

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-2068

TITLE WALTER H. RANKIN, ETC., ET AL., Petitioners V.
ARDITH McPHERSON

PLACE Washington, D. C.

DATE March 23, 1987

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 WALTER H. RANKIN, ETC., ET AL., :

4 Petitioners, : No. 85-2068

5 v. :

6 ARDITH McPHERSON :

7 - - - - - x

8 Washington, D. C.

9 Monday, March 23, 1987

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 11:02 a.m.

13 APPEARANCES:

14 BILLY E. LEE, ESQ., Assistant County Attorney of Harris
15 County, Houston, Texas, on behalf of the
16 petitioners.

17 GLEN D. NAGER, ESQ., Assistant to the Solicitor General,
18 Department of Justice, Washington, D.C., amicus
19 curiae, supporting petitioners.

20 LLOYD CUTLER, ESQ., Washington, D.C., on behalf of the
21 respondent.

C O N T E N T S

ORAL ARGUMENT OF

Page

BILLY E. LEE, ESQ.,

On behalf of the Petitioner

3

GLEN D. NAGER, ESQ.,

Amicus Curiae supporting Petitioners

13

LLOYD CUTLER, ESQ.,

On behalf of the Respondent

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1 P R O C E E D I N G S

2 CHIEF JUSTICE REHNQUIST: We will hear this
3 argument in Case No. 85-2086, Walter H. Rankin, Etc., et
4 al., Petitioners. v. Ardith McPherson.

5 Mr. Lee, you may begin whenever you're ready.

6 ORAL ARGUMENT OF BILLY E. LEE, ESQ.

7 ON BEHALF OF THE PETITIONERS

8 MR. LEE: Mr. Chief Justice, may it please the
9 Court, chronologically developing our case, on January
10 12, 1981, Constable Rankin, who represents one of the
11 eight constable precincts in Harris County appointed a
12 new deputy, Ardith McPherson.

13 It is county procedure for a new county
14 employee to be on a 90-day probation period at which the
15 employee and the employer may look each over to
16 determine whether they wish to extend beyond 20 days and
17 go into indeterminate employment there.

18 The employment period that began on January
19 12, 1981, would have ended on April 12, 1981. We had a
20 short circuit occur though in that occasion.

21 President Roosevelt -- not -- President
22 Reagan was sworn in on January 20 of --

23 (Laughter.)

24 Either one. Thank you.

25 -- on January 20th of 1981. And just a few

1 blocks away from this courthouse now on March 30th of
2 1981, he was a victim of an assassination attempt.

3 That will be six years from next Monday, and
4 this case goes on and on.

5 At the constables' office, business was going
6 on as usual. His new deputy, Ardith McPherson, had been
7 assigned primarily in her initial period as a computer
8 operator.

9 Let me explain one thing about our constables
10 office. Our downtown constable is Walter Rankin. The
11 other seven constables are scattered all over the county
12 by population groupings there.

13 But they are not around the downtown
14 courthouse complex, which has about five court buildings
15 there that generate all of the court process, the
16 majority of the court process that goes out to the other
17 precincts for service.

18 The new system which we call JIMS -- Justice
19 Information Management System -- all of the process
20 throughout the county comes into Constable Rankin's
21 office, and it is put onto computers which plays back in
22 16 justice of the peace courts scattered over the
23 county, 8 constables offices scattered over the county,
24 the district clerk's office and the county clerk's
25 office both across the street from him, as well as

1 juvenile information goes on these same computers there.

2 So that any officer, court or law enforcement
3 who is wanting to know at any particular moment the
4 status of service of process in any of these cases can
5 punch it up on the computer and have the answer right
6 there before him as to what attempts have been made on
7 service, what service has been completed, what service
8 has been rejected because of bad addresses.

9 Anyway, the information is readily available
10 throughout the county, based upon the input by Constable
11 Rankin's office in the first instance before he sends
12 the process out to other officers.

13 Now, when Constable Rankin appointed Ardith
14 McPherson his deputy, he did this under a statute in
15 Texas that says that all of the constable's employees
16 are deputies.

17 He is not authorized to employ clerks, people
18 to answer the telephone, people to do the typing.
19 Everybody that he employs is a deputy constable.

20 QUESTION: Is that also the man that sweeps
21 the floor?

22 MR. LEE: I did not hear you, sir.

23 QUESTION: Does that also include the man that
24 sweeps the floor in the constable's office?

25 MR. LEE: No, sir, it does not.

1 QUESTION: Well, how far down does it go?

2 MR. LEE: All right.

3 QUESTION: How far down?

4 MR. LEE: The man who sweeps the floor in the
5 constable's office is not employed by the constable.
6 He's employed by commissioners' court who takes care of
7 all of the courthouses.

8 But everybody who the constable appoints --

9 QUESTION: Does the woman involved here do
10 other than what every other computer operator does in
11 the United States: feed material in by punching keys?
12 Is that what she does? She punches keys, like a
13 typewriter?

14 MR. LEE: That is --

15 QUESTION: And that's all she does?

16 MR. LEE: No, we won't concede that, Your
17 Honor.

18 She also was --

19 QUESTION: What else does she do other than
20 punch keys?

21 MR. LEE: All right. For one hour a day at
22 least, she answered the public telephones coming into --

23 QUESTION: What else?

24 MR. LEE: That is all at this point, because
25 this was still in her probation period, and she had not

1 yet actually learned that job yet.

2 QUESTION: I mean, you're talking about the
3 whole county is interested in what she does and all?
4 You don't really mean that, do you?

5 All she does is what -- How many people
6 punch computers in Harris County, would you estimate?

7 MR. LEE: All right. It's going to have to be
8 a far out estimate, Your Honor. I would make a guess
9 that we probably have three to five hundred people who
10 do it.

11 QUESTION: Wouldn't it be closer to thousands?

12 MR. LEE: It may very well be, Your Honor.

13 QUESTION: I think we have a misunderstanding
14 about the importance of the job. And that's what I want
15 to hear about.

16 What does she do that's so important to the
17 county, to the state and to the United States?

18 MR. LEE: All right. Under our Texas law, the
19 constable employed her. She is a deputy constable, in
20 spite of the fact that all she does is punch in
21 information on her computer.

22 If she did not do that part of the constable's
23 duties, he himself would have to take his time and punch
24 in that information there because that assignment was
25 made for him to handle these computer inputs in the

1 first instance there.

2 So one of his deputies, Ms. McPherson, was
3 doing the constable's duties to the extent that she was
4 just punching in information.

