OFFICE OF EXECUTIVE INSPECTOR GENERAL
OEIG Self Initiated Case
(Predicate)

Case No. 11-01567 Date Sep 16, 2011

An article in the September 1, 2011 edition of the Springfield Journal-Register reported the hiring of Ashley Carpenter at the Illinois Department of Transportation (IDOT). Ms. Carpenter is reported to be the daughter of Acting IDOT Secretary Ann Schneider. According to the article, Ms. Carpenter was hired into the position of technical manager II in 2007.

The OEIG is currently investigating two complaints -- Case Nos. 11-00553 and 11-00713 -- that allege that family members of IDOT senior managers were hired inappropriately. In both cases, the family members were hired into technical manager II staff assistant positions. According to information obtained in Case No. 11-00553, these positions are double-exempt positions. These positions reportedly exist in IDOT offices across the State. In Case No. 11-00553, the IDOT employee filling the position appears to be unqualified to perform the duties in the existing job description. Further, the job descriptions include policy-making duties, resulting in Central Management Services determining the positions are exempt from Rutan hiring procedures. At least in the case of 11-00553, it appears that the staff assistant is not performing any duties that would warrant an exemption from Rutan requirements.

Because of the potential for hiring abuses and information that relatives of senior IDOT managers are being hired as "staff assistants," the OEIG will open a wider investigation on the staff assistant positions within IDOT. The investigation will seek information on the staff assistant positions statewide. The focus of the investigation will be on how these positions are being created, whether position descriptions are being manipulated to have the positions exempted from Rutan, what the qualifications of the employees filling the positions are, and the relationships between these employees and senior IDOT managers or others with influence within IDOT.

Kristy Shores	Cole S. Kain	Ricardo Meza
Deputy Inspector General	Chief of Staff/General Counsel	Executive Inspector General
Kristy L Shores	Cole S Kain	Ricardo Meza
Date Sep 16, 2011	Date Sep 19, 2011	Date Sep 19, 2011

☐ Attachments

EXHIBIT 1

Ms. Ann L. Schneider - Secretary of Transportation
Illinois Department of Transportation
2300 S. Dirksen Parkway
Springfield, IL 62764

RECEIVED
2011 DEC 27 A 11:57
OFFICE OF THE SECRETARY
ILLINOIS DEPT OF TRANSPORTATION

12/21/11

Madam Secretary:

I wish to relate to you the ethical and professional misconduct going on at the Illinois Department of Transportation – Division of Aeronautics regarding the addition of individuals to the staff under the title of Staff Assistant. These people are being added under the pay title of a Technical Manager II without in any way being interviewed for any position. They are then assuming duties that would normally be done by positions that are currently vacant on the Division organizational chart, but would need to be interviewed and filled by qualified individuals.

Currently the amount of staff personnel that are not part of Operations (mechanics & pilots) comprises 40 people at Aeronautics. As of this date, there are 10 staff assistants at Aero, or 25% of the staff. None of these individuals interviewed for their current job at Aero. Considering there is upwards of 20-30 open positions on the organizational chart that need to be filled the in Safety, Engineering, and Administrative Sections, I find this constant stream of new, unqualified, and sometimes useless individuals offensive as both a taxpayer and a professional employee. Even as I write this letter, another cubical is being cleaned up and prepared for someone new, yet the Division has conducted 1 interview in the last year for an open position, which was filled by an in-house person 2 months ago. Combine that with the fact that, for some of these individuals, the current staff is being told to "train" them or find things for them to do, thus taking time away from the duties they should be doing, and you have the recipe for both low morale as well as contractual violations with Teamsters and AFSCME.

Just as newspapers are calling for investigations into state pension system misconduct reform, these acts tie into that with unqualified people being put on the payroll and into the pension system that are not qualified to do the job duties they are given and unfairly burdening the remaining qualified staff with their incompetence. While some of these individuals may be qualified to fill the open positions at Aero, they should at least have to go through the interview process first. This current process of having these Staff Assistants do the job first, then open up interviews for the spot they have been doing, is a violation of the heart of the union contracts that the Administration is suppose to abide by. It is interesting to see the hypocrisy demonstrated every day by the administration in calling for cuts to worker benefits and re-organizing the pension system, and then see another unqualified person come in who did not interview for the job and get paid a 40-50K salary for doing nothing.

As such, I ask you to investigate this gross injustice of taxpayer dollars and violation of the core of the union contracts in an effort to stop the Administration from continually burdening both the taxpayers and the state employees at the IDOT Division of Aeronautics with these unqualified, politically-connected, and incompetent people labeled as Staff Assistants. Thank you for your time and effort in helping the State of Illinois and its government workers.

Cc: Teamsters Local 916, AFSCME Council 31

EXHIBIT 2

PAR #59093
Department Of Transportation

Jump to PAR: [ ] [PAR list] [PSC list] [Main Menu]

My Action Comment: [ ] Post

Hiring Information

MIKE.WOODS - This PPT position will not be posted. It will be filled by a Rutan exempt appointment. [x]

Archive

Workflow
Director: ann schneider
OMB: REDACTED
Gov DCS:
Can post: APPROVED
Gov DCS: ??
Can hire: APPROVED

Maximum headcount : 5,526 Certified headcount : 5,236 Pending headcount : 17
IPR #36043
742101

Candidate	Salary Request	Previous Salary	Percent Change	Incumbent's Salary
Employee 205	45,720	45,720	0.0%	0

Comments: No previous incumbent due to this being an additional position to assist the Bureau Chief in an increased workload. This is the minimum salary for the TM II position. Salary bracket effective 1-1-11 $45,720-81,540 annually.

Budget Title: TM II (PPT) (Double Exempt) (collective bargaining)	**Functional Title:** Staff Assistant
Summary of duties Serves as a confidential assistant to the Bureau Chief, policy analyst, and liaison.	**Work location** Finance & Administration Personnel Management Sangamon County
Type of appointment BA 045 - Exempt Appointment	**Funding source** Road Fund
Headcount impact 1	**Position number** PW412-23-40-300-00-03

Why does this vacancy or new position exist?
This is an additional position to assist the Bureau Chief of Personnel Management in an increased workload.

What critical, front-line service needs will the position fill? How many similar positions are in the agency and in this location? What is the appropriate level of staffing for this position? Why?
This position assists the Personnel Support Coordinator in coordinating department wide issues. This position is accountable for assisting in the overall development and coordination of policy and directives regarding programs developed by the Bureau of Personnel Management. This position monitors conformance to existing policies and conducts reviews or studies that are of special interest. S/He provides policy interpretation and analysis. In addition, this position provides assistance to elected officials and the general public. There is one (1) position within the agency at this location. The authorized level of staffing is one (1), and it is vacant.

What will happen if the position is not filled by a certain date?
Assistance to the Director in the tactical aspects of developing and/or positions to be taken by the Bureau of Personnel Management on policies and procedures affecting the Department will not be handled in a timely manner.

What is the salary for the new position? What position does the proposed candidate

currently hold? At what salary?
The salary range for this position is $3,810-$6,795/month. There is no proposed candidate at this time.

Please provide any additional information necessary to justify an exception to Executive Order 1.
The Bureau Chief is in need of a confidential assistant, who can serve as a liaison between elected officials, other state agencies, and the general public.

Pursuant to Executive Order 1, approval is required for all probationary appointments; trainee appointments; provisional appointments; exempt code appointments; emergency appointments; reinstatements; reemployment; promotion to vacant positions (including but not limited to newly created positions); and all term appointment activity, including probationary, reinstatement, renewal, promotion, reinstatements, and transfers to term appointments.

Illinois Department of Transportation

Internal Personnel Request

Division/Office: Highways/Region 2/District 2	Bureau: Administrative Services
Location/County: 819 Depot Avenue, Dixon/Lee	Yard/Zone:
Position Title: Technical Manager II	Working Title: Staff Assistant
Position Number: PW412-23-52-100-00-01	Rutan Status: ☐ Covered ☒ Exempt
	Number of Positions: 1

Requested Action		Action Type	
☒ Appointment	☐ Personal Service Contract	☐ Emergency	☐ Temporary
☐ Promotion	☐ Establish Position	☐ PPT	☒ PFT
☐ Lateral Transfer	☐ Blanket	☐ CO-OP	☐ 75-Day
☐ Reallocation	☐ Voluntary Reduction	☐ Recruit	☐ Intermittent
		☐ Term Appointment	☐ Internship

Previous Incumbent Information

Name	Date Position Vacated / Salary
	☒ Monthly ☐ Annual

Reason for Vacancy or Establishment ☐ ERI

AI

Justification

This position is accountable for assisting in the overall development and coordination of policy and directives regarding bureau programs for the District. This position monitors conformance to existing policies and conducts reviews or studies issues that are of special interest. S/he provides policy interpretation and analysis of policies. In addition, this position provides assistance to the local agencies, elected officials, and the general public.

5-16-11

Is Position Budgeted? ☐ Yes ☐ No	Is Position Within Headcount? ☐ Yes ☐ No
Requesting Director	Date
Director of Finance and Administration: REDACTED	Date: 1-7-11
REDACTED 5-16-11	IPR Number: 35406
	Requisition Number

EXHIBIT 8

PM 2205 (Rev 10/03)

Illinois Department of Transportation

Technical Position Classification Request

Instructions:

Fill in items 1 through 18 as indicated on this form. Incomplete and inaccurate forms may cause delays in processing; therefore, it is essential each item be completed properly.

The immediate supervisor should not be confused with lead workers or positions giving functional guidance. An immediate supervisor not only assigns work but evaluates, disciplines and makes recommendations concerning the leave and employment of subordinates.

Complete the original and two copies of this form along with the original and two copies of the technical position description and forward to the Bureau of Personnel Management. One copy of each will be returned and will serve as notification of the action.

Additional information for completing this form can be located in the procedure manual Title "Writing and Processing Technical Position Descriptions."

For Use Of The Requestor		For Use Of The Bureau of Personnel Management	
1. Date of Request: March 16, 2010	2. Division or Office: OCC		Effective Date: 4/1/10
3. Reason For Submittal: ☒ Est. Position ☐ Alt. Change ☐ Clar. Position ☐ In Training Position ☐ Blue Ribbon Recommended Title: Technical Manager I		Action Taken: ☒ Est. Code ☐ Changed ☐ Clarification ☐ Reallocation	
4. Position Title (If Established): Technical Manager I		Position Title	
5. Position Number (If Established): PW411-23-30-600-00-01		Position Number	
6. Bureau (If necessary include specific District): Civil Rights		Bureau (If necessary include specific District)	
7. Section		Section	
8. Unit		Unit	
9. Sub-Unit		Sub-Unit	
10. Address-Place of Work: 2300 S. Dirksen Prkwy., Spfld.	County Code: 084	Address-Place of Work	County Code
11. Authorized Position(s): One		Authorized Position(s)	
12. Immediate Supervisor-Position Title and Number: PW417-23-30-600-00-01		13. Next Immediate Supervisor-Position Title and Number: PW420-23-30-000-00-01	

14. Positions and number of employees reporting directly to the described position

POSITION NUMBER	POSITION TITLE	AUTHORIZED POSITION(S)

15. Licenses or Certificates Desired or Required

16. Comments

Prepared by the Bureau of Personnel Management

Ethics Statement: Yes ☒ No ☐

Pay Plan: PA (Non-Union) ☐ PM (Union) ☒

Authorization And Approval

17. Bureau Chief or Regional Engineer	Bureau Chief [redacted]
18. Bureau Chief	Secretary, Department of Transportation [redacted]

REDACTED

REDACTED

EXHIBIT 10

ILLINOIS DEPARTMENT OF TRANSPORTATION
POSITION DESCRIPTION

DATE: March 16 2010 POSITION: Staff Assistant

APPROVED BY: [redacted] OFFICE: Chief Counsel/Bureau of Civil Rights

CODE: Jcs\tech\DCC\CR\PW411-23-30-600-00-01 REPORTS TO: Bureau Chief

POSITION PURPOSE

This position is accountable for assisting in the overall development and coordination of policy and directives regarding the Office of Chief Counsel (OCC), Bureau of Civil Rights, programs. This position monitors conformance to existing policies and conducts reviews or studies issues that are of special interest. S/He provides policy interpretation and analysis of policies. In addition, this position provides assistance to the elected officials and the general public.

DIMENSIONS

Departmental Staff: 5,050

NATURE AND SCOPE

This position reports to the Bureau Chief of Civil Rights as do the Title VI Specialist, the Affirmative Action Specialist, the Civil Rights Specialist, the EEO Specialist, the Affirmative Actions Specialist and an Executive Secretary.

The environment of this position is unique in that the incumbent at times provides staff assistance and performs special assignments for Bureau Chief regarding statewide civil rights programs. In order to be most effective, s/he must be able to personally anticipate and identify impending issues and problems, many of a confidential nature, especially issues involving policy and related subjects. The incumbent initiates reviews and/or studies of policy issues and presents, upon almost immediate notice, written and precise documents or outlines for management. This position serves as a spokesperson for OCC civil rights programs and as a liaison between the Bureau Chief, the Director of OCC, the Governor's Office, the legislature, other state agencies and the general public.

The greatest challenge of this position is to ensure the development of the best possible solutions to policy issues within the constraints of budgetary and socioeconomic factors. Typical problems encountered include providing liaison between the bureau and legislators, local officials and others to resolve problems that could delay or halt policy initiatives.

The incumbent assists in the development of policy. This position coordinates information and activities office-wide. S/He manages development of background and position documents which detail specific policy problems, information and possible solutions, and recommends alternative courses of action and positions in dealing with such problems. The issues with which the incumbent typically deals with are of a sensitive and confidential nature of which s/he must be continually aware and exercise discretion. Where issues or problems cross departmental office/division lines, s/he serves as a liaison to ensure proper communication of goals and objectives throughout the process. This position ensures that final presentation of policy information or solutions to management represents all relevant points of view and policy recommendations are of a consistent pattern with past decisions/activities and compatible with the overall objectives and plans. It is essential that the incumbent has the ability to elicit, understand and present divergent views. This position serves as liaison between the Bureau Chief and the Governor's Office, the legislature, other state agencies a

and the general public. S/He assists in responding to written and verbal inquiries from the Governor's Office, the legislature and the general public regarding bureau policies and procedures. This position assists in obtaining a timely response to those inquiries. The incumbent serves as a departmental spokesperson on issues concerning personnel problems to create departmental awareness and develop a suitable climate for initiating corrective actions by conducting presentations to departmental management. This position replies to questions at these presentations through the explanation of the departmental stance in these matters and the explanation of all applicable rules/laws involved with the personnel program.

The incumbent maintains liaison with departmental staff. S/He is in frequent contact with the legislators and the general public regarding proposed legislation and concerning bureau programs. S/He meets frequently with various local officials.

The incumbent is expected to develop new and innovative strategies in addressing and formulating resolutions to policy and other problems. The incumbent is required to operate within the established departmental rules and regulations and in accordance with legislative mandates and executive orders.

The effectiveness of this position is measurable by the timely production of policy reports and documents; by the validity, thoroughness and accuracy of information provided to management; and by the degree of reliance management demonstrates in the incumbent.

PRINCIPAL ACCOUNTABILITIES

1. Serves as confidential assistant to the Bureau Chief in all matters regarding employees.
2. Serves as liaison between the Bureau Chief and the Governor's Office, the legislature, other state agencies and the general public to ensure effective and efficient communication..
3. Serves as departmental spokesperson for civil rights programs conducting presentations to departmental management, elected officials and the general public.
4. Coordinates and assists in imp'ementing policy initiatives. Reports on the process to management.
5. Develops informational documents accurately presenting background and options for addressing issues of policy concern. Develops appropriate policy recommendations to provide maximum benefits to IDOT and the State of Illinois.
6. Provides analysis and recommendations on policy issues for management.
7. Coordinates information on relevant policy issues to ensure that decisions are consistent with past policies and current goals and objectives of the bureau.
8. Ensures compliance with departmental safety rules and practices. Performs all duties in a manner conducive to the fair and equitable treatment of all employees.

Illinois Department of Transportation

Technical Position Classification Request

Instructions:

Items 1 through 18 as listed on this form. Incomplete and inaccurate forms may cause delays in processing. Therefore, it is essential each item be completed properly.

The immediate supervisor should not be confused with lead workers or positions giving functional guidance. An immediate supervisor not only assigns work but evaluates employees and makes recommendations concerning the tenure and employment of subordinates.

Submit the original and two copies of this form along with the original and two copies of the technical position description and forward to the Bureau of Personnel Management. One copy of each will be returned and will serve as notification of the action.

Additional information for completing this form can be located in the procedure manual Title "Writing and Processing Technical Position Descriptions."

For Use Of The Requestor		For Use Of The Bureau of Personnel Management	
1. Date of Request: August 4, 2010	2. Division or Office: DPIT		Effective Date: August 1, 2010
3. Reason For Submittal: ☒ Est. Position ☐ Alt. Change ☐ Clar. Position ☐ In Training Position ☐ Blue Ribbon		Action Taken: ◉ Est. Code ☐ Reall. ☐ Changed ☐ Clarified	
Recommended Title			
4. Position Title (If Established): Technical Manager VI		Position Title	
5. Position Number (If Established): PW416-23-80-000-00-02		Position Number	
6. Bureau (If necessary include specific District)		Bureau (If necessary include specific District)	
7. Section		Section	
8. Unit		Unit	
9. Sub Unit		Sub-Unit	
10. Address-Place of Work: JRTC, Chicago	County Code: 016	Address-Place of Work	County Code
11. Authorized Position(s): One		Authorized Position(s)	
12. Immediate Supervisor-Position Title and Number: PW419-23-80-000-00-01		13. Next Immediate Supervisor-Position Title and Number: Secretary of Transportation	

14. Positions and number of employees reporting directly to the described position

POSITION NUMBER	POSITION TITLE	AUTHORIZED POSITION(S)

15. Licenses or Certificates Desired or Required

16. Comments

Ethics Statement: Yes ☒ No ☐

Prepared by the Bureau of Personnel Mgmt.

Pay Plan: PA (Non-Union) ☐ PM (Union) ☒

Authorization And Approval	
17. Bureau Chief or Regional Engineer	Bureau Chief of Personnel Management: REDACTED
18. Director	Secretary, Department of Transportation: REDACTED

BM 1244 (Rev. 1/90)

EXHIBIT 11

ILLINOIS DEPARTMENT OF TRANSPORTATION
POSITION DESCRIPTION

DATE:	August 4, 2010	*POSITION:*	Staff Assistant
APPROVED BY:	REDACTED	*DIVISION:*	Public & Intermodal Transportation
CODE.	[illegible]	*REPORTS TO:*	Director

POSITION PURPOSE

This position is accountable for assisting in the overall development and coordination of policy and directives regarding programs for the DPIT. This position monitors conformance to existing policies and conducts reviews or studies issues that are of special interest. S/He provides policy interpretation and analysis of policies. In addition, this position provides assistance to the local agencies, elected officials, and the general public.

DIMENSIONS

Division Staff:	20
Policy Issues Addressed:	10 – 30 +

NATURE AND SCOPE

This position reports to the Director as do the Deputy Director and the Bureau Chiefs of Downstate Area Programs, Northeastern IL Programs and Railroads and an Administrative Assistant.

The environment of this position is unique in that the incumbent at times provides staff assistance and performs special assignments for the Director as well as divisional managers regarding programs. In order to be most effective, s/he must be able to personally anticipate and identify impending issues and problems, many of a confidential nature, confronting the DPIT, especially issues involving policy and related subjects. The incumbent initiates reviews and/or studies of policy issues and presents, upon almost immediate notice, written and precise documents or outlines for management. This position serves as a spokesperson for divisional programs and as a liaison between the Director, the Governor's Office, the legislature, other state agencies and the general public.

The greatest challenge of this position is to ensure the development of the best possible solutions to policy issues within the constraints of budgetary and socioeconomic factors. Typical problems encountered include providing liaison between the DPIT and legislators, local officials and others to resolve problems that could delay or halt policy initiatives.

The incumbent assists in the development of policy. This position coordinates information and activities division-wide. S/He manages development of background and position documents which detail specific policy problems, information and possible solutions, and recommends alternative courses of action and positions in dealing with such problems. The issues with which the incumbent typically deals with are of a sensitive and confidential nature of which s/he must be continually aware and exercise discretion. Where issues or problems cross departmental office/division lines, s/he serves as a liaison to ensure proper communication of goals and objectives throughout the process. This position ensures that final presentation of policy information or solutions to management represents all relevant points of view and policy recommendations are of a consistent pattern with past decisions/activities and compatible with the overall objectives and plans. It is essential that the incumbent has the ability to elicit, understand and present divergent views. This position serves as liaison between the Director and the Governor's Office, the legislature, other state

agencies and the general public. S/He assists the Director in responding to written and verbal inquiries from the Governor's Office, the legislature and the general public regarding policies and procedures. This position assists the Director in obtaining a timely response to those inquiries. The incumbent serves as a departmental spokesperson on issues concerning divisional problems to create departmental awareness and develop a suitable climate for initiating corrective actions by conducting presentations to departmental management. This position replies to questions at these presentations through the explanation of the divisional/departmental stance in these matters and the explanation of all applicable rules/laws involved with the personnel program.

The incumbent maintains close liaison with all division staff. S/He is in frequent contact with the legislators and the general public regarding proposed legislation and concerning programs. S/He meets frequently with various local officials.

The incumbent is expected to develop new and innovative strategies in addressing and formulating resolutions to policy and other problems. The incumbent is required to operate within the established departmental rules and regulations and in accordance with legislative mandates and executive orders.

The effectiveness of this position is measurable by the timely production of policy reports and documents; by the validity, thoroughness and accuracy of information provided to management; and by the degree of reliance management demonstrates in the incumbent.

PRINCIPAL ACCOUNTABILITIES

1. Serves as confidential assistant to the Director in all matters regarding employees.

2. Serves as liaison between the Director and the Governor's Office, the legislature, other state agencies and the general public to ensure effective and efficient communication.

3. Serves as departmental spokesperson for divisional programs conducting presentations to departmental management, elected officials and the general public.

4. Coordinates and assists in implementing policy initiatives. Reports on the process to management.

5. Develops informational documents accurately presenting background and options for addressing issues of policy concern. Develops appropriate policy recommendations to provide maximum benefits to the DPIT, IDOT and the State of Illinois.

6. Provides analysis and recommendations on policy issues for management.

7. Coordinates information on relevant policy issues to ensure that decisions are consistent with past policies and current goals and objectives of the bureau.

8. Ensures compliance with departmental safety rules and practices. Performs all duties in a manner conducive to the fair and equitable treatment of all employees.

Rod R. Blagojevich, Governor

John W. Cressman, Chief Internal Auditor

Illinois Office of Internal Audit
Wm. G. Stratton Building, Room 616 • Springfield, IL 62706-4100
James R. Thompson Center, Suite 414 • Chicago, IL 60601-3219

May 24, 2005

Secretary Timothy W. Martin
Illinois Department of Transportation
2300 South Dirksen Parkway
Springfield, Illinois 62702

Dear Secretary Martin:

Enclosed is a copy of the final report for the Non-Code Personnel audit of the Department of Transportation. There were six material findings.

The Revised Draft Report dated March 30, 2005 contained seven material findings. Finding #3, "Rutan Covered Positions Incorrectly Coded as Rutan Exempt", after further clarification and documentation by IDOT and our subsequent review, has been removed. We have renumbered the remaining audit findings accordingly in this final report.

In Audit Finding #4 (Finding #5 in the Revised Draft Report), "Employees in Rutan-Exempt Positions Transferred Into Rutan Covered Positions," IDOT has disagreed with our finding and has provided clarification and additional documentation for support. Based on our subsequent review, we maintain the validity of our original finding and have provided our rationale in the attached report following your response.

We would like to thank you for your cooperation with our auditors in the completion of this review. If you have any questions, please contact REDACTED Audit Manager at REDACTED or REDACTED

Sincerely,

REDACTED

Chief Internal Auditor

Enclosures

cc: REDACTED Chief of Staff
Robert Millette, Director, Office of Finance and Administration
REDACTED, Bureau Chief, Bureau of Accounting and Auditing
REDACTED, Chief of Audits, Bureau of Accounting and Auditing, Audit Section
Scott Doubet, Bureau Chief, Bureau of Personnel Management

EXHIBIT 15

Rod R. Blagojevich, Governor

John W. Cressman, Chief Internal Auditor

Illinois Office of Internal Audit
Wm. G. Stratton Building, Room 618 • Springfield, IL 62706-4100

IDOT Non-Code Personnel

05-0206-45

This report is deemed confidential and has been prepared for the exclusive use of only those persons identified as recipients of this report. This report is exempt from disclosure under the Freedom of Information Act. It may not be copied or distributed to any other party without the express written consent of the Chief Internal Auditor.

Distribution:
Secretary Timothy W. Martin, IDOT
REDACTED Chief of Staff, IDOT
Robert Millette, Director of Finance and Administration, IDOT
REDACTED Chief of Accounting and Auditing, IDOT
REDACTED Chief of Audits, IDOT
Scott Lightner, Bureau Chief, Bureau of Personnel Management, IDOT

Auditor(s): REDACTED

REDACTED

REDACTED Audit Manager

REDACTED

REDACTED Division Manager

REDACTED

REDACTED, Chief Internal Auditor

Review Period: 07/01/1999 through 10/01/2004
Revised Report Issued: March 28, 2005
Final Report Issued May 24, 2005
Previous Report Issued: N/A

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EXECUTIVE SUMMARY

The Illinois Office of Internal Audit conducted an audit of Non-Code Personnel of the Illinois Department of Transportation.

Our audit found that, except for the six material findings identified below, the internal controls for the area reviewed were adequate. Our audit disclosed no immaterial findings.

- **Non-code Employees Performing Duties Covered by the Personnel Code – Finding 1**
  Of the 65 positions reviewed in the Technical Manager, Management Technician, Realty Specialist and Urban Planner title groups, 60 (92.31%) of the positions were comparable to Personnel Code positions.

- **Specific Job Duties Not Consistent with General Job Duties – Finding 2**
  Four of the 65 (6.15%) sampled from the Technical Management, Management Technician, Technical Advisor and Urban Planner job descriptions were not consistent with the generic job descriptions.

- **Rutan Exempt Employees Reporting to Non-Rutan Exempt Employees – Finding 3**
  We identified 86 employees that were in Rutan exempt positions where there was a Rutan covered position with a higher position title. Of those 86, we found 12 (13.95%) employees that were directly supervised by managers in a Rutan covered position.

- **Employees In Rutan Exempt Positions Transferred into Rutan Covered Positions – Finding 4**
  There were ten employees that were transferred from Rutan exempt positions to Rutan covered positions without going through interview processes as required by State Executive Orders #2.

- **Outdated Position Descriptions – Finding 5**
  Of the 108 position descriptions reviewed, 34 (31.48%) have not been updated for at least five years.

- **Incomplete Interview Files – Finding 6**
  Of the 20 interview files reviewed, 8 (40%) did not have all required documents.

This Summary is deemed confidential and has been prepared for the exclusive use of only those persons identified as recipients of this report. This Summary is exempt from disclosure under the Freedom of Information Act. It may not be copied or distributed to any other party without the express written consent of the Chief Internal Auditor.

INTRODUCTION/BACKGROUND

The Illinois Office of Internal Audit (IOIA) has completed an audit of the non-code employees at the Illinois Department of Transportation. The objectives of this audit were to:

1. Analyze risks and control structures by obtaining an understanding of the governing rules, statutes, policies, procedures and contractual requirements processes.
2. Ensure non-code employees were properly classified.
3. Ensure proper hiring practices were followed for non-code employees in positions determined to be covered by the Rutan decision.
4. Ensure that Rutan exempt rules were followed.

This audit was chosen as a result of IOIA's risk assessment and was included in our FY05 audit plan.

When a position needs to be filled at the Illinois Department of Transportation (IDOT), the requesting office submits an Internal Personnel Request (IPR) to the Office of Finance Administration. The IPR is reviewed to determine if there is funding available to cover the salary expenditure. If funding is not available, the IPR is denied. If funding is available, the IPR is then forwarded to the Bureau of Personnel Management.

Upon receipt of the IPR by the Bureau of Personnel Management, a Position Review Form (PRF) is prepared. The PRF includes pertinent information such as position title, position number and work county. If the position is identified as potentially "Rutan exempt", the PRF is submitted to Central Management Services (CMS) to determine whether the position is covered by "Rutan." The positions that include high-level decision-making positions which do not fall under "Rutan" require the approval of the Governor's Office.

SCOPE AND METHODOLOGY

The scope of this audit was to review a sample of non-code job descriptions to ensure that they were true non-code positions and should not be classified as positions covered by the Personnel Code, review non-code personnel files to determine their completeness, review a sample of Rutan covered and Rutan exempt positions to determine compliance and review applicable policies and procedures. The review included procedures and tests considered necessary for the purpose of determining with reasonable, but not absolute, assurance whether the system of internal controls was in place and functioning as intended. The audit tests were conducted in accordance with the Standards for the Professional Practice of Internal Auditing.

In order to determine if non-code employees should be classified as code positions, we performed the following tests and procedures:

- Reviewed laws, rules, regulations, system descriptions, policies, procedures, FCIAA certifications and prior audit findings to become familiar with the area to be audited and to address any prior concerns in the area.
- Tested position descriptions to ensure they were properly classified as non-code employees.
- Reviewed the interview files for a sample of individuals that were either hired or promoted within the last five years to determine their completeness.
- Reviewed the non-code Position Review/Determination Form to ensure that CMS approved the Rutan exempt status for newly created positions.

OPINION

Based upon the Illinois Office of Internal Audit's review, the system of internal controls for the non-code personnel area were determined to be adequate with the exception of six material matters identified below. Internal Audit believes these matters require management's attention. Each finding has been reviewed with the responsible manager for the control area reviewed. There were no Immaterial Findings noted. Those areas identified as having weaknesses, are detailed on the following pages.

FINDINGS AND RECOMMENDATIONS

1. Non-Code Employees Performing Duties Covered by the Personnel Code

Illinois Department of Transportation technical employees in non-code positions were performing the same or similar duties as employees that fall under the Personnel Code. IDOT has approximately 3,400 technical positions. Using the payroll pay grade IV or below, we identified 839 employees for our sample population.

Of the 65 positions reviewed in the Technical Manager, Management Technician, Realty Specialist and Urban Planner title groups, the job duties of 60 (92.31%) of the positions were similar or comparable to Personnel Code positions. Examples of these are: Accountants; Administrative Assistants, Office Coordinators, Office Specialists, Human Resource Specialists and Executives. The 65 positions reviewed did not appear to be of a technical or engineering nature.

According to Illinois Compiled Statutes (20 ILCS 415), Section 4c, "The following positions in State service shall be exempt from jurisdictions A, B, and C, unless the jurisdictions shall be extended as provided in this Act...(12) The technical and engineering staffs of the Department of Transportation...."

According to the June 2004 edition of the Illinois Department of Transportation's Technical Classification Manual, "position description should be written clearly and concisely without the use of ambiguous verbiage. Position descriptions are intended to summarize the primary role, major functions and major accountabilities of individual positions. They should not be considered as exhaustive listings of job tasks. [Principal Accountabilities] are statements of the end results of the position. The term "end results"...fairly broad statements of what the job is trying to accomplish."

A standard set of criteria to evaluate specific duties in relation to code position descriptions does not appear to be utilized during the review process by the Bureau of Personnel Management. As such, it appears that the 60 positions above are in violation of state statute by not following the requirements of the Personnel Code.

RECOMMENDATION:

The Illinois Office of Internal Audit recommends the Illinois Department of Transportation and CMS work in conjunction to review all positions classified as technical or engineering in the Technical Manager and Management Technician job classifications to ensure that the positions are sufficiently technical to be classified as non-code. Positions that are not considered exempt under 20 ILCS 415, Section 4c, should be reclassified as coded employees and remedial corrective action should be taken to ensure compliance with the Personnel Code.

AUDITEE RESPONSE:

The Department agrees with the finding.

The technical titles cited in this finding have been in place for an extensive amount of time, some for 40 years. (Technical Managers – 1969; Management Technicians – 1978; Realty Specialist/Urban Planners – 1965). During this time period, there has always been some duplication of duties with the DCMS classification system.

Although there may have been some erroneous use of classification systems, the recent consolidations of the Bureaus of Information Services and Administrative and Facility Services should help remedy some of the sighted examples.

The Department agrees to review each new establishment to verify that functions fall within the correct classification system so that this does not occur in the future.

Implementation Date: Ongoing.

2. Specific Job Duties Not Consistent with General Job Duties

In four of the 65 (6.15%) positions sampled from the Technical Management, Management Technician, Technical Advisor and Urban Planner, individual job descriptions were not consistent with the generic job description for the job title.

Generic job descriptions outline common tasks or duties of a specific pay grade within the department's technical classification structure. As such, it would be expected that individual job descriptions must encompass some, if not all, of the duties outlined in the generic job descriptions.

Management has not thoroughly reviewed the individual job descriptions to ensure they conform to the generic job descriptions, which can result in employees with the same job title doing significantly different duties (i.e. Project Manager).

RECOMMENDATION:

The Illinois Office of Internal Audit recommends the Bureau of Personnel Management review all position descriptions to ensure their comparability to the generic job descriptions. Policies and procedures need to be written and followed to ensure individual job descriptions conform to the requirements of the generic job descriptions.

AUDITEE RESPONSE:

The Department agrees with the finding.

The Department's response is based on the assumption by "general job duties," the Office of Internal Audits is referring to Technical Job Classification Specifications. These specifications are only generic guidelines of functions which may be performed by that particular classification level. In addition, these specifications are not all inclusive of functions which may be performed at that level.

The Department is currently at its lowest historical headcount due to ERIs and retirements. As a result of budgetary constraints restricting hiring, departmental staff are assuming additional functions, which may not typically fall within their designated classification in order to accomplish the workload. Typically these functions should be of a temporary nature, ending when the vacant positions are filled.

The Department agrees to review job specifications to ensure that generic functions reflect general levels of responsibilities for that classification. In addition, the Department agrees to review new establishments to ensure that functions fall within the appropriate classification level.

Implementation Date: Ongoing.

3. Rutan Exempt Employees Reporting to Non-Rutan Exempt Employees

We identified 86 individuals that were in Rutan exempt positions where there was a higher position title that was subject to the Rutan provisions. Of those 86, we identified 12 (13.95%) Rutan exempt employees that were directly supervised by managers in a Rutan covered position.

Exemption of Rutan rules is based in part on duties performed. Individuals in positions that are supervisory, require confidentiality, or those that can affect policy making/decisions are generally exempt. Best practices would require that a position that was supervisory over a Rutan exempt staff position should also be exempt.

Because of coding errors (see Finding #3) and inconsistent job specifications and classifications (see Findings #1 and #2), lower level technical positions (pay grade IV and below) have been determined to be Rutan exempt with no regard to the line of supervision.

RECOMMENDATION:

The Illinois Office of Internal Audit recommends the Illinois Department of Transportation review the above 12 individuals to determine and correct Rutan status. A review process should also be developed to ensure consistency in line responsibility.

AUDITEE RESPONSE:

The Department agrees with the finding.

With the inception of the Rutan review process in the early'90's, these inconsistencies have occurred. Some may have been based on the initial lack of consistency in the Rutan review completed at the start of the process due to the confusion regarding the administration/definition of exemptions. Some may have occurred over time as reviews were submitted and changes made in exemption status. As departmental management has become aware of these issues, they have been addressed.

The Department agrees to review the 12 positions cited to review the reporting relationships, etc., as well as work with appropriate management both at IDOT and DCMS to resolve this issue. In addition, the Department agrees to ensure that any newly created positions will meet the appropriate guidelines for reporting relations due to Rutan exemptions.

Implementation Date: Ongoing

4. Employees In Rutan Exempt Positions Transferred into Rutan Covered Positions

Our comparison of the IDOT internal file of exempt positions and CMS' report of exempt positions revealed that 26 (32%) of the 80 positions selected for review were listed on the department's report, but did not appear on the CMS report. We had initially determined that there were 238 employees in Rutan exempt positions. Our sample of 80 employees was based on pay grade Technical Manager V and below or the equivalent.

After reviewing the personnel files of these 26 employees for the required documentation supporting the decision for classifying the positions as Rutan exempt, we found that 13 had been properly approved. The remaining 13 employees were currently in positions covered by the Rutan decision.

Further review revealed that 10 (76%) of these 13 employees were transferred without going through the interview processes as required by state Executive Order #2. Eight of the ten were lateral transfers to the same pay grade and two were promotions from a TM II pay grade to TM III pay grades. The remaining 3 employees had been interviewed for the current position.

As determined by the U.S. Supreme Court decision in Rutan v Republican Party of Illinois, "... promotion, transfer and recall and hiring decisions involving non-policymaking employees may not be decided on the basis of party affiliation and support" In addition to the court decision, previous administrations have issued Administrative Orders specifically addressing the promotion, transfer, or recall into Rutan covered positions are to be based on the relative merit and fitness of the candidates for the position and not on political affiliations or the lack thereof."

Administrative Order #1, Directive to State Agencies Regarding Personnel Practices (1990) states that "All hiring and other personnel decisions shall be based on the merit and qualifications of the candidates." Administrative Order #2, Directive to State Agencies Guidelines for Interviewing Job Candidates (1990) provides policies and procedures regarding the interview process. Administrative Order #2 also contains principles to assist agencies in

assuring that their personnel policies and procedures relating to interviewing and selecting candidates for employment; promotion and other personnel transactions are in compliance with the Rutan decision.

IDOT Bureau of Personnel Management, by not adequately reviewing promotions and transfers, failed to adhere to established policies and procedures concerning the promotions and transfers contained in the Administrative Orders and appears to be in violation of the U.S. Supreme Court ruling commonly referred to as the "Rutan" decision.

RECOMMENDATION:

The Illinois Office of Internal Audit recommends the Illinois Department of Transportation contact Central Management Services to address and correct the ten Rutan exempt to Rutan covered transfers cited above. Furthermore, we recommend that IDOT review all future requests for lateral transfers and promotions to ensure that positions that have been determined to be non-exempt from the Rutan decision are filled as a result of candidate interviews as required by the Supreme Court decision and the Administrative Orders.

AUDITEE RESPONSE:

The Department disagrees with the finding.

The Department cannot verify the accuracy of the list with the handwritten title of "Rutan Exempt Employees" prepared by DCMS, 10/1/04, due to issues discussed in Finding 3. It may be then, that some of the employees' respective Rutan status cited in the sample is not accurate.

Nevertheless, the Department is entitled to make management-directed as well as employee-requested lateral transfers. Currently, both requests are completed by *Internal Personnel Request* form, PM 2205 (Attachment 4: Finding 5) marked lateral transfer with documentation in the body. Employee-requested transfers are additionally documented by written requests from the employee.

In the past, the Department has complied with the Rutan decision by completing the *Lateral Transfer Form*, PM 2217, (Attachment 4: Finding 5). This form prepared initially after the Rutan decision, and in use for a significant length of time has an affidavit that states, "I certify that the hiring criteria related to this employment decision were developed prior to initiating the candidate selection process. Furthermore, I understand that the hiring decisions documented on this form have not been decided on the basis of political party affiliation, support or lack thereof." Thus necessary legal assurances are given that Rutan is not violated. Furthermore, as far as Departmental management knows, this form has sufficed over the past 13 years for compliance with Rutan requirements. It appears from legal interpretations in the past and currently, at both IDOT and other state agencies, that these types of transfers, without interviews, do not violate the tenets of the Rutan decision. This interpretation, that lateral or voluntary reductions do not violate Rutan, by our past legal counsels as well as other state agencies, leads the Department to disagree with this finding. Frankly, the Department is surprised by this new found IOIA interpretation and does not agree.

The Department agrees, however, to ensure that supporting documentation in the form the *Lateral Transfer Form* will be completed for all lateral transfers.

IOIA COMMENTS

The IOIA respectfully disagrees with the Department's position on this finding.

The listing provided to the Department as support for this finding was an extraction of information contained in the Department's database. The handwritten title "Rutan Exempt Employees" was for identification purposes. The list was not prepared by DCMS, however the extraction program the IOIA utilizes is licensed to DCMS. The confusion may have been caused by the heading "Produced with ACL by: Illinois/CMS, Springfield, IL." This is unrelated to the issues discussed in the Finding #3 of the draft report. Finding #3 in the draft report was removed after clarification by the Department and our subsequent review. This final report does not contain that finding and the findings have been renumbered respectively.

The IOIA agrees with the Department that they are entitled to make "management-directed as well as employee-requested lateral transfers." During our testing we located the appropriate *Internal Personnel Request Form*, PM 2205 for each of the transfers and the IOIA does not take exception in this area.

However, the IOIA is not aware of any statutory authority that authorizes the use of an affidavit, to satisfy the requirements of the Rutan decision or of any court revisiting this issue. Further, based on our review of other agencies, we are also unaware of the usage of similar language or affidavits to satisfy the requirements of Rutan. To validate our position, we will refer this issue to in-house legal counsel for clarification.

Finally, if statutory authority or other precedent was provided, of the eight lateral transfers cited above, the Department could not provide the *Lateral Transfer Form*, PM 2205 that the Department holds as evidence of compliance with Rutan.

5. Outdated Position Descriptions

Of the 108 position descriptions reviewed, 34 (31.48%) had not been updated for at least five years. The oldest position description reviewed was last updated in April 1986. The average age of the position descriptions last updated more than five years ago was almost nine years.

IDOT's Technical Classification Manual (6/04) states that "all position descriptions should be maintained current within five years."

Management has not placed the necessary emphasis required to ensure that position descriptions accurately reflect the duties and responsibilities of the individual. The lack of periodic review of position descriptions may not reflect actual position duties.

RECOMMENDATION:

The Illinois Office of Internal Audit recommends the Illinois Department of Transportation review and update the position descriptions for the 34 individuals cited above. Additionally, IDOT should implement a procedure that ensures all position descriptions are reviewed and updated at least every five years.

AUDITEE RESPONSE:

The Department agrees with the finding.

Initially, the Department's practice was that any position to be posted should be current within one year of posting (Attachment 6: Finding 6). The current practice states that any job description that is to be posted must be recent within two years of posting (Attachment 7: Finding 6). In addition, as the Bureau of Personnel becomes aware of jobs older than five years, the originating office/division is noted with a request to submit the position for clarification (Attachment 8: Finding 6).

The Department is currently undergoing massive reorganizations. During the process, positions that are no longer required will be targeted for abolishment thereby resolving some of the outdated position description issues. In addition, the Department is currently readdressing this issue and will shortly send out an update to the practice above requesting that all position descriptions older than five years be submitted for clarification. It should be recognized that due to manpower/staffing issues, responses may not be as timely as desired.

Implementation Date: Implementation of corrective action will be in conjunction with the ongoing and proposed reorganizations throughout the Department.

6. Incomplete Interview Files

Of the 20 interview files reviewed, 9 (45%) did not have all the documentation as required by the Interview and Selection Criteria and Techniques procedures issued by the Department of Central Management Services. The missing documentation included the

- Employment Decision Form – 6 of the 20 (30%) files, and
- Candidate Evaluation Form – 3 of the 20 (15%) files.

In addition to the CMS requirements, the following IDOT required documents were also missing:

- Applicant Flow Analysis Form – 6 of the 20 (30%)
- Salary Name Memo – 7 of the 20 (35%).

(Note: The total above of missing documentation is greater than 9 because some files were missing more than one document and we only counted total file exceptions rather than document exceptions.)

Failure to maintain complete interview files with all supporting documentation could adversely affect the department's ability to substantiate their selection decision.

The missing documentation could be attributed to the unrestricted access by authorized personnel to the files. Currently there is no process to review file content for completeness when the file is returned.

RECOMMENDATION:

The Illinois Office of Internal Audit recommends the Illinois Department of Transportation establish and enforce procedures to ensure that interview files are completed, maintained, and secured in a consistent manner.

AUDITEE RESPONSE:

The Department agrees with the finding.

Some documentation cited as missing was placed in the employee's individual personnel file as opposed to the interviewing file, i.e., the *Employment Decision Form, Salary Name Memb*, etc., which has been a consistent departmental practice. The Department also recognizes that staff other than bureau personnel, however limited, have access to employee personnel files.

The Department agrees to document access to the files through the implementation of a newly created policy (Attachment 9: Finding 7). The Department further agrees to maintain consistent documentation in the practice maintained in the past as stated above.

Implementation Date: Implemented.

Unknown

From: Hughes, Matthew R
Sent: Wednesday, October 14, 2009 1:10 PM
To: Schneider, Ann L
Attachments: Staffing Needs in the Bureau of Personnel Management.docx

Attached is a summary of what I think needs to happen in terms of staffing in BPM. I would like a chance to convey in person what I have presented here in writing. I have a fairly developed set of goals and a strategy for implementing some improvements down here and a course of action to achieve the new challenges that BPM is facing. This document defines what I think I need in terms of bodies. It's my understanding that I have 4 positions available.

I bet you thought you would never see it... ☺

Matthew R. Hughes
Bureau Chief of Personnel Management
Illinois Department of Transportation
Office of Finance and Administration
2300 S Dirksen Parkway
Springfield, IL 62764
REDACTED office
REDACTED blackberry/cell
REDACTED

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Staffing Needs in the Bureau of Personnel Management

10/14/2009

Personnel Needs:

TM II Training Specialist – The Bureau would like address this position in anticipation of the new Learning Management System set to arrive this month. Employee 82 currently occupies this position although has been TA'd to BIP. I believe our best option at the moment is a Rutan-exempt **TM II Staff Assistant** to handle these duties full-time via Temp Assignment once hired.

TM II Staff Assistant – The Bureau is in need of two Staff Assistants to serve as Rutan Certified interviewers in our Recruiting and Interviewing Unit. BPM has been asked to process a higher than typical number of transactions this year and the help is greatly needed in order to meet our hiring goals this year.

***TM IV Project Manager** – The Bureau would like to propose the creation of a new position along the lines of a Project Manager position which exists in other areas of the Department. My current vision for BPM is to try and streamline some existing process by utilizing technology and communication practices more effectively. The creation of this position would help to achieve some of the goals that I have in mind for BPM and will assist in implementing some much needed advancements in the utilization of technology. This position would also assist in implementing a more "paperless" environment via Document Scanning (Personnel Files), Intranet-based Document Sharing, Signature/Approval Tracking and Executive Level Reporting.

New Hires/Headcount Transactions:

(1) Staff Assistant – TM II (Interviewer)
(1) Staff Assistant - TM II (Training)
(1) Staff Assistant - TM III (Interviewer)
(1) *Project Manager – TM IV (new position)

Internal Promotions:

(1) Recruiting and Interviewing Unit Manager – TM V
(1) Code Employment Specialist – TM III

Temporary/Emergency Help:

(3) 60-day Emergency TM II's – to serve in temporary/emergency capacity until approval to hire is attained. Intent would be to serve/train in interviewer capacity or in a capacity to where some training can take place.
(1) 75-day Employee

OFFICE OF THE GOVERNOR
JRTC, 100 W. RANDOLPH, SUITE 16-100
CHICAGO, ILLINOIS 60601

PAT QUINN
GOVERNOR

July 3, 2014

VIA ELECTRONIC MAIL
Kristy Shores
First Deputy Inspector General
Office of Executive Inspector General
69 W. Washington Street, Suite 3400
Chicago, Illinois 60602
kristy.shores@illinois.gov

Re: Office of the Governor Response in Case No. 11-01567

Dear Ms. Shores:

This letter is in response to the Report identified as Office of the Executive Inspector General (OEIG) Investigation Case No. 11-01567 received by the Office of the Governor (OOG) on June 12, 2014. The OOG has already begun or will immediately undertake a number of actions in relation to the implementation of the recommendations made by the OEIG, as described below.

I. OEIG Recommendations Regarding the Illinois Department of Transportation (IDOT)

The OOG agrees to follow all of the OEIG's IDOT recommendations. The direction to IDOT as to nearly all of the recommendations is reflected in the attached July 3, 2014 memorandum to IDOT's Secretary and Chief Counsel. *See* Attachment A. The same memorandum is to be provided to all IDOT employees. The OOG will follow-up directly with IDOT to implement the remaining recommendations.

II. OEIG Recommendations Regarding the Office of the Governor

The OOG agrees to follow all of the OEIG's recommendations as to the Office of the Governor. The direction to all agency, board and commission heads is contained in the attached July 3, 2014 memorandum. *See* Attachment B.

III. OEIG Recommendations Regarding Individual Employees and Officials at IDOT

Consistent with the OEIG's recommendations, the current status of and actions as to current and former IDOT employees and officials is as follows:

(1) Matt Hughes- As noted in the OEIG's report, Mr. Hughes is no longer employed by the State. The OOG has directed IDOT to place a copy of the above referenced report in Mr. Hughes personnel file.

(2) Mike Woods, Jr.- Mr. Woods resigned from his position at IDOT on July 2, 2014.

(3) Ann Schneider- Secretary Schneider resigned from her position at IDOT, effective July 10, 2014.

(4) Gary Hannig- Former Secretary Hannig's contract with the state expired on June 30, 2014. He is no longer doing work for the State.

IV. Additional Actions Regarding the *Rutan* Hiring Process

In addition to the actions recommended in the report and described above, the OOG will initiate the following actions, reflected in Attachments A and B, to further ensure that the *Rutan* hiring process is followed at IDOT and throughout the State:

(1) ePar Verification- In the coming weeks, the ePar system will be updated to require agency personnel staff and agency heads who approve ePars to verify that an employee filling a position, whether that position is *Rutan*-Covered or *Rutan*-Exempt, will be carrying out the duties and responsibilities contained in that employee's job description.

(2) Creating a Technical Code Merit Board- The OOG will be seeking to create an independent statutory board to oversee and further ensure the integrity of Technical Code personnel decisions at IDOT.

(3) Executive *Rutan* Training- All agency, board, and commission heads and all executive level staff at all agencies, boards, and commissions will be required to complete specialized Executive *Rutan* Training conducted by the Department of Central Management Services.

(4) Reminder to All State Employees Regarding Reporting Potential *Rutan* Violations to the OEIG- The OOG will remind all State employees that any potential *Rutan* violations must be reported to the OEIG.

If there are any questions, please feel free to contact me or General Counsel John Schomberg.

Sincerely,

Marla Harris
Senior Counsel & Ethics Officer

Enclosures
cc: Ryan Croke, Chief of Staff
John Schomberg, General Counsel

Office of Executive Inspector General

for the Agencies of the Illinois Governor

www.inspectorgeneral.illinois.gov

AGENCY OR ULTIMATE JURISDICTIONAL AUTHORITY RESPONSE FORM

Case Number: 11-01567 Return 20 Days After Receipt

Please check the box that applies. (Please attach additional materials, as necessary.)

☑ We have implemented all of the OEIG recommendations. Please provide details as to actions taken:

Please see attached with modifications.

☐ We will implement some or all of the OEIG recommendations but will require additional time to do so.
We will report to OEIG within _____days from the original return date.

☐ We do not wish to implement some or all of the OEIG recommendations. Please provide details as to what actions were taken, if any, in response to OEIG recommendations:

Signature

Office of the Governor, Ethics Officer
Print Agency and Job Title

Marla Harris
Print Name

July 3, 2014
Date

ATTACHMENT A

OFFICE OF THE GOVERNOR
JRTC, 100 W. RANDOLPH, SUITE 16-100
CHICAGO, ILLINOIS 60601

PAT QUINN
GOVERNOR

TO: ANN SCHNEIDER, SECRETARY, ILLINOIS DEPARTMENT OF TRANSPORTATION

MICHAEL FORTI, CHIEF COUNSEL, ILLINOIS DEPARTMENT OF TRANSPORTATION

FROM: JOHN SCHOMBERG, GENERAL COUNSEL

CC: RYAN CROKE, CHIEF OF STAFF

ERICA BORGGREN, INCOMING ACTING SECRETARY, ILLINOIS DEPARTMENT OF TRANSPORTATION

SIMONE MCNEIL, ACTING DIRECTOR, DEPARTMENT OF CENTRAL MANAGEMENT SERVICES

SUBJECT: CONTINUED *RUTAN* COMPLIANCE & MANDATORY TRAINING

DATE: JULY 3, 2014

As part of the Quinn Administration's ongoing commitment (i) to adhering to the principles articulated in the United States Supreme Court decision, *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) ("*Rutan*"), and to *Rutan* Administrative Orders issued by Governor Quinn and previous Illinois Governors,[1] that **prohibit consideration of political affiliation or support (or lack thereof) in connection with employment positions covered by the *Rutan* decision** and (ii) to ensuring and maintaining the organizational integrity of the Illinois Department of Transportation ("Department"), the Office of the Governor is directing the Department to do the following:

- *Rutan* Training- All executive level staff members, including, but not limited to, the Secretary and all Bureau and Office Heads, will be required to attend a *Rutan* training course conducted by personnel experts at the Department of Central Management Services ("CMS"). This will be an executive-level overview intended to further ensure

[1] Copies of *Rutan v. Republican Party of Illinois,* 497 U.S. 62 (1990) and of Administrative Order No. 1 (1990), No. 2 (1990), No. 1 (1991), and No. 2 (2009), are attached hereto as Exhibit A.

that all agency executives continue to ensure compliance with and awareness of the requirements of the *Rutan* decision and the *Rutan* process. In addition, every member of the Department's Bureau of Finance and Administration who works on personnel matters and every *Rutan* interviewer within the Department will be required to receive *Rutan* training from CMS, regardless of what training an individual has received in the past. Further details regarding the dates, times, and locations for these training sessions will be circulated in the very near future by CMS.

- Annual Employee Evaluations and Job Description Reviews- Consistent with the Department's Personnel Policies Manual (CHAPTER 5, Employee Evaluation and Development), all employees must receive a written performance evaluation on an annual basis. As part of this annual review, supervisors must compare the employee's actual job duties and responsibilities to those listed on the employee's job description. If discrepancies exist, the job description must be clarified or the employee's duties must be revised to be consistent with the current description. As further detailed below, any clarification to a currently *Rutan*-Exempt job description must be submitted to CMS's Bureau of Personnel to determine whether the position remains *Rutan*-Exempt or must be reclassified as *Rutan*-Covered.

- Audit of All *Rutan*-Exempt Positions- The Department shall have an outside consultant conduct an audit of all Department job descriptions for positions that are currently classified as *Rutan*-Exempt. That outside consultant shall work in consultation with CMS. Upon completion of this audit, the consultant shall make any job description clarifications and submit any updated job descriptions to CMS's Bureau of Personnel to determine whether the position remains *Rutan*-Exempt or must be reclassified as *Rutan*-Covered. This is in follow-up to an audit that has already been completed for Department Staff Assistants.

- Moratorium on New or Additional *Rutan*-Exempt Positions- Until further notice, the Department shall not seek to create any new or additional *Rutan*-Exempt positions until such time as the Office of the Governor has determined that the corrective actions contained in this memo are being satisfactorily implemented.

- Abolishing Staff Assistant Title- The Department's Staff Assistant working title is to be abolished. In follow-up to the audit of these positions, employees currently in Staff Assistant positions shall be reclassified into appropriate working titles and accurate job descriptions. In the meantime, the Department shall not hire any new Staff Assistants or backfill any current or future Staff Assistant vacancies.

- Reforming the Department's Technical Code- The Department shall, in consultation with and with the approval of CMS's Bureau of Personnel: (i) create a narrowly tailored definition of "technical," for the purposes of classifying positions that are exempt from the Personnel Code under Section 4(c)(12) and thus fall under the Department's

Technical Code, (ii) create and implement personnel policies and procedures for the Department's Technical Code, including, but not limited to, a merit-based classification and salary administration plan, (iii) work with an outside consultant to review all current Technical Code positions against that "technical" definition to determine whether they are appropriately classified, and (iii) if they are not appropriately classified, take the necessary steps to move those positions to fall under the State's Personnel Code.

The Department's Office of Internal Audit shall regularly review those positions to ensure that they are properly classified and that proper hiring practices are being followed.

- Creating a Technical Code Merit Board- In addition to the above and to the independent Office of the Executive Inspector General's *Rutan* jurisdiction and investigatory powers, signed into law by the Governor in 2009 and detailed below, the Administration will seek to create a separate and independent statutory Technical Code Merit Board, to oversee and ensure the integrity of the Technical Code process.

- Employee Transfers to *Rutan*-Covered Positions Must Follow the *Rutan* Process- The Department shall ensure that all employee transfers into *Rutan*-Covered positions are made in compliance with the *Rutan* decision and all *Rutan* administrative orders.

- Implementing Already-Agreed-To *Rutan* Recommendations From Previous Audits- The Department's Office of Internal Audit shall review all prior internal and external audits to make certain that all recommendations related to *Rutan*, that the Department previously agreed to implement, have been implemented. To the extent any such agreed-to recommendations have not been implemented, the Department must move immediately to do so. The Department's Office of Internal Audit shall also develop a plan to regularly conduct reviews of *Rutan*-Exempt positions to ensure that they are properly classified and that they do not circumvent the *Rutan* hiring process.

This memorandum shall be circulated by the Department to all Department employees. In August 2009, the Governor signed into law provisions expanding the jurisdiction of the Office of the Executive Inspector General (OEIG) to include ensuring compliance with *Rutan*. **If an employee is aware of any potential *Rutan* violations (e.g. failures to follow the *Rutan* hiring process, the use of political considerations in *Rutan*-Covered hiring, etc.), he or she should—and has a duty to—report any such violations to the OEIG. Complaints can be securely and anonymously filed electronically or by fax by going to the OEIG's website at http://www2.illinois.gov/oeig/Pages/FileaComplaint.aspx. The employee may also notify his or her supervisor and the agency's Ethics Officer and Chief Counsel, Michael Forti at 312-793-2255 or michael.forti@illinois.gov.** If any employee has any questions regarding the *Rutan* process, he or she should contact the Department's Human Resources staff or Mr. Forti. The Department's Human Resources staff and Ethics Officer should use CMS's Bureau of Personnel as a resource in answering employee questions.

As stated above, the Quinn Administration continues to require strict compliance with *Rutan* principles and to ensuring that employees are appropriately classified as either *Rutan*-Covered or *Rutan*-Exempt. We expect all State employees to continue to be committed to and accountable for the same. For those vast number of State employee positions that are *Rutan*-Covered, the Administration not only expects, but demands, that the *Rutan* hiring process continue to be followed and that politics plays no role.

Thank you for your attention to this matter.

J.F.S.

EXHIBIT A

Supreme Court of the United States
Cynthia RUTAN, et al., Petitioners
v.
REPUBLICAN PARTY OF ILLINOIS, et al.
Mark FRECH, et al., Petitioners
v.
Cynthia RUTAN, et al.

Nos. 88-1872, 88-2074.
Argued Jan. 16, 1990.
Decided June 21, 1990.
Rehearing Denied Aug. 30, 1990.
See 497 U.S. 1050, 111 S.Ct. 13.

Former and present low-level public employees and employment applicant brought action challenging Governor's use of political considerations in hiring, rehiring, transferring, and promoting. The United States District Court for the Central District of Illinois, Baker, Chief Judge, 641 F.Supp. 249, dismissed complaint, and appeal was taken. The Court of Appeals for the Seventh Circuit affirmed in part, reversed in part, and remanded initially, 848 F.2d 1396, and on rehearing en banc, 868 F.2d 943. Certiorari was granted. The Supreme Court, Justice Brennan, held that: (1) promotions, transfers, and recalls based on political affiliation or support are impermissible infringements on public employees' First Amendment rights, and (2) conditioning hiring decisions on political belief and association violates applicants' First Amendment rights in absence of vital governmental interest.

Court of Appeals decision affirmed in part, reversed in part, and remanded.

Justice Stevens filed a concurring opinion.

Justice Scalia filed a dissenting opinion in which Chief Justice Rehnquist and Justice Kennedy joined, and in which Justice O'Connor joined as to Parts II and III.

West Headnotes

[1] Constitutional Law 92 ⚿1475(5)

92 Constitutional Law
92XVII Political Rights and Discrimination
92k1471 Public Employees and Officials
92k1475 Political Affiliation; Patronage
92k1475(5) k. Adverse Action in General. Most Cited Cases
(Formerly 92k82(11))

Constitutional Law 92 ⚿1475(7)

92 Constitutional Law
92XVII Political Rights and Discrimination
92k1471 Public Employees and Officials
92k1475 Political Affiliation; Patronage
92k1475(7) k. Promotion. Most Cited Cases
(Formerly 92k82(11))

States 360 ⚿53

360 States
360II Government and Officers
360k53 k. Appointment or Employment and Tenure of Agents and Employees in General. Most Cited Cases

That low-level public employees had no legal entitlement to promotion, transfer, or recall was not determinative of their claims that promotions, transfers, and recalls based on political affiliation or support were impermissible infringement on their First Amendment rights; government could not rely on basis that infringed employees' constitutionally protected interests to deny them valuable benefits. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 92 ⚿1475(5)

92 Constitutional Law
92XVII Political Rights and Discrimination
92k1471 Public Employees and Officials
92k1475 Political Affiliation; Patronage

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92k1475(5) k. Adverse Action in General. Most Cited Cases
(Formerly 92k82(11))

Constitutional Law 92 ⚿1475(7)

92 Constitutional Law
92XVII Political Rights and Discrimination
92k1471 Public Employees and Officials
92k1475 Political Affiliation; Patronage
92k1475(7) k. Promotion. Most Cited Cases
(Formerly 92k82(11))

Promotions, transfers, and recalls after layoffs based on political affiliation or support are impermissible infringement on First Amendment rights of low-level public employees; such patronage practices are not sufficiently narrowly tailored to serve vital government interests in securing effective employees, in securing employees who will loyally implement policies, or in preserving democratic process. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 92 ⚿1475(5)

92 Constitutional Law
92XVII Political Rights and Discrimination
92k1471 Public Employees and Officials
92k1475 Political Affiliation; Patronage
92k1475(5) k. Adverse Action in General. Most Cited Cases
(Formerly 92k91, 92k82(11))

It was not necessary that employment decision based on patronage be the "substantial equivalent of a dismissal" for decision to violate low-level public employee's rights under First Amendment; this test is unduly restrictive because it fails to recognize that there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 92 ⚿1181

92 Constitutional Law
92X First Amendment in General
92X(B) Particular Issues and Applications
92k1180 Public Employees and Officials
92k1181 k. In General. Most Cited Cases
(Formerly 92k82(11))

Constitutional Law 92 ⚿1446

92 Constitutional Law
92XVI Freedom of Association
92k1446 k. Public Employees and Officials. Most Cited Cases
(Formerly 92k82(11), 92k91)

First Amendment prevents government, except in most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate; it is not merely tenure provision, protecting public employees from actual or constructive discharge. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 ⚿1150

92 Constitutional Law
92X First Amendment in General
92X(A) In General
92k1150 k. In General. Most Cited Cases
(Formerly 92k82(3))

What the First Amendment precludes government from commanding directly, it also precludes government from accomplishing indirectly. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 92 ⚿1474(1)

92 Constitutional Law
92XVII Political Rights and Discrimination
92k1471 Public Employees and Officials
92k1474 Political Beliefs or Discrimination in General
92k1474(1) k. In General. Most Cited Cases
(Formerly 92k91)

Constitutional Law 92 ⚿1474(2)

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92 Constitutional Law
92XVII Political Rights and Discrimination
92k1471 Public Employees and Officials
92k1474 Political Beliefs or Discrimination in General
92k1474(2) k. Adverse Action. Most Cited Cases
(Formerly 92k82(11))

Constitutional Law 92 ⚖1475(4)

92 Constitutional Law
92XVII Political Rights and Discrimination
92k1471 Public Employees and Officials
92k1475 Political Affiliation; Patronage
92k1475(4) k. Appointment and Hiring; Qualifications. Most Cited Cases
(Formerly 92k82(11))

Conditioning public hiring decisions on political belief and association violates First Amendment rights of applicants in absence of vital governmental interest. U.S.C.A. Const.Amend. 1.

***2730 Syllabus** FN**

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

*62 The Illinois Governor issued an executive order instituting a hiring freeze, whereby state officials are prohibited from hiring any employee, filling any vacancy, creating any new position, or taking any similar action without the Governor's "express permission." Petitioners in No. 88-1872 and cross-respondents in No. 88-2074-an applicant for employment, employees who had been denied promotions or transfers, and former employees who had not been recalled after layoffs-brought suit in the District Court, alleging that, by means of the freeze, the Governor was operating a political patronage system; that they had suffered discrimination in state employment because they had not been Republican Party supporters; and that this discrimination violates the First Amendment. The District Court dismissed the complaint for failure to state a claim upon which relief could be granted. The Court of Appeals affirmed in part and reversed in part. Noting that *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547, and *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574, had found that the patronage practice of discharging public employees on the basis of their political affiliation violates the First Amendment, the court held that other patronage practices violate the Amendment only when they are the "substantial equivalent of a dismissal," *i.e.*, when they would lead reasonable persons to resign. The court concluded, based on *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260, that rejecting an employment application did not impose a hardship comparable to the loss of a job. Thus, it dismissed the hiring claim, but remanded the others for further proceedings.

Held: The rule of *Elrod* and *Branti* extends to promotion, transfer, recall, and hiring decisions based on party affiliation and support, and petitioners and cross-respondents have stated claims upon which relief may be granted. Pp. 2734-2739.

(a) Promotions, transfers, and recalls based on political affiliation or support are an impermissible infringement on public employees' First Amendment rights. Even though petitioners and cross-respondents *63 have no legal entitlement to the promotions, transfers, and recalls, the government **2731 may not rely on a basis that infringes their constitutionally protected interests to deny them these valuable benefits. *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570. Significant penalties are imposed on those employees who exercise their First Amendment rights. Those who do not compromise their beliefs stand to lose the considerable increases in pay and job satisfaction attendant to promotions, the shorter commuting hours and lower maintenance expenses incident to transfers to more convenient work loca-

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tions, and even the jobs themselves in the case of recalls. As in *Elrod* and *Branti,* these patronage practices are not narrowly tailored to serve vital government interests. A government's interest in securing effective employees can be met by discharging, demoting, or transferring persons whose work is deficient, and its interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing high-level employees on the basis of their political views. Likewise, the "preservation of the democratic process" is not furthered by these patronage decisions, since political parties are nurtured by other, less intrusive and equally effective methods, and since patronage decidedly impairs the elective process by discouraging public employees' free political expression. Pp. 2735-2737.

(b) The standard used by the Court of Appeals to measure alleged patronage practices in government employment is unduly restrictive because it fails to recognize that there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy. Pp. 2737-2738.

(c) Patronage hiring places burdens on free speech and association similar to those imposed by patronage promotions, transfers, and recalls. Denial of a state job is a serious privation, since such jobs provide financial, health, and other benefits; since there may be openings with the State when business in the private sector is slow; and since there are occupations for which the government is the sole or major employer. Under this Court's sustained precedent, conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so. See, *e.g., Branti, supra,* 445 U.S., at 515-516, 100 S.Ct., at 1293. There is no such government interest here, for the same reasons that the government lacks justification for patronage promotions, transfers, and recalls. It is inappropriate to rely on *Wygant* to distinguish hiring from dismissal in this context, since that case was concerned with the least harsh means of remedying past wrongs and did not question that *some* remedy was permissible when there was sufficient evidence of past discrimination. Here, however, it is unnecessary to consider whether not being hired is less burdensome *64 than being discharged, because the government is not pressed to do *either* on the basis of political affiliation. Pp. 2738-2739.

868 F.2d 943 (CA7 1989), affirmed in part, reversed in part, and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post,* p. 2740. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C.J., and KENNEDY, J., joined, and in which O'CONNOR, J., joined as to Parts II and III, *post,* p. 2746.

Mary Lee Leahy argued the cause for petitioners in No. 88-1872 and respondents in No. 88-2074. With her on the briefs were *Michael R. Berz, Cheryl R. Jansen,* and *Kathryn E. Eisenhart.*

Thomas P. Sullivan argued the cause for respondents in No. 88-1872 and petitioners in No. 88-2074. With him on the briefs were *Jeffrey D. Colman, Michael J. Hayes,* and *Roger P. Flahaven.*†

† Briefs of *amici curiae* urging reversal in both cases were filed for the American Federation of Labor and Congress of Industrial Organizations by *George Kaufmann* and *Laurence Gold;* and for the North Carolina Professional Fire Fighters Association by *J. Michael McGuiness. C. Richard Johnson* filed a brief for the Independent Voters of Illinois-Independent Precinct Organization et al. as *amici curiae* urging reversal in No. 88-1872. *Richard H. Chanin* and *Jeremiah A. Collins* filed a brief for the National Education Association as *amicus curiae* urging reversal in No. 88-1872 and affirmance in No. 88-2074.

Hector Rivera Cruz, Secretary of Justice of Puerto

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Rico, *Jorge E. Perez Diaz,* Solicitor General, and *Lino J. Saldaña* filed a brief for the Commonwealth of Puerto Rico as *amicus curiae* urging affirmance in both cases.

Justice BRENNAN delivered the opinion of the Court.

To the victor belong only those spoils that may be constitutionally obtained. *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), and **2732*Branti v. Finkel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), decided that the First Amendment forbids government officials to discharge or threaten to discharge public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved. *65 Today we are asked to decide the constitutionality of several related political patronage practices-whether promotion, transfer, recall, and hiring decisions involving low-level public employees may be constitutionally based on party affiliation and support. We hold that they may not.

I

The petition and cross-petition before us arise from a lawsuit protesting certain employment policies and practices instituted by Governor James Thompson of Illinois.[FN1] On November 12, 1980, the Governor issued an executive order proclaiming a hiring freeze for every agency, bureau, board, or commission subject to his control. The order prohibits state officials from hiring any employee, filling any vacancy, creating any new position, or taking any similar action. It affects approximately 60,000 state positions. More than 5,000 of these become available each year as a result of resignations, retirements, deaths, expansions, and reorganizations. The order proclaims that "*no* exceptions" are permitted without the Governor's "express permission after submission of appropriate requests to [his] office." Governor's Executive Order No. 5 (Nov. 12, 1980), Brief for Petitioners and Cross-Respondents 11 (emphasis added).

FN1. The cases come to us in a preliminary posture, and the question is limited to whether the allegations of petitioners Rutan et al. state a cognizable First Amendment claim sufficient to withstand respondents' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Therefore, for purposes of our review we must assume that petitioners' well-pleaded allegations are true. *Berkovitz v. United States,* 486 U.S. 531, 540, 108 S.Ct. 1954, 1961, 100 L.Ed.2d 531 (1988).

Three of the five original plaintiffs who brought the lawsuit-Rutan, Taylor, and Moore-are petitioners in No. 88-1872, and we refer to them as "petitioners." The defendants in the lawsuit are various Illinois and Republican Party officials. We refer to them as "respondents" because they are the respondents in No. 88-1872. They are also the cross-petitioners in No. 88-2074. Four of the five original plaintiffs-Rutan, Taylor, Standefer, and O'Brien-are named as cross-respondents in No. 88-2074.

*66 Requests for the Governor's "express permission" have allegedly become routine. Permission has been granted or withheld through an agency expressly created for this purpose, the Governor's Office of Personnel (Governor's Office). Agencies have been screening applicants under Illinois' civil service system, making their personnel choices, and submitting them as requests to be approved or disapproved by the Governor's Office. Among the employment decisions for which approvals have been required are new hires, promotions, transfers, and recalls after layoffs.

By means of the freeze, according to petitioners and cross-respondents, the Governor has been using the Governor's Office to operate a political patronage system to limit state employment and beneficial employment-related decisions to those who are supported by the Republican Party. In review-

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ing an agency's request that a particular applicant be approved for a particular position, the Governor's Office has looked at whether the applicant voted in Republican primaries in past election years, whether the applicant has provided financial or other support to the Republican Party and its candidates, whether the applicant has promised to join and work for the Republican Party in the future, and whether the applicant has the support of Republican Party officials at state or local levels.

Five people (including the three petitioners) brought suit against various Illinois and Republican Party officials in the United States District Court for the Central District of Illinois.[FN2] They alleged that they had suffered**2733 discrimination with respect to state employment because they had not been supporters of the State's Republican Party and that this discrimination violates the First Amendment. Cynthia B. *67 Rutan has been working for the State since 1974 as a rehabilitation counselor. She claims that since 1981 she has been repeatedly denied promotions to supervisory positions for which she was qualified because she had not worked for or supported the Republican Party. Franklin Taylor, who operates road equipment for the Illinois Department of Transportation, claims that he was denied a promotion in 1983 because he did not have the support of the local Republican Party. Taylor also maintains that he was denied a transfer to an office nearer to his home because of opposition from the Republican Party chairmen in the counties in which he worked and to which he requested a transfer. James W. Moore claims that he has been repeatedly denied state employment as a prison guard because he did not have the support of Republican Party officials.

> FN2. The five originally brought this action both individually and on behalf of those similarly situated. The Seventh Circuit, noting that the District Court had failed to address the class-action questions, reviewed the case as one brought by individuals only. 868 F.2d 943, 947 (1989). We therefore have only the claims of the individuals before us.

The two other plaintiffs, before the Court as cross-respondents, allege that they were not recalled after layoffs because they lacked Republican credentials. Ricky Standefer was a state garage worker who claims that he was not recalled, although his fellow employees were, because he had voted in a Democratic primary and did not have the support of the Republican Party. Dan O'Brien, formerly a dietary manager with the mental health department, contends that he was not recalled after a layoff because of his party affiliation and that he later obtained a lower paying position with the corrections department only after receiving support from the chairman of the local Republican Party.

The District Court dismissed the complaint with prejudice, under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief could be granted. 641 F.Supp. 249 (1986). The United States Court of Appeals for the Seventh Circuit initially issued a panel opinion, 848 F.2d 1396 (1988), but then reheard the appeal en banc. The court affirmed the District Court's decision in part and reversed in part. 868 F.2d 943 (1989). Noting that this Court had previously determined that the patronage practice of discharging*68 public employees on the basis of their political affiliation violates the First Amendment, the Court of Appeals held that other patronage practices violate the First Amendment only when they are the "substantial equivalent of a dismissal." *Id.*, at 955. The court explained that an employment decision is equivalent to a dismissal when it is one that would lead a reasonable person to resign. *Ibid.* The court affirmed the dismissal of Moore's claim because it found that basing hiring decisions on political affiliation does not violate the First Amendment, but remanded the remaining claims for further proceedings.[FN3]

> FN3. The Seventh Circuit explained that Standefer's and O'Brien's claims might be cognizable if there were a formal or informal system of rehiring employees in

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their positions, 868 F.2d, at 956-957, but expressed considerable doubt that Rutan and Taylor would be able to show that they suffered the "substantial equivalent of a dismissal" by being denied promotions and a transfer. *Id.*, at 955-956.

Rutan, Taylor, and Moore petitioned this Court to review the constitutional standard set forth by the Seventh Circuit and the dismissal of Moore's claim. Respondents cross-petitioned this Court, contending that the Seventh Circuit's remand of four of the five claims was improper because the employment decisions alleged here do not, as a matter of law, violate the First Amendment. We granted certiorari, 493 U.S. 807, 110 S.Ct. 48, 107 L.Ed.2d 17 (1989), to decide the important question whether the First Amendment's proscription of patronage dismissals recognized in **2734*Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), and *Branti v. Finkel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), extends to promotion, transfer, recall, or hiring decisions involving public employment positions for which party affiliation is not an appropriate requirement.

II

A

In *Elrod, supra,* we decided that a newly elected Democratic sheriff could not constitutionally engage in the patronage practice of replacing certain office staff with members of *69 his own party "when the existing employees lack or fail to obtain requisite support from, or fail to affiliate with, that party." *Id.*, 427 U.S., at 351, 373, 96 S.Ct., at 2679, 2689 (plurality opinion), and 375, 96 S.Ct., at 2690 (Stewart, J., joined by BLACKMUN, J., concurring in judgment). The plurality explained that conditioning public employment on the provision of support for the favored political party "unquestionably inhibits protected belief and association." *Id.*, at 359, 96 S.Ct., at 2683. It reasoned that conditioning employment on political activity pressures employees to pledge political allegiance to a party with which they prefer not to associate, to work for the election of political candidates they do not support, and to contribute money to be used to further policies with which they do not agree. The latter, the plurality noted, had been recognized by this Court as "tantamount to coerced belief." *Id.*, 427 U.S., at 355, 96 S.Ct., at 2681 (citing *Buckley v. Valeo,* 424 U.S. 1, 19, 96 S.Ct. 612, 634-635, 46 L.Ed.2d 659 (1976)). At the same time, employees are constrained from joining, working for or contributing to the political party and candidates of their own choice. *Elrod, supra,* 427 U.S., at 355-356, 96 S.Ct., at 2681. "[P]olitical belief and association constitute the core of those activities protected by the First Amendment," the plurality emphasized. 427 U.S., at 356, 96 S.Ct., at 2681. Both the plurality and the concurrence drew support from *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), in which this Court held that the State's refusal to renew a teacher's contract because he had been publicly critical of its policies imposed an unconstitutional condition on the receipt of a public benefit. See *Elrod, supra,* 427 U.S., at 359, 96 S.Ct., at 2682 (plurality opinion) and 375, 96 S.Ct., at 2690 (Stewart, J., concurring in judgment); see also *Branti, supra,* 445 U.S., at 514-516, 100 S.Ct., at 1292-1293.

The Court then decided that the government interests generally asserted in support of patronage fail to justify this burden on First Amendment rights because patronage dismissals are not the least restrictive means for fostering those interests. See *Elrod, supra,* 427 U.S., at 372-373, 96 S.Ct., at 2689 (plurality opinion) and 375, 96 S.Ct., at 2690 (Stewart, J., concurring in judgment). The plurality acknowledged that a government has a significant interest in ensuring that it has effective and efficient employees. It expressed*70 doubt, however, that "mere difference of political persuasion motivates poor performance" and concluded that, in any case, the government can ensure employee effectiveness and efficiency through the less drastic means of discharging staff members whose work is inadequate. 427 U.S., at 365-366, 96 S.Ct., at 2685-2686. The plurality also found that a govern-

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ment can meet its need for politically loyal employees to implement its policies by the less intrusive measure of dismissing, on political grounds, only those employees in policymaking positions. *Id.*, at 367, 96 S.Ct., at 2686-2687. Finally, although the plurality recognized that preservation of the democratic process "may in some instances justify limitations on First Amendment freedoms," it concluded that the "process functions as well without the practice, perhaps even better." Patronage, it explained, "can result in the entrenchment of one or a few parties to the exclusion of others" and "is a very effective impediment to the associational and speech freedoms which are essential to a meaningful system of **2735 democratic government." *Id.*, at 368-370, 96 S.Ct., at 2688.[FN4]

FN4. Justice SCALIA's lengthy discussion of the appropriate standard of review for restrictions the government places on the constitutionally protected activities of its employees to ensure efficient and effective operations, see *post*, at 2747-2752, is not only questionable, it offers no support for his conclusion that patronage practices pass muster under the First Amendment. The interests that Justice SCALIA regards as potentially furthered by patronage practices are not interests that the government has in its capacity as an employer. Justice SCALIA describes the possible benefits of patronage as follows: "patronage stabilizes political parties and prevents excessive political fragmentation," *post*, at 2752; patronage is necessary to strong, disciplined party organizations, *post*, at 2752-2753; patronage "fosters the two-party system," *post*, at 2754; and patronage is "a powerful means of achieving the social and political integration of excluded groups," *post*, at 2754-2755. These are interests the government might have in the structure and functioning of society as a whole. That the government attempts to use public employment to further such interests does not render those interests employment related. Therefore, even were Justice SCALIA correct that less-than-strict scrutiny is appropriate when the government takes measures to ensure the proper functioning of its internal operations, such a rule has no relevance to the restrictions on freedom of association and speech at issue in these cases.

*71 Four years later, in *Branti, supra*, we decided that the First Amendment prohibited a newly appointed public defender, who was a Democrat, from discharging assistant public defenders because they did not have the support of the Democratic Party. The Court rejected an attempt to distinguish the case from *Elrod*, deciding that it was immaterial whether the public defender had attempted to coerce employees to change political parties or had only dismissed them on the basis of their private political beliefs. We explained that conditioning continued public employment on an employee's having obtained support from a particular political party violates the First Amendment because of "the coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one's job." 445 U.S., at 516, 100 S.Ct., at 1294. "In sum," we said, "there is no requirement that dismissed employees prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance." *Id.*, at 517, 100 S.Ct., at 1294. To prevail, we concluded, public employees need show only that they were discharged because they were not affiliated with or sponsored by the Democratic Party. *Ibid.*[FN5]

FN5. *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), also refined the exception created by *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), for certain employees. In *Elrod*, we suggested that policymaking and confidential employees probably could be dismissed on the basis of their political

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views. *Id.*, at 367, 96 S.Ct., at 2686-2687 (plurality opinion) and 375, 96 S.Ct., at 2690 (Stewart, J., concurring in judgment). In *Branti*, we said that a State demonstrates a compelling interest in infringing First Amendment rights only when it can show that "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti, supra*, 100 U.S., at 518, 100 S.Ct., at 1295. The scope of this exception does not concern us here as respondents concede that the five employees who brought this suit are not within it.

B

[1] We first address the claims of the four current or former employees. Respondents urge us to view *Elrod* and *Branti* *72 as inapplicable because the patronage dismissals at issue in those cases are different in kind from failure to promote, failure to transfer, and failure to recall after layoff. Respondents initially contend that the employee petitioners' and cross-respondents' First Amendment rights have not been infringed because they have no entitlement to promotion, transfer, or rehire. We rejected just such an argument in *Elrod*, 427 U.S., at 359-360, 96 S.Ct., at 2683 (plurality opinion) and 375, 96 S.Ct., at 2690 (Stewart, J., concurring in judgment), and *Branti*, 445 U.S., at 514-515, 100 S.Ct., at 1293, as both cases involved state workers who were employees at will with no legal entitlement to continued employment. In *Perry*, 408 U.S., at 596-598, 92 S.Ct., at 2696-2697, we held explicitly that the plaintiff teacher's lack of a contractual or tenure right to re-employment**2736 was immaterial to his First Amendment claim. We explained the viability of his First Amendment claim as follows:

"For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, *there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests-especially, his interest in freedom of speech.* For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' *Speiser v. Randall*, 357 U.S. 513, 526 [78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958)]. Such interference with constitutional rights is impermissible." *Id.*, 408 U.S., at 597, 92 S.Ct., at 2697 (emphasis added).

Likewise, we find the assertion here that the employee petitioners and cross-respondents had no legal entitlement to promotion, transfer, or recall beside the point.

*73 [2][3][4] Respondents next argue that the employment decisions at issue here do not violate the First Amendment because the decisions are not punitive, do not in any way adversely affect the terms of employment, and therefore do not chill the exercise of protected belief and association by public employees.[FN6] This is not credible. Employees who find themselves in dead-end positions due to their political backgrounds *are* adversely affected. They will feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold, in order to progress up the career ladder. Employees denied transfers to workplaces reasonably close to their homes until they join and work for the Republican Party will feel a daily pressure from their long commutes to do so. And employees who have been laid off may well feel compelled to engage in whatever political activity is necessary to regain regular paychecks and positions corresponding to their skill and experience.[FN7]

FN6. Respondents' reliance on *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 107 S.Ct. 1442, 94

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L.Ed.2d 615 (1987), to this effect is misplaced. The question in *Johnson* was whether the Santa Clara County affirmative-action program violated the anti-discrimination requirement of Title VII of the Civil Rights Act of 1964. In that context, we said that the denial of a promotion did not unsettle any legitimate, firmly rooted expectations. We did not dispute, however, that it placed a burden on the person to whom the promotion was denied. We considered Johnson's expectations in discussing whether the plan unnecessarily trammeled the rights of male employees-*i.e.*, whether its goal was pursued with an excessive, rather than reasonable, amount of dislocation. Our decision that promotion denials are not such an imposition that Title VII prevented Santa Clara from considering gender in order to redress past discrimination does not mean that promotion denials are not enough of an imposition to pressure employees to affiliate with the favored party.

FN7. The complaint in this case states that Dan O'Brien was driven to do exactly this. After being rejected for recall by the Governor's Office, he allegedly pursued the support of a Republican Party official, despite his previous interest in the Democratic Party.

*74 The same First Amendment concerns that underlay our decisions in *Elrod, supra,* and *Branti, supra,* are implicated here. Employees who do not compromise their beliefs stand to lose the considerable increases in pay and job satisfaction attendant to promotions, the hours and maintenance expenses that are consumed by long daily commutes, and even their jobs if they are not rehired after a "temporary" layoff. These are significant penalties and are imposed for the exercise of rights guaranteed by the First Amendment. Unless these patronage practices are narrowly tailored to further vital government interests, we must conclude that they impermissibly encroach on First Amendment freedoms. See **2737*Elrod, supra,* 427 U.S., at 362-363, 96 S.Ct., at 2684 (plurality opinion) and 375, 96 S.Ct., at 2690 (Stewart, J., concurring in judgment); *Branti, supra,* 445 U.S., at 515-516, 100 S.Ct., at 1293.

We find, however, that our conclusions in *Elrod, supra,* and *Branti, supra,* are equally applicable to the patronage practices at issue here. A government's interest in securing effective employees can be met by discharging, demoting, or transferring staff members whose work is deficient. A government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views. See *Elrod, supra,* 427 U.S., at 365-368, 96 S.Ct., at 2685-2687 (plurality opinion); *Branti, supra,* 445 U.S., at 518, and 520, n. 14, 100 S.Ct., at 1294-1295, and 1295, n. 14. Likewise, the "preservation of the democratic process" is no more furthered by the patronage promotions, transfers, and rehires at issue here than it is by patronage dismissals. First, "political parties are nurtured by other, less intrusive and equally effective methods." *Elrod, supra,* 427 U.S., at 372-373, 96 S.Ct., at 2689 (plurality opinion). Political parties have already survived the substantial decline in patronage employment practices in this century. See *Elrod, supra,* at 369, and n. 23, 96 S.Ct., at 2688, and n. 23 (plurality opinion); see also L. Sabato, Goodbye to Good-time Charlie 67 (2d ed. 1983) ("The number of patronage positions has significantly decreased in virtually every state"); Congressional Quarterly Inc., State Government,*75 CQ's Guide to Current Issues and Activities 134 (T. Beyle ed. 1989-1990) ("Linkage[s] between political parties and government office-holding ... have died out under the pressures of varying forces [including] the declining influence of election workers when compared to media and money-intensive campaigning, such as the distribution of form letters and advertising"); Sorauf, Patronage and Party, 3 Midwest J.

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Pol. Sci. 115, 118-120 (1959) (many state and local parties have thrived without a patronage system). Second, patronage decidedly impairs the elective process by discouraging free political expression by public employees. See *Elrod,* 427 U.S., at 372, 96 S.Ct., at 2689 (plurality opinion) (explaining that the proper functioning of a democratic system "is indispensably dependent on the unfettered judgment of each citizen on matters of political concern"). Respondents, who include the Governor of Illinois and other state officials, do not suggest any other overriding government interest in favoring Republican Party supporters for promotion, transfer, and rehire.

We therefore determine that promotions, transfers, and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees. In doing so, we reject the Seventh Circuit's view of the appropriate constitutional standard by which to measure alleged patronage practices in government employment. The Seventh Circuit proposed that only those employment decisions that are the "substantial equivalent of a dismissal" violate a public employee's rights under the First Amendment. 868 F.2d, at 954-957. We find this test unduly restrictive because it fails to recognize that there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy. See *Elrod, supra,* 427 U.S., at 356-357, 96 S.Ct., at 2681 (plurality opinion); *West Virginia Bd. of Education v. Barnette,* 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943).[FN8] *76 The First Amendment is not a tenure provision, protecting public **2738 employees from actual or constructive discharge. The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate.

FN8. The Seventh Circuit's proffered test was not based on that court's determination that other patronage practices do not burden the free exercise of First Amendment rights. Rather, the court chose to defer to the political process in an area in which it felt this Court had not yet spoken clearly. 868 F.2d, at 953-954. The court also expressed concern that the opposite conclusion would open state employment to excessive interference by the Federal Judiciary. *Ibid.* We respect but do not share this concern.

> Our decision does not impose the Federal Judiciary's supervision on any state government activity that is otherwise immune. The federal courts have long been available for protesting unlawful state employment decisions. Under Title VII, 42 U.S.C. §§ 2000e(a), (f), and 2000e-2(a) (1982 ed.), it is a violation of federal law to discriminate in any way in state employment (excepting certain high-level positions) on the basis of race, color, religion, sex, or national origin. Moreover, the First Amendment, as the court below noted, already protects state employees not only from patronage dismissals but also from "even an act of retaliation as trivial as failing to hold a birthday party for a public employee ... when intended to punish her for exercising her free speech rights." 868 F.2d, at 954, n. 4.

Whether the four employees were in fact denied promotions, transfers, or rehires for failure to affiliate with and support the Republican Party is for the District Court to decide in the first instance. What we decide today is that such denials are irreconcilable with the Constitution and that the allegations of the four employees state claims under 42 U.S.C. § 1983 (1982 ed.) for violations of the First and Fourteenth Amendments. Therefore, although we affirm the Seventh Circuit's judgment to reverse

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the District Court's dismissal of these claims and remand them for further proceedings, we do not adopt the Seventh Circuit's reasoning.

C

[5][6] Petitioner James W. Moore presents the closely related question whether patronage hiring violates the First Amendment.*77 Patronage hiring places burdens on free speech and association similar to those imposed by the patronage practices discussed above. A state job is valuable. Like most employment, it provides regular paychecks, health insurance, and other benefits. In addition, there may be openings with the State when business in the private sector is slow. There are also occupations for which the government is a major (or the only) source of employment, such as social workers, elementary school teachers, and prison guards. Thus, denial of a state job is a serious privation.

Nonetheless, respondents contend that the burden imposed is not of constitutional magnitude.[FN9] Decades of decisions by this Court belie such a claim. We premised *Torcaso v. Watkins,* 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961), on our understanding that loss of a job opportunity for failure to compromise one's convictions states a constitutional claim. We held that Maryland could not refuse an appointee a commission for the position of notary public on the ground that he refused to declare his belief in God, because the required oath "unconstitutionally invades the appellant's freedom of belief and religion." *Id.,* at 496, 81 S.Ct., at 1684. In *Keyishian v. Board of Regents of Univ. of New York,* 385 U.S. 589, 609-610, 87 S.Ct. 675, 687, 17 L.Ed.2d 629 (1967), we held a law affecting appointment and retention of teachers invalid because it premised employment on an unconstitutional restriction of political belief and association. In *Elfbrandt v. Russell,* 384 U.S. 11, 19, 86 S.Ct. 1238, 1242, 16 L.Ed.2d 321 (1966), we struck down a loyalty oath which was a prerequisite for public employment.

FN9. To the extent that respondents also argue that Moore has not been penalized for the exercise of protected speech and association rights because he had no claim of right to employment in the first place, that argument is foreclosed by *Perry v. Sindermann,* 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972). See *supra,* at 2735-2736.

Almost half a century ago, this Court made clear that the government "may not enact a regulation providing that no Republican ... shall be appointed to federal office." *Public Workers v. Mitchell,* 330 U.S. 75, 100, 67 S.Ct. 556, 569, 91 L.Ed. 754 (1947). What the *78 First Amendment precludes the government**2739 from commanding directly, it also precludes the government from accomplishing indirectly. See *Perry,* 408 U.S., at 597, 92 S.Ct., at 2697 (citing *Speiser v. Randall,* 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958)); see *supra,* at 2735. Under our sustained precedent, conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so. See *Elrod,* 427 U.S., at 362-363, 96 S.Ct., at 2684 (plurality opinion) and 375, 96 S.Ct., at 2690 (Stewart, J., concurring in judgment); *Branti,* 445 U.S., at 515-516, 100 S.Ct., at 1293; see also *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (unemployment benefits); *Speiser v. Randall, supra* (tax exemption). We find no such government interest here, for the same reasons that we found that the government lacks justification for patronage promotions, transfers, or recalls. See *supra,* at 2735-2738.

The court below, having decided that the appropriate inquiry in patronage cases is whether the employment decision at issue is the substantial equivalent of a dismissal, affirmed the trial court's dismissal of Moore's claim. See 868 F.2d, at 954. The Court of Appeals reasoned that "rejecting an employment application does not impose a hardship upon an employee comparable to the loss of [a] job." *Ibid.,* citing *Wygant v. Jackson Bd. of Educa-*

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tion, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion). Just as we reject the Seventh Circuit's proffered test, see *supra,* at 2737-2738, we find the Seventh Circuit's reliance on *Wygant* to distinguish hiring from dismissal unavailing. The court cited a passage from the plurality opinion in *Wygant* explaining that school boards attempting to redress past discrimination must choose methods that broadly distribute the disadvantages imposed by affirmative-action plans among innocent parties. The plurality said that race-based layoffs placed too great a burden on individual members of the nonminority race, but suggested that discriminatory hiring was permissible, under certain circumstances, even though it burdened white applicants, because the burden was less intrusive than the loss of an existing job. *79 476 U.S., at 282-284, 106 S.Ct., at 1851-1852. See also *id.,* at 294-295, 106 S.Ct., at 1857-1858 (WHITE, J., concurring in judgment).

Wygant has no application to the question at issue here. The plurality's concern in that case was identifying the least harsh means of remedying past wrongs. It did not question that *some* remedy was permissible when there was sufficient evidence of past discrimination. In contrast, the Governor of Illinois has not instituted a remedial undertaking. It is unnecessary here to consider whether not being hired is less burdensome than being discharged, because the government is not pressed to do *either* on the basis of political affiliation. The question in the patronage context is not which penalty is more acute but whether the government, without sufficient justification, is pressuring employees to discontinue the free exercise of their First Amendment rights.

If Moore's employment application was set aside because he chose not to support the Republican Party, as he asserts, then Moore's First Amendment rights have been violated. Therefore, we find that Moore's complaint was improperly dismissed.

III

We hold that the rule of *Elrod* and *Branti* extends to promotion, transfer, recall, and hiring decisions based on party affiliation and support and that all of the petitioners and cross-respondents have stated claims upon which relief may be granted. We affirm the Seventh Circuit insofar as it remanded Rutan's, Taylor's, Standefer's, and O'Brien's claims. However, we reverse the Seventh Circuit's decision to uphold the dismissal of Moore's claim. All five claims are remanded for proceedings consistent with this opinion.

It is so ordered.

**2740 Justice STEVENS, concurring.

While I join the Court's opinion, these additional comments are prompted by three propositions advanced by Justice SCALIA in his dissent. First, he implies that prohibiting imposition*80 of an unconstitutional condition upon eligibility for government employment amounts to adoption of a civil service system. Second, he makes the startling assertion that a long history of open and widespread use of patronage practices immunizes them from constitutional scrutiny. Third, he assumes that the decisions in *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), and *Branti v. Finkel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), represented dramatic departures from prior precedent.

Several years before either *Elrod* or *Branti* was decided, I had occasion as a judge on the Court of Appeals for the Seventh Circuit to evaluate each of these propositions. *Illinois State Employees Union, Council 34, Am. Federation of State, Cty., and Municipal Employees, AFL-CIO v. Lewis,* 473 F.2d 561 (1972), cert. denied, 410 U.S. 928, 93 S.Ct. 1364, 35 L.Ed.2d 590 (1973). With respect to the first, I wrote:

> "Neither this court nor any other may impose a civil service system upon the State of Illinois. The General Assembly has provided an elaborate system regulating the appointment to specified positions solely on the basis of merit and fitness, the grounds for termination of such employment,

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and the procedures which must be followed in connection with hiring, firing, promotion, and retirement. A federal court has no power to establish any such employment code.

"However, recognition of plaintiffs' claims will not give every public employee civil service tenure and will not require the state to follow any set procedure or to assume the burden of explaining or proving the grounds for every termination. It is the former employee who has the burden of proving that his discharge was motivated by an impermissible consideration. It is true, of course, that a prima facie case may impose a burden of explanation on the State. But the burden of proof will remain with the plaintiff employee and we must assume that the trier of fact will be able to differentiate between those discharges which are politically motivated and *81 those which are not. There is a clear distinction between the grant of tenure to an employee-a right which cannot be conferred by judicial fiat-and the prohibition of a discharge for a particular impermissible reason. The Supreme Court has plainly identified that distinction on many occasions, most recently in *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

"Unlike a civil service system, the Fourteenth Amendment to the Constitution does not provide job security, as such, to public employees. If, however, a discharge is motivated by considerations of race, religion, or punishment of constitutionally protected conduct, it is well settled that the State's action is subject to federal judicial review. There is no merit to the argument that recognition of plaintiffs' constitutional claim would be tantamount to foisting a civil service code upon the State." 473 F.2d, at 567-568 (footnotes and citations omitted).

Denying the Governor of Illinois the power to require every state employee, and every applicant for state employment, to pledge allegiance and service to the political party in power is a far cry from a civil service code. The question in this case is simply whether a Governor may adopt a rule that would be plainly unconstitutional if enacted by the General Assembly of Illinois.[FN1]

FN1. Despite Justice SCALIA's imprecise use of the term, *post,* at 2758, the legal issue presented in this litigation is plainly not a "political question." See *Elrod v. Burns,* 427 U.S. 347, 351-353, 96 S.Ct. 2673, 2678-2679, 49 L.Ed.2d 547 (1976) (plurality opinion); *Illinois State Employees Union, Council 34, Am. Federation of State, Cty., and Municipal Employees, AFL-CIO v. Lewis,* 473 F.2d 561, 566-567 (1972), cert. denied, 410 U.S. 928, 93 S.Ct. 1364, 35 L.Ed.2d 590 (1973).

**2741 Second, Justice SCALIA asserts that "when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down." *Post,* at 2748; *post,* at 2752 (a "clear and continuing tradition of our people" *82 deserves " *dispositive* effect"). The argument that traditional practices are immune from constitutional scrutiny is advanced in two plurality opinions that Justice SCALIA has authored, but not by any opinion joined by a majority of the Members of the Court.[FN2]

FN2. See *Michael H. v. Gerald D.,* 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989) (plurality opinion); *Burnham v. Superior Court of California, Marin County,* 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990) (plurality opinion). Justice SCALIA's additional reliance on *Bowers v. Hardwick,* 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), *post,* at 2752, is misplaced because in that case the Court used a history of state criminal prohibitions to support its refusal to extend the doctrine of substantive due process to previously unprotected conduct. The question

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> in these cases is whether mere longevity can immunize from constitutional review state conduct that would otherwise violate the First Amendment.

In the *Lewis* case, I noted the obvious response to this position: "[I]f the age of a pernicious practice were a sufficient reason for its continued acceptance, the constitutional attack on racial discrimination would, of course, have been doomed to failure." 473 F.2d, at 568, n. 14. See, *e.g., Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).[FN3] I then added *83 this comment on the specific application of that argument to patronage practices:

> FN3. Ironically, at the time of the adoption of the Bill of Rights, the party system itself was far from an "accepted political nor[m]." *Post,* at 2748. Our founders viewed it as a pathology:
>
> "Political discussion in eighteenth-century England and America was pervaded by a kind of anti-party cant. Jonathan Swift, in his *Thoughts on Various Subjects,* had said that 'Party is the madness of many, for the gain of the few.' This maxim, which was repeated on this side of the Atlantic by men like John Adams and William Paterson, plainly struck a deep resonance in the American mind. Madison and Hamilton, when they discussed parties or factions (for them the terms were usually interchangeable) in *The Federalist,* did so only to arraign their bad effects. In the great debate over the adoption of the Constitution both sides spoke ill of parties. The popular sage, Franklin (who was not always consistent on the subject), gave an eloquent warning against factions and 'the infinite mutual abuse of parties, tearing to pieces the best of characters.' George Washington devoted a large part of his political testament, the Farewell Address, to stern warnings against 'the baneful effects of the Spirit of Party.' His successor, John Adams, believed that 'a division of the republic into two great parties.... is to be dreaded as the greatest political evil under our Constitution.' Similar admonitions can be found in the writings of the arch-Federalist Fisher Adams and the 'philospher of Jeffersonian democracy,' John Taylor of Caroline. If there was one point of political philosophy upon which these men, who differed on so many things, agreed quite readily, it was their common conviction about the baneful effects of the spirit of party." R. Hofstadter, The Idea of a Party System 2-3 (1969) (footnote omitted).
>
> Our contemporary recognition of a state interest in protecting the two major parties from damaging intraparty feuding or unrestrained factionalism, see, *e.g., Storer v. Brown,* 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974); *post,* at 2754-2755, has not disturbed our protection of the rights of individual voters and the role of alternative parties in our government. See, *e.g., Anderson v. Celebrezze,* 460 U.S. 780, 793, 103 S.Ct. 1564, 1572, 75 L.Ed.2d 547 (1983) (burdens on new or small parties and independent candidates impinge on associational choices); *Williams v. Rhodes,* 393 U.S. 23, 32, 89 S.Ct. 5, 11, 21 L.Ed.2d 24 (1968) (there is "no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them").

"Finally, our answer to the constitutional question is not foreclosed by the fact that the 'spoils system has been entrenched in American history for almost two hundred years.' *Alomar v. Dwyer,* 447 F.2d 482, 483 (2d Cir.1971). For most of that period it was assumed, without serious question

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or debate, that since a public employee has no constitutional right to his job, there can be no valid constitutional objection to his summary removal. See *Bailey v. Richardson,* 86 U.S.App.D.C. 248, 182 F.2d 46, 59 (1950), affirmed per curiam by an equally divided Court, 341 U.S. 918 [71 S.Ct. 669, 95 L.Ed. 1352 (1951)]; **2742*Adler v. Board of Education,* 342 U.S. 485 [, 72 S.Ct. 380, 96 L.Ed. 517 (1952)]. But as Mr. Justice Marshall so forcefully stated in 1965 when he was a circuit judge, 'the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.' *Keyishian v. Board of Regents,* 345 F.2d 236, 239 (2d Cir.1965). The development of constitutional law subsequent to the Supreme Court's unequivocal repudiation of the line of cases ending with *Bailey v. *84 Richardson* and *Adler v. Board of Education* is more relevant than the preceding doctrine which is now 'universally rejected.' " 473 F.2d, at 568 (footnotes and citations omitted).

With respect to Justice SCALIA's view that until *Elrod v. Burns* was decided in 1976, it was unthinkable that patronage could be unconstitutional, see *post,* at 2748-2749, it seems appropriate to point out again not only that my views in *Lewis* antedated *Elrod* by several years, but, more importantly, that they were firmly grounded in several decades of decisions of this Court. As explained in *Lewis:*

"[In 1947] a closely divided Supreme Court upheld a statute prohibiting federal civil service employees from taking an active part in partisan political activities. *United Public Workers v. Mitchell,* 330 U.S. 75 [67 S.Ct. 556, 91 L.Ed. 754 (1947)]. The dissenting Justices felt that such an abridgment of First Amendment rights could not be justified. The majority, however, concluded that the government's interests in not compromising the quality of public service and in not permitting individual employees to use their public offices to advance partisan causes were sufficient to justify the limitation on their freedom.

"There was no dispute within the Court over the proposition that the employees' interests in political action were protected by the First Amendment. The Justices' different conclusions stemmed from their different appraisals of the sufficiency of the justification for the restriction. That justification-the desirability of political neutrality in the public service and the avoidance of the use of the power and prestige of government to favor one party or the other-would condemn rather than support the alleged conduct of defendant in this case. Thus, in dicta, the Court unequivocally stated that the Legislature could not require allegiance to a particular political faith as a condition of public employment:

*85 " 'Appellants urge that federal employees are protected by the Bill of Rights and that Congress may not "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work." None would deny such limitations on Congressional power but, because there are some limitations it does not follow that a prohibition against acting as ward leader or worker at the polls is invalid.' 330 U.S. 75, 100, 67 S.Ct., at 569-570.

"In 1952 the Court quoted that dicta in support of its holding that the State of Oklahoma could not require its employees to profess their loyalty by denying past association with Communists. *Wieman v. Updegraff,* 344 U.S. 183, 191-192 [73 S.Ct. 215, 219, 97 L.Ed. 216 (1952)]. That decision did not recognize any special right to public employment; rather, it rested on the impact of the requirement on the citizen's First Amendment rights. We think it unlikely that the Supreme Court would consider these plaintiffs' interest in freely associating with members of the Democratic Party less worthy of protection than the Oklahoma employees' interest in associating with

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Communists or former Communists.

"In 1961 the Court held that a civilian cook could be summarily excluded from a naval gun factory. **2743*Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy,* 367 U.S. 886 [81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961)]. The government's interest in maintaining the security of the military installation outweighed the cook's interest in working at a particular location. Again, however, the Court explicitly assumed that the sovereign could not deny employment for the reason that the citizen was a member of a particular political party or religious faith-'that she could not have been kept out because she was a Democrat or a Methodist.' 367 U.S., at 898 [81 S.Ct., at 1750].

*86 "In 1968 the Court held that 'a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.' *Pickering v. Board of Education,* 391 U.S. 563, 574, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). The Court noted that although criminal sanctions 'have a somewhat different impact on the exercise of the right to freedom of speech from dismissal from employment, it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech.' *Ibid.* The holding in *Pickering* was a natural sequel to Mr. Justice Frankfurter's comment in dissent in Shelton v. Tucker that a scheme to terminate the employment of teachers solely because of their membership in unpopular organizations would run afoul of the Fourteenth Amendment. 364 U.S. 479, 496[, 81 S.Ct. 247, 256, 5 L.Ed.2d 231 (1960)].

"In 1972 the Court reaffirmed the proposition that a nontenured public servant has no constitutional right to public employment, but nevertheless may not be dismissed for exercising his First Amendment rights. *Perry v. Sindermann,* 408 U.S. 593 [92 S.Ct. 2694, 33 L.Ed.2d 570]. The Court's explanation of its holding is pertinent here:

" 'For at least a quarter century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not act. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests-especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser v. Randall,* 357 U.S. 513, 526 [78 S.Ct. 1332, 2 L.Ed.2d 1460]. Such interference with constitutional rights is impermissible.'

*87 " 'We have applied this general principle to denials of tax exemptions, *Speiser v. Randall, supra,* unemployment benefits, *Sherbert v. Verner,* 374 U.S. 398, 404-405 [83 S.Ct. 1790, 1794, 10 L.Ed.2d 965 (1963)], and welfare payments, *Shapiro v. Thompson,* 394 U.S. 618, 627 n. 6 [89 S.Ct. 1322, 1327 n. 6, 22 L.Ed.2d 600 (1969)]; *Graham v. Richardson,* 403 U.S. 365, 374 [91 S.Ct. 1848, 1853, 29 L.Ed.2d 534 (1971)]. But, most often, we have applied the principle to denials of public employment. *United Public Workers v. Mitchell,* 330 U.S. 75, 100 [67 S.Ct. 556, 569, 91 L.Ed. 754 (1947)]; *Wieman v. Updegraff,* 344 U.S. 183, 192 [73 S.Ct. 215, 219, 97 L.Ed. 216 (1952)]; *Shelton v. Tucker,* 364 U.S. 479, 485-486 [81 S.Ct. 247, 250-251, 5 L.Ed.2d 231 (1960)]; *Torcaso v. Watkins,* 367 U.S. 488, 495-496 [81 S.Ct. 1680, 1683-1684, 6 L.Ed.2d 982 (1961)]; *Cafeteria and Restaurant Workers, etc. v. McElroy,* 367 U.S. 886, 894 [81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961)]; *Cramp v. Board of Public Instruction,* 368 U.S. 278, 288 [82 S.Ct. 275, 281, 7 L.Ed.2d 285 (1961)]; *Baggett v. Bullitt,* 377 U.S. 360 [84 S.Ct. 1316, 12 L.Ed.2d 377 (1964)]; **2744*Elfbrandt v. Russell,* 384 U.S. [11,] 17 [86 S.Ct. 1238, 1241, 16

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L.Ed.2d 321 (1966)]; *Keyishian v. Board of Regents,* 385 U.S. 589, 605-606 [87 S.Ct. 675, 684-685, 17 L.Ed.2d 629 (1967)]; *Whitehill v. Elkins,* 389 U.S. 54 [88 S.Ct. 184, 19 L.Ed.2d 228 (1967)]; *United States v. Robel,* 389 U.S. 258 [88 S.Ct. 419, 19 L.Ed.2d 508 (1967)]; *Pickering v. Board of Education,* 391 U.S. 563, 568 [88 S.Ct. 1731, 1734-1735, 20 L.Ed.2d 811 (1968)]. We have applied the principle regardless of the public employee's contractual or other claim to a job. Compare *Pickering v. Board of Education, supra,* with *Shelton v. Tucker, supra.*'

"Thus the respondent's lack of a contractual or tenure "right" to reemployment for the 1969-1970 academic year is immaterial to his free speech claim....' 408 U.S., at 597, 92 S.Ct., at 2696-2698.

"This circuit has given full effect to this principle." 473 F.2d, at 569-572 (footnotes and citations omitted).

See also *American Federation of State, Cty. and Municipal Employees, AFL-CIO v. Shapp,* 443 Pa. 527, 537-545, 280 A.2d 375, 379-383 (1971) (Barbieri, J., dissenting).

To avoid the force of the line of authority described in the foregoing passage, Justice SCALIA would weigh the supposed general state interest in patronage hiring against the *88 aggregated interests of the many employees affected by the practice. This defense of patronage obfuscates the critical distinction between partisan interest and the public interest.[FN4] It assumes that governmental power and public resources *89 in this case employment opportunities-may appropriately be used to subsidize partisan activities even when the political affiliation of the employee or the job applicant is entirely unrelated to **2745 his or her public service.[FN5] The premise on which this position rests would justify the use of public funds to compensate party members for their campaign work, or, conversely, a legislative enactment denying public employment to nonmembers of the majority party. If such legislation is unconstitutional-as it clearly would be-an equally pernicious rule promulgated by the executive must also be invalid.

FN4. Although Justice SCALIA's defense of patronage turns on the benefits of fostering the two-party system, *post,* at 2754, his opinion is devoid of reference to meaningful evidence that patronage practices have played a significant role in the preservation of the two-party system. In each of the examples that he cites-"the Boss Tweeds, the Tammany Halls, the Pendergast Machines, the Byrd Machines, and the Daley Machines," *post,* at 2747-patronage practices were used solely to protect the power of an entrenched majority. See Laycock, Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights, 99 Yale L.J. 1711, 1722 (1990) (describing the "hopelessness of contesting elections" in Chicago's "one-party system" when "half a dozen employees of the city and of city contractors were paid with public funds to work [a precinct] for the other side"); Johnson, Successful Reform Litigation: The *Shakman* Patronage Case, 64 Chi.-Kent L.Rev. 479, 481 (1988) (the "massive Democratic patronage employment system" maintained a "noncompetitive political system" in Cook County in the 1960's).

Without repeating the Court's studied rejection of the policy arguments for patronage practices in *Elrod,* 427 U.S., at 364-373, 96 S.Ct., at 2685-2690, I note only that many commentators agree more with Justice SCALIA's admissions of the systemic costs of patronage practices-the "financial corruption, such as salary kickbacks and partisan political activity on government-paid time," the reduced efficiency of government, and the undeniable constraint upon the ex-

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pression of views by employees, *post,* at 2755-2756-than with his belief that patronage is necessary to political stability and integration of powerless groups. See, *e.g.,* G. Pomper, Voters, Elections, and Parties 282-304 (1988) (multiple causes of party decline); D. Price, Bringing Back the Parties 22-25 (1984) (same); Comment, 41 U.Chi.L.Rev. 297, 319-328 (1974) (same); Wolfinger, Why Political Machines Have Not Withered Away and Other Revisionist Thoughts, 34 J.Politics 365, 398 (1972) (absence of machine politics in California); J. James, American Political Parties in Transition 85 (1974) (inefficient and antiparty effects of patronage); Johnston, Patrons and Clients, Jobs and Machines: A Case Study of the Uses of Patronage, 73 Am.Pol.Sci.Rev. 385 (1979) (same); Grimshaw, The Political Economy of Machine Politics, 4 Corruption and Reform 15 (1989) (same); Comment, 49 U.Chi.L.Rev. 181, 197-200 (1982) (same); Freedman, Doing Battle with the Patronage Army: Politics, Courts and Personnel Administration in Chicago, 48 Pub.Admin.Rev. 847 (1988) (race and machine politics).

Incidentally, although some might suggest that Jacob Arvey was "best known as the promoter of Adlai Stevenson," *post,* at 2753, that connection is of interest only because of Mr. Arvey's creative and firm leadership of the powerful political organization that was subsequently led by Richard J. Daley. M. Tolchin & S. Tolchin, To the Victor 36 (1971).

FN5. Neither Justice SCALIA nor any of the parties suggests that party affiliation is relevant to any of the positions at stake in this litigation-rehabilitation counselor, road equipment operator, prison guard, dietary manager, and temporary garage worker. Reliance on the difficulty of precisely dividing the positions in which political affiliation is relevant to the quality of public service from those in which it is not an appropriate requirement of the job is thus inapposite. See *post,* at 2756-2758. Difficulty in deciding borderline cases does not justify imposition of a loyalty oath in the vast category of positions in which it is irrelevant.

Justice SCALIA argues that distinguishing "inducement and compulsion" reveals that a patronage system's impairment of the speech and associational rights of employees and would-be employees is insignificant. *Post,* at 2755-2756. This analysis contradicts the harsh reality of party discipline that is the linchpin of his theory of patronage. *Post,* at 2753 (emphasizing the "link between patronage and party discipline, and between that and party success").[FN6] More importantly,*90 it rests on the long-rejected fallacy that a privilege may be burdened by unconstitutional conditions. See, *e.g., Perry v. Sindermann,* 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972). There are a few jobs for which an individual's race or religion may be relevant, see *Wygant v. Jackson Bd. of Education,* 476 U.S. 267, 314-315, 106 S.Ct. 1842, 1868-1869, 90 L.Ed.2d 260 (1986) (STEVENS, J., dissenting); there are many jobs for which political affiliation is relevant to the employee's ability to function effectively as part of a given administration. In those cases-in other words, cases in which "the efficiency of the public service," *Public Workers v. Mitchell,* 330 U.S. 75, 101, 67 S.Ct. 556, 570, 91 L.Ed. 754 (1947), would be advanced by hiring workers who are loyal to the Governor's party-such hiring is permissible under the holdings in *Elrod* and *Branti.* These cases, however, concern jobs in which race, religion, and political affiliation are all equally and entirely irrelevant to the public service to be performed. When an individual has *91 been denied employment for an impermissible reason, it

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is unacceptable to balance the constitutional rights of the individual against the political interests of the party in power. It seems to me obvious that the government may not discriminate against particular individuals in hopes of advancing **2746 partisan interests through the misuse [FN7] of public funds.

FN6. The iron fist inside the velvet glove of Justice SCALIA's "inducements" and "influences" is apparent from his own descriptions of the essential features of a patronage system. See, *e.g., post,* at 2755 (the worker may "urge *within the organization* the adoption of any political position; but if that position is rejected he must vote and work for the party nonetheless"); *post,* at 2753 (quoting M. Tolchin & S. Tolchin, To the Victor, at 123 (reporting that Montclair, New Jersey, Democrats provide fewer services than Cook County, Illinois, Democrats, while "the rate of issue participation is much higher among Montclair Democrats who are not bound by the fear displayed by the Cook County committeemen")); *post,* at 2753 (citing W. Grimshaw, The Political Economy of Machine Politics, 4 Corruption and Reform 15, 30 (1989) (reporting that Mayor Daley "sacked" a black committeeman for briefly withholding support for a school board nominee whom civil rights activists opposed)).

Of course, we have firmly rejected any requirement that aggrieved employees "prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance." *Branti,* 445 U.S. 507, 517, 100 S.Ct. 1287, 1294, 63 L.Ed.2d 574 (1980) . What is at issue in these cases is not whether an employee is actually coerced or merely influenced, but whether the attempt to obtain his or her support through "party discipline" is legitimate. To apply the relevant question to Justice SCALIA's example, *post,* at 2755-2756 the person who attempts to bribe a public official is guilty of a crime regardless of whether the official submits to temptation; likewise, a political party's attempt to maintain loyalty through allocation of government resources is improper regardless of whether any employee capitulates.

FN7. I use the term "misuse" deliberately because the entire rationale for patronage hiring as an economic incentive for partisan political activity rests on the assumption that the patronage employee filling a government position must be paid a premium to reward him for his partisan services. Without such a premium, the economic incentive rationale on which Justice SCALIA relies does not exist. It has been clear to Congress and this Court for over a century that refusal to contribute "may lead to putting good men out of the service, liberal payments may be made the ground for keeping poor ones in," and "the government itself may be made to furnish indirectly the money to defray the expenses of keeping the political party in power that happens to have for the time being the control of the public patronage." *Ex parte Curtis,* 106 U.S. 371, 375, 1 S.Ct. 381, 385, 27 L.Ed. 232 (1882) (upholding constitutionality of Act of Aug. 15, 1876, § 6, ch. 287, 19 Stat. 169, prohibiting nonappointed federal employees from requesting or receiving any thing of value for political purposes).

Petitioners Rutan and Taylor both allege that they are more qualified than the persons who were promoted over them.

The only systemic consideration permissible in these circumstances is not that of the controlling party, but that of the aggregate of burdened indi-

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viduals. By impairing individuals' freedoms of belief and association, unfettered patronage practices undermine the "free functioning of the electoral process." *Elrod,* 427 U.S., at 356, 96 S.Ct., at 2681. As I wrote in 1972:

> "Indeed, when numbers are considered, it is appropriate not merely to consider the rights of a particular janitor who may have been offered a bribe from the public treasury to obtain his political surrender, but also the impact on the body politic as a whole when the free political choice of millions of public servants is inhibited or manipulated by the selective award of public benefits. While the patronage system is defended in the name of democratic tradition, its paternalistic impact on the political *92 process is actually at war with the deeper traditions of democracy embodied in the First Amendment." *Lewis,* 473 F.2d, at 576.[FN8]

FN8. A decade later, in *Anderson v. Celebrezze,* 460 U.S., at 794, 103 S.Ct., at 1572, this Court decided that a law burdening independent candidates, by "limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group," would burden associational choices and thereby "threaten to reduce diversity and competition in the marketplace of ideas." We concluded that "the primary values protected by the First Amendment-'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,' *New York Times Co. v. Sullivan,* 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964)-are served when election campaigns are not monopolized by the existing political parties." *Ibid.*

The tradition that is relevant in these cases is the American commitment to examine and reexamine past and present practices against the basic principles embodied in the Constitution. The inspirational command by our President in 1961 is entirely consistent with that tradition: "Ask not what your country can do for you-ask what you can do for your country." These cases involve a contrary command: "Ask not what job applicants can do for the State-ask what they can do for our party." Whatever traditional support may remain for a command of that ilk, it is plainly an illegitimate excuse for the practices rejected by the Court today.

Justice SCALIA, with whom The Chief Justice and Justice KENNEDY join, and with whom Justice O'CONNOR joins as to Parts II and III, dissenting.

Today the Court establishes the constitutional principle that party membership is not a permissible factor in the dispensation of government jobs, except those jobs for the performance of which party affiliation is an "appropriate requirement." *Ante,* at 2732. It is hard to say precisely (or even generally) what that exception means, but if there is any category of jobs for whose performance party affiliation is not an appropriate requirement, it is the job of being a judge, where *93 partisanship is not only unneeded but positively undesirable. It is, however, **2747 rare that a federal administration of one party will appoint a judge from another party. And it has always been rare. See *Marbury v. Madison,* 1 Cranch 137, 2 L.Ed. 60 (1803). Thus, the new principle that the Court today announces will be enforced by a corps of judges (the Members of this Court included) who overwhelmingly owe their office to its violation. Something must be wrong here, and I suggest it is the Court.

The merit principle for government employment is probably the most favored in modern America, having been widely adopted by civil service legislation at both the state and federal levels. But there is another point of view, described in characteristically Jacksonian fashion by an eminent practitioner of the patronage system, George Washington Plunkitt of Tammany Hall:

> "I ain't up on sillygisms, but I can give you some arguments that nobody can answer.

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"First, this great and glorious country was built up by political parties; second, parties can't hold together if their workers don't get offices when they win; third, if the parties go to pieces, the government they built up must go to pieces, too; fourth, then there'll be hell to pay." W. Riordon, Plunkitt of Tammany Hall 13 (1963).

It may well be that the Good Government Leagues of America were right, and that Plunkitt, James Michael Curley, and their ilk were wrong; but that is not entirely certain. As the merit principle has been extended and its effects increasingly felt; as the Boss Tweeds, the Tammany Halls, the Pendergast Machines, the Byrd Machines, and the Daley Machines have faded into history; we find that political leaders at all levels increasingly complain of the helplessness of elected government, unprotected by "party discipline," before the demands of small and cohesive interest groups.

*94 The choice between patronage and the merit principle-or, to be more realistic about it, the choice between the desirable mix of merit and patronage principles in widely varying federal, state, and local political contexts-is not so clear that I would be prepared, as an original matter, to chisel a single, inflexible prescription into the Constitution. Fourteen years ago, in *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), the Court did that. *Elrod* was limited however, as was the later decision of *Branti v. Finkel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), to patronage firings, leaving it to state and federal legislatures to determine when and where political affiliation could be taken into account in hirings and promotions. Today the Court makes its constitutional civil service reform absolute, extending to all decisions regarding government employment. Because the First Amendment has never been thought to require this disposition, which may well have disastrous consequences for our political system, I dissent.

I

The restrictions that the Constitution places upon the government in its capacity as lawmaker, *i.e.,* as the regulator of private conduct, are not the same as the restrictions that it places upon the government in its capacity as employer. We have recognized this in many contexts, with respect to many different constitutional guarantees. Private citizens perhaps cannot be prevented from wearing long hair, but policemen can. *Kelley v. Johnson,* 425 U.S. 238, 247, 96 S.Ct. 1440, 1445, 47 L.Ed.2d 708 (1976). Private citizens cannot have their property searched without probable cause, but in many circumstances government employees can. *O'Connor v. Ortega,* 480 U.S. 709, 723, 107 S.Ct. 1492, 1500, 94 L.Ed.2d 714 (1987) (plurality opinion); *id.,* at 732, 107 S.Ct., at 1505 (SCALIA, J., concurring in judgment). Private citizens cannot be punished for refusing to provide the government information that may incriminate them, but government employees can be dismissed when the incriminating information that they refuse to provide relates to the performance of their jobs. *Gardner v.* **2748 *Broderick,* 392 *95 U.S. 273, 277-278, 88 S.Ct. 1913, 1915-1916, 20 L.Ed.2d 1082 (1968). With regard to freedom of speech in particular: Private citizens cannot be punished for speech of merely private concern, but government employees can be fired for that reason. *Connick v. Myers,* 461 U.S. 138, 147, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983). Private citizens cannot be punished for partisan political activity, but federal and state employees can be dismissed and otherwise punished for that reason. *Public Workers v. Mitchell,* 330 U.S. 75, 101, 67 S.Ct. 556, 570, 91 L.Ed. 754 (1947); *Civil Service Comm'n v. Letter Carriers,* 413 U.S. 548, 556, 93 S.Ct. 2880, 2886, 37 L.Ed.2d 796 (1973); *Broadrick v. Oklahoma,* 413 U.S. 601, 616-617, 93 S.Ct. 2908, 2918-2919, 37 L.Ed.2d 830 (1973).

Once it is acknowledged that the Constitution's prohibition against laws "abridging the freedom of speech" does not apply to laws enacted in the government's capacity as employer in the same way that it does to laws enacted in the government's capacity as regulator of private conduct, it may some-

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times be difficult to assess what employment practices are permissible and what are not. That seems to me not a difficult question, however, in the present context. The provisions of the Bill of Rights were designed to restrain transient majorities from impairing long-recognized personal liberties. They did not create by implication novel individual rights overturning accepted political norms. Thus, when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.[FN1] Such a venerable and accepted tradition is not to *96 be laid on the examining table and scrutinized for its conformity to some abstract principle of First Amendment adjudication devised by this Court. To the contrary, such traditions are themselves the stuff out of which the Court's principles are to be formed. They are, in these uncertain areas, the very points of reference by which the legitimacy or illegitimacy of *other* practices are to be figured out. When it appears that the latest "rule," or "three-part test," or "balancing test" devised by the Court has placed us on a collision course with such a landmark practice, it is the former that must be recalculated by us, and not the latter that must be abandoned by our citizens. I know of no other way to formulate a constitutional jurisprudence that reflects, as it should, the principles adhered to, over time, by the American people, rather than those favored by the personal (and necessarily shifting) philosophical dispositions of a majority of this Court.

FN1. The customary invocation of *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), as demonstrating the dangerous consequences of this principle, see *ante,* at 2741 (STEVENS, J., concurring), is unsupportable. I argue for the role of tradition in giving content only to *ambiguous* constitutional text; no tradition can supersede the Constitution. In my view the Fourteenth Amendment's requirement of "equal protection of the laws," combined with the Thirteenth Amendment's abolition of the institution of black slavery, leaves no room for doubt that laws treating people differently because of their race are invalid. Moreover, even if one does not regard the Fourteenth Amendment as crystal clear on this point, a tradition of *unchallenged* validity did not exist with respect to the practice in *Brown.* To the contrary, in the 19th century the principle of "separate-but-equal" had been vigorously opposed on constitutional grounds, litigated up to this Court, and upheld only over the dissent of one of our historically most respected Justices. See *Plessy v. Ferguson,* 163 U.S. 537, 555-556, 16 S.Ct. 1138, 1145, 41 L.Ed. 256 (1896) (Harlan, J., dissenting).

I will not describe at length the claim of patronage to landmark status as one of our accepted political traditions. Justice Powell discussed it in his dissenting opinions in *Elrod* and *Branti. Elrod, supra,* 427 U.S., at 378-379, 96 S.Ct., at 2692; *Branti, supra,* 445 U.S., at 522, n. 1, 100 S.Ct., at 1296, n. 1. Suffice it to say that patronage was, without any thought that it could be unconstitutional, a basis for government employment from the **2749 earliest days of the Republic until *Elrod*- and has continued unabated *since Elrod,* to the extent still permitted by that unfortunate decision. See, *e.g.,* D. Price, Bringing Back the Parties 24, 32 (1984); Gardner, A Theory of the Spoils System, 54 Public Choice 171, 181 (1987); Toinet & Glenn, Clientelism and Corruption in the "Open" Society: The Case of the United States, in Private Patronage and Public Power 193, 202 (C. Clapham ed. *97 1982). Given that unbroken tradition regarding the application of an ambiguous constitutional text, there was in my view no basis for holding that patronage-based dismissals violated the First Amendment-much less for holding, as the Court does today, that even patronage hiring does so.[FN2]

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FN2. Justice STEVENS seeks to counteract this tradition by relying upon the supposed "unequivocal repudiation" of the right-privilege distinction. *Ante,* at 2742. That will not do. If the right-privilege distinction was once used to explain the practice, and if that distinction is to be repudiated, then one must simply devise some other theory to explain it. The order of precedence is that a constitutional theory must be wrong if its application contradicts a clear constitutional tradition; not that a clear constitutional tradition must be wrong if it does not conform to the current constitutional theory. On Justice STEVENS' view of the matter, this Court examines a historical practice, endows it with an intellectual foundation, and later, by simply undermining that foundation, relegates the constitutional tradition to the dustbin of history. That is not how constitutional adjudication works. Cf. *Burnham v. Superior Court of California, Marin County,* 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990) (opinion of SCALIA, J.). I am not sure, in any event, that the right-privilege distinction has been as unequivocally rejected as Justice STEVENS supposes. It has certainly been recognized that the fact that the government need not confer a certain benefit does not mean that it can attach any conditions whatever to the conferral of that benefit. But it remains true that certain conditions can be attached to benefits that cannot be imposed as prescriptions upon the public at large. If Justice STEVENS chooses to call this something other than a right-privilege distinction, that is fine and good-but it is in any case what explains the nonpatronage restrictions upon federal employees that the Court continues to approve, and there is no reason why it cannot support patronage restrictions as well.

II

Even accepting the Court's own mode of analysis, however, and engaging in "balancing" a tradition that ought to be part of the scales, *Elrod, Branti,* and today's extension of them seem to me wrong.

A

The Court limits patronage on the ground that the individual's interest in uncoerced belief and expression outweighs the systemic interests invoked to justify the practice. *Ante,* *98 at 2734-2735. The opinion indicates that the government may prevail only if it proves that the practice is "narrowly tailored to further vital government interests." *Ante,* at 2736.

That strict-scrutiny standard finds no support in our cases. Although our decisions establish that government employees do not lose all constitutional rights, we have consistently applied a lower level of scrutiny when "the governmental function operating ... [is] not the power to regulate or license, as lawmaker, an entire trade or profession, or to control an entire branch of private business, but, rather, as proprietor, to manage [its] internal operatio [ns]...." *Cafeteria & Restaurant Workers v. McElroy,* 367 U.S. 886, 896, 81 S.Ct. 1743, 1749, 6 L.Ed.2d 1230 (1961). When dealing with its own employees, the government may not act in a manner that is "patently arbitrary or discriminatory," *id.,* at 898, 81 S.Ct., at 1750, but its regulations are valid if they bear a "rational connection" to the governmental end sought to be served, *Kelley v. Johnson,* 425 U.S., at 247, 96 S.Ct., at 1446.

In particular, restrictions on speech by public employees are not judged by the test applicable to similar restrictions on speech by nonemployees. We have said that "[a] governmental employer may subject its employees to such special restrictions on free expression as are reasonably necessary to promote effective government." **2750*Brown v. Glines,* 444 U.S. 348, 356, n. 13, 100 S.Ct. 594, 600, n. 13, 62 L.Ed.2d 540 (1980). In *Public Workers v. Mitchell,* 330 U.S., at 101, 67 S.Ct., at 570

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upholding provisions of the Hatch Act which prohibit political activities by federal employees, we said that "it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service." We reaffirmed *Mitchell* in *Civil Service Comm'n v. Letter Carriers,* 413 U.S., at 556, 93 S.Ct., at 2886, over a dissent by Justice Douglas arguing against application of a special standard to Government employees, except insofar as their "job performance" is concerned, *id.,* at 597, 93 S.Ct., at 2906. We did not say that the Hatch Act was narrowly tailored to meet ***99** the government's interest, but merely deferred to the judgment of Congress, which we were not "in any position to dispute." *Id.,* at 567, 93 S.Ct., at 2891. Indeed, we recognized that the Act was not indispensably necessary to achieve those ends, since we repeatedly noted that "Congress at some time [may] come to a different view." *Ibid.;* see also *id.,* at 555, 564, 93 S.Ct., at 2890. In *Broadrick v. Oklahoma,* 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), we upheld similar restrictions on state employees, though directed "at political expression which if engaged in by private persons would plainly be protected by the First and Fourteenth Amendments," *id.,* at 616, 93 S.Ct., at 2918.

To the same effect are cases that specifically concern adverse employment action taken against public employees because of their speech. In *Pickering v. Board of Education of Township High School Dist.,* 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968), we recognized:

> "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

Because the restriction on speech is more attenuated when the government conditions employment than when it imposes criminal penalties, and because "government offices could not function if every employment decision became a constitutional matter," *Connick v. Myers,* 461 U.S., at 143, 103 S.Ct., at 1688, we have held that government employment decisions taken on the basis of an employee's speech do not "abridg[e] the freedom of speech," U.S. Const., Amdt. 1, merely because they fail ***100** the narrow-tailoring and compelling-interest tests applicable to direct regulation of speech. We have not subjected such decisions to strict scrutiny, but have accorded "a wide degree of deference to the employer's judgment" that an employee's speech will interfere with close working relationships. 461 U.S., at 152, 103 S.Ct., at 1692.

When the government takes adverse action against an employee on the basis of his political affiliation (an interest whose constitutional protection is derived from the interest in speech), the same analysis applies. That is why both the *Elrod* plurality, 427 U.S., at 359, 96 S.Ct., at 2682, and the opinion concurring in the judgment, *id.,* at 375, 96 S.Ct., at 2690, as well as *Branti,* 445 U.S., at 514-515, 100 S.Ct., at 1292-1293, and the Court today, *ante,* at 2735-2736, rely on *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), a case that applied the test announced in *Pickering,* not the strict-scrutiny test applied to restrictions imposed on the public at large. Since the government may dismiss an employee for political *speech* "reasonably deemed by Congress to interfere with the efficiency of the public service," *Public Workers v. Mitchell, supra,* 330 U.S., at 101, 67 S.Ct., at 570, it follows, *a fortiori,* that the government may dismiss an employee for political *affiliation* if "reasonably necessary to promote effective government." ****2751** *Brown v. Glines, supra,* 444 U.S., at 356, n. 13, 100 S.Ct., at 600, n. 13.

While it is clear from the above cases that the normal "strict scrutiny" that we accord to government regulation of speech is not applicable in this

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field, [FN3] the precise test that **2752 replaces*101 it is not so clear; we have used various formulations. The one that appears in the case dealing with an employment practice closest in its effects to patronage is whether the *102 practice could be "reasonably deemed" by the enacting legislature to further a legitimate goal. *Public Workers v. Mitchell,* 330 U.S., at 101, 67 S.Ct., at 570. For purposes of my ensuing discussion, however, I will apply a less permissive standard that seems more in accord with our general "balancing" test: Can the governmental advantages of this employment practice reasonably be deemed to outweigh its "coercive" effects?

FN3. The Court calls our description of the appropriate standard of review "questionable," and suggests that these cases applied strict scrutiny ("even *were* Justice SCALIA correct that less-than-strict scrutiny is appropriate"). *Ante,* at 2735, n. 4 (emphasis added). This suggestion is incorrect, does not aid the Court's argument, and if accepted would eviscerate the strict-scrutiny standard. It is incorrect because even a casual perusal of the cases reveals that the governmental actions were sustained, not because they were shown to be "narrowly tailored to further vital government interests," *ante,* at 2736, but because they were "reasonably" deemed necessary to promote effective government. It does not aid the Court's argument, moreover, because *whatever* standard those cases applied must be applied here, and if the asserted interests in patronage are as weighty as those proffered in the previous cases, then *Elrod* and *Branti* were wrongly decided. It eviscerates the standard, finally, because if the practices upheld in those cases survived strict scrutiny, then the so-called "strict-scrutiny" test means nothing. Suppose a State made it unlawful for an employee of a privately owned nuclear powerplant to criticize his employer. Can there be any doubt that we would reject out of hand the State's argument that the statute was justified by the compelling interest in maintaining the appearance that such employees are operating nuclear plants properly, so as to maintain public confidence in the plants' safety? But cf. *Civil Service Comm'n v. Letter Carriers,* 413 U.S. 548, 565, 93 S.Ct. 2880, 2890, 37 L.Ed.2d 796 (1973) (Hatch Act justified by need for Government employees to "appear to the public to be avoiding [political partiality], if confidence in the system of representative Government is not to be eroded"). Suppose again that a State prohibited a private employee from speaking on the job about matters of private concern. Would we even hesitate before dismissing the State's claim that the compelling interest in fostering an efficient economy overrides the individual's interest in speaking on such matters? But cf. *Connick v. Myers,* 461 U.S. 138, 147, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983) ("[W]hen a public employee speaks ... upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior"). If the Court thinks that strict scrutiny is appropriate in all these cases, then it should forthrightly admit that *Public Workers v. Mitchell,* 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947) , *Letter Carriers, supra, Pickering v. Board of Education of Township High School Dist.,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), *Connick, supra,* and similar cases were mistaken and should be overruled; if it rejects that course, then it should admit that those cases applied, as they said they did, a reasonableness test.

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The Court's further contention that these cases are limited to the "interests that the government has in its capacity as an employer," *ante,* at 2735, n. 4, as distinct from its interests "in the structure and functioning of society as a whole," *ibid.,* is neither true nor relevant. Surely a principal reason for the statutes that we have upheld preventing political activity by government employees-and indeed the *only* substantial reason, with respect to those employees who are permitted to be hired and fired on a political basis-is to prevent the party in power from obtaining what is considered an unfair advantage in political campaigns. That is precisely the type of governmental interest at issue here. But even if the Court were correct, I see no reason in policy or principle why the government would be limited to furthering *only* its interests "as an employer." In fact, we have seemingly approved the furtherance of broader governmental interests through employment restrictions. In *Hampton v. Mow Sun Wong,* 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976), we held unlawful a Civil Service Commission regulation prohibiting the hiring of aliens on the ground that the Commission lacked the requisite authority. We were willing, however, to "assume ... that if the Congress or the President had expressly imposed the citizenship requirement, it would be justified by the national interest in providing an incentive for aliens to become naturalized, or possibly even as providing the President with an expendable token for treaty negotiating purposes." *Id.,* at 105, 96 S.Ct., at 1906. Three months after our opinion, the President adopted the restriction by Executive Order. Exec.Order No. 11935, 3 CFR 146 (1976 Comp.). On remand, the lower courts denied the *Mow Sun Wong* plaintiffs relief on the basis of this new Executive Order and relying upon the interest in providing an incentive for citizenship. *Mow Sun Wong v. Hampton,* 435 F.Supp. 37 (ND Cal.1977), aff'd, 626 F.2d 739 (CA9 1980). We denied certiorari *sub nom. Lum v. Campbell,* 450 U.S. 959, 101 S.Ct. 1419, 67 L.Ed.2d 384 (1981). In other cases, the lower federal courts have uniformly reached the same result. See, *e.g., Jalil v. Campbell,* 192 U.S.App.D.C. 4, 7, n. 3, 590 F.2d 1120, 1123, n. 3 (1978); *Vergara v. Hampton,* 581 F.2d 1281 (CA7 1978), cert. denied, 441 U.S. 905, 99 S.Ct. 1993, 60 L.Ed.2d 373 (1979); *Santin Ramos v. United States Civil Service Comm'n,* 430 F.Supp. 422 (PR 1977) (three-judge court).

B

Preliminarily, I may observe that the Court today not only declines, in this area replete with constitutional ambiguities, to give the clear and continuing tradition of our people the *dispositive* effect I think it deserves, but even declines to give it substantial weight in the balancing. That is contrary to what the Court has done in many other contexts. In evaluating*103 so-called "substantive due process" claims we have examined our history and tradition with respect to the asserted right. See, *e.g., Michael H. v. Gerald D.,* 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989); *Bowers v. Hardwick,* 478 U.S. 186, 192-194, 106 S.Ct. 2841, 2844-2846, 92 L.Ed.2d 140 (1986). In evaluating claims that a particular procedure violates the Due Process Clause we have asked whether the procedure is traditional. See, *e.g., Burnham v. Superior Court of California, Marin County,* 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990). And in applying the Fourth Amendment's reasonableness test we have looked to the history of judicial and public acceptance of the type of search in question. See, *e.g., Camara v. Municipal Court of San Francisco,* 387 U.S. 523, 537, 87 S.Ct. 1727, 1735, 18 L.Ed.2d 930

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(1967). See also *Press-Enterprise Co. v. Superior Court of California, Riverside County,* 478 U.S. 1, 8, 106 S.Ct. 2735, 2740, 92 L.Ed.2d 1 (1986) (tradition of accessibility to judicial proceedings implies judgment of experience that individual's interest in access outweighs government's interest in closure); *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 589, 100 S.Ct. 2814, 2834, 65 L.Ed.2d 973 (1980) (BRENNAN, J., concurring in judgment) ("Such a tradition [of public access] commands respect in part because the Constitution carries the gloss of history"); *Walz v. Tax Comm'n of New York City,* 397 U.S. 664, 678, 90 S.Ct. 1409, 1416, 25 L.Ed.2d 697 (1970) ("unbroken practice of according the [property tax] exemption to churches" demonstrates that it does not violate Establishment Clause).

But even laying tradition entirely aside, it seems to me our balancing test is amply met. I assume, as the Court's opinion assumes, that the balancing is to be done on a generalized basis, and not case by case. The Court holds that the governmental benefits of patronage cannot reasonably be thought to outweigh its "coercive" effects (even the lesser "coercive" effects of patronage hiring as opposed to patronage firing) not merely in 1990 in the State of Illinois, but at any time in any of the numerous political subdivisions of this vast country. It seems to me that that categorical pronouncement reflects a naive vision of politics and an inadequate appreciation of the systemic effects of patronage in promoting political stability*104 and facilitating the social and political integration of previously powerless groups.

The whole point of my dissent is that the desirability of patronage is a policy question to be decided by the people's representatives; I do not mean, therefore, to endorse that system. But in order to demonstrate that a legislature could reasonably determine that its benefits outweigh its "coercive" effects, I must describe those benefits as the proponents of patronage see them: As Justice Powell discussed at length in his *Elrod* dissent, patronage stabilizes political parties and prevents excessive political fragmentation-both of which are results in which States have a strong governmental interest. **2753 Party strength requires the efforts of the rank and file, especially in "the dull periods between elections," to perform such tasks as organizing precincts, registering new voters, and providing constituent services. *Elrod,* 427 U.S., at 385, 96 S.Ct., at 2695 (dissenting opinion). Even the most enthusiastic supporter of a party's program will shrink before such drudgery, and it is folly to think that ideological conviction alone will motivate sufficient numbers to keep the party going through the off years. "For the most part, as every politician knows, the hope of some reward generates a major portion of the local political activity supporting parties." *Ibid.* Here is the judgment of one such politician, Jacob Arvey (best known as the promoter of Adlai Stevenson): Patronage is " 'a necessary evil if you want a strong organization, because the patronage system permits of discipline, and without discipline, there's no party organization.' " Quoted in M. Tolchin & S. Tolchin, To the Victor 36 (1971). A major study of the patronage system describes the reality as follows:

> "[A]lthough men have many motives for entering political life ... the vast underpinning of both major parties is made up of men who seek practical rewards. Tangible advantages constitute the unifying thread of most successful political practitioners" *Id.,* at 22.
>
> *105 "With so little patronage cement, party discipline is relatively low; the rate of participation and amount of service the party can extract from [Montclair] county committeemen are minuscule compared with Cook County. The party considers itself lucky if 50 percent of its committeemen show up at meetings-even those labeled 'urgent'-while even lower percentages turn out at functions intended to produce crowds for visiting candidates." *Id.,* at 123.

See also W. Grimshaw, The Political Economy of Machine Politics, 4 Corruption and Reform 15,

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30 (1989); G. Pomper, Voters, Elections, and Parties 255 (1988); Wolfinger, Why Political Machines Have Not Withered Away and Other Revisionist Thoughts, 34 J. Politics 365, 384 (1972).

The Court simply refuses to acknowledge the link between patronage and party discipline, and between that and party success. It relies (as did the plurality in *Elrod, supra,* at 369, n. 23, 96 S.Ct., at 2688, n. 23) on a single study of a rural Pennsylvania county by Professor Sorauf, *ante,* at 2738-a work that has been described as "more persuasive about the ineffectuality of Democratic leaders in Centre County than about the generalizability of [its] findings." Wolfinger, *supra,* at 384, n. 39. It is unpersuasive to claim, as the Court does, that party workers are obsolete because campaigns are now conducted through media and other money-intensive means. *Ante,* at 2737. Those techniques have supplemented but not supplanted personal contacts. See Price, Bringing Back the Parties, at 25. Certainly they have not made personal contacts unnecessary in campaigns for the lower level offices that are the foundations of party strength, nor have they replaced the myriad functions performed by party regulars not directly related to campaigning. And to the extent such techniques have replaced older methods of campaigning (partly in response to the limitations the Court has placed on patronage), the political system is not clearly better off. See *Elrod, supra,* at 384, 96 S.Ct., at 2694 (Powell, J., dissenting); *Branti,* 445 *106 U.S., at 528, 100 S.Ct., at 1300 (Powell, J., dissenting). Increased reliance on money-intensive campaign techniques tends to entrench those in power much more effectively than patronage-but without the attendant benefit of strengthening the party system. A challenger can more easily obtain the support of party workers (who can expect to be rewarded even if the candidate loses-if not this year, then the next) than the financial support of political action committees (which will generally support incumbents, who are likely to prevail).

It is self-evident that eliminating patronage will significantly undermine party discipline;**2754 and that as party discipline wanes, so will the strength of the two-party system. But, says the Court, "[p]olitical parties have already survived the substantial decline in patronage employment practices in this century." *Ante,* at 2737. This is almost verbatim what was said in *Elrod,* see 427 U.S., at 369, 96 S.Ct., at 2687. Fourteen years later it seems much less convincing. Indeed, now that we have witnessed, in 18 of the last 22 years, an Executive Branch of the Federal Government under the control of one party while the Congress is entirely or (for two years) partially within the control of the other party; now that we have undergone the most recent federal election, in which 98% of the incumbents, of whatever party, were returned to office; and now that we have seen elected officials changing their political affiliation with unprecedented readiness, Washington Post, Apr. 10, 1990, p. A1, the statement that "political parties have already survived" has a positively whistling-in-the-graveyard character to it. Parties have assuredly survived-but as what? As the forges upon which many of the essential compromises of American political life are hammered out? Or merely as convenient vehicles for the conducting of national Presidential elections?

The patronage system does not, of course, merely foster political parties in general; it fosters the two-party system in particular. When getting a job, as opposed to effectuating a particular substantive policy, is an available incentive for *107 party workers, those attracted by that incentive are likely to work for the party that has the best chance of displacing the "ins," rather than for some splinter group that has a more attractive political philosophy but little hope of success. Not only is a two-party system more likely to emerge, but the differences between those parties are more likely to be moderated, as each has a relatively greater interest in appealing to a majority of the electorate and a relatively lesser interest in furthering philosophies or programs that are far from the mainstream. The stabilizing effects of such a system are obvious. See

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Toinet & Glenn, Clientelism and Corruption in the "Open" Society, at 208. In the context of electoral laws we have approved the States' pursuit of such stability, and their avoidance of the "splintered parties and unrestrained factionalism [that] may do significant damage to the fabric of government." *Storer v. Brown,* 415 U.S. 724, 736, 94 S.Ct. 1274, 1282, 39 L.Ed.2d 714 (1974) (upholding law disqualifying persons from running as independents if affiliated with a party in the past year).

Equally apparent is the relatively destabilizing nature of a system in which candidates cannot rely upon patronage-based party loyalty for their campaign support, but must attract workers and raise funds by appealing to various interest groups. See Tolchin & Tolchin, To the Victor, at 127-130. There is little doubt that our decisions in *Elrod* and *Branti,* by contributing to the decline of party strength, have also contributed to the growth of interest-group politics in the last decade. See, *e.g.,* Fitts, The Vice of Virtue, 136 U.Pa.L.Rev. 1567, 1603-1607 (1988). Our decision today will greatly accelerate the trend. It is not only campaigns that are affected, of course, but the subsequent behavior of politicians once they are in power. The replacement of a system firmly based in party discipline with one in which each office-holder comes to his own accommodation with competing interest groups produces "a dispersion of political influence that may inhibit a ***108** political party from enacting its programs into law." *Branti, supra,* at 531, 100 S.Ct., at 1301 (Powell, J., dissenting).[FN4]

> FN4. Justice STEVENS discounts these systemic effects when he characterizes patronage as fostering partisan, rather than public, interests. *Ante,* at 2744. But taking Justice STEVENS at his word, one wonders why patronage can *ever* be an "appropriate requirement for the position involved," *ante,* at 2732.

Patronage, moreover, has been a powerful means of achieving the social and political ****2755** integration of excluded groups. See, *e.g., Elrod,* 427 U.S. at 379, 96 S.Ct. at 2692 (Powell, J., dissenting); Cornwell, Bosses, Machines and Ethnic Politics, in Ethnic Group Politics 190, 195-197 (H. Bailey, Jr., & E. Katz eds. 1969). By supporting and ultimately dominating a particular party "machine," racial and ethnic minorities have-on the basis of their politics rather than their race or ethnicity-acquired the patronage awards the machine had power to confer. No one disputes the historical accuracy of this observation, and there is no reason to think that patronage can no longer serve that function. The abolition of patronage, however, prevents groups that have only recently obtained political power, especially blacks, from following this path to economic and social advancement.

> " 'Every ethnic group that has achieved political power in American cities has used the bureaucracy to provide jobs in return for political support. It's only when Blacks begin to play the same game that the rules get changed. Now the use of such jobs to build political bases becomes an "evil" activity, and the city insists on taking the control back "downtown." ' " New York Amsterdam News, Apr. 1, 1978, p. A-4, quoted in Hamilton, The Patron-Recipient Relationship and Minority Politics in New York City, 94 Pol. Sci. Q. 211, 212 (1979).

While the patronage system has the benefits argued for above, it also has undoubted disadvantages. It facilitates financial corruption, such as salary kickbacks and partisan political activity on government-paid time. It reduces the efficiency ***109** of government, because it creates incentives to hire more and less qualified workers and because highly qualified workers are reluctant to accept jobs that may only last until the next election. And, of course, it applies some greater or lesser inducement for individuals to join and work for the party in power.

To hear the Court tell it, this last is the greatest evil. That is not my view, and it has not historically been the view of the American people. Corruption and inefficiency, rather than abridgment of liberty,

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have been the major criticisms leading to enactment of the civil service laws-for the very good reason that the patronage system does not have as harsh an effect upon conscience, expression, and association as the Court suggests. As described above, it is the nature of the pragmatic, patronage-based, two-party system to build alliances and to suppress rather than foster ideological tests for participation in the division of political "spoils." What the patronage system ordinarily demands of the party worker is loyalty to, and activity on behalf of, the organization itself rather than a set of political beliefs. He is generally free to urge *within the organization* the adoption of any political position; but if that position is rejected he must vote and work for the party nonetheless. The diversity of political expression (other than expression of party loyalty) is channeled, in other words, to a different stage-to the contests for party endorsement rather than the partisan elections. It is undeniable, of course, that the patronage system entails some constraint upon the expression of views, particularly at the partisan-election stage, and considerable constraint upon the employee's right to associate with the other party. It greatly exaggerates these, however, to describe them as a general " 'coercion of belief,' " *ante,* at 2735, quoting *Branti,* 445 U.S., at 516, 100 S.Ct., at 1293; see also *ante,* at 2737; *Elrod, supra,* 427 U.S., at 355, 96 S.Ct., at 2681 (plurality opinion). Indeed, it greatly exaggerates them to call them "coercion" at all, since we generally make a distinction between inducement and compulsion. The public official *110 offered a bribe is not "coerced" to violate the law, and the private citizen offered a patronage job is not "coerced" to work for the party. In sum, I do not deny that the patronage system influences or redirects, perhaps to a substantial degree, individual political expression and political association. But like the many generations of Americans that have preceded us, I do not consider that **2756 a significant impairment of free speech or free association.

In emphasizing the advantages and minimizing the disadvantages (or at least minimizing one of the disadvantages) of the patronage system, I do not mean to suggest that that system is best. It may not always be; it may never be. To oppose our *Elrod-Branti* jurisprudence, one need not believe that the patronage system is *necessarily* desirable; nor even that it is always and everywhere *arguably* desirable; but merely that it is a political arrangement that may sometimes be a reasonable choice, and should therefore be left to the judgment of the people's elected representatives. The choice in question, I emphasize, is not just between patronage and a merit-based civil service, but rather among various combinations of the two that may suit different political units and different eras: permitting patronage hiring, for example, but prohibiting patronage dismissal; permitting patronage in most municipal agencies but prohibiting it in the police department; or permitting it in the mayor's office but prohibiting it everywhere else. I find it impossible to say that, always and everywhere, all of these choices fail our "balancing" test.

C

The last point explains why *Elrod* and *Branti* should be overruled, rather than merely not extended. Even in the field of constitutional adjudication, where the pull of *stare decisis* is at its weakest, see *Glidden Co. v. Zdanok,* 370 U.S. 530, 543, 82 S.Ct. 1459, 1469, 8 L.Ed.2d 671 (1962) (opinion of Harlan, J.), one is reluctant to depart from precedent. But when that precedent is not only wrong, not only recent, not only contradicted by a long prior *111 tradition, but also has proved unworkable in practice, then all reluctance ought to disappear. In my view that is the situation here. Though unwilling to leave it to the political process to draw the line between desirable and undesirable patronage, the Court has neither been prepared to rule that no such line exists (*i.e.,* that *all* patronage is unconstitutional) nor able to design the line itself in a manner that judges, lawyers, and public employees can understand. *Elrod* allowed patronage dismissals of persons in "policymaking" or "confidential" positions. 427 U.S., at 367, 96 S.Ct., at 2687 (plurality opinion); *id.,* at 375, 96 S.Ct., at 2690 (Stewart, J., concurring in judgment). *Branti* retreated from that for-

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mulation, asking instead "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S., at 518, 100 S.Ct., at 1295. What that means is anybody's guess. The Courts of Appeals have devised various tests for determining when "affiliation is an appropriate requirement." See generally Martin, A Decade of *Branti* Decisions: A Government Officials' Guide to Patronage Dismissals, 39 Am.U.L.Rev. 11, 23-42 (1989). These interpretations of *Branti* are not only significantly at variance with each other; they are still so general that for most positions it is impossible to know whether party affiliation is a permissible requirement until a court renders its decision.

A few examples will illustrate the shambles *Branti* has produced. A city cannot fire a deputy sheriff because of his political affiliation,[FN5] but then again perhaps it can,[FN6] especially if he is called the "police captain."[FN7] A county cannot fire on that basis its attorney for the department of social *112 services,[FN8] nor **2757 its assistant attorney for family court,[FN9] but a city can fire its solicitor and his assistants,[FN10] or its assistant city attorney,[FN11] or its assistant state's attorney,[FN12] or its corporation counsel.[FN13] A city cannot discharge its deputy court clerk for his political affiliation,[FN14] but it can fire its legal assistant to the clerk on that basis.[FN15] Firing a juvenile court bailiff seems impermissible,[FN16] but it may be permissible if he is assigned permanently to a single judge.[FN17] A city cannot fire on partisan grounds its director of roads,[FN18] but it can fire the second in command of the water department.[FN19] A government cannot discharge for political reasons the senior vice president of its development bank,[FN20] but it can discharge the regional director of its rural housing administration.[FN21]

FN5. *Jones v. Dodson,* 727 F.2d 1329, 1338 (CA4 1984).

FN6. *McBee v. Jim Hogg County,* 730 F.2d 1009, 1014-1015 (CA5 1984) (en banc).

FN7. *Joyner v. Lancaster,* 553 F.Supp. 809, 818 (MDNC 1982), later proceeding, 815 F.2d 20, 24 (CA4), cert. denied, 484 U.S. 830, 108 S.Ct. 102, 98 L.Ed.2d 62 (1987).

FN8. *Layden v. Costello,* 517 F.Supp. 860, 862 (NDNY 1981).

FN9. *Tavano v. County of Niagara,* 621 F.Supp. 345, 349-350 (WDNY 1985), aff'd mem., 800 F.2d 1128 (CA2 1986).

FN10. *Ness v. Marshall,* 660 F.2d 517, 521-522 (CA3 1981); *Montaquila v. St. Cyr,* 433 A.2d 206, 211 (R.I.1981).

FN11. *Finkelstein v. Barthelemy,* 678 F.Supp. 1255, 1265 (ED La.1988).

FN12. *Livas v. Petka,* 711 F.2d 798, 800-801 (CA7 1983).

FN13. *Bavoso v. Harding,* 507 F.Supp. 313, 316 (SDNY 1980).

FN14. *Barnes v. Bosley,* 745 F.2d 501, 508 (CA8 1984), cert. denied, 471 U.S. 1017, 105 S.Ct. 2022, 85 L.Ed.2d 303 (1985).

FN15. *Bauer v. Bosley,* 802 F.2d 1058, 1063 (CA8 1986), cert. denied, 481 U.S. 1038, 107 S.Ct. 1976, 95 L.Ed.2d 816 (1987).

FN16. *Elrod v. Burns,* 427 U.S. 347, 351, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

FN17. *Balogh v. Charron,* 855 F.2d 356 (CA6 1988).

FN18. *Abraham v. Pekarski,* 537 F.Supp. 858, 865 (ED Pa.1982), aff'd in part and dism'd in part, 728 F.2d 167 (CA3), cert. denied, 467 U.S. 1242, 104 S.Ct. 3513, 82 L.Ed.2d 822 (1984).

FN19. *Tomczak v. Chicago,* 765 F.2d 633

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(CA7), cert. denied, 474 U.S. 946, 106 S.Ct. 313, 88 L.Ed.2d 289 (1985).

FN20. *De Choudens v. Government Development Bank of Puerto Rico,* 801 F.2d 5, 10 (CA1 1986) (en banc), cert. denied, 481 U.S. 1013, 107 S.Ct. 1886, 95 L.Ed.2d 494 (1987).

FN21. *Rosario Nevarez v. Torres Gaztambide,* 820 F.2d 525 (CA1 1987).

The examples could be multiplied, but this summary should make obvious that the "tests" devised to implement *Branti* have produced inconsistent and unpredictable results. That uncertainty undermines the purpose of both the nonpatronage*113 rule and the exception. The rule achieves its objective of preventing the "coercion" of political affiliation, see *supra,* at 2749, only if the employee is confident that he can engage in (or refrain from) political activities without risking dismissal. Since the current doctrine leaves many employees utterly in the dark about whether their jobs are protected, they are likely to play it safe. On the other side, the exception was designed to permit the government to implement its electoral mandate. *Elrod, supra,* at 367, 96 S.Ct., at 2687 (plurality opinion). But unless the government is fairly sure that dismissal is permitted, it will leave the politically uncongenial official in place, since an incorrect decision will expose it to lengthy litigation and a large damages award, perhaps even against the responsible officials personally.

This uncertainty and confusion are not the result of the fact that *Elrod,* and then *Branti,* chose the wrong "line." My point is that there is no right line-or at least no right line that can be nationally applied and that is known by judges. Once we reject as the criterion a long political tradition showing that party-based employment is entirely permissible, yet are unwilling (as any reasonable person must be) to replace it with the principle that party-based employment is entirely impermissible, we have left the realm of law and entered the domain of political science, seeking to ascertain when and where the undoubted benefits of political hiring and firing are worth its undoubted costs. The answer to that will vary from State to State, and indeed from city to city, even if one **2758 rejects out of hand (as the *Branti* line does) the benefits associated with party stability. Indeed, the answer will even vary from year to year. During one period, for example, it may be desirable for the manager of a municipally owned public utility to be a career specialist, insulated from the political system. During another, when the efficient operation of that utility or even its very existence has become a burning political issue, it may be desirable that he be hired and fired on a political basis. The appropriate "mix" of party-based *114 employment is a political question if there ever was one, and we should give it back to the voters of the various political units to decide, through civil service legislation crafted to suit the time and place, which mix is best.

III

Even were I not convinced that *Elrod* and *Branti* were wrongly decided, I would hold that they should not be extended beyond their facts, viz., actual discharge of employees for their political affiliation. Those cases invalidated patronage firing in order to prevent the "restraint it places on freedoms of belief and association." *Elrod,* 427 U.S., at 355, 96 S.Ct., at 2681 (plurality opinion); see also *id.,* at 357, 96 S.Ct., at 2682 (patronage "compels or restrains" and "inhibits" belief and association). The loss of one's current livelihood is an appreciably greater constraint than such other disappointments as the failure to obtain a promotion or selection for an uncongenial transfer. Even if the "coercive" effect of the former has been held always to outweigh the benefits of party-based employment decisions, the "coercive" effect of the latter should not be. We have drawn a line between firing and other employment decisions in other contexts, see *Wygant v. Jackson Bd. of Education,* 476 U.S. 267, 282-283, 106 S.Ct. 1842, 1851-1852, 90 L.Ed.2d 260 (1986) (plurality opinion), and should do so here as well.

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I would reject the alternative that the Seventh Circuit adopted in this case, which allows a cause of action if the employee can demonstrate that he was subjected to the "substantial equivalent of dismissal." 868 F.2d 943, 950, 954 (1989). The trouble with that seemingly reasonable standard is that it is so imprecise that it will multiply yet again the harmful uncertainty and litigation that *Branti* has already created. If *Elrod* and *Branti* are not to be reconsidered in light of their demonstrably unsatisfactory consequences, I would go no further than to allow a cause of action when the employee has lost his position, that is, his formal title and salary. That narrow ground alone is enough to resolve the constitutional*115 claims in the present case. Since none of the plaintiffs has alleged loss of his position because of affiliation,[FN22] I would affirm the Seventh Circuit's judgment insofar as it affirmed the dismissal of petitioner Moores' claim and would reverse the Seventh Circuit's judgment insofar as it reversed the dismissal of the claims of other petitioners and of cross-respondents.

FN22. Standefer and O'Brien do not allege that their political affiliation was the reason they were laid off, but only that it was the reason they were not recalled. Complaint ¶¶ 9, 21-22, App. to Respondents' Brief in Opposition; 641 F.Supp. 249, 256, 257 (CDIll.1986). Those claims are essentially identical to the claims of persons wishing to be hired; neither fall within the narrow rule of *Elrod* and *Branti* against patronage firing.

The Court's opinion, of course, not only declines to confine *Elrod* and *Branti* to dismissals in the narrow sense I have proposed, but, unlike the Seventh Circuit, even extends those opinions beyond "constructive" dismissals-indeed, even beyond adverse treatment of current employees-to all hiring decisions. In the long run there may be cause to rejoice in that extension. When the courts are flooded with litigation under that most unmanageable of standards *(Branti)* brought by that most persistent and tenacious of suitors (the disappointed office seeker) we may **2759 be moved to reconsider our intrusion into this entire field.

In the meantime, I dissent.

U.S.Ill.,1990.
Rutan v. Republican Party of Illinois
497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52, 58 USLW 4872, 5 IER Cases 673

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State of Illinois
Office of the Governor
Springfield 62706
July 17, 1990

James R. Thompson
Governor

Administrative Order
Number 1 (1990)

DIRECTIVE TO STATE AGENCIES REGARDING PERSONNEL PRACTICES

As you know, on Thursday, June 21, 1990, the United States Supreme Court issued its decision in Rutan v. Republican Party of Illinois, in which the Court held that promotion, transfer, recall and hiring decisions involving nonpolicymaking employees may not be decided on the basis of party affiliation and support. It has been the policy and practice of this administration to fill positions in the state only with individuals who are qualified for their positions. This will continue to be our policy.

We are reviewing the Supreme Court's decision with our attorneys to determine what actions we will take in the Rutan lawsuit in light of the Supreme Court's opinion. As part of our review of the decision, we set forth the following preliminary policies and procedures to ensure that all personnel decisions made by state agencies under the control of the Governor are in full compliance with the Supreme Court's decision:

1. All hiring and other personnel decisions shall be based on the merit and qualifications of the candidates. Where the selection of a candidate is made pursuant to an interview process, the agency must use uniform, job-related criteria and interview questions; the responses to such questions must be evaluated by reference to the requirements for the particular position and such evaluation must be thoroughly documented and must demonstrate the basis on which the selection was made.

2. No hiring or other personnel decisions - including promotions, transfers or recalls from layoff - may be decided on the basis of the candidate's party affiliation or support. Where practical the agency shall interview all qualified candidates on the eligibility list for the position being filled.

   In instances where it is not practical to do so, the method used by the agency for determining the individual candidates to be interviewed for a particular position shall be based on factors related to the merits of the individual applicants, length of time on the list, random selection or any other reasonable and impartial standard.

3. No investigation shall be performed into a candidate's political affiliation, including his or her voting record, financial support, and/or willingness to work for or donate to any political party. This information shall not be reviewed or considered at any point in the employment process.

4. In making personnel decisions, agencies may consider recommendations and referrals from any sources, including elected officials or representatives of any political party. However, referrals or recommendations may be considered only if they relate to the job qualifications of the particular candidate. The political affiliation of the candidate or of the elected official or party representative who provides the recommendation or referral may not be considered in making personnel decisions.

* * * * * * * * * * * * * * *

Please ensure that all officials and employees in your agency immediately become familiar with the terms of this order, and that they take all necessary steps to see that it is implemented. We will advise you as to any further changes in our personnel practices based upon our continuing review of the Supreme Court's decision. Thank you for your full cooperation.

State of Illinois
Office of the Governor
Springfield 62706
October 1 1990

James R. Thompson
Governor

Administrative Order
Number 2 (1990)

DIRECTIVE TO STATE AGENCIES
GUIDELINES FOR INTERVIEWING JOB CANDIDATES

The following employment policies and procedures regarding the interview process are intended to provide additional guidance and clarification to state agencies with respect to the following directive taken from the Governor's Administrative Order, Number 1, dated July 17, 1990.

> "1. All hiring and other personnel decisions shall be based on the merit and qualifications of the candidates. Where the selection of a candidate is made pursuant to an interview process, the agency must use uniform, job-related criteria and interview questions; the responses to such questions must be evaluated by reference to the requirements for the particular position and such evaluation must be thoroughly documented and must demonstrate the basis on which the selection was made."

This Directive contains principles which will assist agencies in assuring that their personnel policies and procedures relating to interviewing and selecting candidates for employment, promotion or other personnel transaction are in compliance with the requirements of the Rutan decision. Adherence to these principles will also result in the production of documentation necessary to defend against any claims that may arise under this ruling.

It is not the intent of this directive to mandate a single, specific set of personnel policies and procedures applicable to all agencies and all personnel transactions. Nor is it is the intent of this directive to mandate agency employment decisions, but to provide a consistent, fair and objective basis to assure compliance with Rutan as well as the employment of fully qualified persons.

Other employment policies such as Veterans Appointment Preference, Affirmative Action, and bargaining agreements will not be replaced by these policies and procedures. Additional screening requirements that the agency may impose prior to placing an individual on the payroll, promoting, transferring, or recalling an employee (e.g., background check, drug testing, residency) or other employment policies will not be restricted so long as they are not inconsistent with the procedures described herein. In addition, these policies and procedures address only the interview process, and do not apply where other types of selection devices are used.

I. SCOPE

A. Positions for which Principles are Relevant

The employment policies and procedures described in the following sections should be followed for all positions not specifically exempted from Rutan. A preliminary listing of those positions which, due to their policymaking or confidential nature, are clearly exempted from Rutan, will be published within the next two weeks. There will be many more positions which are not clearly exempt or non-exempt. Cataloguing and reviewing all these positions will be a time consuming effort which is too extensive to be undertaken in the time remaining to this administration. However, agencies wishing to make a determination regarding a particular position which is not included in this initial listing of exempted positions may submit the appropriate materials to CMS. In consultant with Ernst and Young and Jenner and Block, CMS will determine whether or not such a position is exempted from the requirements of the Rutan decision. In the absence of a determination that a position is exempted, this memorandum will apply to all positions.

B. Personnel Actions for which Principles are Relevant

The following principles apply to all employment decisions concerning individuals who are currently candidates to be interviewed for employment by the State or who are current State employees who are to be interviewed for promotion, transfer, or recall from layoff. Note that when the remainder of this document mentions "hiring" that this pertains to the interview activities involving both the hire of new employees and the promotion, transfer, or recall of current employees.

II. OBJECTIVES

Within the framework established by the Governor's directive, the State is committed to an interview process which will:

- Base employee selection on a candidate's ability to perform effectively on the job;
- Provide equal opportunity for State employment to all qualified job candidates;
- Prohibit the basing of employment, promotion, transfer, and recall decisions on partisan affiliation or support;
- Provide the hiring agency with maximum lawful discretion in making selection decisions; and
- Adequately document all employment, promotion, transfer and recall decisions.

III. THE INTERVIEW PROCESS

A. Approach

Following is a summary of minimum steps which should be part of an interview process to ensure compliance with the principles of the Governor's aforementioned Order. A summary of these steps is explained more fully below:

- Document and file hiring criteria for each position to be filled before conducting the interview, regardless of location:
  - Define and document major position responsibilities;
  - Define required knowledge, skills, abilities, and personal characteristics essential for competent performance in the job; and
  - Determine the relative weight of each hiring criterion.
- Develop a standardized interview questionnaire for each position to be filled to gather pertinent information about the candidate's knowledge, skill, abilities, and personal characteristics.
- Conduct a structured employment interview using a standardized interview questionnaire and note pertinent responses from the candidates that can be compared and evaluated in a consistent manner.
- Evaluate each candidate interviewed:
  - Rate the completed interview questionnaire;
  - Score each hiring criterion and note on an evaluation form;
  - Determine each candidate's overall score based on all hiring criteria; and
  - Rank all candidates interviewed by overall score.
- Document the interview process for all candidates interviewed.
- Document the employment decision.

- Maintain a chronological file of all interview questionnaires, evaluation and employment decision forms for each position when interviews were conducted.

B. Establish the Hiring Criteria

The reliability of a structured employment interview in screening qualified candidates is based on the identification of pre-established criteria for successful job performance which are required for entry into the position. Hiring criteria include major position responsibilities, knowledge, skills, abilities, and personal characteristics. As a general rule, the larger the number of qualified candidates, and/or additional identical positions to be filled, the higher the level of standardization required to assure the objectivity of the actual interviews.

The following approach to the development of hiring criteria assures that the criteria will be job-related, specific to the particular position, and essential to acceptable job performance. It is important to remember that hiring criteria which have not been pre-established should not be used as justification for the employment decision.

1. Define major position responsibilities. As a first step, this information should be obtained from existing job descriptions and class specifications. However, it is important to review this information with current job incumbents and/or the supervisor to assure its accuracy with respect to the specific position being filled. This step should produce up to ten major duties which serve as the primary areas of inquiry during the interview as well as the basis for identifying the knowledge, skills, abilities, and personal characteristics required to perform each major duty, and the subsequent development of specific interview questions. These duties should reflect the position as it is documented by the existing position description, not how it could be changed or improved.

2. Define required knowledge, skills, and abilities ("KSAs") and personal characteristics. Job-related KSAs and personal characteristics are derived from the position's major duties by focusing on such questions as "What would a candidate need to know to perform this duty?", "Can the required knowledge be obtained through formalized training or must it be learned through experience?", and "What types of behaviors are demonstrated by current incumbents who successfully perform this duty?". Once identified, the task of developing interview questions which are clearly and demonstrably job-related is greatly simplified.

   To the extent that the position's major duties, required KSAs and personal characteristics are too broadly defined, the agency may have difficulty developing questions as well as differentiating, and subsequently selecting, between qualified candidates. Conversely, being too specific may cause well qualified candidates to be eliminated from consideration. In summary, the hiring authority must be actively involved in the definition of a position's hiring criteria.

3. Weight to each hiring criteria. These weights should reflect the relative importance of each criteria to acceptable job performance.

4. Document the hiring criteria on a Candidate Evaluation Form. The hiring criteria for each position must be documented prior to the conduct of any interviews.

C. