

ORIGINAL

In the

Supreme Court of the United States

PETER BRANTY, AS PUBLIC DEFENDER
OF ROCKLAND COUNTY,

PETITIONER,

v.

AARON FINKEL AND ALAN TABAKMAN,

RESPONDENTS.

No. 78-1654

Washington, D. C.
December 4, 1979

Pages 1 thru 49

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IN THE SUPREME COURT OF THE UNITED STATES

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OF ROCKLAND COUNTY,		:
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	Petitioner,	:
		:
	v.	:
		:
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		:
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		:
	Respondents.	:
		:
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Washington, D. C.,

Tuesday, December 4, 1979,

The above-entitled matter came on for oral argument at 11:55 o'clock 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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

MARC L. PARRIS, ESQ., County Attorney of Rockland
County, 11 New Hempstead Road, New York, New
York 10956; on behalf of the Petitioner

DAVID MacRAE WAGNER, ESQ., 11 Stokum Lane, New
York, New York 10956; on behalf of the
Respondents

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-1654, Branti v. Finkel and others.

Mr. Parris, you may proceed when you are ready.

ORAL ARGUMENT OF MARC L. PARRIS, ESQ.,

ON BEHALF OF THE PETITIONER

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

I believe there are two central questions before this Court: First, whether sponsorship alone infringes upon the constitutional rights of these respondents; and, secondly, whether it is in the best interests of this country to virtually end the patronage system.

In this case we are not dealing with full-time teachers, janitors of deputy sheriffs whose only income is their government jobs which they have more than some expectancy of continuation. But rather before this Court come the respondents, attorneys with private practices who --

QUESTION: Your second question, counsel, whether it is in the best interests of this country to end the patronage system is not really a constitutional question over which this Court would have jurisdiction, is it? It is up to New York or Nassau County, unless there is a constitutional provision to the contrary, to make that decision for itself.

MR. PARRIS: True, Your Honor. I was just talking on the point of the effect it would have on my county especially as I see it.

QUESTION: Your county could set up a civil service system for public defenders and prosecutors if it wanted to, could it not?

MR. PARRIS: That's correct, Your Honor. In fact, it --

QUESTION: The state legislature could do the same thing, could it not?

MR. PARRIS: That's correct, Your Honor. However, if you want me to espouse on that, there is politics even in civil service since the department head can pick from the top three and he could find his friend even sixth or seventh if you wait until the exam comes out or when the exam is published, some of the top people have already received positions, and you can work that up so there is politics in civil service as well.

Rockland County actually has a very good record in civil service. In fact, out of 2,000 employees, there are a mere 50 approximately that are in this exempt patronage situation, of which 34 are attorneys.

QUESTION: But neither the state legislature nor your legislative body in Rockland County has undertaken to--

MR. PARRIS: No, they have not opted to do that.

QUESTION: -- do it with prosecutors or public defenders.

MR. PARRIS: Nor assistant county attorneys or assistant district attorneys. They have found it works better and is more responsive --

QUESTION: Well, whether it works better or not is of no concern to the courts.

MR. PARRIS: I understand that.

We would argue that there is no compelling -- we don't have to show a compelling state interest because in fact we see no denial of any constitutional right in this case.

Unlike Elrod, there was no coercion here. No one asked the respondents to leave the Republican Party and to contribute to the Democratic Party, to swear allegiance to the Democratic Party. In fact, they were simply ignored, not rehired, and I cannot see where that is a denial of their right to freedom of association.

They do also make a claim of some sort of an expectancy, however I do not see any objective expectancy equalling any property right or any denial of due process under the Fourteenth Amendment.

In this case, the respondents serve at the pleasure of the appointing authority. That was their public defender, Mr. Barone, the prior. If you can

envision that the public defender is the hand and the assistants are the fingers, when the hand goes so do the fingers.

On December 31, 1977, at 12:00 midnight, Mr. Barone's term was over. He was being replaced. By law, they also terminated. On January 1, when my client, Mr. Branti --

QUESTION: What provision of the New York law do you rely on for that latter statement, that the assistant's terms ended when the public defender's term ended?

MR. PARRIS: In the civil service interpretation of the law by our personnel director, and I would refer the Court to pages 138 and 139 of the appendix where this discussion takes place, in which he states quite clearly that they serve at the pleasure of the appointing authority, and when the appointing authority is no longer there, their term ends when his term ends.

QUESTION: That to me is a very, very important issue, as you might --

MR. PARRIS: Yes, I believe it is very germane.

QUESTION: -- get from reading my concurring opinion in Elrod, and the District Court talks about -- in talking about 6(a) of the appendix to your petition for writ of certiorari -- talks about -- he says on that date,

that is soon after his appointment as public defender, he began the process of executing termination notices for six of the nine assistants who had served under Barone, which would seem to indicate that they were being discharged. That is what termination notices mean. But then later the District Court says -- and I just, for example, look at page 25a of the appendix to the certiorari petition, subsection (c) of the opinion -- plaintiffs were not reappointed solely because of their political beliefs. So to me this is a very important issue.

MR. PARRIS: I would like to elaborate on both of those points. The first one is --

QUESTION: Maybe over the lunch break you can be thinking about that.

MR. PARRIS: No, but I didn't want you to necessarily answer it now.

MR. PARRIS: Okay.

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock.

(Whereupon, at 12:00 noon the court was in recess, to reconvene at 1:00 o'clock p.m.)

AFTERNOON SESSION -- 1:00 P.M.

MR. CHIEF JUSTICE BURGER: Mr. Parris, you may continue.

MR. PARRIS: Thank you.

