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In the

Supreme Court of the United States

RICHARD J. ELROD, ET AL., Petitioners,	:	
v.	:	No. 74-1520
JOHN BURNS, ET AL., Respondents.	:	

Washington, D. C.
April 19, 1976

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Petitioners, : No. 74-1520

v.

JOHN BURNS, ET AL.,

Respondents.

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Washington, D. C.

Monday, April 19, 1976

The above-entitled matter came on for argument at 11 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

THOMAS A. FORAN, ESQ., Foran, Wiss and Schultz, 111 West Washington Street, Suite 1731, Chicago, Illinois 60602, for the petitioners.

JOHN C. TUCKER, ESQ., One I.B.M. Plaza, Chicago, Illinois 60611, for the respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 74-1520, Elrod against Burns.

Mr. Foran, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF THOMAS A. FORAN,

ON BEHALF OF PETITIONERS

MR. FORAN: Mr. Chief Justice, and may it please the Court: This case involves an alleged violation of the First Amendment right of political association of four public employees --they were process servers and court attendants -- in the office of the Sheriff of Cook County whom I argue in behalf of, incident to discharges or threat of discharge for political considerations or more commonly described as so-called patronage practice requesting political sponsorship for either appointment to certain public jobs or to continue in employment in public jobs.

In this particular case the plaintiffs below, or the respondents here, were employees of the Sheriff's office in December 1970 when an incumbent Republican was replaced by the Democrat Elrod who was elected the prior month. The plaintiffs were not in job categories, like some others in the Sheriff's office, which were protected by civil service or other nonpolitical or merit system of job category. They were not protected in any way by contract or agreement or legislation

against summary discharge.

The plaintiffs stated in their case that they are Republican and that they originally obtained their jobs in the Sheriff's office by having Republican sponsorship by Republican officials in order to be employed by the Republican sheriff.

QUESTION: They stated that in their complaint?

MR. FORAN: Yes, sir, they did.

They alleged that they were discharged because they were Republicans and could not or would not obtain Democratic sponsorship to continue on their jobs.

Now, in the complaint there are a number of allegations concerning a practice of discharging non-civil service employees in Cook County by the Sheriff's office on the assumption that a sheriff of a different political party would discharge any employee who didn't pledge allegiance to the party of the new sheriff, who didn't agree to work for the party and candidates of the party of the new sheriff, would not contribute a portion of their wages to the party of the new sheriff, or would not obtain political sponsorship by the new sheriff's party.

Now, neither the complaint nor the affidavits in this case allege that these four respondents were required or that they were even told that they might be required to meet any of the conditions that were set forth as a practice other than

this political sponsorship condition.

I might add that the respondents here have referred the Court to a stipulation of fact by the sheriff and the Sheriff's Office in a companion case, the Shakman case, also out of the Seventh Circuit. We do not object to that statement of facts of the operation of the Sheriff's Office. We feel that it does fairly state what the factual situation is in the Sheriff's Office.

The district court below denied a preliminary injunction and dismissed the case for failure to state a claim.

QUESTION: Can you tell from the Shakman case, Mr. Foran, whether a Republican might be employed in the tradition of the Sheriff's Office by a Democratic sheriff if he obtained a Democratic sponsor?

MR. FORAN: Mr. Justice Rehnquist, the stipulation of the Sheriff's Office, and I think I can describe it in summary rather quickly. There are 3,000 employees in the Sheriff's Office in Cook County. About 500 of them fit into a kind of a large category that includes the type that you are mentioning. About 500 of them are either supervisory, are co-sponsored by any political person, or are holdovers from previous administrations, almost in effect career employees, might well have been sponsored by a Republican. About 1300 of the 3,000 employees are protected by a legislatively created merit system. This includes the Sheriff's police and the

corrections officers who run the county jail and the house of corrections, and juvenile facility. And about 1200 of the 3,000 are in this patronage area where they are appointed only if sponsored by a political figure in the party of the existing sheriff.

QUESTION: Is it theoretically possible, at least, for a Republican employee within this 1200 when a Democratic sheriff comes to power, if he could get a sponsorship from a Democrat --

MR. FORAN: Oh, yes.

QUESTION: -- to be retained?

MR. FORAN: Oh, yes, sir. And it often does happen.

QUESTION: And the record in this case shows that --

MR. FORAN: Yes, sir.

QUESTION: -- somebody was about to be terminated and his sponsorship came in the next day and he was put back on the payroll.

MR. FORAN: That is correct, sir.

QUESTION: But there is a quid pro quo from that, I gather, from reading the record, along with the sponsorship comes the obligation at the next election to work for this man.

MR.FORAN: Yes, sir, political support is expected with respect to those patronage employees.

QUESTION: But is there a change of registration required?

MR. FORAN: No, sir, not specifically, nor is there any such allegation in the complaint. The requirement is that one support the Democratic candidate for sheriff for his reelection, at least, and in all likelihood, that he become a worker for the Democratic party.

QUESTION: Well, I realize there comes a point where probably a stipulation doesn't cover -- is it also required that he support the Democratic candidate for Senator and for Governor as well as the Democratic candidate for sheriff?