5 QUESTION: I guess it's a lucky thing then
6 that the constable is not himself responsible for
7 keeping the courthouse clean, which could have been the
8 case. I mean, you --

9 MR. LEE: Which could have been the case, yes,
10 sir. That is right, because he would then --

11 QUESTION: Then your argument would indeed
12 extend to the man who swept the floor; right?

13 MR. LEE: He would have employed a deputy who
14 swept the floor, unless there were some changes in the
15 law that authorized him to employ the floor sweepers.

16 QUESTION: And you would be making the same
17 argument here --

18 MR. LEE: Yes, sir.

19 QUESTION: -- because that man had the name of
20 deputy?

21 MR. LEE: That's right.

22 All right. Now, we have a constitutional oath
23 in Texas that every officer elected must take, and every
24 officer appointed must take, and Deputy McPherson took
25 this oath that says that she will uphold the office of

1 deputy constable, and that she will uphold and support
2 the Constitution and laws of the United States and of
3 the State of Texas.

4 Now, only the constable was elected. In the
5 metropolitan area that is Harris County, which has about
6 20 percent of the entire population of the state of
7 Texas in our county lines, the constable himself cannot
8 possibly do all of the duties that the legislature has
9 placed upon him by statute to do.

10 For one thing, at the time of this case we had
11 about 160,000 pieces of process come through his office
12 for channeling out to the other constables.

13 QUESTION: Mr. Lee, is this process, is it
14 civil; is it criminal; is it both?

15 MR. LEE: It is both, Your Honor.

16 It is generally civil process, because his
17 office is the incoming mailbox for all of the other 253
18 counties in Texas, and for counties and courts outside
19 of the state, that send process into Harris County.

20 It is the originator, the square one there
21 that makes all of the rest of the -- and he has more
22 computer agents, I would say, in his one office than all
23 of the other seven constables put together there.

24 But that does not mean that he does all of the
25 work there. He just is the initial inputter. But

1 because of the greater litigation area in his precinct
2 there, he probably handles about 25 percent of all of
3 the service process, and the other seven handle 75
4 percent of it.

5 All right. Now, this court and other courts
6 throughout the state and the nation have consistently
7 taken the viewpoint that the constable is an officer of
8 the court. He is a law enforcement officer.

9 In Texas we have a Code of Criminal Procedure
10 that says that he is a conservator of the peace, that he
11 is charged with suppressing crime.

12 Now in this particular instance when the radio
13 in the computer room announced that an attempt was made
14 to assassinate President Reagan, it apparently has
15 failed, and he is being pushed into a car and leaving
16 the scene.

17 And --

18 QUESTION: Mr. Lee, was this lady fired
19 because of what she said or because of what she
20 believed? Do we know that?

21 I mean, suppose when she was called in by the
22 constable and asked whether she had said that, she said,
23 "Yes, I said it."

24 MR. LEE: She was, Your Honor. She was called
25 in by the constable.

1 QUESTION: I know. Now, suppose she had said,
2 "Yeah, I said it, but, you know, I didn't really mean
3 anything by it."

4 MR. LEE: Yes, sir.

5 QUESTION: Do we know whether she would have
6 been fired? I mean, conceivably you might fire her
7 anyway. I mean, he might have said, "Well, you know,
8 you shouldn't talk like that, whether you mean it or
9 not. I don't want that kind of talk in my law
10 enforcement agency, whether you mean it or not. It
11 shows poor judgment, and you're fired."

12 Was that the basis for his dismissal?

13 MR. LEE: Your Honor, I would say not, based
14 upon two trials that we have been through in the
15 District Court.

16 In the District Court, Captain LeVrier heard
17 Ardith McPherson say that --

18 QUESTION: -- she really meant it?

19 MR. LEE: No. He asked her that.

20 He said that if they tried for the President
21 again, she hoped next time they got him. And he went
22 over to her, and he said, "You don't really mean that."

23 She said, "Yes, I do mean it."

24 So then through channels that information was
25 carried to Constable Rankin who called her into his

1 office with Captain LeVrier there, and he asked her, he
2 said, "I have herd of a statement that you have just
3 made. Did you make that statement?"

4 She said yes, she did mean it, and --

5 QUESTION: Well, we don't really know that.
6 Was there a finding to that effect?

7 MR. LEE: There was a finding by the District
8 Court in both trials, Your Honor.

9 QUESTION: That what?

10 MR. LEE: That she had said it and that she
11 meant it.

12 QUESTION: No, that isn't correct, is it?

13 Tell me where you find in the District Court
14 findings a decision either way on whether she meant it.
15 I didn't find it.

16 Can you --

17 QUESTION: I didn't either.

18 QUESTION: -- tell me what finding it is?

19 MR. LEE: In the end of the trial on the
20 second trial, the retrial, the Court announced his
21 decision, his findings of fact and conclusions of law
22 from the bench.

23 And in those he does make the declaration
24 there in the joint appendix, back toward the back end of
25 it, that he -- Sir?

1 QUESTION: What page?

2 MR. LEE: I do not --

3 QUESTION: 25a, he says, "I don't believe she
4 meant nothing, as she said here today. And I don't
5 believe that those words were mere political hyperbole."

6 MR. LEE: Yes, Your Honor.

7 QUESTION: That's all he says.

8 QUESTION: Well, certainly the Court of
9 Appeals for the Fifth Circuit thought the District Court
10 made a finding, because on page 38a, they say, "For the
11 purpose of applying the Pickering/Connick balancing
12 test, we accept the district court's conclusion that
13 McPherson actually hoped that the President would be
14 assassinated."

15 MR. LEE: Yes, sir.

16 I'm pleased for all the help I can get, Your
17 Honor.

18 (Laughter.)

19 MR. LEE: I will cede the rest of my time to
20 the Solicitor General.

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lee.

22 We'll hear now from you, Mr. Nager.

23 ORAL ARGUMENT BY GLEN D. NAGER, ESQ.

24 AS AMICUS CURIAE SUPPORTING PETITIONERS

25 MR. NAGER: Thank you, Mr. Chief Justice.

1 May it please the Court, this Court has noted
2 on more than one occasion that the State's interests as
3 an employer in regulating the expressive activities of
4 its employees differs quite significantly from those it
5 possesses in connection with regulation of the speech of
6 the citizenry in general.

7 The Court has upheld various restrictions on
8 the expressive activities of public employees,
9 restrictions that could not have been applied to the
10 citizenry in general.

11 For example, in *Snepp versus United States*,
12 this Court upheld the right of the CIA to screen its
13 employees' publications, a system of prior restraint
14 which simply could not have been applied to the
15 citizenry in general.

16 QUESTION: Mr. Nager, that's what we have
17 here, a firing because of what she said, not because of
18 the kind of person she was; right?

19 It wasn't that "I don't want somebody here who
20 hopes that the President will get assassinated the next
21 time successfully," but rather, "I don't want somebody
22 who says that kind of thing."

23 MR. NAGER: The short answer is yes, although
24 I'm not quite sure you can separate them out --

25 QUESTION: We can.

1 MR. NAGER: -- by what the constable said.

2 In fact, as we read the record, he terminated
3 her for expressing her approval of the violation of a
4 serious criminal law; that is, he did fire her for what
5 she said.

6 I'm not quite sure there's another way she
7 could have said the same thing, that he could have just
8 fired her for the manner of her expression.

9 But we do think he did fire her for the
10 substance of what she said; that is, that if they go for
11 him again, I hope they get him.

12 QUESTION: Is there reason to think she would
13 have been fired if she had said that, but then it turned
14 out that she didn't mean it?

15 MR. NAGER: The record doesn't reflect what
16 Constable Rankin's thinking was on that subject, Justice
17 Rehnquist.

18 QUESTION: It was important to him. He asked
19 her that, didn't he?

20 MR. NAGER: Yes, he did, which shows that he
21 was trying to find out whether or not she was an
22 individual who indeed believed that it was okay to
23 assassinate -- attempt to assassinate the President, to
24 violate criminal laws.

25 Now, we think that this Court's decision

1 emphasized two things in public employees' speech
2 cases. The first is that the Government's interest as
3 an employer differ from those it has when it acts in its
4 capacity as a sovereign.

5 And, in addition, employment-related
6 sanctions, while placing a burden on First Amendment
7 rights to be sure, are a much lesser burden than general
8 criminal or civil sanctions.

9 Thus, the court has upheld the right of the
10 Government to place reasonable restrictions on the
11 expressive activities of public employees, in order to
12 promote substantial governmental interests.

13 And we think that this is precisely such a
14 case. Respondent in this case was an employee of a law
15 enforcement agency, and she expressed her approval and
16 desire for an assassination of the President.

17 The law enforcement agency for which she
18 worked is by definition committed to the enforcement of
19 criminal laws.

20 QUESTION: Would the result be different in
21 some other kind of public officer, Mr. Nager? Let's say
22 the clerk's office as opposed to the constable's?

23 MR. NAGER: The clerk's office of the court
24 system of Harris County?

25 QUESTION: Yeah, where papers are filed.

1 MR. NAGER: We believe the answer would be the
2 same, Justice O'Connor, although the twist on the theory
3 would be slightly different.

4 Here, the constable's office is a law
5 enforcement agency; and the expressive activity is
6 directly inconsistent with the principal function of
7 that office. That is, it is a law enforcement agency.

8 The clerk's office would not be, quote, a law
9 enforcement agency. But it does have an interest in
10 having employees who won't engage in expressive activity
11 inconsistent with its function.

12 And when an employee --

13 QUESTION: What about the garbage service?

14 MR. NAGER: When an employee expresses
15 approval of a violation of a serious criminal law, that
16 is indicative of the type of expressive activity that
17 that employee will engage in as regards to the function
18 of the agency with which she is employed.

19 So while we recognize it's a more difficult
20 case, it's not a case that the Court has to decide
21 today. But we still would be willing in the proper
22 circumstances to defend it before this Court.

23 QUESTION: What about the street clean-up?

24 MR. NAGER: Once again, Justice Marshall, it
25 is our position before this Court that --

1 QUESTION: Well, just what harm was done to
2 anybody by her statement?

3 I have limited this to anybody.

4 MR. NAGER: The harm in this case is to the
5 Government's interest in promoting the public
6 understanding and respect for the laws of the constables.

7 QUESTION: For uniformity of thought?

8 MR. NAGER: No, Justice Marshall, not for
9 uniformity of thought, but for understanding about the
10 requirements of the law.

11 A law enforcement agency doesn't just engage
12 in day-to-day enforcement activity. It doesn't just go
13 out on the street and arrest people and put them in jail.

14 A law enforcement agency is responsible --

15 QUESTION: You tell me; I don't know.

16 MR. NAGER: A law enforcement agency is
17 responsible for teaching the public about the
18 requirements of the law, for emphasizing their
19 importance.

20 QUESTION: This statement was made in an
21 office where nobody was there but employees of that
22 office, and it doesn't even show how many were there.
23 It only shows there were three there.

24 Now, that wrecks the world?

25 MR. NAGER: It is correct -- it is correct

1 that this statement was made in an office. It was made
2 after an announcement on the radio that there had been
3 an attempt on the President's life.

4 Her comment was overheard by a deputy -- by a
5 senior deputy constable who asked her if she meant it.
6 By her testimony, all she did was smile at him. By his
7 testimony, she said she meant it.

8 QUESTION: At that stage what was the harm
9 done?

10 MR. NAGER: The harm at that stage was she had
11 indicted that she would approve of violations of the
12 criminal law.

13 The constable has to make judgments about
14 which employees --

15 QUESTION: Mr. Nager, may I? To the extent
16 you emphasize the enforcement of the law, supposing this
17 had been a radio report of the almost-killing of
18 Gadhafi, and she said, "I hope the next time they get
19 him"?

20 MR. NAGER: I'm not aware of a law which
21 prohibits --

22 QUESTION: Would you make the same argument in
23 that case?

24 MR. NAGER: I'm sorry. I couldn't understand.

25 QUESTION: Would you make the same argument

1 -- Say, it wasn't Gadhafi. Say some other unpopular
2 figure, Al Capone. They tried to shoot him, but they
3 missed. And she said, "I hope next time they get him."

4 MR. NAGER: Yes. Our argument would be the
5 same.

6 QUESTION: It would be the same?

7 MR. NAGER: In fact, it's somewhat --

8 QUESTION: So we can disregard the fact that
9 the President of the United States is involved?

10 MR. NAGER: Yes. In fact, it's somewhat
11 unfortunate for us, being in a posture before this
12 Court, that, in fact, it was a statement about the
13 President of the United States because it makes it a
14 less attractive case for the Government to be enforcing.

15 It's substantial --

16 QUESTION: Well, I don't know. I mean, surely
17 the worse the crime that she's willing to endorse, the
18 worse it looks for her.

