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# Will the Supreme Court Sound the Death Knell for Political Patronage? An Analysis of *O'Hare Truck Services, Inc. v. City of Northlake*

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# Case at a Glance

Given statutory and civil service limits on political patronage, such patronage may not be in the best of health but is still very much alive. This case directly challenges one of its remaining vestiges. A tow truck operator who lost his place on a police department's dispatch list because he supported the mayor's opponent asserts that the government's political-patronage decision violates his First Amendment rights. Now the Supreme Court decides if political patronage again must yield to the Constitution.



## Will the Supreme Court Sound the Death Knell for Political Patronage?

by Barbara J. Fick

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"To the victor belong the spoils" is a philosophy which has a long, if not venerable, tradition in American politics, since the founding of the Republic. Over the years, however, the tradition has eroded.

The civil service reform movement replaced political patronage in public employment with the merit principle, and federal and state laws were enacted requiring the award of government contracts to the lowest bidder rather than to the cronies of incumbents. Nonetheless, vestiges of political patronage continue to survive. This case presents the Supreme Court with the opportunity to decide if the patronage principle is consistent with the guarantees of free speech and association found in the First Amendment.

### ISSUE

Does use of the traditional system of political patronage in awarding government contracts infringe on First Amendment rights?

### FACTS

The Northlake, Illinois, Police Department maintains a list of towing companies which it consults whenever a vehicle must be moved.

When there is an accident or a vehicle is abandoned, a police dispatcher calls a towing company on the list. If that company is unable to respond, the dispatcher contacts the next company on the list "in rotation." The practice is intended to ensure that towing work is distributed to all companies on the list.

Neither the Northlake Police Department nor the City of Northlake contract directly with any towing company. Companies are compensated in the form of towing fees which are paid directly by the owner of the vehicle.

Since 1965, O'Hare Truck Services, Inc. ("O'Hare Truck" or "O'Hare"), owned by John Gratziana, has been entered on the Northlake Police Department's rotation list of towing companies. During the 1993 election campaign for mayor of Northlake, the incumbent's reelection committee asked Gratziana, for a contribution. Gratziana declined the request and openly

*O'HARE TRUCK SERVICE, INC. AND JOHN A. GRATZIANA V. CITY OF NORTHLAKE, ILLINOIS, MAYOR REID PAXSON, AND POLICE CHIEF SEYMOUR SAPOZNIK  
DOCKET NO. 95-191*

ARGUMENT DATE:  
MARCH 20, 1996  
FROM: THE SEVENTH CIRCUIT



supported the incumbent's opponent. The incumbent won, and shortly thereafter O'Hare Truck was removed from the towing list.

O'Hare Truck and Gratianna filed suit in federal district court against the City of Northlake, its mayor, and police chief (collectively, "Northlake"), alleging that O'Hare's removal from the rotation list in retaliation for Gratianna's political support of the mayor's opponent violated his rights of free speech and political association guaranteed by the First Amendment.

The district court granted Northlake's motion to dismiss the lawsuit. 843 F. Supp. 1231 (N.D. Ill. 1994). The court concluded that it was bound to follow *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705, 710 (7th Cir. 1991), a case in which the Seventh Circuit held that "political favoritism in the awarding of public contracts is not actionable."

O'Hare and Gratianna appealed to the Seventh Circuit which affirmed, following its earlier holding in *Downtown Auto Parks*. 48 F.3d 883 (7th Cir. 1995). The Supreme Court granted the petition for a writ of certiorari filed by O'Hare and Gratianna to decide if government is restrained in awarding government contracts by the First Amendment. 116 S. Ct. 593 (1995).

## CASE ANALYSIS

There is no question but that Gratianna's refusal to support the incumbent mayor and his decision to support the mayor's opponent implicate the First Amendment. As former Justice Brennan stated in a three-Justice plurality opinion in *Elrod v. Burns*, 427 U.S. 347, 356 (1976), "political belief and association constitute the core of those activities protected by the First

Amendment." (Refer to Glossary for the definition of plurality opinion.) The question presented by this case is whether political patronage in the awarding of government contracts infringes these core First Amendment rights and, if so, whether the government can justify the infringement.

The Supreme Court has struggled with questions of First Amendment rights and political patronage over a series of cases in the context of government employment. In *Elrod*, five Justices agreed that a nonpolicymaking, nonconfidential government employee cannot be discharged from a job that he or she is performing satisfactorily solely because of his or her political beliefs. In arriving at that conclusion, the *Elrod* plurality opinion noted that discharging an employee because of his or her political beliefs constitutes a significant impairment of First Amendment rights. In order to justify such an impairment, the plurality opinion applied a strict scrutiny analysis which requires that the government's interest in maintaining a patronage system must be an interest of vital importance and that the means used to achieve that interest must be narrowly tailored, a burden that was not met in *Elrod*.

In dissent, former Justice Powell suggested that the plurality opinion had "seriously understated the strength of the government interest . . . in allowing some patronage hiring practices, and . . . exaggerated the perceived burden on First Amendment rights." 427 U.S. at 382. Justice Powell concluded that "patronage hiring practices make a sufficiently substantial contribution to the practical functioning of our democratic system to support their relatively modest intrusion on First Amendment interests." 427 U.S. at 388-89.

The debate among the Justices in *Elrod* resurfaced in *Rutan v. Republic Party of Illinois*, 497 U.S. 62 (1990), a case dealing with promotion, transfer, recall, and hiring decisions involving public employees based on their political affiliation. The majority in *Rutan* again concluded that government employment decisions based on political affiliation significantly impair First Amendment rights and that the government employer had failed to justify the infringement.

Justice Scalia dissented, arguing that the Court's use of the strict scrutiny test in analyzing the government's employment-related actions was inappropriate. According to Justice Scalia, the correct test is whether or not the advantages derived from a system of political patronage can reasonably be deemed to outweigh its coercive effect.

Although First Amendment limits on the use of political patronage in the public employment context are settled, this case requires the Court to consider patronage in the context of awarding government contracts. The Seventh Circuit, in deciding this case, joined the Third and Eighth Circuits and held that there are enough differences in the strength of the competing interests in the two classes of cases — government employee cases versus government contractor cases — to warrant a decision against extending the *Elrod-Rutan* line of cases to public contractors. See *Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986); *Sweeney v. Bond*, 669 F.2d 542 (8th Cir. 1982).

The argument against extending the Court's *Elrod-Rutan* holdings to the government contractor context emphasizes the difference in the magnitude of the harm caused

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by the government's patronage-based action. When a government employee is discharged, the employee generally has lost his or her sole source of income and faces the prospect of a sustained period of unemployment and the specter of eventual underemployment.

Few government contractors, on the other hand, depend solely on one contract for their livelihoods. Government contractors, who are essentially independent contractors, have other customers and there are other contracts on which they can bid. Moreover, the individual government worker's support for a political party generally is based on the worker's political beliefs, whereas many independent contractors doing business with government are politically neutral to the extent that they support both major parties in order to "cover their bases." Thus, the magnitude of the harm suffered as well as the impact on political beliefs is different in degree for an independent contractor than it is for an individual government employee.

Those in favor of extending the *Elrod-Rutan* holdings to independent government contractors, however, point out that the degree of harm suffered has not been a determinative factor in deciding whether or not patronage systems violate the First Amendment. In *Rutan*, for example, the Court stated that the degree of economic harm suffered is irrelevant to whether or not an employee has sustained injury in retaliation for exercising rights guaranteed by the First Amendment. Moreover, for some businesses, government contracts may constitute the majority of work, and the loss of a contract may not be replaced easily. Beyond sheer economics, the Court has recognized that "the inherent worth of the speech in terms of its capacity for informing the public does not depend on the

identity of its source, whether corporation, association, union, or individual." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (emphasis added).

