

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

CAPTION: CYNTHIA RUTAN, ET AL., Petitioners V.
REPUBLICAN PARTY OF ILLINOIS, ET AL.; AND
MARK FRECH, ET AL., Cross-Petitioners V.
CYNTHIA RUTAN, ET AL

CASE NO: 88-1872 & 88-2074

PLACE: Washington, D.C.

DATE: January 16, 1990

PAGES: 1 thru 43

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 239-2260

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x

3 CYNTHIA RUTAN, ET AL., :

4 Petitioners :

5 v. : No. 88-1872

6 REPUBLICAN PARTY OF ILLINOIS, :

7 ET AL.; and :

8 MARK FRECH, ET AL., :

9 Cross-Petitioners :

10 v. : No. 88-2074

11 CYNTHIA RUTAN, ET AL. :

12 -----x

13 Washington, D.C.

14 Tuesday, January 16, 1990

15 The above-entitled matter came on for oral

16 argument before the Supreme Court of the United States at

17 12:59 p.m.

18 APPEARANCES:

19 MARY LEE LEAHY, ESQ., Springfield, Illinois; on behalf of

20 the Petitioners/Cross-Respondents.

21 THOMAS P. SULLIVAN, ESQ., Chicago, Illinois; on behalf of

22 the Respondents/Cross-Petitioners.

C O N T E N T S

1		
2	<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
3	MARY LEE LEAHY, ESQ.	
4	On behalf of the Petitioners/	
5	Cross-Respondents	3
6	THOMAS P. SULLIVAN, ESQ.	
7	On behalf of the Respondents/	
8	Cross-Petitioners	20
9	<u>REBUTTAL ARGUMENT OF</u>	
10	MARY LEE LEAHY, ESQ.	
11	On behalf of the Petitioners/	
12	Cross-Respondents	40
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 service system?

2 MRS. LEAHY: That is correct, Your Honor.

3 QUESTION: And it was -- there was an executive
4 order --

5 MRS. LEAHY: That is correct, Your Honor. In 19
6 --

7 QUESTION: -- that imposed a hiring freeze back
8 in 1980?

9 MRS. LEAHY: That is correct, Your Honor.

10 QUESTION: And is that freeze still in effect?

11 MRS. LEAHY: Yes, Your Honor.

12 QUESTION: And did the freeze in effect impose a
13 new system of determining promotions and transfers and
14 hires?

15 MRS. LEAHY: Your Honor, I believe that this --
16 yes, a new system imposed on the civil service system.

17 QUESTION: Because the freeze, the text of the
18 freeze just said we won't have any more hiring.

19 MRS. LEAHY: Unless I approve it, or someone
20 that I delegate that authority to approves it. That was
21 the gist of the Governor's executive order. And that is
22 exactly what has happened. Their power to approve the
23 filling of any of these positions has been delegated to
24 the Governor's Office of Personnel, and they decide the
25 filling of these positions.

1 QUESTION: And had the civil service system been
2 in effect, there would not -- you wouldn't be here. It
3 would operate to disregard these considerations that you
4 say are used now?

5 MRS. LEAHY: Your Honor, we believe, and we
6 quoted in our brief, certain appellate court rulings in
7 Illinois that talked about the purpose of the civil
8 service system. We believe that had that been operating
9 as we believe it ought to, no, we would not be here,
10 because these constitutional issues would not have been
11 raised.

12 QUESTION: Do you know how many states do not
13 have a civil service system now for nonpolicy-making
14 employees?

15 MRS. LEAHY: No, Your Honor, I do not know the
16 precise number. The overwhelming majority do, Your Honor.
17 We have looked at certain states.

18 QUESTION: Just to be clear, the civil service
19 system just had the Governor's order superimposed upon it.
20 It was not suspended?

21 MRS. LEAHY: That is correct, Your Honor.

22 QUESTION: So that for the plaintiffs here, the
23 civil service system was still operating in that it had
24 examinations and it had a list of qualified people?

25 MRS. LEAHY: That is correct, Your Honor, but

1 the decision now is made by the Governor's Office of
2 Personnel. And as we point out, unless the form, which is
3 found at page 7 of our brief, unless that sponsorship of
4 the individual person makes its way to the Governor's
5 Office of Personnel, they do not even get in that pool to
6 be considered. As we have alleged, both Ms. Rutan and Mr.
7 Taylor should have received the promotion had the civil
8 service system been working, because they were more
9 qualified than the people who did receive those
10 promotions. But without that sponsorship they do not get
11 in the pool to be considered.

12 QUESTION: Well, how about new employees?

13 MRS. LEAHY: That is the same thing, Your Honor.
14 Representative Winchester wrote to Petitioner Moore, who
15 was trying to get a job in the Department of Corrections,
16 and he said you have to get the endorsement of the county
17 party before your name can be referred to the Governor's
18 Office.

19 QUESTION: Are there any new hires or potential
20 new hires who are parties to this action, people who are
21 not already in state employment?

22 MRS. LEAHY: Yes, Your Honor, Petitioner Moore.

23 QUESTION: He had never been employed by the
24 state before?

25 MRS. LEAHY: That is correct, Your Honor. He

1 was seeking positions within the Department of
2 Corrections.

3 QUESTION: And your contention is that we should
4 expand our rulings in Branti and Elrod, to extend them to
5 the hiring process?

6 MRS. LEAHY: Your Honor, I'm not sure I would
7 use the word extend, but I am asking the Court to apply
8 those same principles of law, yes, Your Honor.

9 QUESTION: To the hiring.

10 MRS. LEAHY: Your Honor, I believe that this
11 Court has not made any distinction in applicants' First
12 Amendment rights in other contexts. For example, Torcaso
13 v. Watkins.

14 QUESTION: But in Branti and Elrod, the opinions
15 point out in both cases that those people were already
16 within the government employment system, didn't they?