In answer to Mr. Justice Stewart's questions, as to the termination notice referred to in 6(a), that is actually purely a ministerial or pro forma act in order to indicate to the various county departments, such as the treasurer and personnel that the termination has taken place, otherwise you would have people continued as to pensions and payroll. It is really a bookkeeping type of thing.

QUESTION: Mr. Parris, were these people part-time?

MR. PARRIS: That's correct, Your Honor.

QUESTION: Just part-time.

MR. PARRIS: Part-time.

QUESTION: Did they practice on the side?

MR. PARRIS: Yes, sir.

QUESTION: But you tell us as a matter of fact and of law that these people's employment automatically expired subject only to this ministerial certification of that fact --

MR. PARRIS: That's correct, Your Honor.

QUESTION: -- as the public defender himself

left office.

MR. PARRIS: That's correct, Your Honor. I think the best example can be myself because I am the county attorney of Rockland County. I have similar employees, the exempt class attorneys, the assistant county attorneys. I hope to be reappointed next month. I will be then retaining these employees who will then have to go and swear an oath. If they had some sort of a continuation, why would they have to swear their oath again next month after I retain them? It is because they serve at my pleasure.

QUESTION: You say you reappoint them, not retain them.

MR. PARRIS: That's right, I reappoint them. Then they have to go and swear an oath. Now, why would they have to do that? They serve at my pleasure.

QUESTION: When they were originally appointed, did they receive a document or a certificate, something like the one that the President gives to the members of his Cabinet which ends with the words "at the pleasure of the President"?

MR. PARRIS: I don't believe so, sir.

QUESTION: They don't get any piece of paper?

MR. PARRIS: No.

QUESTION: The law says it though?

MR. PARRIS: Excuse me?

QUESTION: The law says it though?

MR. PARRIS: Yes, the law does, right. Yes.

QUESTION: Is that a statute or an ordinance or what?

MR. PARRIS: No, Your Honor. Of course, there is no statute.

QUESTION: Well, is there an ordinance that says "at the pleasure"?

MR. PARRIS: It goes through the civil service department of the State of New York, interpreted by our personnel director.

QUESTION: So what does it say?

MR. PARRIS: Well, as he stated in --

QUESTION: Where do we find that in the record?

MR. PARRIS: Page 138.

QUESTION: That is what I have here.

MR. PARRIS: Toward the bottom. The question: Is there such a thing as a permanent appointment of an exempt man so that he can remain in office and succeed his appointing authority? Answer: No, sir. Question: When an individual is appointed to an exempt position, is he required to take an oath of office? Answer: All employees are required to take an oath of office, including those appointed to the exempt class positions.

QUESTION: What did the District Court have to

say on this subject, do you remember?

MR. PARRIS: Well, also he had asked the question as to Judge Roderick on 25a and above he does state the third and final requirement of the Elrod concurrence that the attempt to remove plaintiffs from their jobs have been based upon the sole ground of their political beliefs. But down about six lines from the bottom of that same page he writes the incident was not a ground for defendant's decision not to renew plaintiff Finkel.

QUESTION: And his caption for that section of the opinion is plaintiffs were not reappointed, but beyond that is there any findings of the District Court which you remember on this subject?

MR. PARRIS: No, Your Honor.

QUESTION: Mr. Parris, could I ask a question about this. You said they would have to take -- your people have to take an oath in the new term. Well, this testimony doesn't say that and no statute says it, if you recall. Why do you say they have to take a new oath?

MR. PARRIS: It is by civil service law. They are now serving a new --

QUESTION: What in civil service law says that? What if they just stayed on and nothing was done? As I understand the way this is written, he began the process of executing termination notices for six of the nine

assistants who had served under Barone. I thought you indicated that if he had done nothing they would have just continued on the payroll, wouldn't they?

MR. PARRIS: They may have but they wouldn't have continued --

QUESTION: There is nothing in the law that says they would not have stayed on the payroll, is there, if he had done nothing?

MR. PARRIS: They could have by error because the ministerial act didn't take place.

QUESTION: Well, how do we know it is error? Your witness doesn't say that and the law doesn't say that and the regulations don't say it.

MR. PARRIS: Well, basically I know that because of the fact that I am the county attorney and I am involved in --

QUESTION: It is a requirement that you imposed, right?

MR. PARRIS: Well, it is an involvement that I know because I handle these matters.

QUESTION: But if you didn't impose that requirement at all and nothing at all was done --

MR. PARRIS: Right.

QUESTION: -- is it not true they would continue just to get their pay checks in the ordinary routine and

continue their work?

MR. PARRIS: No, Your Honor, because they serve at the pleasure of an appointing authority. That is stated in Mr. Anderson's uncontroverted testimony. If the person is gone and you are serving that person and his term ends, they also self-destruct.

QUESTION: Well, isn't it necessarily a predicate for the District Court's judgment that you couldn't fire them, that they couldn't be fired for their political beliefs, that their term lasted beyond the expiration of the term --

MR. PARRIS: Yes, sir, that --

QUESTION: -- of the public defender?

MR. PARRIS: -- that was in error.

QUESTION: Don't you think the District Court read New York law as saying their term does not end with the term of the public defender?

MR. PARRIS: I believe that was an error on the part of Judge Broderick.

QUESTION: Well, I know, but we don't usually second-guess District judges about state law.

MR. PARRIS: I understand that, Your Honor.

QUESTION: Counsel, what about page 32a of the appendix. I am wondering how semantical and how substantive this discussion we have been having is. We have

Footnote 10, where Judge Broderick says the fact that plaintiffs are removable at the will of the public defender is, of course, irrelevant to the determination of the constitutional issue presented herein. Do you see a substantive distinction between a person being removable at will and a person whose term expires at a given point?