19 I mean, you --

20 MR. NAGER: I was comparing one life with
21 another.

22 QUESTION: -- know, "I hope he gets away with
23 that \$2," doesn't amount to the same thing as killing
24 somebody; right?

25 MR. NAGER: Absolutely.

1 QUESTION: And likewise, I presume, killing Al
2 Capone isn't quite as bad as killing the President in
3 the scheme of what is considered to be a terrible -- I
4 mean, what amounts to an attempt to bring down the
5 government; right?

6 MR. NAGER: You're absolutely right, Justice
7 Scalia.

8 All I was doing in responding to Justice
9 Stevens' question was suggesting in terms of the
10 Government --

11 QUESTION: You would make the same argument.
12 You would say the statement was unprotected, if she
13 said, "I hope the next time they try to kill Al Capone,
14 they kill him," you would make precisely the same
15 argument? It wouldn't be quite as strong. That's what
16 Justice Scalia pointed out.

17 MR. NAGER: Yes.

18 QUESTION: And you'd even make the argument,
19 if she said, "The next time they try to steal a loaf of
20 bread, I hope he gets away with it"?

21 MR. NAGER: To the extent that she is
22 approving a violation of a criminal law --

23 QUESTION: She could be fired for that.

24 MR. NAGER: -- and that stealing a loaf of
25 bread would constitute a violation of the criminal law,

1 yes. The governmental interest here is in having
2 employees of law enforcement agencies not demean, not
3 suggest that it is okay to violate criminal laws.

4 The Government -- and it is a little odd for
5 us to be standing here pointing to Justice Brandeis'
6 famous dissent in Homestead -- but, nevertheless, the
7 Government is a teacher.

8 The law enforcement agency is the principal
9 teacher about the importance of complying with and
10 respecting the laws that --

11 QUESTION: Well, following up on Justice
12 Marshall just a minute: Who are the pupils in this case?

13 MR. NAGER: The pupils in this case are her
14 fellow employees, one.

15 QUESTION: Was she ever told all of that?

16 MR. NAGER: Was she ever told --

17 QUESTION: That she is a minion of the law and
18 somebody that stands for this and that and should
19 conduct herself in such a fashion as to not bring
20 disrepute upon this office.

21 Was she ever told that?

22 MR. NAGER: The record doesn't reflect it.

23 QUESTION: Well, don't you need it in order to
24 argue it?

25 MR. NAGER: No, I don't believe it does.

1 Chief Justice Rehnquist's --

2 QUESTION: Yet you assume it.

3 MR. NAGER: -- opinion in Arnett versus
4 Kennedy specifically says -- in a context of public
5 employees cases, we don't need a detailed code of
6 procedure and substantive rules.

7 QUESTION: I didn't say "detailed." I just
8 said "a fact."

9 The first time that she was ever told that it
10 was wrong to do this was when the man asked her. That
11 was the first time in this record.

12 MR. NAGER: That is true. That is what the
13 record reflects, and we have no reason to believe
14 otherwise.

15 QUESTION: You know there wasn't any other
16 reason.

17 MR. NAGER: Yes, Justice Marshall, that's
18 true. Again, though --

19 QUESTION: Suppose she had advocated,
20 "Somebody ought to shoot that man that bumped my fender
21 this morning"?

22 MR. NAGER: We would say that she could be
23 discharged for that.

24 QUESTION: Really?

25 MR. NAGER: Yes.

1 Once again, we don't believe that it --

2 QUESTION: How many have been discharged for
3 that in Texas, in Houston?

4 MR. NAGER: I do not know the answer to that.

5 QUESTION: You can't name one?

6 MR. NAGER: I certainly cannot.

7 Once again, we think that the government
8 interest here is in promoting public respect for and
9 understanding of the law.

10 Let me point out that the Court of Appeals
11 understood that in this case. It said that a government
12 agency is entitled to employ only those individuals who
13 have no serious reservations about the mission of the
14 agency.

15 And it also said that a law enforcement agency
16 is entitled to carry out its mission through officers
17 who do not favor political assassination.

18 But the Court of Appeals said that for some
19 reason, because she performed ministerial duties, that
20 the Government had no interest in discharging her.

21 We suggest that that just misunderstands the
22 governmental interest here. The governmental interest
23 here does not relate to the particular duties that she
24 was performing.

25 Rather, it extends beyond them. It extends to

1 every employee of the agency, because it extends to the
2 core function of the agency; that is, of enforcing the
3 law, of promoting respect for the law, teaching the
4 public about the law.

5 Her speech demeans that, undermines it, and is
6 inconsistent with the function that the agency is
7 attempting to perform.

8 In our brief we gave --

9 QUESTION: If she were an employee in the
10 Interior Department, that would be okay then; right?

11 MR. NAGER: "That" being?

12 QUESTION: The same thing. The news on the
13 radio, there's an attempted assassination on the
14 President. She says, "I hope they get him next time."

15 MR. NAGER: Now, as I tried to -- in response
16 to Justice O'Connor's question -- say, although we think
17 it would be a different case, we would be willing to
18 defend it on the theory that by expressing approval of
19 such a serious act as a violation of a criminal law as
20 approval of murder, that, in fact, that would be an
21 indicator that a public employer could use to
22 acknowledge and determine that this employee of the
23 Interior Department is not one who would carry out to
24 the best of his or her abilities the functions of the
25 Interior Department.

1 QUESTION: May I ask another question? We
2 started out with President Roosevelt. I remember that
3 there was an assassination attempt on him.

4 Supposing four years later, an employee said,
5 "I think the country would be better off if they had
6 gotten him"?

7 MR. NAGER: That's a good question, and I
8 think it will point out, hopefully, a good part of our
9 answer is that the issue is: Does the expressive
10 activity indicate that that employee is one who will act
11 inconsistently with the function of the agency today,
12 such that if the statement could be reasonably
13 understood --

14 QUESTION: That the employee would act --
15 You think this is a suggestion that this person would
16 try to kill the President?

17 MR. NAGER: No, no, not at all.

18 QUESTION: Oh?

19 MR. NAGER: We did not at all suggest that
20 this individual was making any threat on the life of the
21 President or that she was actively encouraging anyone.

22 All we're suggesting is: The question is
23 whether or not her speech can be reasonably understood
24 as expressing approval of an illegal act --

25 QUESTION: You're changing the hypothetical a

1 little.

2 "Not only do I think the government -- the
3 country would be better off if they had gotten him four
4 years ago, but I've thought about it a great deal, and I
5 really wish they had hit him."

6 MR. NAGER: We think that -- I'd have to say
7 that we would think that she could be discharged for
8 that.

9 Let me point out -- before my time is up --
10 that while we made this argument in our brief about what
11 the governmental interest is here, in 70 pages of
12 briefing by Respondent and their amicus, there is not
13 anything which answers this argument, that this is the
14 governmental interest that the constable testified he
15 was trying to promote and that, in fact, it is a
16 reasonable judgment for the public employer to discharge
17 an employee for engaging in this type of expressive
18 activity.

19 QUESTION: Well, didn't the Court of Appeals
20 say something more?

21 MR. NAGER: It focused on the --

22 QUESTION: It says there has to be -- Her
23 statement not only has to be inconsistent with the
24 mission of the agency, but inconsistent with her role in
25 the agency's function.

1 MR. NAGER: Right. And what we're suggesting
2 is --

3 QUESTION: And there was this low-level
4 employee, the Court of Appeals said to balances -- that
5 she should be able to make this kind of a political
6 speech.

7 MR. NAGER: And we're suggesting that this is,
8 (a), not an appropriate inquiry for the court to be
9 making, that that is something in the discretion of the
10 employer, the employer could take into account in
11 determining whether to reprimand her or discharge her,
12 or whatever. But the employer is, in fact, promoting
13 the government's interests when, no matter what level
14 the employee is at, the employee engages in expressive
15 activity that is inconsistent with the message that the
16 agency is supposed to be sending to the public.

17 That any employee of the EEOC, for example,
18 who expresses her approval of acts of employment
19 discrimination undermines the EEOC's efforts to teach
20 the public and to get the public to appreciate the
21 importance of complying with the employment
22 discrimination laws.

23 That any employee of the Internal Revenue
24 Service who expresses approval of tax fraud or tax
25 evasion or noncompliance is undermining the IRS's

1 efforts to get the public to understand the importance
2 of voluntarily complying with laws.

3 Our legal order is one that depends critically
4 on the public appreciating and voluntarily complying
5 with the law and of respecting the law.

6 When the law enforcement agency itself -- any
7 of its employees starts expressing their approval for
8 the violations of those laws, it undermines the agency's
9 ability to accomplish the function with which it is
10 assigned.

11 Unless the Court has further questions ...

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Nager.

13 We'll hear now from you, Mr. Cutler.

14 ORAL ARGUMENT BY LLOYD CUTLER, ESQ.

15 ON BEHALF OF RESPONDENT

16 MR. CUTLER: Mr. Chief Justice, and may it
17 please the Court.

18 It's common grounds in this case that Mrs.
19 McPherson's remarks were not among the classes of speech
20 which can constitutionally be branded as illegal. They
21 were not libelous or obscene or fighting words or a
22 threat of or an incitement to assassination or the
23 violent overthrow of the government.

24 There are really two disputed issues. The
25 first is whether these remarks were on a serious matter

1 of public concern and, therefore, on the highest rung of
2 the ladder of First Amendment values.

3 The second is whether the balancing test of
4 the Pickering/Connick line of cases, which both sides
5 accept for weighing the speech of public employees.

6 Mrs. McPherson's right to speak is outweighed
7 by the governmental interests in the efficiency of the
8 public service.

9 Under the Connick test we accept that for the
10 Fifth Circuit's views to be upheld in this Court, we
11 must prevail on both of those issues.

12 I'd like to turn first --

13 QUESTION: For instance, if a newspaperman
14 heard about this statement and interviewed her on
15 television and said, "Do you really think that you would
16 like to see him killed the next time?"

17 "Yes."

18 You wouldn't think she could be fired then?

19 MR. CUTLER: I think that's a different case,
20 Justice White. This is --

21 QUESTION: Well, it may be, but what's your
22 answer? Do you know?

23 MR. CUTLER: My answer to that for her
24 position would be that there would still not be a right
25 to fire her.

1 On the other hand, if she were someone who
2 faced the public -- an FBI officer, a cop on the beat --
3 perhaps it's a different case.

4 QUESTION: Well, he says, "What's your job?"

5 "I'm a deputy constable."

6 "You're sworn to obey the law?"

7 "Yes."

8 "Do you think the President should be killed?"

9 "Yes."

10 MR. CUTLER: Well, that was not what she
11 said. I don't think that's close to what she said,
12 Justice White.

13 Perhaps that gets to the question of whether
14 she was addressing an issue of public concern. And I
15 take it, although the Solicitor General at one point
16 seems to dispute this, there is no doubt that the
17 context in form and content of her remarks are something
18 that this Court will judge for itself, because this is a
19 mixed question of constitutional law and fact in a First
20 Amendment case.

21 QUESTION: Do we accept the case, Mr. Cutler,
22 on the statement of the Court of Appeals that McPherson
23 actually hoped the President would be assassinated?

24 MR. CUTLER: The Court of Appeals didn't quite
25 say that except arguendo, Justice O'Connor.

1 QUESTION: The Court says, "We accept the
2 District Court's conclusion that McPherson actually
3 hoped that the President would be assassinated."

4 MR. CUTLER: Yes. But then they went on to
5 say --

6 QUESTION: And do we decide the case on that
7 basis?

8 MR. CUTLER: They go on to say, a sentence or
9 so later, that whether her remark was a comment on the
10 President's policies or an actual wish for her [sic]
11 assassination, it was still on a matter of public
12 concern; and that's what I'd like to come to right now.

13 QUESTION: That the desirability of
14 assassinating the President is a matter of public
15 concern?

16 MR. CUTLER: Not the desirability of
17 assassinating the President, but expressing a
18 disapproval of the President's comments in terms as
19 strong and as ill-advised as, "If they try it again, I
20 hope they get him," that that is a comment, and it's the
21 only way it can be understood is as a comment on the
22 President's policies.

23 It happened to be that the conversation
24 occurred at the very moment after the first news of the
25 attempt which, under the first report, was unsuccessful.

1 I think it's perfectly clear that if she had
2 been in a discussion of the President's policies, the
3 Administration's policies, the day before, she never
4 would have uttered that comment.

5 If it had been weeks later, it's most unlikely
6 that she would have uttered that comment.

7 It was a comment that was simply evoked by the
8 circumstances, the shock of the report which everybody
9 feels. And once she heard that, she used that figure of
10 speech in expressing her disapproval.

11 When you make an examination of what she
12 actually said, as -- and this is undisputed testimony --
13 she begins by saying, after this first news, "It must
14 have been a black who did it," to her colleague at the
15 next desk to whom she has since been married.

16 She then says -- she makes comments about the
17 President's policies on food stamps, on CETA, on public
18 welfare programs; and her colleague at the next desk
19 agrees with her.

