to a provision of law or regulation authorizing consideration of such statement with respect to a specific position or category of positions.

[(g) An agency shall take any action it determines necessary and proper under subchapter I or II of chapter 75 to enforce the provisions of this section.

[(h) The provisions of this section shall not affect the right of any employee to petition Congress as authorized by section 7211.]

3303. Competitive service; recommendations of Senators or Representatives

An individual concerned in examining an applicant for or appointing him in the competitive service may not receive or consider a recommendation of the applicant by a Senator or Representative, except as to the character or residence of the applicant.

○