MR. PARRIS: Yes, I do, Your Honor, and I would like the Court to take notice of Judge Hall's concurrence in *Ramey v. Harber*, because he made a point that it is not a termination. There is a difference if you are going to talk about someone you are not rehiring. For instance, really it comes down to I think that sponsorship to nine vacant positions, absence the coercion in *Elrod*, leads me to believe that you couldn't violate anyone's constitutional right. Where is this right of liberty, does it extend to someone who has another job and who is just not rehired? And I believe that --

QUESTION: I suppose you could argue that it is fair to read in Judge Broderick's opinion as saying it doesn't make any difference whether it is a -- whether the term expired or not. The failure to reappoint is subject to the same constitutional rule as if the term was held to extend until fired. That poses a completely different question if he held that.

MR. PARRIS: Yes, but --

QUESTION: And I am sure you would say it did.

MR. PARRIS: Yes. I would also like to return, if I may, to the question of expectancy. We have a case here where one of the respondents, Mr. Finkel, changes registration to a Democrat several months prior to January 1978. That doesn't sound like someone who has an expectancy, an objective expectancy of returning.

QUESTION: But it didn't work?

MR. PARRIS: Excuse me?

QUESTION: It didn't work?

MR. PARRIS: It didn't work, yes, Your Honor, obviously.

QUESTION: You haven't mentioned anything yet -- and I hope you will at some point at your convenience -- of the policy relationship that exists between the management of the office and all of the staff.

MR. PARRIS: Yes, I plan to, Your Honor.

QUESTION: All right, do it at your own time.

QUESTION: As part-time employees.

MR. PARRIS: That's correct. Also historically the respondents had some people in this office that had been rehired, others that hadn't been. They both tried and used political friends to try to receive recommendations. That doesn't sound like someone with an abjective expectancy like in Perry v. Sindermann.

QUESTION: Well, could I ask you, suppose the terms did expire and the public defender, the new public defender put out a notice on the wall and said only Democrats need apply or only Republicans need apply, I am just not interested in hiring anybody but Democrats, does Elrod cover a situation like that or not?

MR. PARRIS: It may in that case, but that is not what happened here.

QUESTION: Well, of course, it wasn't Elrod, was it?

MR. PARRIS: No, it wasn't Elrod at all.

QUESTION: Are you referring to the plurality between Elrod or to the -- there were several separate opinions in Elrod.

MR. PARRIS: As to which issue?

QUESTION: In response to my brother White.

MR. PARRIS: I don't think I made --

QUESTION: Let's assume that these employees, everybody agreed that these employees were policy-making and confidential, let's just assume that they were not. Assume they were not policy-making or confidential and you put on the sign on the wall "Only Democrats need apply," we are in a process of rehiring and your terms have expired but none of you who is a Republican need apply. Does Elrod cover that or not?

MR. PARRIS: I think if the Court wanted to extend it to that --

QUESTION: So you say it doesn't?

MR. PARRIS: No. It doesn't, but it might.

QUESTION: The Elrod judgment was supported by five members of this Court. Three joined in one opinion which is called correctly the plurality opinion, and two joined in the judgment based upon another considerably shorter opinion and that second opinion joined the judgment only on the basis of the proposition that an employee cannot be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs. And if there is no discharge here, then, as you say, you would have to extend Elrod and Elrod would have to be extended to cover it.

MR. PARRIS: I agree, Mr. Justice.

QUESTION: Correct?

MR. PARRIS: And there is one important point here. We talk about solely for political reasons. I would like to point out that there were two Democrats in that office who were not rehired. One of the people that was rehired is a registered blank --

QUESTION: A registered blank?

MR. PARRIS: In fact, the record also shows that my client had spoken to a Republican legislator about -- he

was very interested in a law secretary, a Republican law secretary, and Legislator Dusanenko, a Republican, stated I am not interested in him, he has a job, I want to find a job for Tabakman. So there was I think no denial of political beliefs in the sense of their being Republicans. What you had was, as I see it, nine vacant positions, 280-some-odd attorneys in Rockland County, all with a possibility if they could qualify as criminal attorneys.

QUESTION: Could the public defender on his own decide that he does not want to have part-time assistants any more and just abolish the positions?

MR. PARRIS: No, Your Honor, it would have to be done by the legislature of Rockland County.

QUESTION: The legislature itself fixes part-time and full-time?

MR. PARRIS: Yes, sir, they could change it to full-time and again they do control that. That is the power of the purse. They could have three assistants or nine assistants. It is the local legislature.

Now, as we stated before, we don't believe we have to show a compelling state interest because we don't believe that any constitutional right was lost. In fact, however, we believe we have shown a compelling state interest in that attorneys are special. I think this Court recognized that attorneys were special in *Bates v. State Bar of*

Arizona. They are special in our civic, cultural, and political life.

I would like the Court to envision a political ladder right here. At the bottom rung are assistant county attorneys, assistant public defenders, assistant attorney generals; up at the top the U.S. Congressmen, U.S. Senators, governors and, of course, judges. And I think this Court will recognize that attorneys do have a higher proportionate share than other occupations or professions as to these high and lofty positions.

What I am saying is if you affirm the lower court decisions, you will effectively set up an entry barrier for young, intelligent, ambitious male and female, black and white attorneys from starting on that ladder and moving up to those lofty positions.

QUESTION: Did you make that argument below?

MR. PARRIS: No, Your Honor, because below we believed that there was no constitutional right that was lost and we didn't have to show a compelling state interest. But I think it is an important interest. I think that myself --- and this is really why I am here, because I do believe in the patronage system, our patronage system in Rockland County, a moderate one, and I am an example of it. So is my co-counsel, Mr. Apotheker.

In 1974, the Democrats took over the legislature

in Rockland County, the majority, and I was appointed assistant county attorney and from there I moved to first deputy county attorney. Two years ago I became county attorney. Leaders have spoken to me recently about running me for state office and possibly a county court judgeship. Mr. Apotheker was just recently elected to a town justice seat in Haverstraw.