MR. FORAN: That's a hard question to answer, Mr. Justice Rehnquist. I think for the purposes of this argument and for the purposes of this Court's decision, that the patronage practice of sponsorship would presume on the part of the sponsoring Democrat that this man was going to be a worker generally for the Democratic party.

In the lower court, the district court, Judge Bauer dismissed the case on the basis of Alomar v. Dwyer. While it was pending an appeal, the Seventh Circuit came down with Illinois State Employees Union v. Lewis where a Republican Secretary of State had in effect done the same thing to a large number of Democrats after he took over the Secretary of State's office.

I did mention the Shakman case, and I should say what the Shakman case previously held. The Shakman case was an independent who was running for constitutional delegate, in

effect a kind of a nonpartisan election, and in the Shakman case he argued that because the major political parties had a patronage system in their public employment, that his voter candidate rights to equal protection in his election, his attempt to become a constitutional delegate had been interfered with. So it came up in a slightly different context than the Lewis case or this case, or Alomar v. Dwyer, but nevertheless was related in the instance of the patronage system being in question.

So that the core issue in the case is really a very specific one. Is there a First Amendment prohibition against an elected public official discharging a noncivil service employee for his failure to obtain political sponsorship by the party that the elected official wishes him to? Perhaps in a different context the respondents' rights to their jobs which are conditioned on their political affiliation be equivalent of their right to free speech. Only the Seventh Circuit Court of Appeals has ruled that they are. The Second Circuit said no, the Fourth Circuit said no, the D. C. Circuit has said no. This Court has in recent years unequivocally held that the right of political association is not absolute and is subject to reasonable restriction or limitation in the public interest. In the Letter Carriers case and the Buckley v. Valeo, this Court has so held.

This Court in I think an important case to consider

because it is the companion case to the case upon which the respondent rely. In Board of Regents v. Roth, the Seventh Circuit Court of Appeals had ruled that a nontenured teacher who was fired without reason being given to him did not have such a property interest in his job that it would generate due process rights. The Seventh Circuit had ruled that he did. The Seventh Circuit said that he was entitled to a hearing. This Court said no, he was a nontenured teacher and he had alleged that his First Amendment rights had been violated but had been fired for no reason given.

So this Court has ruled that he had no such property interest which would justify protection under the due process clause or under the Fourteenth Amendment. The argument, then, must be by the respondents that these nontenured employees who had no contract, no agreement, who had got their job well knowing, since they had already received their jobs politically sponsored, that it was the type of job that needed political sponsorship, whether those people had such a right in their job that their political association was like free speech and that their interest as individuals in free speech overrode any governmental interest that might exist in a partisan political public service, a governmental interest in that which could condition or restrict their right to political association.

It seems to me that while the respondents do here

argue that there is no legitimate governmental interest in a -- or at least no compelling governmental interest -- in a partisan, political public service, that in that area which has not been articulated, we must strongly disagree with that position. Their position is based on this type of an argument, since some courts, including this Court, have agreed that nonpartisanship in public service, in public office, is under some circumstances, some legislative act, the Hatch Act is the one most obvious, campaign finance, that if in certain areas of government that it is good to have a nonpartisan tenured security-oriented employee, that therefore necessarily political public service is bad.

QUESTION: I would have thought all this Court said in the Hatch Act cases was that Congress thought it was desirable.

MR. FORAN: Exactly, Mr. Justice. Exactly. And in this case, at a different level, we have the same situation here. The Illinois State legislature and the County Board of Cook County have both legislatively acted to say with respect to certain offices, the police and the corrections officers in the Sheriff's Office, they are merit.

QUESTION: By implication they have said that with respect to the rest of them, that he that liveth by the sword shall perish by the sword.

MR. FORAN: In effect, yes. I think in our reply

brief we commented on the criticism by the respondents of Chief Justice Bell's factual analysis of that in suggesting that perhaps in exchange, he who has not sinned should cast the first stone.

QUESTION: Suppose the legislature of Illinois passed a statute that said only Democrats may be employed in the Sheriff's Office.

MR. FORAN: They would be wrong. They did not do that here.

QUESTION: And the difference is?

MR. FORAN: The difference is this --

QUESTION: The legislature didn't do it.

MR. FORAN: Yes, sir.

QUESTION: But a State officer can do it?

MR. FORAN: A State officer who is an elected public official in a political public office can with particular employees who have not been made a part of a nonpolitical public service.

QUESTION: But the legislature couldn't do it.

MR. FORAN: Yes, sir.

QUESTION: Could not do it.

MR. FORAN: They could not do it. They could not say you can't appoint --

QUESTION: Could the Governor do it?

MR. FORAN: A Democrat? Yes, sir.

QUESTION: A Democratic Governor could --

MR. FORAN: Or a Republican Governor.

QUESTION: -- could issue a proclamation saying that only Democrats could work --

MR. FORAN: Oh, no, sir.

QUESTION: But the county sheriff can. Who else can beside the county sheriff?

MR. FORAN: Any public official with respect to public jobs that are not designated as nonpolitical public jobs. See --

QUESTION: What State interest is there in having that to be the case?

MR. FORAN: Let me give this as the State interest --

QUESTION: You seem to say it's essential to find a State interest.

MR. FORAN: I think it is.

QUESTION: You do?

MR. FORAN: I think it is essential to show that there is some State interest in partisanship in public office.

