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Supreme Court Strikes Down Political Patronage Practices

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On June 21, 1990, the United States Supreme Court, by a five to four vote, held that any employment action—promotion, transfer, recall, hiring, as well as firing—violates the freedom of association and speech guaranteed by the First Amendment if it is based on political party affiliation except where party affiliation can be shown to support a vital government interest. This bulletin summarizes the decision, *Rutan v. Republican Party of Illinois*,[1] and its implications for local governments in North Carolina.

Facts of the Case

Five employees of the state of Illinois (a rehabilitation counselor, a road equipment operator, a prison guard, a state motor pool garage worker, and a mental health department dietary manager) claimed that they had been denied an opportunity for promotion, reassignment, recall from layoff, or initial hiring because they had not supported the Republican party. They alleged that under a 1980 executive order of the governor, all personnel actions in state government required the approval of the governor's office and that the dominant criterion for approval was support of the Republican party. They argued that this use of party affiliation and support in awarding state jobs (or in promotions or other favorable treatment once hired) was an impermissible infringement on their First Amendment rights to free speech and association.

The district court dismissed their claim, and they appealed. The Seventh Circuit Court of Appeals held that only politically motivated dismissals or personnel actions that are the substantial equivalent of a dismissal (that is, personnel actions that would lead a reasonable employee to resign) could be challenged as a violation of the First Amendment. The court therefore rejected the hiring claim but sent the claims concerning denial of promotion, reassignment, and recall back to the trial court to be heard, as these actions could be the substantial equivalent of dismissal. The plaintiffs appealed from that ruling, and the Supreme Court granted *certiorari*, agreeing to hear the case.

The Majority Decision

Justice Brennan, joined by Justices White, Marshall, Blackmun, and Stevens, delivered the opinion of the Supreme Court.

Noting that the Court had previously addressed the question of political firings in two decisions, *Elrod v. Burns*[2] and *Branti v. Finkle*,[3] Justice Bren-

nan summarized those cases as holding that "conditioning continued public employment on an employee's having obtained support from a particular political party violates the First Amendment because of 'the coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one's job.'"[4] *Elrod* and *Branti* had acknowledged the scope of First Amendment interests by stating that party affiliation could not be used to dismiss employees except in the narrow category of positions where affiliation could be shown to be "an appropriate requirement for the effective performance of the public office involved,"[5] such as high-level policy making positions. Neither decision, however, had attempted to stake out the limits of the First Amendment interests. Neither decision addressed the question of whether such interests come into play not only when a public employee is fired but also when the employee suffers some other personnel action (such as a transfer, demotion, or rejection for promotion). The question was squarely presented in this case: Does the First Amendment protect against the use of political party affiliation by public employers in taking personnel actions other than dismissals?

The Court held that it does. The Court rejected the argument of the defendants that the actions at issue were not punitive and did not in any way adversely affect the employees' terms and conditions of employment. Stated the Court,

> Employees who find themselves in dead-end positions due to their political backgrounds are adversely affected. They will feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold, in order to progress up the career ladder. Employees denied transfers to workplaces reasonably close to their homes until they join and work for the Republican Party will feel a daily pressure from their long commutes to do so. And employees who have been laid off may well feel compelled to engage in whatever political activity is necessary to regain regular paychecks and positions corresponding to their skill and experience.[6]

In other words, the same First Amendment concerns at issue in the earlier political firings cases were implicated by this case, in that there were significant penalties imposed upon the employees because they had exercised their right of free speech and association. Likewise, held the Court, the First Amendment is implicated in patronage hiring, which similarly places burdens on free speech because a valuable benefit—a state job—is conditioned on the willingness of the individual to conform to a set of political beliefs.

Nevertheless, political affiliation can sometimes still be considered. The Court said the presence of "vital government interests" would permit units of government to infringe on First Amendment rights by considering political affiliation in making hiring decisions and in their subsequent treatment of their employees. But even where vital government interests justify an infringement on First Amendment rights, the Court held, the infringement must be narrowly tailored. In other words, the use of party affiliation or support is subject to strict judicial scrutiny under the Fourteenth Amendment. The practice of the state of Illinois was unable to withstand such scrutiny.

Because the case was an appeal from the district court's dismissal for failure to state a claim, the Court did not decide whether, in fact, the five plaintiffs' First Amendment rights had been violated. What the Court did decide, however, is bold new law: no denials of any types of job opportunities for lower level employees, from initial hiring through recall from layoffs, may be based on the exercise of political party affiliation and support.