And that is what I am talking about in the ladder. I don't want to leave the ladder to the rich who don't need the political machinery, they don't need to party strength to move up that ladder. They can skip all the rungs, they can go straight with their money and run for U.S. Senator or Congress.

QUESTION: Since you are arguing that kind of an issue, is it not also, assuming this is relevant, would it not be equally relevant if this is related to the existence of the two-party system?

MR. PARRIS: Absolutely. I believe in the two-party system and I believe that both parties in Rockland County, Democrats and Republicans, should still be able to attract these intelligent, young and, yes, ambitious attorneys to move up this ladder.

QUESTION: The question still remains whether that is relevant to the issues in this case, however.

MR. PARRIS: Maybe, Your Honor, but it is something

I wanted to say to this Court because I deeply believe it.

QUESTION: What happens to the poor independent lawyer who doesn't belong to either party?

MR. PARRIS: Well, as I say, through that party system --

QUESTION: What?

MR. PARRIS: Attorneys generally, as they come out of law school, to a great extent most of them do get involved in politics. That is why they are different than deputy sheriffs and janitors and we recognize that if Bates --

QUESTION: So the non-partisan lawyer becomes a janitor?

MR. PARRIS: Not necessarily, Your Honor. He still has a right to run but --

QUESTION: But he ends up a janitor.

MR. PARRIS: No, Your Honor.

QUESTION: I don't see where you get this special privilege of a party member.

MR. PARRIS: Party member?

QUESTION: I don't see where you get that in the Constitution.

MR. PARRIS: Well, not in the Constitution but the Court can take judicial notice of the importance of the two-party system which has been for the past 200 years.

Recommendations or patronage, whatever you want, is in all of our public and our private lives. Everyone recommends someone for something.

QUESTION: I know a very great prosecuting attorney in New York that had both parties endorse him every time he ran.

MR. PARRIS: That happens quite often.

QUESTION: Isn't the real question not whether the patronage system is desirable or undesirable or whether New York has chosen it or not, but this was a civil rights action where Judge Broderick found that Rockland County's application of it violated the federal Constitution, and unless it violates the federal Constitution New York is free to choose as bazarre a system of promotion as it wants.

MR. PARRIS: That's correct.

QUESTION: So far as the federal courts are concerned.

MR. PARRIS: Yes. What I believe this Court should be following, as I said before, is the reasoning especially of Judge Hall's concurrence because there I think is a tremendous resemblance between Ramey v. Harber and this case. In both cases, you don't have the coercion of Elrod and in both cases you have terms that came to an end. Yes, and in Ramey v. Harber it was by statute, but it was also the question of a small office, looking for

loyalty as opposed to the deputy sheriff's office in Cook County, which was 3,000 or 4,000 employees.

QUESTION: Where is Rockland County, Mr. Parris?

MR. PARRIS: It is about thirty miles north of New York City, northwest of New York City.

QUESTION: New York City, is it --

MR. PARRIS: It is across the Tappansee Bridge from Westchester County and right above New Jersey.

QUESTION: The Tappansee Bridge comes into Rockland County?

MR. PARRIS: Correct, from Westchester.

QUESTION: South of Bear Mountain.

MR. PARRIS: Exactly. Exactly.

As to the relationship of the public defender and his assistants and as to whether a public defender is in fact a policy-maker, I have a great deal of problem because I really -- at the time I read Elrod, I have been troubled by what this Court meant by policy-making confidential. I think that lower court decisions, legal periodicals are all in the same position. Possibly Harvard Law Review is the closest when they said janitors and elevator operators definitely are not, department heads probably are, and everyone between would have to be decided on a case by case basis by the court.

I think that one point I would like to make is

that the assistants are the alter-ego, the extension of the public defender. They are in these just 23 justice courts around the county, and they are the public defender when they walk into those courts. So there is an extension there. We --

QUESTION: U.S. attorneys, does their term expire when a new President is inaugurated?

MR. PARRIS: I don't know, Your Honor.

QUESTION: Well, there was some little brouhaha about that in Philadelphia not so long ago.

MR. PARRIS: I remember, yes.

QUESTION: And in New York earlier. But generally there is a change, isn't there?

MR. PARRIS: Yes.

QUESTION: They are appointees of the executive, so is the Justice Department.

MR. PARRIS: Yes.

QUESTION: But you don't know if their term expires?

MR. PARRIS: No, I am unsure.

QUESTION: Maybe it is unsettled.

MR. PARRIS: I'm not sure, Your Honor.

QUESTION: Well, the commission of a United States Attorney has those famous last three words "to serve at the pleasure of the President," is that the --

QUESTION: But it is a term of office.

MR. PARRIS: Yes, I think it is. Assistant public defenders really live within the term of their appointing authority.

QUESTION: Well, there is a certain inconsistency isn't there, between the two facts which we apparently believe to be fact, that you serve at the pleasure of an official for a term of four years --

QUESTION: Which is it?

QUESTION: In the case of the U.S. Attorney, I think it is both.

QUESTION: And the four years can expire and if you aren't reappointed you are through.

MR. PARRIS: In the case of the assistant public defenders or assistant county attorneys --

QUESTION: No, no, U.S. Attorneys.

MR. PARRIS: Oh, I am not familiar with that, Your Honor.

QUESTION: United States Attorneys.

MR. PARRIS: As I earlier stated, I had this problem about public defender but I would like to give this example possibly, because I am not sure whether public defender is a policy-holder or who is a policy-holder, just a legislator and his confidential secretary, is it the judge and his law secretary, and then what about the others

in an office?

I thought about this and I took the example of the possibility of a public defender stating we will have no more pleas on marihuana cases, and he gives that to his assistant public defenders and they go into the courts to implement that policy. But he is the one up front, he is the one in the courts, he sees the witnesses, the judge, the jury, and when he comes back and they discuss it in the public defender's office and he states that on this case, chief, we must take a plea, I've seen that witness, I've seen that judge, this one we are going to change your policy. Are they not in a confidential relationship within the making, the implementing and the changing of a policy?

I reserve whatever time I have left for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Wagner, you may proceed.

ORAL ARGUMENT OF DAVID MacRAE WAGNER, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

I would like to begin by addressing myself to the issue that was being dealt with by Mr. Justice Stewart just before the luncheon recess, which is the question is the permanency of the appointments of assistant public defenders.

I think the record will show firstly Mr. Finkel

was appointed with less than a year remaining in the term of his appointing public defender, Arnold Becker. Page 94 of the record further shows that Mr. Finkel left another job to take that job and he testified not only did he believe his appointment permanent subject only to the right of the public defender to discharge him for improperly performing his job, but that he would not have left one job to go to another job with only nine months tenure remaining.

QUESTION: Counsel, what do you make of Footnote 10 in Judge Broderick's opinion at page 32a of the appendix, the fact that plaintiffs are removable at the will of the public defender, not for cause but at the will of the public defender?

MR. WAGNER: Mr. Justice Rehnquist, I think that the District Court found that a set term or lack thereof was irrelevant in his application of Elrod to the facts in this case. I don't think he decided whether there was or was not a set term.

QUESTION: Well, the very page of the record to which he referred us indicates the awareness of the witness that he could be dismissed without cause, which means employment at will. I am looking toward the bottom of the page there, the last question and answer.

MR. WAGNER: Well, respectfully, Mr. Justice

Stewart, this Court has held in the past that while employees can be dismissed for no reason, they cannot be dismissed for the wrong reason.

QUESTION: Yes, I know that, but I was just indicating that this question and answer and without more support of Footnote 10.

MR. WAGNER: And I might further go on to point out that Mr. Finkel, whatever the procedure is in Mr. Parris' county attorneys office, Mr. Finkel testified that when Mr. Barone replaced Mr. Becker, he was not formally reappointed, he took no formal steps to remain in the office, he was merely told casually and verbally to stay on. This is a far cry from the situation that Mr. Justice White describes where there is a set term and you must take an oath of office or you have no legal standing whatsoever.

The court I think very accurately perceived the situation here, there is a big void, there is no statutory provision setting a fixed term or an unfixed term for an assistant public defender.

QUESTION: And yet the District Court labeled a whole heading of its opinion, beginning on page 25a, "Plaintiffs were not reappointed." That is quite a different thing from discharged, and if two of the necessary -- of the five votes necessary to support a majority judgment in *Elrod v. Burns* limited themselves to the question of

whether it was unconstitutional to discharge people because of their political beliefs, if these people were not discharged then Elrod is not applicable.

MR. WAGNER: Then, Your Honor, I would refer back to Perry v. Sindermann where there is a very similar situation. There was an underwritten agreement in essence that untenured teachers in fact did by tradition have tenure. The --

QUESTION: But Sindermann had a contract, didn't he, year by year?

MR. WAGNER: Yes, which expired, as I recall the facts correctly, Your Honor.

QUESTION: Running for ten consecutive years which, as I recall, the Court thought created an expectancy of continuation, at least that was a factor.

MR. WAGNER: Well, Your Honor, I might respectfully point out that Mr. Finkel, who was in the public defender's office for seven years, saw under Mr. Becker four Republicans and four Democrats; under Mr. Barone approximately the same mix, four-four and one unregistered, and certainly Mr. Tabakman, who came in later, had the same expectation that succeeding public defenders would continue the nonpartisan policy of the office.

QUESTION: Now, is that in the record somewhere?

MR. WAGNER: The number of --

QUESTION: No, no, his expectation that this in fact, whatever the law was, in fact this was an appointment of an indefinite duration. Is that in the record anywhere?

MR. WAGNER: Yes, Mr. Finkel testified explicitly that he thought the appointment was permanent.

QUESTION: Where is this?

MR. WAGNER: I believe it is on pages 76 and 77 of the appendix, and also page 94 on either recross or redirect, I believe, Your Honor.

QUESTION: Well, on page 77 there is the question, about the middle of the page, did you approach Mr. Barone about being retained in your position. Answer, no he just continued me in office.

MR. WAGNER: And I submit, Mr. Justice Rehnquist, that that militates against a set term. The fact that there was no formal requirement of taking a new oath or any formal requirement other than just remaining in the same office, doing the same job for a new boss.

QUESTION: But the answer was he continued me in office, not I remained in office.

MR. WAGNER: Well, I concede the wording which, of course, implies, as we have conceded, that these assistants serve at the pleasure of the public defender. But it also indicates to me that there is a continuing employment in the

absence of an action on the part of a Mr. Branti who attempts to terminate.

QUESTION: Let me ask you this: Is your basic claim that this is a Perry v. Sindermann and Roth v. Board of Regents type of case where even though the people had no job tenure claim, they were fired for the exercise of a constitutional right of free speech, or an Elrod v. Burns case, or do you see no distinction between the two?

MR. WAGNER: Well, Your Honor, we took the position in the District Court that these were in effect continued employments, they were not as in Ramey set by statute at a fixed term. The District Court judge, as I interpret his decision, took no position on that --

QUESTION: He said it made no difference.

MR. WAGNER: Exactly.

QUESTION: Even if their terms expired with the public defender's term, the failure to reappoint them for this kind of a reason was constitutionally wrong.

MR. WAGNER: That is correct, Mr. Justice White.