The second issue over which the parties disagree is the importance of the role served by political patronage. Justice Scalia in his dissent in *Rutan* noted the "systemic effects of patronage in promoting political stability and facilitating the social and political integration of previously powerless groups." 497 U.S. at 103-04. A similar point was made by Justice Powell in his dissent in *Elrod*: "Patronage practices broadened the base of political participation by providing incentives to take part in the process, thereby increasing the volume of political discourse in society." 427 U.S. at 379.

Making a related point, Northlake argues that patronage serves the interest of government efficiency in relation to the performance of public services by independent contractors. The failure to properly provide public services can impact directly and adversely on elected officials. An independent contractor who supports the political opposition could undermine incumbents through inefficient performance. And because the work of independent contractors is not subject to direct government monitoring and control, the only way to exert any control is through contract termination. Any limitation on the power to terminate an independent contractor would destroy the ability of elected officials to control the delivery of public services.

Those who favor extending the Court's *Elrod-Rutan* holdings to independent government contractors counter the efficiency argument by noting that there is no basis for assuming that differences in political opinion lead to poor perfor-

mance. If an independent contractor is not meeting its performance responsibilities under its contract, the government is free to sanction the poor performance by terminating the contract. What government cannot do is assume that poor performance is based on the political affiliation of the contractor.

The third area of dispute between the parties is the standard of judicial review to be used in evaluating the government's patronage-based conduct. Borrowing from Justice Scalia's analysis in his *Rutan* dissent, Northlake would argue that the appropriate standard is whether the benefits gained from a patronage system can reasonably be said to outweigh the relatively limited impact on an independent contractor's First Amendment rights. The Seventh Circuit cases in this area seem to go even further, suggesting that no balancing of competing interests is required because political favoritism in awarding government contracts does not violate the First Amendment. *Downtown Auto Parks*, 938 F.2d at 710; *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983).

O'Hare Truck counters by arguing that the Court should apply the strict scrutiny test of *Elrod* and *Rutan*, requiring the government to establish that its patronage practices are narrowly tailored to achieve compelling governmental interests.

## SIGNIFICANCE

The Supreme Court this Term appears to be considering seriously the intersection between the First Amendment's free speech and association rights, on the one hand, and political patronage, on the other. Earlier this Term, the Court heard arguments in the case of *Heiser v. Umbehr*, No. 94-1654 (U.S. argued Nov. 28, 1995); 3 **ABA PREVIEW** 112 (Nov. 17, 1995), which concerns an independent contractor's claim



that his trash hauling contract with a county commission was terminated because of his criticism of the commission's policies. And with this case, the Court is presented with a classic political-patronage scenario — termination of a contract based on party affiliation. Clearly, the Court's decisions in these cases will provide guidance to state and local governmental units about the restrictions, if any, that the First Amendment places on their decisionmaking discretion in awarding government contracts.

The Seventh Circuit in its decision in the present case warned that a consequence of imposing restrictions in this area "would invite every disappointed bidder for a public contract to bring a federal suit against the government purchaser." 47 F.3d at 885. On the other hand, if independent contractors are denied protection against government retaliation prompted by their First Amendment activities, an entire class of persons could be effectively silenced in the political arena. Given the sheer volume of government contracts, the Court's decision will have far-reaching effects regardless of which party prevails.

### **ATTORNEYS OF THE PARTIES**

**For O'Hare Truck Service, Inc. and John A. Gratianna** (Harvey Grossman; Roger Baldwin Foundation of the ACLU, Inc.; (312) 201-9740.

**For City of Northlake, Illinois, Mayor Reid Paxson, and Police Chief Seymour Sapoznik** (Gary M. Feiereisel; Fraterrigo, Best & Beranek; (312) 782-9255).

### **AMICUS BRIEFS**

**In support of O'Hare Truck Service, Inc. and John A. Gratianna**

Towing & Recovery Association of America, Inc. (Counsel of Record: Robert A. Hirsch; Krukowski & Costello; (202) 659-4799).

**In support of City of Northlake, Illinois, Mayor Reid Paxson, and Police Chief Seymour Sapoznik**

Illinois State Officials (Counsel of Record: Jeffrey D. Colman; Jenner & Block; (312) 222-9350).