Justice Stevens, although joining the majority opinion in its entirety, wrote separately to respond to the dissent authored by Justice Scalia (discussed in the section below). Justice Stevens stated that the Court's opinion is consistent with longstanding precedent. Quoting from a lower court opinion he had authored in 1972, Justice Stevens said that by ensuring the right of public employees to exercise their First Amendment freedom of political party affiliation, the Court was not imposing a civil service system on employees who otherwise served at will, but was simply prohibiting the governor from doing that which would plainly be held unconstitutional if enacted by the General Assembly of Illinois: conditioning public employment on the unjustified compromise of First Amendment rights.

The Dissenting Opinion

Justice Scalia, joined by Chief Justice Rehnquist and Justices Kennedy and O'Connor, wrote the dissent.

Justice Scalia noted the irony that politically appointed judges will be responsible for enforcing the Court's opinion that politics has no place in public employment. He equated the Court's ruling to mandating a form of civil service protection, in that the Court had chosen to extend the merit principle at the expense of patronage. Whether the political patronage system should continue or should be replaced by a merit system, Justice Scalia said, should properly be left to the legislature, not the courts.

The dissent disagreed with the majority's view that the appropriate standard of review for political patronage cases is strict scrutiny. It is true, noted Justice Scalia, that previous Supreme Court decisions establish that public employees do not lose their constitutional rights by virtue of their public employment. However, he added, the Court's prior decisions do not support the majority's holding that the government may prevail in a political patronage case only if it proves that the practice in question (such as promotion or hiring based on party affiliation) is narrowly tailored to further vital government interests. Rather, Justice Scalia stated, the appropriate standard of review is whether such practices bear a rational connection to the governmental end sought to be served. Stated another way, the test should be whether the employment practice reasonably furthers a legitimate goal.

Finally, the dissent noted the difficulty the lower courts have had in applying the standard set forth in the Supreme Court's previous holdings on political firings. That standard, most recently set forth in *Branti*, held that political party affiliation may be taken into consideration only when the employer can demonstrate that it is an appropriate requirement for the effective performance of the office. What that standard means, stated Justice Scalia, is anybody's guess. Indeed, he described the line of lower court decisions produced by implementation of the *Branti* standard as "a shambles." Similar results are now inevitable with respect to other political patronage cases, he predicted.

Effect of the Decision

For state and local governments, this decision is historic. Political party affiliation has traditionally played a part in many kinds of personnel decisions—for example, in determining who is hired in a sheriff's office. Unfortunately, application of the *Branti* standard by the lower courts, including those with jurisdiction over North Carolina, has led to inconsistent and even unpredictable results. For example, in *Joyner v. Lancaster*[7] the political firing of a deputy in a sheriff's office was upheld; in contrast, in *Jones v. Dodson*[8] the political firing of a deputy was overturned. These cases turn on fine distinctions. Indeed, Justice Scalia's dissent in the *Rutan* case notes that "for most positions it is impossible to know whether party affiliation is a permissible requirement until a court renders a decision."[9] Continuation of the traditional practice may now lead to lawsuits and liability.

By carrying forward the *Branti* principle that party affiliation may be taken into consideration only in a narrow range of positions, and by applying that principle to all personnel decisions, this decision will likely increase the number of lawsuits claiming violation of First Amendment rights. Certainly, the application of the strict scrutiny standard to political patronage actions will make it less likely that those actions will survive legal challenge. Where, however, personnel decisions are based on merit, those decisions should withstand attack.

Notes

1. 58 U.S.L.W. 4872 (U.S. June 21, 1990).
2. 427 U.S. 347 (1976) (invalidating the dismissal of office staff by a newly elected sheriff because the staff was of the opposite political party).
3. 445 U.S. 507 (1980) (striking down the dismissal of opposition party assistant public defenders by the newly elected public defender).
4. 58 U.S.L.W. at 4874 (quoting *Branti*, 445 U.S. at 516).
5. *Branti*, 445 U.S. at 518.
6. 58 U.S.L.W. at 4875.
7. 815 F.2d 20 (4th Cir.), *cert. denied*, 484 U.S. 830 (1987).
8. 727 F.2d 1329 (4th Cir. 1984).
9. 58 U.S.L.W. at 4885.

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