QUESTION: And that is the judgment you are defending here.

MR. WAGNER: That's correct, Your Honor, and in view of the fact that --

QUESTION: That is not covered by Elrod at all, is it?

QUESTION: That is not what the District Court said at all. At page 25a, he said the third and final requirement of the concurrence in Elrod is the attempt to remove plaintiffs from their jobs had been based upon the sole ground of their political beliefs, I find that this requirement has been satisfied. Isn't that a finding that the only reason for the removal was their political beliefs? That is the way the Court of Appeals interpreted it on page 2a. The Court of Appeals said Judge Broderick found that the appellant had attempted to terminate their employment on the sole ground of their political beliefs.

MR. WAGNER: No, but --

QUESTION: But you concede something else.

QUESTION: But you don't take any position -- you say the District Judge didn't take any position on whether it was a termination or a renewal. That is what you were saying.

MR. WAGNER: Mr. Justice White and Mr. Justice Stevens, as I read Footnote 10, Justice Broderick says the fact that the plaintiffs are removable at will is irrelevant to the determination of the constitutional issue, therefore I don't think Judge Broderick reached that.

QUESTION: So you are saying even if this was a failure to reappoint, even if their terms had expired and it was only a failure to reappoint, the fact that they

refused to reappoint because of their political beliefs is constitutionally wrong, like the District Court concluded.

MR. WAGNER: That is correct, Your Honor.

QUESTION: Elrod covers it unless they are confidential or policy-making?

MR. WAGNER: That is correct, Your Honor. I believe Elrod read in conjunction with Perry the expectation of continued employment I believe covers the situation.

QUESTION: But then don't you have to argue here that or sustain the holding below that these positions were not in fact confidential or policy-making?

MR. WAGNER: That is correct, Your Honor, and I believe that, first of all, the District Court did so find and the Court of Appeals unanimously affirmed that finding. Secondly, I think, although my learned adversary has made much of the fact that lawyers are not janitors, a fact which I would be the first to concede, these lawyers are very unlike other lawyers in government. These are not people who give advice to town boards, to zoning boards. They are not hired by the government to advise the government. They are hired by the government to represent individual indigent defendants. They --

QUESTION: What about a situation where the new public defender comes in and says the new policy of this office for which I am responsible will be that we will take

no guilty pleas at all, or alternatively he says the policy of this office will be that you are to direct all your efforts to negotiate a plea, we've got to get this calendar moving -- now, does that not involve a very high policy in terms of operating that office?

MR. WAGNER: The policy-setter himself, yes, but he has instructed his assistant public defenders as to what they can and cannot do. In fact, Mr. Parris gave a hypothetical example, I can give the Court an actual example. The District Attorney in Rockland County has established a policy that he will not accept pleas to a lesser offense in cases of driving while intoxicated where the blood alcohol reading is in excess of .20. This is a policy that all his assistant district attorneys must follow.

The District Attorney, like the public defender, himself sets the policy, the assistants disobey that policy at their peril and they are subject, as the plurality in Elrod pointed out, to dismissal for cause.

QUESTION: But how? How is the prosecutor or the public defender, the head of the staff going to follow what each one of the nine assistants is going to do on each specific case, in many instances that assistant will be handling ten or twenty cases in one day.

MR. WAGNER: Well, Your Honor, I think we are drawing a distinction here between cases by case discretion

which both Mr. Barone and Mr. Branti indicated that individual assistant public defenders have and broad, the broad overall goals of the office as referred to in the plurality where the public defender says it shall be the goal of our office to concentrate on marihuana pleas, driving while intoxicated, whatever you choose, and then it is up to his employees to follow that drug policy scope. But they do not decide in the initial instance what the policy of the office will be.

QUESTION: My point was is it possible, feasible, with the volume of cases you would have in these relatively minor offenses, to monitor what each one is doing or is he not entitled to select a person of his own choice in whom he has confidence and sure knowledge that they will carry out his policies? Is that a factor in this case is what I am asking.

MR. WAGNER: Mr. Chief Justice, I think the sheriff in Elrod was entitled, the sheriff's deputies who followed his policy directives, and of course any employer is entitled to have loyal employees.

QUESTION: I thought you had already conceded that there is quite a difference between a deputy sheriff and a lawyer.

MR. WAGNER: There is a difference on a general basis. But when you look at the specific duties that these

gentlemen performed, is there such a great difference between trying a case, an individual case on a case by case basis within the guidelines laid down by the public defender and the decisions made by a deputy sheriff? The deputy sheriff has the decision of life and death over a fleeing perpetrator. Any job that involves any degree of discretion, there are some case by case policy decisions to be made.

For example, the deputy sheriffs may be instructed always fire one warning shot before you shoot at a fleeing felon or never fire your firearm under certain circumstances That is a policy directive. Or they may be given a certain latitude with regard to whether they use their firearm in isolated areas or in metropolitan areas. These case by case decisions I submit are not the policy-making referred to by this Court in Elrod. There is always in practically any occupation some degree of case by case review by the individual.

Now, Mr. Parris, my learned adversary, indicated in some detail the value of a system which enables young attorneys to enter the political system and in effect get a leg up into politics and, like Mr. Parris, I got my start in politics the same way. I don't quarrel with that system. However, that is not the way it works.

Of the appointees made to these positions, they were the people, as Mr. Justice Marshall pointed out, who

were given the chore, the politically active, the successful who were able to get these favored jobs.

QUESTION: Who said that?

MR. WAGNER: Your Honor indicated -- I may have stretched your point a little bit, but Your Honor indicated that --

QUESTION: I though there were quite a few independent unregistered lawyers that I know personally that are pretty good lawyers and making a pretty good living, and they didn't have to join any party.