QUESTION: You don't think the Sheriff's Office or Illinois is permitted to just say to these people, "You are just fired. We don't need to give you any reason at all."

MR. FORAN: I think they could say that, yes. They could say, "You are fired." But they didn't.

QUESTION: They said, "We fire you because you belong

to the wrong party.

MR. FORAN: Well, they said, "We fired you because you won't switch over and help us politically."

QUESTION: And you think if they are going to say that, then they must find some substantial State interest, a pretty strong one. Now, what is it?

MR. FORAN: It is this, Mr. Justice White: Throughout the history of this country, as distinguished from the European public service, the concept of political public service is crucial to the growth of the Government, for a very good many reasons.

QUESTION: Crucial to the growth of the Government?

MR. FORAN: To the growth and good operation, the efficient operation of the Government.

QUESTION: You mean it's essential to the elective process or essential to the --

MR. FORAN: No, to the operation of the Government.

QUESTION: To the operation of the Government. Why is it essential to the operation of the Government?

MR. FORAN: Because --

QUESTION: It helps out the party, that's why.

MR. FORAN: Well, much more than that, Mr. Justice Marshall. Elected public officials --

QUESTION: Whatever is good for the party is good for the country.

MR. FORAN: Well, that's the political argument. But the political argument is also a good one to this extent: That the sheriff, who has been elected by the people to exercise his management discretion, if he is to exercise his management discretion consistent with his commitment to the people who elected him, the people who work for him should be loyal to him. And he should have faith that they are loyal to him. And he should have faith that they are intending to encourage his reelection as the political figure that he is in that operation of the government.

QUESTION: Wouldn't it be enough to protect your interest if you drew a line, if you divided the employees where it was important that obviously they follow his lead and others that -- the legislatures think there is some way of doing that.

MR. FORAN: There is, by the way some comment in the Lewis case about policy-making and nonpolicy-making.

QUESTION: Quite a bit, as a matter of fact.

MR. FORAN: Well, but that, by the way, Mr. Justice White, does include a fallacy. Government at the local level is not run from the quarterdeck. It is run from the engine room. What government gives in the local area is service to the people. It services sewers, it services court operations, it serves summons. It takes care of buildings, it runs transportation systems, it collects the

garbage, it keeps the water pure.

QUESTION: Mr. Foran, if the legislature of Illinois wanted to, it could make all of the 3,000 employees of the Sheriff's Office subject to their civil service, could they not?

MR. FORAN: Yes, sir.

QUESTION: They could make the sheriff, by some provision in your constitution, they could make the sheriff a civil servant, could they not?

MR. FORAN: Well, we do have that constitutional problem, Mr. Chief Justice, but they could with any offices, they could eliminate them, the legislature could eliminate them.

QUESTION: And you tell us 2,800 of these people approximately -- or 1,800, rather -- about 1,800 are freelancers and 1,200 are subject to the civil service program.

MR. FORAN: Yes, sir. The freelancers, by the way, include the policy-makers, Mr. Justice White. But freelancers is a good way to describe them.

QUESTION: But if you are going to have a political organization in a city the size of Chicago, someone who is elected sheriff has to have some jobs to give out when he gets in, doesn't he?

MR. FORAN: That's the way it's always run. And by the way, not just in Chicago, Mr. Justice Rehnquist, but it happens throughout the country's history.

Now, ordinarily when we talk policy-making/nonpolicy-making, Mr. Justice White, that's where we get into the quarterdeck concept because we talk about the perquisites of office of the elected executives, the President of the United States. I think Jefferson when he came into office one time said, Well, I think I will wait for the normal attrition in jobs, and then he said, two die, but nobody --

QUESTION: I'm still waiting for you tell me what's the interest State / of having the elevator operator be a Republican rather than a Democrat, or a Democrat rather than a Republican.

MR. FORAN: Well, let me say this --

QUESTION: What State interest is there -- do you accept Mr. Justice Rehnquist's statement this is just essential to have the two-party system work?

MR. FORAN: I think it --

QUESTION: It certainly isn't essential for the government.

MR. FORAN: I do believe it's essential for the efficiency of government. Simply this: Look at the plethora of cases that are coming up in all the Federal district courts, by the way, in line with your question, Mr. Justice Marshall, of what happens in a civil service system that shuts out the disadvantaged, that shuts out minorities, that shuts out the aged, that shuts out the infirm because of the requirements for testing. All over the country we are running into that

problem with the fact that we don't have proper proportions of our society, proper geographic distribution within our voting districts because of civil service regulations.

The patronage system, Mr. Justice White, is the way that the minority people in this country got into the system.

QUESTION: Do you mind if I don't agree with you?

MR. FORAN: Pardon?

QUESTION: Do you mind if I don't agree with you.

QUESTION: Mr. Foran, are you saying that on this record, the minorities are shut in, are taken into the system, on this record?

MR. FORAN: Yes, sir.

QUESTION: Could you point out specifically where that is?

MR. FORAN: Oh, on this record. I am sorry, Mr. Justice Blackman. Not on this record. I cannot. But I can say that in the civil service area of public employment there are cases all over this country that are indicating that not sufficient numbers of minorities are able to get into public service under the --

QUESTION: We are talking about the civil service segment here. I am zeroing in on your non-civil service people, and I want to know whether your record here, as constructed, shows minorities and others are taken in as your rather bland and broad remarks just now would indicate.

MR. FORAN: Not under this record here, Mr. Justice.

QueSTION: What type of jobs do these 1,200 non-civil service people hold? You mentioned janitors and people who provided various services. How is the line drawn between civil service and non-civil service employees?

MR. FORAN: The civil service in the Sheriff's Office are the county sheriff's police and the corrections officers who take care of the county jail and the house of corrections and the juvenile court facility which are all under the jurisdiction of the sheriff.

QUESTION: Are these categories prescribed by the legislature?

MR. FORAN: Yes, sir, as a merit system of employment.

All other categories, which includes the supervisory level of the police, the warden of the county jail, the major supervisors of divisions, and many of the court attendants, process servers, at least some. For instance, in the court attendants, all of the judges select their own. There is no political patronage involved in that, although there is a judicial patronage involved.

QUESTION: Does this same system obtain statewide in Illinois?

MR. FORAN: Pardon?

QUESTION: Does the system you describe apply statewide? Would you have this in Springfield, for example?

MR. FORAN: Oh, yes. As a matter of fact, in the Shakman case there are comments in the brief about the consent judgment. There are 103 defendants in the Shakman case, 103 Republican committeemen defendants who have not consented in the Shakman case. Elrod has not consented in the Shakman case. The Chicago park district has not consented in the Shakman case. Recently the new Governor of Illinois argued that the consent decree of the predecessor Governor did not apply to him. By the way, it doesn't look like he is going to be the new Governor for long because he was recently -- he didn't win the nomination.

But the partisan political service, Mr. Justice White, just to get back to that point, it's consensus. What it is is the necessity of consensus to operate any conceivable operation, the necessity of loyalty. By the way, I think Mr. Justice Stevens used a good phrase of it. He calls it the necessity of effective supervision of employees, for an employee to know he is subject to your discipline if he doesn't do what you want him to do, that he must be loyal to you in your endeavor to convince the people that your representations to them that you could do this job were based on your political commitment.

QUESTION: There are some more practical reasons than that, too, aren't there, Mr. Foran? Who is going to circulate the sheriff's nominating petitions? I don't know if you have a petition requirement in Illinois or not, but we did in Arizona, and every elected political officer had to have a couple of

political people on his staff, not to make policy, but to circulate his nominating petitions and to do things like that.

MR. FORAN: Well, that's correct, but I don't think that's the interest that I'm talking about.

QUESTION: You seem to want to evade the view that it's essential to make the elective process work. You just don't seem to want to -- you want to put it on the operation of the government?

MR. FORAN: Yes, I do, Mr. Justice White, because I say this: When a man is elected by the people to operate a service government, the people elect him to exercise his discretion as he sees fit. One of the perquisites of that discretion is his right to appoint. And one of the things --

QUESTION: If it's so important, I'm surprised the Illinois legislature removed from this category these very important blocks of employees.

MR. FORAN: Well, I think because some particular jobs --

QUESTION: Those would be the very ones that you would like to know are supporting you tooth and toenail.

MR. FORAN: Pardon me, Mr. Justice White, there are certain types of jobs that simply should not be subject to political control. Historically firemen and policemen have highly tended to become civil service under the legislature.

QUESTION: You mean in the last hundred years.

MR. FORAN: Yes, sir.

QUESTION: Before that, they were all political appointees, were they not?

MR. FORAN: Yes, sir.

QUESTION: If you would like to have the unqualified support of some people in your office, you would like to have it from the policemen who are out serving the people.

MR. FORAN: That's right, but the legislature took it away from them.

QUESTION: Yeah.

MR. FORAN: And they took the FBI away, and they took the CIA away. But the legislature did that. The legislature had the right to do that. And the legislature has the right not to do it, and in this case they didn't do it. What the respondents are asking here to do are asking this Court to do it for the legislature.

QUESTION: But the reason that you give, it seems to me, is considerably illuminated by what the legislature of Illinois has done. I mean, it wouldn't if you would just frankly say, "Look, the elective process has to work, the party system has to work."

MR. FORAN: I think there is a necessity of generating consensus, Mr. Justice White. It's terribly important, the opportunity for a political official to have a chance to be elected, to continue his progress. I think that's terribly important and that is a mixture of the government and the

political process.

QUESTION: Something like the parallel between congressional staffs. The Congressman picks all of his staff. When the Congressman or Senator is defeated, they are all out of employment, are they not?

MR. FORAN: I would say it's a fair analogy, Mr. Justice Brennan.

QUESTION: Are there any civil servants working for a Senator or Congressman?

MR. FORAN: No, sir.

QUESTION: That you know of?

MR. FORAN: Not that I know of. They all -- by the way, the President's power to appoint is used there, to generate the consensus for his program.

I would like to save a couple of minutes if I could.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Tucker.

ORAL ARGUMENT OF JOHN C. TUCKER

ON BEHALF OF RESPONDENTS

MR. TUCKER: Mr. Chief Justice, and may it please the Court:

QUESTION: When was the first time, Mr. Tucker -- I am not sure this record shows it -- that in the federal system or in any of the State systems a tenured service came into being?