17 MRS. LEAHY: Yes, Your Honor, that is correct.
18 But I think the only thing that the Court could decide
19 were the facts that were before the Court at that time,
20 and those were discharges.

21 Your Honor, that is precisely the question that
22 is before this Court, as to whether those factors that
23 were constitutionally impermissible in Branti and Elrod
24 are constitutionally impermissible in the benefits of
25 employment we are talking about here.

1 The Seventh Circuit held that those claiming
2 recall from layoff, that they were not recalled from
3 layoff when they should have been due to their political
4 affiliation, should be remanded under Elrod and Branti.
5 The court then held that as to Petitioners Rutan and
6 Taylor, their denial of promotion and denial of transfer
7 should be remanded to see if it reached the level of
8 constructive discharge. And then the court outright held
9 there was no cause of action whatsoever for the man
10 seeking the job.

11 We have approached this case in the traditional
12 First Amendment analysis, and the respondents have failed
13 to do that. Before going into that analysis, I would like
14 to point out a few things that I think are important. The
15 first is that there is no dispute that a person has the
16 right not to affiliate with a particular party and has the
17 right not to support a particular candidate or to support
18 particular beliefs under the First Amendment, that that is
19 protected activity.

20 There also has been no suggestion at any point
21 along the way that the jobs in question in this case fall
22 under Branti, that is, the confidential policy making
23 exception which was first talked about in Elrod and then
24 further delineated in Branti. The Seventh Circuit Court
25 of Appeals admitted that what had happened to the

1 petitioners and cross-respondents was coercive. The
2 respondents have used the words intrusive. And yet,
3 throughout this litigation from the very beginning the
4 Respondents have offered no compelling reason as to why
5 such coercion, or such intrusion, should be allowed to
6 exist.

7 If we go back to the traditional First Amendment
8 analysis, we start with the conduct in question. The
9 conduct in question in this case is the right not to
10 affiliate or not to associate or not to support particular
11 political ideas. And that is protected by the First
12 Amendment. The very coercion that this Court found
13 existed in Elrod exists in this case. The purpose of this
14 system is to force the person to affiliate with the party
15 by voting in the primary, or to contribute money or to do
16 volunteer work if they wish to get the promotion or the
17 transfer or the job itself.

18 The sponsorship that was found to be offensive
19 in Branti is present in this case. The form used in
20 Sangamon County requires the recommendation or endorsement
21 of the precinct committeemen. These actions are
22 substantial. Jobs are important to people. Promotions
23 are important to people. Being able to get a job in your
24 chosen field is important.

25 QUESTION: Mrs. Leahy, some, in fact quite a few

1 political scientists, think that political parties are
2 important, too, for the democratic process, and think that
3 the ability of people to get jobs, the spoils system if
4 you want to put it that way, is important to maintaining
5 the viability of at least the kind of political party
6 system we have had, a two-party system instead of multiple
7 splinter parties. Why isn't that a sufficient state
8 interest, perhaps not to overcome firing somebody who is
9 already in a job and putting that person on the street,
10 but a sufficient -- sufficient interest to say we will
11 hire the people who supported us for office?

12 MRS. LEAHY: Your Honor, I am beginning with
13 your premise that it is important to have a stable two-
14 party system. I believe that this system is designed not
15 to support the two-party system, but to preserve and
16 protect the one party. If -- if there were a state
17 interest in rewarding those who were politically active,
18 then these jobs ought to be open equally to all of those
19 who are politically active.

20 QUESTION: But they don't want to reward all
21 those who are politically active. They want to reward
22 those people who have worked for that party. I mean, it's
23 not new. That has been done right in this country for
24 many, many years.

25 MRS. LEAHY: To a far less extent, Your Honor,

1 but that is not --

2 QUESTION: Oh, I think Andrew Jackson maybe did
3 it to a far greater extent. I -- I'm not sure about that.

4 MRS. LEAHY: Your Honor, that is why I said I
5 accepted the premise that it is the two-party system.
6 This system is not designed to promote that. It is
7 designed to preserve and increase the strength of the
8 incumbent party.

9 QUESTION: Well, but the two-party system
10 suggests the outs will get their turn and they will do the
11 same thing to the -- for their supporters, that the ins
12 did this time. I mean, there is a cycle involved.

13 MRS. LEAHY: Well, Your Honor, I am not sure
14 that there is a cycle involved, or how short that cycle
15 has to be. I do not think that the First Amendment gives
16 the majority the right to trample on the rights of the
17 minority just because they happen to be in power for a
18 particular period of time.

19 QUESTION: Well, suppose we were to disagree
20 with you on that point. Suppose that we were to conclude
21 that this does support the two-party system. Would you
22 then have no case?

23 MRS. LEAHY: No, Your Honor, if you find that
24 there is a compelling state interest, and that it is
25 served by -- that it is this preservation or promotion of

1 the two-party system, then you have to move to the third
2 prong of the First Amendment analysis, which is --

3 QUESTION: But you would concede that that is a
4 compelling interest protecting the two-party system?

5 MRS. LEAHY: Yes, Your Honor, I think protecting
6 the stable two-party system is. I would point out --

7 QUESTION: And so then on the first prong of the
8 analysis it is just a question of whether or not we agree
9 with your characterization that it helps out one party
10 only. Because if we -- if we disagree with that and say
11 it helps both parties, or helps preserve the two-party
12 system, then there is a compelling state interest.

13 Correct?

14 MRS. LEAHY: No, Your Honor. I think I
15 misunderstood your question. I think then you would have
16 to look at whether or not in those states which have civil
17 service protection and do not take political factors into
18 consideration in hiring, you would have to look there to
19 see if there has been any effect on the two-party system.
20 I don't believe that the Federal system, or those states
21 that have a true civil service system in hiring, that the
22 two-party system has been damaged in any way. I would
23 submit that this system -- the flip side of the coin can
24 be that this system so turns people off from participation
25 in political activity that it damages that system.

1 Take a person who comes out of college with a
2 degree in sociology and wants to be a case worker in the
3 Department of Children and Family Services, and then finds
4 out that this is the system by which he will get that job.
5 I think that could damage political participation as much
6 or more than any type of promotion of the system that has
7 gotten by hiring those who are politically favored.

8 QUESTION: Mrs. Leahy, would you tell me whether
9 all the Plaintiffs who were before the district court are
10 still on the case and before us here?

11 MRS. LEAHY: Yes they are, Your Honor.

12 QUESTION: Every category --

13 MRS. LEAHY: That is correct, Your Honor.

14 QUESTION: -- is represented before us now.

15 MRS. LEAHY: That is right, Your Honor.

16 QUESTION: Promotion, rehire, --

17 MRS. LEAHY: Recall from layoff, Your Honor.

18 QUESTION: Recall from layoff.

19 MRS. LEAHY: Transfer.

20 QUESTION: Transfer, and new hire.

21 MRS. LEAHY: That is correct, Your Honor. We
22 did not seek cert. on the recall from layoff, Mr. O'Brien
23 and Mr. Standefer. But --

24 QUESTION: Well, then they are not before us.

25 MRS. LEAHY: The cross-petition was granted in

1 regard to them, Your Honor.

2 QUESTION: Okay.

3 MRS. LEAHY: I would like to go back to the one
4 point about, about the hiring and the significance of
5 that. I do not believe that this Court has ever made any
6 distinction between the applicant and those who are
7 incumbent. The Torcaso case, Keyishian, Perry, can
8 certainly be viewed as an applicant because this Court
9 held even if he had no right, no expectation of continuing
10 employment, that if he were not given a year's teaching
11 contract because of exercise of his First Amendment
12 rights, he had stated a cause of action.

13 This Court recently addressed the applicant for
14 unemployment compensation benefits in Frazee and in
15 Hobbie, and again found no distinction between -- no
16 distinction in regard to First Amendment rights.

17 We believe that --

18 QUESTION: We -- we've done it in another
19 context, though. In affirmative action cases we have
20 indicated that there is a difference between race-based
21 determinations for purposes of hiring and race-based
22 determinations for purposes of firing. Haven't we said
23 that?

24 MRS. LEAHY: Yes, Your Honor, if you are
25 referring to Wygant and its prodigy. But I would point

1 out there, Your Honor, as we did in our reply brief, that
2 that comparison was only done at the third stage of that
3 First Amendment and our Fourteenth Amendment analysis.
4 And that was when you were looking at the remedy to be
5 imposed. I think there was an uncomfortable choice before
6 this Court. Somebody was going to have to be hurt, and
7 the Court admitted that both were intrusive, firing and
8 the hiring, but the Court found one to be less intrusive.
9 But that was at the remedy stage, Your Honor. That is not
10 where we are in this case. We are not -- there is not an
11 uncomfortable choice before this Court as to which
12 category of persons to hurt.

13 QUESTION: Do you think we would make a
14 distinction under Title VII if an employer had an
15 affirmative action program for one purpose versus for
16 another purpose? That wouldn't involve remedy.

17 MRS. LEAHY: I think it then would depend on the
18 purpose of the affirmative action program, because the
19 affirmative action program is to remedy a prior wrong.

20 QUESTION: Do you think we would treat an
21 employer who did -- who fired people on the basis of
22 racial preferences the same as we treat an employer who
23 hired people on that basis?

24 MRS. LEAHY: Yes, Your Honor, if we are not to
25 the remedy stage of the matter. We contend that the state

1 has the obligation to be neutral when granting the type of
2 benefits that are at stake in this case.

3 One last thing about the hiring. So many areas
4 of public employment -- public employment has become such
5 a large employer. So many of those areas are strictly
6 public employment. Law enforcement, conservation,
7 corrections, regulation of certain industries. The
8 Seventh Circuit has effectively cut off hundreds of people
9 from seeking to work in those chosen professions.

10 The important factor is that no reason has been
11 given for taking into account or consideration the
12 person's political affiliation when denying them these
13 benefits. What is the reason that the state should even
14 inquire into the political affiliation of the person who
15 seeks to be a prison guard, or the person who wants to be
16 recalled to his position as dietary manager, or the person
17 who seeks a promotion as a lead worker on an equipment
18 crew on the state highway?

19 QUESTION: Mrs. Leahy, you concede that if the
20 position were a policy-making one that patronage
21 considerations could survive the First Amendment
22 challenge?

23 MRS. LEAHY: Yes, Your Honor. Yes, Your Honor,
24 under Branti. That has never been in dispute in this
25 case. These positions simply do not fall under that

1 category.

2 I would like to go back to one thing about the
3 political participation. In Buckley v. Valeo this Court
4 said that sweeping inquiries into protected areas
5 discouraged the citizens from exercising the rights
6 protected by the Constitution. As the Court knows that
7 case dealt with regulation of election expenditures,
8 ethics and so on. We think that is true in this case,
9 that the detailed inquiry made into these peoples' lives
10 about their political affiliation, will discourage their
11 participation from that.

12 QUESTION: Well, I think in Buckley the facts
13 were that anyone who contributed was required to have a
14 fairly detailed summary and so forth. Here, the person,
15 the inquiry is made only when the person seeks a job. It
16 isn't the government inquiring on their own as to what
17 they have done.

18 MRS. LEAHY: That is correct, Your Honor. That
19 is correct. They inquire into how you voted in the
20 primary, every two years from 1978 on, and even under
21 certain circumstances, if you weren't old enough to vote
22 in those primaries, how your parents voted in the
23 primaries.

24 QUESTION: They don't really inquire into your -
25 - your philosophical views. I mean, you -- they just want

1 to know whether you are Republican. They don't care what
2 you think about any national or international issue,
3 right?

4 MRS. LEAHY: If you define being a Republican by
5 having voted in the primary and given money and worked for
6 the party, yes, Your Honor.

7 QUESTION: Right. Which is -- which is another
8 thing that this kind of a system does. It blurs the, what
9 would otherwise be a very sharp distinction between the
10 two parties. People will tend to go into one or the other
11 in order to get a job. And the parties become less --
12 less philosophical. Which, again, some political
13 scientists think is a good thing, so that you don't have a
14 pendulum swing from one extreme to another whenever --
15 whenever the party in power changes. Why isn't that also
16 a good state interest that would justify --

17 MRS. LEAHY: Your Honor, I would submit that
18 open and robust debate on the issues is discouraged by
19 this system, and that that is what is healthy for the two-
20 party system.

21 QUESTION: Well, I -- many think the genius of
22 the two-party system is that it reduces extremes, it
23 reduces robust debates, so that you don't go from
24 capitalism to socialism overnight. It doesn't make that
25 much difference if you put in another party, because a lot

1 of the people in the party are just there for the jobs
2 anyway.

3 MRS. LEAHY: But, Your Honor, I would submit
4 that if you go to the Federal Government and you go to
5 those states that enforce a true civil service system
6 without considering these factors, the party has not been
7 any different in that regard.

8 QUESTION: It is clear that there are no
9 philosophical or political views that are inquired into,
10 simply party affiliation. If you voted as a Republican it
11 doesn't matter if you, you have a picture of Franklin
12 Roosevelt on your wall and believe in everything he stood
13 for. Right? It is just whether you voted as a
14 Republican.

15 MRS. LEAHY: No, Your Honor. Let's take the
16 contributions for a moment. The contributions to the
17 party or its candidate are traced, and therefore the
18 support of a particular idea -- say there is a faction in
19 the party in Illinois that is on outs with the incumbent
20 faction of that party. That would lead to a review of the
21 philosophical beliefs of the individual person seeking the
22 state benefit. The fact he contributed to one candidate
23 in the Republican primary over the other. So I think it
24 goes beyond that, Your Honor, when you are looking at work
25 and at contributions, because those, as we have alleged,

1 could be for candidates as opposed to the party itself.

2 QUESTION: Is there something in the record that
3 indicates the party did look into that sort of a thing,
4 whether you were opposed to one faction of the party?

5 MRS. LEAHY: Your Honor, the complaint alleges
6 that the contributions, the financial support to
7 candidates or to the party is taken into consideration.
8 As to whether -- there is nothing in the record as to a
9 particular person, there was a primary battle that
10 contributions were made to one and not to the other. No,
11 Your Honor, we are here on a motion to dismiss.

12 I would like to reserve the rest of my time for
13 rebuttal.

14 QUESTION: Very well, Ms. Leahy.

15 Mr. Sullivan.

16 ORAL ARGUMENT OF THOMAS P. SULLIVAN

17 ON BEHALF OF THE RESPONDENTS/CROSS-PETITIONERS

18 MR. SULLIVAN: Mr. Chief Justice, and may it
19 please the Court:

20 I would like to start by reframing the issue as
21 stated by Mrs. Leahy, and as contained in the complaint
22 which Judge Baker dismissed and which the court of appeals
23 en banc affirmed. The alleged system is not a strictly
24 partisan political system. The system in Illinois that is
25 alleged in this complaint is consistent with the Illinois

1 personnel code, which Justice O'Connor asked about. That
2 code was and still is in operation. Under that personnel
3 code, any applicant for a job, promotion, transfer or --
4 not rehire, but job, promotion or transfer must be tested
5 and evaluated, evaluated by superiors in case of
6 promotions, tested by the applicable agency in case of a
7 new hire.

8 With respect to new hires, the personnel code
9 requires that the persons who take the test are listed in
10 a group from the highest-ranking group, or they can -- you
11 can take the three highest on the list of -- passed the
12 test. And promotions must be made from a list of
13 qualified employees. All of the people who were hired or
14 promoted under the system alleged in the complaint
15 qualified under the Illinois personnel code, and it is not
16 alleged to the contrary.

17 But the code allows play. There is play in the
18 code within those qualified people. And what it allows is
19 that the persons who are at the heads of the department or
20 the hiring authority may select among those qualified,
21 persons who are recommended, persons who are political
22 supporters, or persons who are friends of those who
23 recommend and are political supporters, so that we start
24 out with the underlying proposition that the Illinois
25 personnel code is not in anyway defeated or diminished by

1 this system and that no one who is not qualified for a job
2 or a promotion has been hired or promoted.

3 QUESTION: Mr. Sullivan, were all of the named
4 plaintiffs here processed through that civil service
5 system and tested and examined and rated and so forth?

6 MR. SULLIVAN: Yes, they were. All but Moore
7 were already employed. And in fact -- but the answer is
8 yes, and Moore was tested.

9 QUESTION: And they were included in the list of
10 eligibles for promotion, transfer, et cetera?

11 MR. SULLIVAN: Yes. And indeed, Justice
12 O'Connor, two of the plaintiffs, O'Brien and Standefer,
13 who are here complaining about the system, got jobs under
14 the system. Standefer was hired, I think it was 1984,
15 after this system was in place, and claims that he voted
16 only in the Democratic primary. And O'Brien, after a
17 layoff which had nothing to do with politics, a layoff he
18 does not complain about, was rehired, he says after he
19 obtained the support of the Republican county chairman,
20 but he does not say he changed his political affiliation.

21 QUESTION: Well, we're here on a motion to
22 dismiss, I guess.

23 MR. SULLIVAN: Yes. But, I'm telling you what
24 you --

25 QUESTION: I am just trying to find out whether

1 they all were tested and processed through the civil
2 service system.

3 MR. SULLIVAN: The answer is yes.

4 So that this complaint alleges, and I think if
5 Your Honors were to look at paragraph -- I think it's
6 11(F) of the complaint, at, which is in the brief in
7 opposition record Appendix 7, they allege that in making
8 hiring decisions, and this is within --

9 QUESTION: Where are you reading from, Mr.
10 Sullivan?

11 MR. SULLIVAN: All right. It's in the orange
12 brief in opposition, and it is in the Appendix RA-7.

13 QUESTION: Is that orange?

14 QUESTION: Tangerine.

15 MR. SULLIVAN: It looks orange to me.

16 QUESTION: Oh, I didn't know. Do we have an
17 orange color? Do we have a color in our -- do we have
18 that color?

19 (Laughter.)

20 MR. SULLIVAN: Okay. It's 11(F).

21 QUESTION: 11(F)?

22 MR. SULLIVAN: 11(F). And here is the
23 allegation. And that this -- also, I would like to point
24 out that at the beginning it says that the hiring
25 decisions are substantially motivated by political

1 considerations. It is not a strict test; it is what
2 consideration is given to this favored class, the ones --

3 QUESTION: Mr. Sullivan, would it make any
4 difference? Supposing they had a strict test, would you
5 defend it? If you cannot -- say the Governor put out an
6 order you cannot be promoted unless you agree to vote
7 Republican next year.

8 MR. SULLIVAN: We would defend such a system.
9 It is not the systems here. Governor Thompson I think
10 would not subscribe to such a system.

11 QUESTION: Why not, if he believes in the
12 patronage system?

13 MR. SULLIVAN: Your Honor, this system -- I want
14 to make it clear, Justice Stevens, this system permits the
15 hiring of Democrats. And two of the people here in the
16 complaint --

17 QUESTION: Yes, but you have to acknowledge you
18 get a head start if you are Republican, I think, don't
19 you?

20 MR. SULLIVAN: Well, that may be, but if you
21 look at 11(F) --

22 QUESTION: And isn't the legal issue the same
23 whether it is just a head start or a flat qualification?
24 That is what I'm -- well, I'm puzzled by your argument.

25 MR. SULLIVAN: I think that if it were a strict

1 political test it would be a more difficult case for us,
2 and we do not have that case.

3 QUESTION: Didn't the court of appeals face
4 right up to it?

5 MR. SULLIVAN: No, I think that both the
6 district court and the court of appeals recognized that
7 this was a loose system of friendships and political
8 considerations and not a strict -- the loyalty oath to the
9 Republican party test.

10 QUESTION: Well, didn't they decide that even if
11 it was it's perfectly okay with -- didn't they say that
12 this preference is only -- is limited to certain
13 categories?

14 MR. SULLIVAN: No, Your Honor. They --

15 QUESTION: Well, didn't it say it doesn't make
16 any difference with new hires, for example?

17 MR. SULLIVAN: Yes, they said -- they said with
18 respect to new hires you may take these friendship and
19 political connections into consideration among qualified
20 candidates, as did Judge Baker.

21 QUESTION: And you can't, and you couldn't get a
22 job without -- with ^{out} being cleared politically. Isn't that
23 right?

24 MR. SULLIVAN: Actually it is not. But because,
25 if you look at paragraph 11(F), Justice White, you will

1 see that the categories that they allege here are -- for
2 example, or is sponsored by a member of the Illinois
3 General Assembly who is deemed to be a friend or supporter
4 of Defendant Thompson. Now, the Illinois General Assembly
5 for years has been controlled by the Democrats. And Mr. -
6 - Governor Thompson has many friends in the Illinois
7 General Assembly who he needs to get his program through
8 who are Democrats. This system permits the hiring of
9 Democrats as well as Republicans, and indeed the hiring of
10 people who have no political affiliation whatsoever.

11 It talks about friends of a Republican. That
12 person could be a Democrat; it could be one with no
13 political affiliation whatever.

14 QUESTION: But with respect to the individuals
15 involved here, aren't the allegations that each of them
16 failed to either get a promotion or a transfer or a
17 rehire, and it was because they could not produce any
18 evidence of whatever you call it, loyalty to the
19 Republican party.

20 MR. SULLIVAN: They lack the connection or
21 sponsorship of such a person. That is correct. Except
22 that two of them, as I pointed out before, O'Brien and
23 Standefer, were hired under this system.

24 QUESTION: How about the others?

25 MR. SULLIVAN: Moore was not hired, and Ms.

1 Rutan was not promoted. Mr. Taylor was not transferred.

2 QUESTION: Because of the failure to have
3 sponsorship?

4 MR. SULLIVAN: They claim that it -- they allege
5 --

6 QUESTION: Well, that is the allegation.

7 MR. SULLIVAN: That is the allegation, that they
8 failed to have the adequate sponsorship. They do not
9 allege that the persons that were hired or promoted
10 instead of them were not qualified under the personnel
11 code, and indeed they were qualified under the personnel
12 code.

13 QUESTION: What is the relationship between
14 friendship and ability?

15 MR. SULLIVAN: Well, I think, Your Honor, that
16 there is a -- there may be a relationship between
17 friendship and ability, and in --

18 QUESTION: What?

19 MR. SULLIVAN: Well, if you know a person and
20 know his qualifications, it is often better than to employ
21 a stranger. I think that is a matter of common --

22 QUESTION: You didn't say knowledge, you said
23 friendship.

24 MR. SULLIVAN: Well, these -- it may be that
25 there would be none if you don't know anything --

1 QUESTION: Well, what happens to friendship in
2 the primary?

3 MR. SULLIVAN: I'm sorry?

4 QUESTION: What happens to friendship in the
5 primary, where Republicans and Democrats go at each other
6 with hammers and tongs?