MR. WAGNER: Your Honor, I thought your point was that in order to get ahead in politics you had to join one of the parties. I am not saying he will make a good living without it, but you have to be a member --

QUESTION: I did not say that and I don't believe that.

MR. WAGNER: Well, I am sorry I misconstrued Your Honor's comments, in that case. But that does not take away from the point that I was attempting to make, which is essentially that it is not the young attorneys fresh out of law school who get these positions, because they with rare exceptions, unless they have some family political influence, they are not in a position to obtain these appointments.

QUESTION: Is the pay pretty good for these things in Rockland County? In some parts of the country, it is

pretty much pro bono.

MR. WAGNER: No, Your Honor, it is a fixed salary. The reason that it is part-time is because, as Mr. Parris indicated, there are 23 justice courts and it is more important to have a relatively large number of part-time employees and fewer full-time employees because a lot of this is night work, and with 23 courts to be covered it is necessary to have a large number of personnel available several evenings a week plus days in the office.

QUESTION: They work fixed hours, or how is their time assigned?

MR. WAGNER: Your Honor, my understanding is they are assigned two days a week in the office plus each attorney is assigned certain specific courts in which they appear and handle regular calendars.

QUESTION: In the evenings?

MR. WAGNER: Some are evenings, some are day sessions. It depends on when the individual court happens to sit.

QUESTION: Do you think this is any different than some county rule that says in the next year we are probably going to have ten public construction projects but only Democrats or Republicans need bid on these or limit the bidding opportunities to Democrats or Republicans?

MR. WAGNER: I think that is exactly the situation

here, as the District Court found. No one who did not receive sponsorship of the Democratic caucus, which consisted of the majority of the county legislature, was considered for employment as an assistant public defender.

QUESTION: Well, that is the issue here then, it is not covered by Elrod v. Burns, is it?

MR. WAGNER: I believe, Your Honor, it is.

QUESTION: Well, a construction job isn't the same as a confidential or policy-making assistant.

MR. WAGNER: Your Honor, I don't believe that these gentlemen are policy-making or confidential.

QUESTION: It may be, but for the reason suggested by my brother Stewart, I don't think the answer to a question about whether construction jobs are assigned only to Democrats or Republicans answers the question of whether one may choose only Republicans or Democrats for confidential or policy-making positions.

MR. WAGNER: Your Honor, I agree with you perfectly, if these were in fact confidential or policy-making positions.

QUESTION: But it does get you across the bridge that there is no difference between this charge and reappointment.

MR. WAGNER: I believe that that is what Perry read with Elrod in effect says. I don't think that there is

a significant constitutional distinction between holding and serving in a position that you are serving in well, whether it is a fixed term or a determinate term. I do not for a moment concede that there is a fixed term in this instance. I think it is an indeterminate term.

QUESTION: Mr. Wagner, on that point your witness, Mr. Finkel, said he thought he had a permanent appointment. Did that mean until he reached retirement age or what does it mean?

MR. WAGNER: No, Mr. Justice Powell. I believe if you read his testimony in context with some later cross-examination, he realized he served at the pleasure of the public defender but that he would not be terminated as long as he did his job properly. This was the experience under the two prior public defenders of Rockland County.

QUESTION: That is a different point from saying -- that is a much stronger expectation than saying I serve at his will and he can fire me for any reason he wants to except my political beliefs.

MR. WAGNER: Well, isn't that what this Court has said, that --

QUESTION: Well, that is a difference, too, nevertheless and it is completely different from what you just said.

MR. WAGNER: Someone who serves at will can be

terminated for no reason but not an improper reason, and I would submit --

QUESTION: That is as far as you need to go, I gather.

QUESTION: You are saying he could only be fired for cause, is that the substance of your view?

MR. WAGNER: Well, I wouldn't go quite that far, Mr. Justice Powell. I would say that he cannot be fired for a constitutionally impermissible reason.

QUESTION: Well, couldn't he be fired to replace him with his brother? I mean that is not --

MR. WAGNER: Yes. Yes.

QUESTION: Well, that is not for cause, is it?

MR. WAGNER: No, that is why I would not go as far as to say only for cause.

QUESTION: Yes.

MR. WAGNER: I will not go any further than to say --

QUESTION: You would say that he couldn't fire him because of his political beliefs.

MR. WAGNER: Right, I will not go any further than to say he cannot be fired for constitutionally impermissible reasons.

QUESTION: Would he have an entitlement to a due process hearing before being fired, as in Arnett?

MR. WAGNER: If he is discharged allegedly for cause?

QUESTION: Yes.

MR. WAGNER: Not statutorily, Your Honor.

QUESTION: But constitutionally?

MR. WAGNER: I believe that that would be a constitutional right to that, but not under the statute.

QUESTION: If he had alleged that he had been fired for an unconstitutional reason, then --

MR. WAGNER: If it were alleged that he had in some way improperly performed his duties and he claimed he had not improperly performed them, I believe he would be entitled to a hearing. Certainly there is --

QUESTION: Why would you say that? You just conceded -- what if he said, well, I was fired, I was doing my job well but I was fired because -- not because I didn't do my job well but because he wanted to replace me with my brother, he wouldn't get any hearing.

MR. WAGNER: That's correct. I said, Your Honor, if he were allegedly dismissed for improperly performing his duties, he would have a hearing. That would be discharge for cause.

QUESTION: But he is not entitled to be discharged only for cause.

MR. WAGNER: No. Again, Your Honor, I have to

fall back on my statement that he can be discharged for any reason except an impermissible one, except a constitutionally abhorrent reason.

QUESTION: Well, what are those that are involved in this case?

MR. WAGNER: Specifically in this case, as the District Court found, these assistant public defenders were not continued in their employment solely because they were not members of the majority political party in Rockland County and were not sponsored by members of that party.