MR. TUCKER: Well, I am not certain I can answer that directly. I suppose you would start back with the original Federal civil service laws, back in the period following the assassination of Garfield when the civil service reform began in the 1800's.

QUESTION: 1890's.

MR. TUCKER: Yes, 1880's. Yes, sir.

However, I think on the historical aspect of this case, as we have indicated in the brief, it is not correct that the patronage or spoils system has always been a part of our government since constitutional times. For whatever relevancy that has to the fundamental constitutional issues in this case, I think really it has very little, because we are dealing with rights which this Court has just declared, and not that it is anything new, but certainly just recently again declared, are at the very core of the First Amendment.

QUESTION: Well, if it's not anything new, and the First Amendment has been with us since 1791, why did Andrew Jackson feel free to say to the victors belong the spoils?

MR. TUCKER: Because, Mr. Justice Rehnquist, I think --

QUESTION: It was Andy Jackson.

MR. TUCKER: -- this Court for many years, up until the late forties or early fifties engaged in what was considered to be a right/privilege distinction with respect to public employment, and they said -- the Court in substance

said, "Well, there is no right to public employment, and therefore there are no benefits that come with it. It is purely a matter of discretion, and you can even require someone to give up their constitutional rights."

However, once you accept the proposition which Mr. Justice Stewart -- again, not a new proposition, but I suppose culminating in Mr. Justice Stewart's decision in the Sindermann case -- that there are certain things which you cannot require of public employees. There are certain things which you cannot take away the benefits, one of which --

QUESTION: Wait a minute. You agree that the thing is a balancing test. You would agree that the Governor's principal assistant in Springfield, his special counsel certainly has to give up his constitutional rights. If he is a Republican and wants to be counsel to the Democratic Governor, and the Governor tells him,"That's fine, but you register as a Democ at," he has got to do that to get that job, doesn't he?

MR. TUCKER: Yes, sir. I don't know that he has to register as a Democrat. I would say this, that I have no objection to the policy/nonpolicy distinction which the court below in this case and Mr. Justice Stevens in the Lewis case devised. I have no objection to that. I don't think that is the same thing as a balancing test with respect to fundamental constitutional rights, however. That's a different kind of

balancing.

QUESTION: To get a policy-making job, then, under your analysis, if it's a Republican administration and you are a Democrat, you may well have to give up some of your constitutional rights.

MR. TUCKER: Now, just a moment. I think you have to distinguish between the policy-making and nonpolicy-making.

QUESTION: OK, let's talk about policy-making.

MR. TUCKER: You are now on policy-making.

QUESTION: Right.

MR. TUCKER: I don't think that when you are on policy-making, if you want to say you have to give up certain rights, I suppose that's right, you do. The chances are you have already made a determination with respect --

QUESTION: Why do you agree with that? You say the interest in what overrides --

MR. TUCKER: I'm not saying that the interest, there is a governmental interest --

QUESTION: How do you arrive at it? How do you arrive at the fact that the policy-maker has to -- that it's all right to fire the policy-making officeholder?

MR. TUCKER: I think you get there by virtue of another distinction that Justice Stevens drew in Lewis, which is that there are certain kinds of jobs -- and I think this is the same kind of thing that the jobs that the Chief Justice

was talking about -- Congressional administrative aids. There are certain kinds of jobs in which a personal loyalty and an agreement with the governmental philosophy of the officeholder is essential. And I don't think you find -- no, that's not what the patronage system is about. We are not talking about those jobs when we are talking about the patronage system.

QUESTION: I know, but how do you -- you say in that kind of a job, whatever the gentleman's First Amendment interests are, they are not sufficient to keep him in the job.

MR. TUCKER: Well --

QUESTION: Isn't there a yes or no to that?

MR. TUCKER: I suppose there is and the answer would have to be no, but I don't think that's the way it works out as a practical matter, because First Amendment --

QUESTION: He doesn't keep his job.

MR. TUCKER: No, sir, he does not keep his job, but at that point in time, as a policy-maker, the person, or public officeholders who brought him in there is leaving, his whole philosophy, so to speak, insofar as it relates to that job, is leaving. I don't think at that point you could really say that the congressional aid, or to take it to the sublime, the Secretary of State is fired because he is a Republican or because he is a Democrat. He simply leaves with the group that was in office, the group of people who ran that public office.

QUESTION: You can honestly say he is fired because

of his political beliefs.

MR. TUCKER: You can, you say?

QUESTION: I would think so.

MR. TUCKER: Well, perhaps so. Perhaps.

QUESTION: Perhaps! He is fired because he very likely doesn't agree with his new boss.

MR. TUCKER: I think he --

QUESTION: What more do you want to say?

MR. TUCKER: I think more realistically he is fired, Mr. Justice White, because he is not really fired; he leaves with the administration, and it's more a personal than a political matter. Many times someone perhaps of a different political persuasion comes in. But the distinction that I think we have to keep in mind is we are not talking about those kind of personnel. We are not talking about congressional aids. We are talking about process servers, bailiffs, janitors, window washers, street cleaners.

QUESTION: The Sindermann case that you referred to and then, I think, Roth, wasn't there considerable emphasis placed on the expectation of continued employment?

MR. TUCKER: Not in Sindermann, your Honor. In Roth there was, and I want to make it very clear --

QUESTION: Doesn't that permeate the whole area that we are talking about, though?

MR. TUCKER: No, sir, I --

QUESTION: This Court's decisions?

MR. TUCKER: Mr. Chief Justice, I think that when you talk about due process rights, it does. We are not talking about due process in this case; we are talking about fundamental First Amendment rights. And I think that Mr. Justice Stewart in Sindermann made that distinction very clear when he said, and when the Court said in that case that even where there is no expectation of continued employment, and therefore discharge is discretionary, there are some reasons for which you cannot discharge people. And the most basic of them is the exercise of fundamental First Amendment rights, and the basic right to freedom of political association, as this Court has held in Kusper v. Pontikes, in Buckley more recently. Every Member of the Court agreed that the right of freedom of political association is at the core of the First Amendment.

QUESTION: Buckley also, though, the Court in sustaining the public financing provisions indicated that Congress could go a pretty far distance in funding the two major parties differently than minority parties.

MR. TUCKER: Well, that's true, Mr. Justice Rehnquist, but I think that what the Court, as I understand it, comes to, as far as that part of Buckley is concerned is simply, "Well, we can find nothing on this record to suggest that there is anything discriminatory about this setup. Your Honors have always made it clear, in the Letter Carriers case, in United Public Workers,

and I think in Buckley that where fundamental rights, such as political association, are involved, a statutory scheme that is going to infringe on this -- and, of course, here we don't have a statutory scheme; we have got an ad hoc determination of the Sheriff of Cook County -- but any public official or legislative or congressional enactment that would infringe on those rights must be extremely narrowly drawn and must be totally neutral and nondiscriminatory.

QUESTION: Mr. Tucker, you say there is no statutory scheme. I thought there was a statutory scheme.

MR. TUCKER: No, I don't believe --

QUESTION: That provides that almost half of the employees of the Sheriff's Office are tenured civil service employees.

MR. TUCKER: That's correct.

QUESTION: That's a statutory scheme, isn't it?

MR. TUCKER: That's a statutory scheme.

QUESTION: Do you agree with your friend, Mr. Foran, that the legislature could make everyone in the office of the sheriff except the sheriff himself a tenured civil servant?

MR. TUCKER: Yes, sir. Yes, sir.

QUESTION: But they picked out only 1,200 of them.

MR. TUCKER: They picked out two departments, the police and the corrections department. But I think Mr. Justice Marshall answered that question. In the first place, the

legislature has not acted. The legislature has simply not acted with respect to these and many, many other employees. It's not that they devise a scheme with respect to how they could or could not be discharged or said specifically that no Republican may remain in office or no person shall be in office or be a public employee for an officeholder of the opposite party. But as Mr. Justice Marshall says, and as this Court has said, since 1949 every member -- not every member of this Court, but I think most recently Mr. Justice White in his decision in Arnett has continuously said the same thing. Congress, the legislature, may not, the State may not enact a law the substance of which is that no Republican, Jew, or Negro may be employed in public office or as a public employee. And to suggest that the legislature has acted by not acting here seems to me to be irrelevant to the controversy, because if the legislature had specifically enacted something to approve this, or the Congress --

QUESTION: Isn't there an old rule of statutory construction that has something to do with this, when the legislative body acts in one field and doesn't act in the same area in another?

MR. TUCKER: Well, I understand the reference that you make, Mr. Chief Justice, but I go back to what I said. If the legislature had enacted a provision specifically doing what Sheriff Elrod does -- and I think it's important to look

at what the facts here are, and they are undisputed. Mr. Foran very frankly admits the requirement is that in order to obtain and maintain your job as a janitor or a process server in the Sheriff's Office, you have to agree (a) to switch your party affiliation, or if you are unaffiliated to affiliate with the Democratic Party of Cook County, not just the Democratic Party, because there are other Democrats in Cook County besides the regular organization; you have to agree to affiliate with that organization and to work for and support its entire slate of candidates, not only for sheriff, but down the line.

QUESTION: Is it also agreed that these plaintiffs obtained their jobs through the operation of that same system?

MR. TUCKER: It is not agreed on the record that they obtained them on the basis of the same system, Mr. Justice Rehnquist, because the record is silent. It is of record that the named plaintiffs in this case had Republican sponsorship at the time that they came into their jobs. It's not clear on the record as to what that entailed, whether the same kind of affirmative support of a particular county party ticket was required.

QUESTION: I take it you would be here making the same kind of an argument if there were a State law, State statute, or State constitutional provision which said, "We are not now enacting any rule that only Democrats or Republicans may work for the State government; what we are saying is that

whatever party rules the election must staff the State government from bottom to top, and whoever wins the election runs the government."

MR. TUCKER: Yes, sir, I would be here making the same argument because that would be in substance the statute saying that no Republican, if a Democrat wins the office, shall be a public employee during that term of office.

QUESTION: Although the fact that a Republican gets elected Governor automatically takes care of the Democrat. The Republican moves in and runs the State government.

MR. TUCKER: Yes, sir.

QUESTION: Whoever wins the election runs the government.

MR. TUCKER: That's correct.

QUESTION: What's the difference between a legislature saying, "Well, we are going to replace this Democratic Governor because the Republican won the election," and saying, "Well, he can also replace the elevator operator."