20 And then she says -- and that happens to be at
21 the very moment when Captain LeVrier is walking up --
22 "The next time they try it, I hope they get him."

23 In its context, there isn't the slightest
24 question that that remark is a remark in the course of a
25 discussion of the political -- of Administration

1 policies, and that the reference to "if they try it
2 again, I hope they get him," was clearly something
3 evoked by the emotion of the moment.

4 QUESTION: Your theory is that any statement,
5 hyperbole or anything else that occurs during the course
6 of a political discussion like that gets special
7 protection; right?

8 MR. CUTLER: I would say that gets special
9 protection. I would still agree it has to be weighed in
10 a Pickering/Connick balance for a public employee.

11 QUESTION: You could fire an employee, I take
12 it, who constantly uses profanity, vulgar, obscene
13 language around the office, but not -- or arguably not,
14 you'd have to meet a different -- a substantially
15 different burden, if he only uses that language in the
16 course of his political discussions?

17 MR. CUTLER: Well, if he uses obscene
18 language, you said, I believe, Justice Scalia, commonly
19 or regularly that might affect employee morale or
20 efficiency, it might well be someone who went around
21 even in the context of a political discussion --

22 QUESTION: You're applying the test. All I'm
23 asking you is whether it's a different test. We have to
24 apply one test to vulgarity, obscenity, profanity when
25 it's just used generally. But a totally different test

1 -- and we have to see if it's outweighed by some
2 governmental interest -- if that's used in the course of
3 a political discussion.

4 MR. CUTLER: If it is part of a discussion on
5 a political issue or meant to be an expression on a
6 political expression, it has to be weighed. It may turn
7 out to be obscene, in which case it can be banned.

8 QUESTION: Why is that? I mean, part of my
9 problem is: I don't understand how broad the definition
10 of the discussion has to be. Why can't we just look at
11 this one sentence?

12 Do we have to expand it to look at the whole
13 conversation?

14 I don't know --

15 MR. CUTLER: Well, we're now in the context, I
16 take it, of can this discussion be prohibited or
17 punished? Or are you speaking solely of public
18 employees?

19 QUESTION: No. I'm talking about whether for
20 purposes of deciding whether this was a part of a
21 statement on a matter for public concern --

22 MR. CUTLER: -- not a political issue.

23 QUESTION: -- we have to look at the whole
24 preceding ten minutes of her conversation or we can't
25 just look at the single sentence?

1 MR. CUTLER: I think you have to look at the --

2 QUESTION: If you look at the single sentence,
3 you would acknowledge, I hope, that it is not a matter
4 of public concern, that we don't debate on whether the
5 President should be assassinated or not.

6 MR. CUTLER: We certainly don't debate on
7 whether the President should be assassinated, and I
8 deplore myself any such statement.

9 QUESTION: So if we would only look at one
10 sentence --

11 MR. CUTLER: A statement, "If they try it
12 again, I hope they get him," is clearly, by any
13 standard, an expression of her disapproval of the
14 individual. It is not a general endorsement of
15 violence, assassination or anything like that.

16 It's an extreme, immoderate, foolish,
17 excessive comment about a matter of public concern;
18 namely, the policies of that individual.

19 QUESTION: Well, are you suggesting --

20 MR. CUTLER: And it happens all the time.

21 QUESTION: Are you suggesting, Mr. Cutler,
22 that there's a difference between saying, "I think all
23 sorts of people should be assassinated, and I think
24 President Reagan should be assassinated"?

25 MR. CUTLER: Yes, I do think there is.

1 QUESTION: Where --

2 MR. CUTLER: If you're still on the issue of
3 whether this is a matter of public concern, it is
4 clearly something, number one, that cannot legally be
5 punished or prohibited.

6 And, number two, if it is with reference to an
7 individual, and there were many similar statements, no
8 doubt at the time of the attempt on Governor George
9 Wallace, at the time of the successful assassination of
10 Dr. Martin Luther King, at the time when Jack Ruby shot
11 Lee Harvey Oswald, there were many, many people --

12 QUESTION: Many of which were meant.

13 MR. CUTLER: Huh?

14 QUESTION: Many of which were meant literally.

15 MR. CUTLER: It may have been meant, but they
16 were expressions, not, "We're all for assassination."
17 They were expressions of how that individual thought
18 about the policies or the actions of the victim.

19 That's what they were.

20 QUESTION: Well, then that takes it out of the
21 context of favoring assassination?

22 MR. CUTLER: I do believe it takes it out of
23 the context of favoring assassination as such. I would
24 remind you also --

25 QUESTION: Is what you're saying that anybody

1 who favors assassinating someone is disapproving that
2 person? I mean, I'll stipulate that.

3 But doesn't that --

4 MR. CUTLER: That's right.

5 QUESTION: But the two aren't coextensive. I
6 mean, you can disapprove of someone without favoring
7 that person's assassination.

8 MR. CUTLER: Of course you can. It is an
9 excessive, immoderate way of making a political
10 statement is what it is.

11 QUESTION: No. It's --

12 MR. CUTLER: And it cannot be --

13 QUESTION: It isn't a political statement, if
14 you want the person's assassination.

15 MR. CUTLER: Well, certainly in the context
16 here, it was a political statement. I believe you began
17 this line of questioning by inquiring, "Do we have to
18 look at all the sentences?"

19 In Claiborne Hardware there was a reference in
20 the long impassioned speech by Mr. Evers, the boycott
21 organizer, in which he said that "If we catch you in
22 those stores which are to be boycotted, we'll break your
23 necks; and there won't be any white policemen around in
24 the middle of the night to help you."

25 But because it was in the middle of a long

1 impassioned speech, the bulk of which was about
2 promoting the success of the boycott, it was held --
3 just as the remarks in the Watts case were held -- to be
4 political hyperbole.

5 QUESTION: Yes. But there was no finding
6 there that the statement was actually meant and was
7 seriously made. Here I think you have to face up to the
8 fact that the Court of Appeals sustained the District
9 Court's finding --

10 MR. CUTLER: There was no finding --

11 QUESTION: -- and interpreted it that she
12 really meant it, and that she really wished the
13 President would be killed.

14 MR. CUTLER: She was expressing at most a hope
15 that if it happened again -- she was not urging
16 assassination, she was not threatening it herself most
17 certainly -- she was stating her opposition to the
18 President's policies in this extreme and immoderate
19 form, "If they try it again, I hope they get him."