QUESTION: Okay. Then you've got to show in addition to that that they were not confidential or policy-making officials?

MR. WAGNER: Absolutely, Mr. Justice Rehnquist, and that is exactly what we contend, that they are -- the District Court so found, the Court of Appeals affirmed that finding, they are case by case representatives of the indigent. They do not make government policy, they do not advise government boards, they do not even advise the public defender other than to say here I am, give me my files to go to court and I will represent the indigent.

QUESTION: Well, what if one of them comes in to the public defender and says I think we've got a real problem with Judge so and so in such and such a precinct and I think we ought to try to transfer all the cases we

can out of that precinct to another one. Isn't there some sort of confidentiality there?

MR. WAGNER: I don't believe there is any more confidentiality there than a deputy sheriff or a police officer saying so and so's bar in downtown Rockland County is a hangout for young alcoholics and there are fights there every night and we ought to increase our police --

QUESTION: Or that we are having trouble getting search warrants from a certain judge.

MR. WAGNER: Exactly, Your Honor. Again, Mr. Justice Rehnquist, I think that is a recommendation to a policy-maker which may or may not be acted on. The public defender still has the absolute right to say you are wrong, we are not going to do it. He makes the policy.

QUESTION: But frequently a confidential employee or one who makes a recommendation to a policy-maker and not himself a policy-maker, is not that so?

MR. WAGNER: I believe that that was Judge Broderick's definition of confidentiality which I think is a good one, one who stands in a confidential relationship to a policy-maker. But he, as I, limits that to, for example, the confidential secretary to a town supervisor, a confidential law secretary to a judge, someone with whom there is a very close interaction. I don't think that, as I read Elrod, this confidentiality extends to an entire office of people

who are essentially employees. Undoubtedly, the chief assistant public defender is confidential because he is the alter ego of the public defender, just like Mr. Newcomb in the Newcomb case, who was the deputy city attorney, who made policy, made law, was in line to succeed as mayor of the City of Milwaukee, I believe it was, certainly he was a policy-maker but the city attorneys under him were not.

QUESTION: Do you think that the assistants sometimes give legal opinions to their superiors as to what should be done about a case?

MR. WAGNER: Yes, Your Honor, as to what should be done about a case, but that again, as the plurality points out, is decision-making on a case by case basis, not broad overall implementation of policy such as concentrated on a particular type of crime --

QUESTION: If he is doing that, he is in the relationship of a lawyer to a client essentially, is he not?

MR. WAGNER: I don't believe so, Your Honor. I think it falls into Mr. Justice White's analogy of the police officer who says we're having trouble getting a search warrant from a certain judge.

QUESTION: That certainly is a confidential matter, isn't it, if nothing else?

MR. WAGNER: Well, Your Honor, I would submit that

probably the lowliest clerk of the FBI must keep his information confidential, but does that make him constitutionally unprotected as a policy-maker? I don't believe it does.

QUESTION: Well, let's stay with this situation, an assistant who says let's keep away from Judge Jones, he just never will give us a warrant. Now, is that a confidential communication within that office?

MR. WAGNER: I believe the communication is confidential, but I --

QUESTION: He hopes it is.

MR. WAGNER: -- but I do not believe that that creates a confidential relationship, as this Court meant in Elrod, because if you are going to make that many employees confidential, then aren't you in a sense in essence vitiating the holding in Elrod? I think the plurality in Elrod very meticulously detailed the reasons for excluding confidential and policy-making employees and left the others protected by that holding, and the reason was, as I interpret it, that the policy-making and confidential employees were in a position to in effect thwart the goals of the newly appointed public defender or sheriff or whatever, whereas assistant public defenders, the only way that they could embarrass or interrupt the operation of the public defender's office would be if they did not competently perform their jobs and

then, of course, they could be discharged for cause. So I submit that they do not come in under the heading of those who must be excluded from the Elrod holding because they are in a position to obstruct their supervisor.

QUESTION: Don't you think a defense counsel could throw a case, as it were -- you know what I mean by that --

MR. WAGNER: Oh, yes.

QUESTION: -- and do it, if he did it skillfully, in a way that it would be very difficult to establish that fact?

MR. WAGNER: Well, it may be difficult --

QUESTION: Say it is a very unpopular defendant and the community is aroused and wants that fellow to go to jail and the assistant defender is politically ambitious and so he just lets this fellow go down the drain. That is a possibility, isn't it?

MR. WAGNER: Of course, it is a possibility, Your Honor, but then again he is not properly performing his job, just as --

QUESTION: Do you think it is easy to monitor that kind of thing?

MR. WAGNER: Corruption is never easy to monitor, any more than it is easy to monitor a corrupt deputy sheriff who takes bribes to let felons escape. It happens.

We try and prevent it, but it is going to happen no matter how hard we try. I don't think that that is the setting criteria, in my opinion.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Parris? You have about two minutes left.

ORAL ARGUMENT OF MARC L. PARRIS, ESQ.,
ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. PARRIS: If I could make two quick points. I don't want to leave this Court or have this Court left with the impression that Democrats in Rockland County don't re-hire Republicans. Two of the leading people in the county, Mr. George Renk, who is director of our audit and control, is a Republican. Initially --

QUESTION: There are some they don't?

MR. PARRIS: Some they don't, right, but we have quite a few and I don't want to leave that impression. I would just leave the Court with, as to the question of continuation of employment, which I think is paramount, as was stated by Mr. Justice Stewart in the Board of Regents v. Roth, "It stretches the concept too far to suggest that a person is deprived of liberty when he simply is not rehired in one job but remains as free as before to seek another."

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:52 o'clock p.m., the case in the above-entitled matter was submitted.)

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