MR. TUCKER: I think that the Governor has been elected by the people of the State to --

QUESTION: I know, but the State law says if you win the election, you also replace the elevator operator.

MR. TUCKER: I understand this is a hypothetical State law, Mr. Justice White, that you are talking about.

QUESTION: It's not much different from this one.

MR. TUCKER: All right. And I suggest what this Court has said and every Member of this Court over the years since 1949 or every successive Court including yourself, Mr. Justice White, in Arnett is that that kind of a law either --

QUESTION: This is a neutral law. This is a neutral law. It says whoever wins the elections can work for the government, Republican or Democrat, or Socialist, or Communist, whoever wins.

MR. TUCKER: My understanding of the law that you propose is one that says that when a Republican is elected Governor no Democrat shall be permitted to serve in the public service. Is that it?

QUESTION: Or put it the other way, whoever wins the election staffs the government.

MR. TUCKER: All right. I think that Mr. Justice Stewart's opinion in Sindermann and all of the opinions going back to Wieman that precede that, make it clear that that cannot be the law because it involves giving up and requiring people as the price of public employment to give up their fundamental First Amendment rights. And I think if Sindermann means anything and if Wieman means anything, and if all of the cases that have said that you cannot require people to give up their fundamental rights as the price of public employment, if those cases mean anything, they mean that you cannot come into office or while in office make a requirement of public

employment --

QUESTION: Except for 500.

MR. TUCKER: Except for 500? You mean the policy-making?

QUESTION: Or whatever you want to call it.

MR. TUCKER: I think that's a distinction that has been drawn and worked in many other areas, Mr. Justice White, and one that is clearly appropriate in light of the function of Government and the way in which the Government operates in an elective process. But when you are talking about nonpolicy, making employees, I think that you have to follow the line of cases and afford these people their fundamental constitutional rights, and when you say that they will be deprived of those rights or that they can be discharged or kept from public service by virtue of their exercise of their fundamental freedom of political expression, then you are doing by indirection that which you could not do directly, which is exactly what Mr. Justice Stewart expressed --

QUESTION: Is your only exception for policy-making?

I want to give you an example. Arizona has a Corporation Commission consisting of three members who are elected and who are highly political, and they have an executive secretary who has no policy-making responsibilities whatever. He simply hangs around, so to speak, and will inscribe the Commissions orders on the docket sheet. I would

say under your definition, he is not a policy-maker at all. Can they not, if the party control of the Corporation Commission changes, can the new majority not replace him under your theory?

MR. TUCKER: I think they could because I think that, as Mr. Justice Stevens in the Lewis opinion indicated, there are certain kinds of positions which are of such a personal nature. For example, it may be that -- let's just take the sheriff's personal chauffeur who may be a person who certainly isn't making any policy, when a new sheriff comes in, I am not suggesting that he has to keep the old sheriff's personal chauffeur or bodyguard. It may be that he has to use that person or move that person into another capacity if he is qualified for it in the sheriff's office rather than just firing him because he is a Republican or a Democrat, but he is certainly entitled to have his own man driving his car. And I think the example you give me is the same kind of thing.

Furthermore, I think it's important that everybody understand that we are not asking this Court to create -- and the Seventh Circuit again made it very clear that we are not creating a super-civil service. The question, the only thing that is being done here is to say, not that these people have tenure, not that they can't be fired for any reason whatsoever, but simply that if the sole reason they are discharged is because of their exercise of their freedom of speech, freedom

of political expression, and if they can bear the burden of proof of showing that, then they have a claim for violation, under 1983, for violation of their fundamental First Amendment rights.

QUESTION: Mr. Tucker.

MR. TUCKER: Yes.

QUESTION: In line with what you are just saying, if you prevail in this litigation, as a practical matter won't you set the stage for every non-civil service government employee, local,State, and national, to contest any discharge on the ground that it was politically motivated?

MR. TUCKER: I don't believe so. Perhaps I should put it another way, Mr. Justice Powell. It is clear that the rule which the Seventh Circuit adopted does create or recognize that there are certain things,in this instance the exercise of First Amendment rights for which people may not be discharged. Therefore, persons who are discharged, I suppose, could allege that they were discharged for political reasons.

QUESTION: Whenever they are discharged by someone in the opposite party, I think it very likely that the individual would think the reason was political. There must be hundreds of thousands of non-civil service employees at government levels all over our large country. I am just wondering about the extent to which your position would not

breed a vast flood of litigation.

MR. TUCKER: I understand that question, and my answer to it is threefold. Number one, this is a vastly different thing than a civil service system in which there is a presumption that the officeholder has to show a cause for firing and go through a whole panoply of due process rights and so forth. The burden in these cases would be on the discharged employee, the burden of proof would be on the discharged employee to show that the sole reason for his discharge was the exercise of First Amendment rights. The very placement of that burden on the employee in this kind of a situation, in my judgment, makes it clear that there would be very little problem in terms of enforcement.

Now, there is some history in this regard. In the Seventh Circuit we have history based on two things: Number one, we have the so-called Shakman consent decree, and number two, we have had the decision in Shakman and in the Lewis opinion for four or five years. There have been a grand total of, I believe, four enforcement proceedings under the Shakman decree in that entire period of time with many, many thousands of workers covered. There have been, I think, five or six cases filed under the general provisions of Shakman and Lewis in that whole period of time in the entire Seventh Circuit. And I think in each instance the only people who filed those suits, in one instance was the Public Employees

Union in Lewis which resulted in the Lewis decision. Another one is this case, which again is filed as a class action in a situation where the violation is admitted and flagrant on the record, and no dispute about that, and the others were three or four cases in which, after Governor Walker became Governor, people in much higher levels brought actions which in each instance resulted in a determination that they were policy-making employees and therefore not covered.

I think that if you look at it in those terms, you can see that any concern or any interrorem argument based on the idea that there would be a flood of litigation arising from this kind of a determination is simply not justified.

At the same time I cannot answer your question without also saying that we are dealing here with the protection of fundamental First Amendment rights. There is no one else to protect these rights. There is no procedure in Illinois, administrate State law or otherwise. If the Sheriff of Cook County or other officeholders throughout this country utilize the public payroll and their election to public office and the tax money that the taxpayers provide them for the purpose of soliciting an army of partisan workers,while in doing so, and in order to do so, requiring those persons to forfeit their fundamental rights under the Constitution --

QUESTION: Mr. Tucker.

MR. TUCKER: Yes, sir.

QUESTION: I am interested in your saying they are forced to forego constitutional rights. All of the respondents and every one of these people you are talking about accepted employment under the system you are now attacking. Do you think there is anything at all to the argument advanced by your brother that they waived any constitutional right they may have had?

MR. TUCKER: No, I don't, Mr. Justice Powell.

QUESTION: They were adults, they knew what they were doing, they understood the system.

MR. TUCKER: Assume those things to be true. It is not necessarily clear on the record, but assume those things to be true, it doesn't seem to me -- and I think that in their reply brief they basically admitted and agreed that there can be,if there are fundamental constitutional rights involved here, there can be no waiver applied in this situation by any construction of the law of waiver when you are dealing with First Amendment rights. But forgetting about looking at it from the legal standpoint and analyzing whether there could be a waiver of constitutional rights here, I don't think that the -- and you can phrase this in terms of live by the sword, die by the sword analogy or any other kind of phrase that expresses that same idea -- I don't think that that can be applied to this situation.

In the first place, the people that are involved here,

nonpolicy-making employees of public agencies, are the people who are least in the position to exercise the election of going elsewhere to preserve their constitutional rights. They are people who apply for and need jobs. They are compelled in order to receive those jobs,to get those jobs, to agree to forego their constitutional rights.

QUESTION: You have already said it's all right to do that with the Sheriff's chauffeur and his bodyguard.

MR. TUCKER: With respect to the particular job as chauffeur/bodyguard, yes, because of a personal loyalty or personal connection that may be required there.

QUESTION: That doesn't really have anything to do with policy-making. It isn't exclusively confined to policy-making, is it?

MR. TUCKER: I think, Mr. Chief Justice, that we have to be practical about it any kind of a situation of this sort, and what I am saying is that the personal chauffeur for the sheriff may have to be -- the sheriff probably has the right to reassign him to be an elevator operator from whence he came, if that's from whence he came, or a driver in the rest of the department. I don't think that the constitution requires --

QUESTION: Who is going to decide that?

MR. TUCKER: The sheriff.

QUESTION: Yes, but who is going to decide whether the sheriff must give him another job. A judge?

MR. TUCKER: I don't think anybody is going to say he has to give him another job. If the sheriff discharges him and as a practical matter, if he exercises, as occurred here, the patronage function by discharging large numbers of people, a lawsuit may be filed alleging that this person and others were discharged solely because of their political affiliation, and if the burden of proof can be sustained, then that person will recover.

QUESTION: Supposing, instead of firing large blocks, he fired only one man. Does that change the fundamental First Amendment rights for that one man?

MR. TUCKER: It does not. No. And if he could prove that he was discharged solely for the exercise of his fundamental constitutional rights, he will have a claim. I think that the chances of very many people -- you see, the decision of this Court, Mr. Chief Justice, and I might say generally the decisions of this Court are generally respected by the people of this country, including public officials, and if this Court declares, as it seems to me any analysis of the applicable constitutional law requires, declares that these practices are violative of fundamental constitutional rights, public officials will start obeying the law, just as the public officials of Cook County have been obeying the law under the Shakman decree to the result that there have been almpst no litigation as a result of it. Public officials are not about

to come out and flaunt the decree of the Supreme Court of the United States when it declares that fundamental constitutional rights are entitled to protection in this area. And it is for that reason, among others, that there is not, in my judgment, any great problem in terms of any flood of litigation. But the Court has the duty to vindicate those rights. If there is any clearer function of the Court, I don't know what it is than to vindicate the basic and fundamental constitutional rights.

We started this, or I had intended to start this, I guess I will end instead, with Mr. Justice White's question to Mr. Foran. What governmental interest is served for fundamental constitutional rights to be able to be infringed or to make infringement a condition of public employment? There has to be a governmental interest.

MR. CHIEF JUSTICE BURGER: Your time is up, counsel.

MR. TUCKER: Thank you.

(Whereupon, at 12 noon, oral argument in the above-entitled matter was concluded.)