20 QUESTION: Well, the Court of Appeals said
21 that the record supports the District Court's conclusion
22 that McPherson expressed an actual wish for the
23 assassination of the President.

24 MR. CUTLER: That is correct. But in the very
25 next sentence, as I mentioned, Justice Rehnquist -- I

1 think it's the very next paragraph -- the Court of
2 Appeals says, in suggesting that that finding is an
3 arguendo finding, that whether she was expressing
4 opposition to the President's policies or an actual wish
5 for his assassination, her remarks --

6 QUESTION: Well, we judge the case as though
7 she really meant it and she really had the wish. The
8 Court of Appeals said even if she really wished it, the
9 First Amendment protects her.

10 MR. CUTLER: Well, there's no question that --

11 QUESTION: Isn't that right?

12 MR. CUTLER: That is right.

13 There's no question that the First Amendment
14 protects it from the standpoint of enjoining --

15 QUESTION: Protected her from being fired?

16 MR. CUTLER: That gets us to the
17 Pickering/Connick balancing test, I think.

18 QUESTION: We don't have to go that far, that
19 she intended to kill the President?

20 MR. CUTLER: I don't believe you have to --
21 I think it is clear this was political hyperbole, and
22 you are obliged, I think, to examine it yourself.

23 It was the fourth or fifth sentence in a
24 series that began, as I said, "It must have been a black
25 who did it." A discussion of the President's policies,

1 which she and her neighbor at the next desk disapproved,
2 and then this extreme final sentence which happens to be
3 the one that was overheard.

4 May I continue, if I can, with the balancing
5 test issue which I think really is the most important
6 issue?

7 We think that Mrs. McPherson's firing cannot
8 be justified under the Pickering/Connick test. And in
9 asking you to weigh this, bear in mind that there are
10 some 16 million public employees. That's approximately
11 15 percent of the work force.

12 It's our best guess there are some 5 million
13 law enforcement employees, of whom perhaps one million
14 -- that's a figure we know more solidly -- are in the
15 criminal justice system.

16 It was not -- I hope I have carried you that
17 -- properly understood as political hyperbole as in
18 Watts, where the statement, as you'll recall, was -- by
19 someone opposed to the draft, "If they put a rifle in my
20 hands, the first man I hope to get in my sights is LBJ."

21 QUESTION: Do you think Watts is still good
22 law?

23 MR. CUTLER: I would hope Watts is still good
24 law, Justice. I believe it still is, and I believe
25 that's conceded by the government, at least which

1 concedes you could not criminalize this statement. It
2 regards Watts simply as a construction of the statute
3 about threats to the President, but I think an
4 examination of the opinion would clearly show it's on
5 constitutional grounds.

6 It was not as in Connick one remark on a
7 matter of public concern among many other remarks which
8 were about the affairs of the office. It was a private,
9 rather than a public, remark.

10 She didn't stand up on a table and make this
11 remark. She didn't have a poster behind her desk or
12 anything like that.

13 That, as you held in the Givhan case, the fact
14 that it was private, does not take it out of the
15 category of comment on a matter of public concern. Most
16 public speech in this country is private.

17 QUESTION: Well, it wasn't really private. I
18 mean, she may have thought it was private, but that was
19 part of --

20 MR. CUTLER: It happened to get overheard by
21 one person; that's quite right.

22 QUESTION: By Captain LeVrier, who was
23 offended by it, and it might have offended other
24 co-workers. I mean, that shows some --

25 MR. CUTLER: That's what I -- I believe I'll

1 show in a moment, Justice Scalia, she was not fired on
2 the ground that it offended anyone else, or that it
3 affected discipline or morale in the office.

4 It was the constable's loss of confidence in
5 her that was his basis for firing her, and as I'll try
6 to get to in a moment in response to your earlier
7 question to Mr. Lee, it was based more on her beliefs
8 than anything else.

9 In Connick's words it was "speech as a
10 citizen," and not as an employee. The fact that it
11 occurred in the workplace was certainly not a matter of
12 deliberate choice on her part.

13 All of us, when we heard that news, were
14 frozen in place wherever we were and whatever emotional
15 response we had to the event was going to come out
16 wherever we were.

17 It was not intended to, and it did not cause,
18 what Connick called a mini-insurrection in the office.
19 It was private. It wasn't meant to be overheard. It
20 wasn't voicing a grievance as an employee, but a
21 grievance as a citizen.

22 Constable Rankin conceded that it had no
23 effect on office efficiency or discipline, and the
24 Court of Appeals found that.

25 It had nothing to do with office business or

1 the personnel or the mission of the office. There was
2 no other reason for the finding -- for the firing on
3 which a court could have relied, as in the Mt. Healthy
4 case.

5 And Rankin conceded that this was the reason.

6 And what he said was, "I did not base my
7 action on whether the work was interrupted or not. I
8 based my statement -- my action, on a statement that was
9 made to me direct. Right then was when I lost
10 confidence in her."

11 That's at page 86, I think, of the Joint
12 Appendix.

13 QUESTION: Well, if you rely on that, then you
14 are conceding that she reaffirmed in the discussion with
15 Rankin, not only that she had said it, but that she
16 meant it, because that's what that testimony refers to?

17 "I said it, and I meant it."

18 MR. CUTLER: What the District Court found is
19 by word or deed -- The District Court never found, as
20 I think Justice O'Connor pointed out earlier, that she
21 said, "Yes, I meant it."

22 QUESTION: No. But that excerpt that you just
23 read from Rankin's testimony --

24 MR. CUTLER: That's his testimony.

25 QUESTION: That's his testimony.

1 MR. CUTLER: That's right.

2 QUESTION: If you rely on it, you have to
3 accept it for the good and the bad.

4 MR. CUTLER: I rely on it to -- Well, the
5 District Court made its findings. I don't think it's
6 important whether she said, "Yes, I mean it," or not.
7 And we do have a finding below that by word or deed, she
8 meant it.

9 I ask you: Looking at the conversation in
10 context, though, to conclude that even if she meant it,
11 it was still political hyperbole of the type which Mr.
12 Evers in the Claiborne Hardware case -- where I don't
13 believe, and I was in that case -- there was any issue
14 as to whether he meant it, other than as political
15 hyperbole.

16 The critical point there was: It was part of
17 a much larger speech, and that no violent acts occurred
18 after the speech was made. So that a finding of
19 intimidation in the lower courts -- unlawful
20 intimidation was not justified.

21 The fact that the constable's office is a law
22 enforcement agency, rather than some other place of
23 public employment, we don't think changes the balance
24 here.

25 QUESTION: Mr. Cutler, this was a probationary

1 employee. Do you suppose there's any reason at all why
2 the employer of a probationary employee could not
3 determine that the employer would keep as employees in
4 the office only people the employer could trust and had
5 confidence in, that they would be sensible people who
6 could deal properly with the public in a public office,
7 and then judge -- make that judgment on the basis of
8 perfectly protected speech, but conclude the fact that
9 the person thinks the way the employee thinks and says
10 what she says indicates to me that person doesn't merit
11 a permanent job?

12 What's the matter with that?

13 MR. CUTLER: Well, to begin with, Perry
14 against Sindermann holds even for employees lacking
15 tenure -- I believe that's a teacher's case -- that
16 there is an economic expectation even for probationary
17 employees.

18 But, in addition, to allow all of the
19 supervisors of public employees in the country a broad
20 discretion to fire people, even probationary people,
21 based on their speech on a matter of public concern is
22 giving a very wide discretion.

23 There are considerable doubts about any
24 statute -- let us say a modern version of the Alien and
25 Sedition --

1 QUESTION: My question is whether speech on a
2 matter of public concern can evidence character traits
3 of the employee that would justify the employer from
4 saying, "I don't think this person merits permanent
5 employment." Do you think that can't be done in the
6 public sector?

7 MR. CUTLER: I would say, Justice O'Connor,
8 that it is a very dangerous power to grant just on the
9 distinction between the probationary employee and the
10 employee or this person, let us say, a month later after
11 her probationary status was over.

12 Any form of government sanction, based on
13 judgments about the beliefs of an employee, at the very
14 least ought to be supported by statutes and rules, as
15 Professor Bickel said.

16 The only thing that saved the Civil Service
17 rules in Arnett against Kennedy was a long period of
18 interpretation and regulations so that employees knew
19 what to expect, for to allow all the supervisors in the
20 country to decide on the basis of speech on a matter of
21 public concern, "I don't like the President, I
22 disapprove of his policies," to go get somebody else, I
23 should think would be a very dangerous thing.

24 You have ruled several times in Elrod against
25 Burns, in Branti against Finkel, where you had public

1 employees who were not on probationary status. You had
2 a deputy sheriff in Elrod. You had a public defender in
3 Branti.

4 You said in neither case could they be fired
5 on the basis of their political beliefs.

6 QUESTION: Can they be fired because they
7 exhibit character traits and an inability to reason
8 adequately to serve in the job of public employment,
9 even though that judgment is made in part by speech that
10 could be protected?

11 MR. CUTLER: If it is made on the basis of
12 their suitability to hold the particular job that they
13 are doing, I would say yes.

14 If this same remark had been made -- let us
15 say by an FBI employee in Justice White's case on
16 television, I would say yes, that person could be fired.

17 But for the janitor, for the computer punch
18 operator -- and there are millions of them around the
19 country, and we know --

20 QUESTION: What about a secretary in the
21 clerk's office out here who, you know, says that? "I
22 hope the next time they go for the President, they get
23 him."

24 MR. CUTLER: Well, I would think you would at
25 least deliberate, Justice Scalia, and learn the full

1 text of the conversation and have something, for
2 example, in the area --

3 QUESTION: If it comes up in the same kind of
4 a conversation, do you think that --

5 MR. CUTLER: It may very well be that this
6 Court is a place of confidential -- it certainly is a
7 confidential place which takes you out of this line of
8 cases, and you might be free to do it there.

9 She was not performing a confidential job or a
10 policymaking job.

11 QUESTION: Well, Mr. Cutler --

12 MR. CUTLER: Suppose the janitor in the court
13 had said it.

14 QUESTION: This lady was on probation, but if
15 she were hired permanently, wouldn't sooner or later she
16 perform the other duties of a deputy constable, like
17 serving process and --

18 MR. CUTLER: I doubt it very much. You have
19 the testimony of Mr. Jackson in the record. He served
20 in that office for three or four years. And so far as I
21 know, he never had any job different in terms of
22 confidentiality than the job he had -- that they both
23 had at this time.

24 I think the last points I would like to make
25 are that the Solicitor General's professionalism test

1 and the constable's test of losing confidence are not
2 constitutionally adequate justifications for firing,
3 based on speech relating to matters of public concern.

4 And I would submit to you that no statute
5 containing that sort of a vague standard, "whenever the
6 supervisor loses confidence," or finds that in his
7 judgment the employee is unprofessional would be
8 sustained as to a matter of speech on a subject of
9 public concern.

10 Suppose that you had a new alien and sedition
11 law which was limited to the 15 million public
12 employees, or even the 5 million law enforcement
13 employees. And the only sanction for speaking ill of
14 the President or the Government or bringing them into
15 disrepute was loss of job.

16 Could a statute like that possibly be
17 sustained today? I would submit to you, in New York
18 Times against Sullivan at least that it could not.

19 Approving Mrs. McPherson's discharge, it seems
20 to us, opens up an Orwellian prospect of standardless
21 firing by supervisors for speech on matters of public
22 concern, for political expressions and even beliefs.

23 We think it would go far beyond any First
24 Amendment case that you have ever decided, even those
25 written under the stress of the war and the McArthur era.

1 And even those cases where you sustained a
2 restriction on speech and belief, almost all of them
3 were based on some statute or regulation passed by the
4 majority of some legislature in setting some standard,
5 rather than on the discretion, without any regulation at
6 all, of hundreds or thousands of supervisors.

7 QUESTION: Most of those cases involve
8 criminal sanctions, however, rather than --

9 MR. CUTLER: Some.

10 QUESTION: -- what kind of employees a public
11 employer must retain.

12 MR. CUTLER: Some, like American
13 Communications Workers against Dowd, just involve simply
14 loss of a union position and nothing more.

15 Justice Jackson --

16 QUESTION: That was upheld in Dowd.

17 MR. CUTLER: It was upheld over Justice
18 Jackson's dissent.

19 And I would just like to close by reading one
20 sentence from his dissent, or one paragraph.

21 "I think that under our system, it is time
22 enough for the law to lay hold of the citizen when he
23 acts illegally or in some rare circumstances where his
24 thoughts are given illegal utterance."

25 I think we must let --

1 CHIEF JUSTICE REHNQUIST: Your time has
2 expired, Mr. Cutler. The case is submitted.
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CERTIFICATION

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85-2068 - WALTER H. RANKIN, ETC., ET AL., Petitioners V.

EDITH MCPHERSON

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BY Paul A. Richardson

(REPORTER)

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