7 MR. SULLIVAN: Yes, Your Honor.

8 QUESTION: They are not very friendly, are they?

9 MR. SULLIVAN: Often they are very unfriendly.

10 QUESTION: So you have temporary friendliness.

11 MR. SULLIVAN: That is right.

12 QUESTION: Do you need friendliness in this
13 statute to help you? Do you think it helps you?

14 MR. SULLIVAN: I am not sure I understand --

15 QUESTION: Do you think the word friendship
16 helps you?

17 MR. SULLIVAN: Oh, yes, Your Honor. I think so,
18 because it --

19 QUESTION: And how does it help?

20 MR. SULLIVAN: Well, it demonstrates what
21 happens to be the fact, that you do not have to be a
22 Republican under this system to get hired. If -- a friend
23 of a Republican can be a Democrat. He can be somebody
24 with no political connection whatsoever. They are not
25 alleging a strict partisan test in this case, nor could

1 they.

2 QUESTION: Well, no, but they are alleging a
3 partisan test with respect to these particular people.
4 And these are the people who are before the Court. They
5 didn't have the sponsorship.

6 MR. SULLIVAN: That is -- that is right, Your
7 Honor, and we are saying that this system --

8 QUESTION: Although some other people may not
9 have been discriminated against, these people were,
10 weren't they?

11 MR. SULLIVAN: No, Your Honor, I think not.
12 What is happening --

13 QUESTION: You mean -- maybe that's the wrong
14 word, but the -- but nevertheless they weren't hired
15 because they didn't have Republican connections.

16 MR. SULLIVAN: Well, Your Honor --

17 QUESTION: Isn't that right?

18 MR. SULLIVAN: I think that that -- you could
19 look at it that way --

20 QUESTION: That's what it -- that's the way it
21 is alleged. That's what is alleged.

22 MR. SULLIVAN: What we say is that others were
23 hired instead, or promoted. All right? And that there is
24 a major difference between not getting the job and being
25 fired or retaliated against, such as what happened -- such

1 as happened in the Branti case and the Elrod case. Or in
2 these other cases, such as Keyishian and Perry against
3 Sindermann and those cases. In --

4 QUESTION: Right, but that's -- that's a
5 different point. That's a different point.

6 MR. SULLIVAN: Yes, it is.

7 QUESTION: It's not the point that this is not a
8 partisan, I mean, even taking into account the friendship,
9 it seems to me it's still a very partisan thing. It
10 doesn't help you to be a friend of a Democrat, does it? I
11 mean, it isn't friendship, it's friendship with a
12 Republican. I still consider that partisan.

13 MR. SULLIVAN: Yes, that is true. And -- or a
14 friend of a member of the General Assembly who is deemed
15 to be a friend of the Governor.

16 QUESTION: Who is the big Republican.

17 MR. SULLIVAN: That's right. I agree with what
18 you're saying, Justice Scalia. The point I want to make
19 is, however, that you -- there is no allegation here that
20 any of these people was retaliated against or demoted for
21 his, or his or her job diminished in any way owing to
22 their lack of sponsorship or because they were a Democrat
23 or voted in the Democratic primary.

24 QUESTION: Well, of course, someone applies for
25 a transfer and they are denied the transfer, you really

1 wouldn't expect further retaliation, would you?

2 MR. SULLIVAN: Well, that person had been in
3 that job in that county for years, Your Honor, so, it
4 wasn't alleged that somebody else got a transfer into that
5 county. He applied for a transfer, he had been working
6 in, whether it was Schuyler or Fulton County, for many
7 years, and wanted to move over to the other county. He
8 was denied that transfer.

9 QUESTION: Of course, there are a lot of
10 employees who are unhappy, I suppose, because they have
11 been in the same job for years without any opportunity to
12 go elsewhere.

13 MR. SULLIVAN: Yes, I am sure there are. I'm
14 sure there are. Both Republicans and Democrats.

15 In any event, Your Honors, we believe and submit
16 to you that there is a major distinction between the -- in
17 the hiring context, which Plaintiff Moore has here, and in
18 the lack of promotion, which Ms. Rutan has here, between
19 the kind of situation where you had in Elrod where the
20 political -- system caused the person to be fired, or in
21 many of these other cases where the person was demoted
22 when the new party came into office.

23 QUESTION: Mr. Sullivan, do you think that
24 distinction is strong enough to support a statute that
25 said no prison guard shall be hired who are not

1 Republicans?

2 MR. SULLIVAN: I think it would be, Your Honor,
3 in light of the countervailing state interest, but --

4 QUESTION: Which is?

5 MR. SULLIVAN: Which -- well, which are that to
6 engender activity and support in the two parties, to have
7 increased participation in the political process, an
8 incentive to those employees to do well who have supported
9 the party, and to provide good representatives of the
10 incumbent party, and --

11 QUESTION: Don't you think that interest can be
12 served by the partisan appointment that goes on for
13 policy-making employees?

14 MR. SULLIVAN: Well, Your Honor, in many
15 respects the people who are in the jobs that are lower
16 than the policy making are the ones who the public deals
17 with, and that -- those are the ones that have the
18 interaction with the public and who the incumbent
19 administration will be judged by. And it is not unusual,
20 it seems to us, that the incumbent administration would
21 want to have persons who support them rather than their
22 opponents out there dealing with the public.

23 QUESTION: Isn't a part of the reason too, Mr.
24 Sullivan, you want to be able to have each party get
25 people to serve as poll watchers and election judges and

1 challengers, the very gritty kind of work at various
2 elections. And the way you get them to do that is promise
3 them -- you can't promise them they are going to be
4 secretary of state or attorney general. You promise them
5 they'll be a bailiff's assistant or something like that.

6 MR. SULLIVAN: Yes, Your Honor, that -- that is
7 another consideration that is there, and the activity in
8 the party between the elections is another important thing
9 here that is served by this system.

10 Another factor I think that's important to
11 consider, although it is not dispositive, I don't think
12 any of these points is dispositive, but I think to look at
13 the history of the United States and to see that any one
14 of the state legislatures that wishes to impose a strict
15 civil service system, take a test, the top one gets the
16 job, they are all free to do that.

17 QUESTION: Yes, but what do you say, Mr.
18 Sullivan, to your opponents argument that a lot of them
19 have done that and the two-party system has survived quite
20 well in those states?

21 MR. SULLIVAN: Well, perhaps that is so, perhaps
22 it isn't so. But isn't it up to each state and each
23 mosquito abatement district and each county and each
24 village to decide that for themselves and to --

25 QUESTION: Well, Judge Ripple made the

1 suggestion that we might understand these issues a lot
2 more if we had a full hearing at which the parties could
3 develop their evidence and show how valuable the system
4 is. I don't know, maybe you're dead right. Maybe you
5 won't get any prison guards if they don't agree to vote
6 Republican. I just don't know. He thought you ought to
7 have a hearing on it, but you think we can all -- we can
8 take judicial notice of all this history.

9 MR. SULLIVAN: I think the history is very well
10 defined; it's all in the books. Thomas Jefferson apparent
11 -- according to the books I have read, was one of the
12 leaders in the hiring of his political supporters, and for
13 good reason, for obvious reasons. And I am not talking,
14 Justice Stevens, about the secretary of state.

15 QUESTION: Isn't there a little difference
16 between Thomas Jefferson's day and my day?

17 MR. SULLIVAN: Oh, yes, Your Honor, there is --
18 there is lots of things --

19 QUESTION: Well, let's talk about today.

20 MR. SULLIVAN: All right, I am talking about
21 today, and I say that under the system that we have in --
22 take Illinois today. Illinois today, of the five state
23 offices that are elected, three are in the hands of
24 Democrats and two -- one -- of the four, one is in the
25 hands of the Republicans. Now, the Illinois General

1 Assembly, which is controlled by the Democrats, could at
2 any time -- the Democratic -- if they didn't like this
3 system could introduce a statute to change it and to
4 change this personnel code to say of those three top
5 applicants you must take the one that tested the highest.
6 They have not sought or seen fit to do so.

7 The question then is does the First Amendment
8 require a strict civil service system that cannot take any
9 consideration into political factors or friendship
10 factors. And it is our submission to Your Honors that it
11 does not. That it has never been thought to do so, and it
12 does not. And to suggest that every time one of these
13 local governments made an employment decision that they
14 were risking a Federal lawsuit is going very far and would
15 be most disruptive of the local governments and the
16 operation of the local governments, which ought to be left
17 to those --

18 QUESTION: They do run a lawsuit now under Elrod
19 when they make a hiring decision.

20 MR. SULLIVAN: A firing.

21 QUESTION: I'm sorry, a firing decision. But
22 you say that's -- that's not likely to be as numerous as
23 promotions, transfers, hiring.

24 MR. SULLIVAN: Well, when you have a firing you
25 have a specific person who has been retaliated against.

1 When you have a promotion you can have four or five people
2 that submit their applications for the promotion. Each
3 feels he's the -- he or she is the best qualified.
4 Similarly with respect to a job. You have, you can have
5 multiple applicants for that job. Each of them can say I
6 wasn't picked because I was not a friend of a Republican,
7 or something like that. So there you are.

8 QUESTION: Well, what (inaudible)?

9 MR. SULLIVAN: We say, Justice White --

10 QUESTION: Because it was alleged here that is
11 exactly what --

12 MR. SULLIVAN: Right, and we -- just to face
13 right up to that, we say that that is not a basis for
14 claiming a violation of the First Amendment right.

15 QUESTION: Whether it's a hiring or a promotion
16 or what.

17 MR. SULLIVAN: Right. So long as the personnel
18 code has been followed, the person is qualified for the
19 job, and so long as there is no retaliation, there is no
20 adverse action taken against anyone.

21 QUESTION: Well, I guess you have to acknowledge
22 that is some kind of a burden on the right of political
23 association of the employee, that system you describe.

24 MR. SULLIVAN: Well, we --

25 QUESTION: It does that in some fashion.

1 MR. SULLIVAN: We submit, Your Honor, that the
2 burden of the -- as you, when you compare the subtle
3 expectations in a job, which the Court in the Wygant case
4 and the Johnson case for example looked at, and compare
5 that to the -- the person who is seeking a job and doesn't
6 get the job, he is in no different -- he or she is in no
7 different position than when he started. Or the
8 promotion. Ms. Rutan still has the job she had. Those
9 interests are not sufficient when weighed against the
10 other interests, the countervailing interests, to require
11 that First Amendment exclude all political and friendship
12 considerations from these decisions.

13 QUESTION: Do you want us then to decide the
14 case on the assumption that the Illinois system does
15 coerce political activities and political beliefs?

16 MR. SULLIVAN: No, Your Honor, and it is not --

17 QUESTION: Well, I thought that -- that the
18 opposite was your point. You are justifying it by saying
19 that it encourages party activity in those that are
20 partisanship --

21 MR. SULLIVAN: It does in some. It does in
22 some.

23 QUESTION: Well, how -- you can't have it both
24 ways. It either coerces party membership and party
25 activity or it doesn't. Which is it?

1 MR. SULLIVAN: Well, Your Honor, in -- this
2 system will benefit -- will benefit both Democrats and
3 Republicans --

4 QUESTION: I am not talking about who is benefit
5 and who is hurt. I am asking about the proposition
6 whether or not this is coercive of a person's political
7 beliefs and political expression and political
8 participation?

9 MR. SULLIVAN: I -- I do not think it is.

10 QUESTION: Well then, I don't see how it serves
11 the interest that you have been claiming in the first half
12 of the argument that it does, that it promotes party --
13 that it promotes the party --

14 QUESTION: You ought to tighten it up a little.

15 MR. SULLIVAN: Pardon me?

16 QUESTION: You ought to tighten it up a little;
17 it's too loose. It's not doing the job you want it to do.

18 MR. SULLIVAN: What I am trying to say is that I
19 think it works both ways. It does give benefits to those
20 who support the incumbent party, and it also --

21 QUESTION: All right, so then you want us to
22 decide the case on the assumption that this is coercive of
23 political beliefs and political expression.

24 MR. SULLIVAN: I am not, Your Honor, and I was
25 about to say that -- that it also -- this system also can

1 work to the benefit of those who are in the other side of
2 the political aisle, the Democrats can get hired under
3 this system, as two of these plaintiffs have. So, they
4 weren't coerced in their beliefs in any way. And -- but
5 whatever, however you want to characterize this system,
6 you are talking about the incidental -- the incidental
7 effect on someone who is not selected for promotion or
8 hire. Not someone who has been fired or demoted, or whose
9 job has been diminished in the slightest by the incumbent
10 administration.

11 QUESTION: Mr. Sullivan, do we know how many
12 people are affected by this practice in Illinois?

13 MR. SULLIVAN: Well, we -- no, there is --

14 QUESTION: Nonpolicy-making, nonconfidential
15 people.

16 MR. SULLIVAN: It is, I think the number 60,000
17 jobs was used. However, there are collective bargaining
18 agreements that cut across this. So the number is not in
19 the record, Justice Stevens.

20 QUESTION: I see.

21 MR. SULLIVAN: Mr. Chief Justice, if the members
22 of the Court have no other questions, that is our
23 submission.

24 QUESTION: Thank you, Mr. Sullivan.

25 Ms. Leahy, you have six minutes remaining.

1 REBUTTAL ARGUMENT OF MARY LEE LEAHY
2 ON BEHALF OF THE PETITIONERS/CROSS-RESPONDENTS

3 MRS. LEAHY: May it please the Court:

4 I believe the complaint, read fairly to the
5 petitioners and cross-respondents, clearly makes the point
6 that what happened to these people happened because they
7 did not support the incumbent party. We have clearly met
8 the standard that would be required under Mt. Healthy that
9 political consideration be a substantial or motivating
10 factor.

11 I would like to make just a couple of comments
12 about the state civil service system. In terms of the
13 test being administered and the grades being given, yes,
14 that is in place. But as we pled in our complaint, it is
15 not the department or agency that is making the decision
16 about filling these position. It is the Governor's Office
17 of Personnel. And they superimpose, then, on those who
18 meet the minimal qualifications the requirement of
19 sponsorship.

20 QUESTION: (Inaudible) make much difference;
21 they both are qualified, as long as the choice is made to
22 pick the well-qualified Republican.

23 MRS. LEAHY: No, Your Honor, in this case,
24 specifically pled, that Petitioners Rutan and Taylor were
25 more qualified than who was chosen.

1 QUESTION: Well, I know, but it wouldn't -- your
2 case would be just as good on -- your constitutional
3 argument if they were equally qualified.

4 MRS. LEAHY: That is correct, Your Honor.
5 That's the decisive factor.

6 Just a couple of comments about an increase in
7 litigation. We submit that under the rule of law that we
8 seek there would be less likelihood of that, because what
9 we are asking for is a clear rule, thou shalt not, except
10 in policy-making positions. That is a rule that can be
11 clearly understood by the employer. If there is not
12 political hiring and if the office is administered in an
13 even-handed manner, there isn't going to be litigation.

14 We have looked at the circuits, the Second, the
15 Third, the Eleventh and the D.C. circuits that have
16 adopted this kind of rule of law, and there has not been
17 that increase in litigation. We submit that the
18 possibilities are far more in the area of race or sex
19 discrimination, and yet no one would suggest to this
20 Court, at least I hope not, that, if a person is denied a
21 job because of their sex or because of their race, that
22 they have not stated a cause of action. The possibility
23 is far more in terms of litigation in those two areas than
24 it is in this area.

25 We submit that the state of law as it is under

1 the Seventh Circuit requires far more litigation. The
2 Seventh Circuit has held that you do have a cause of
3 action if you are harassed for your political affiliation,
4 but you only have a cause of action for failure to promote
5 if it reaches the level of constructive discharge. But in
6 the harassment claim you don't have to reach the level of
7 constructive discharge. That is asking the courts to
8 litigate not only the protected right, but then does it
9 reach the level of constructive discharge. It does not
10 give sound guidance to the employer who has to make the
11 decision.

12 We are asking this Court to hold that political
13 affiliation, which was considered constitutionally
14 impermissible in discharge, that those factors are
15 constitutionally impermissible in denial of these very
16 important public benefits. The Court has repeatedly -- it
17 was explained in Perry, in Elrod, in Branti. The
18 principles were reaffirmed in Connick, they were
19 reaffirmed in McPherson v. Rankin. Those principles of
20 law are good, and they should apply in this case. The
21 state may not deny a benefit, these benefits, for
22 constitutionally impermissible reasons.

23 Thank you.

24 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Leahy.

25 The case is submitted.

1 (Whereupon, at 1:51 p.m., the case in the above-
2 entitled matter was submitted.)
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 88-1872 - CYNTHIA RUTAN, ET AL., Petitioners V. REPUBLICAN PARTY OF ILLINOIS, ET AL.; and

No. 88-2074 - MARK FRECH, ET AL., Cross-Petitioners V. CYNTHIA RUTAN, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Leona M. May*
(SIGNATURE OF REPORTER)

LEONA M. MAY
(NAME OF REPORTER - TYPED)

RECEIVED
SOUTH
MA

'90 JUN 23 P 4 45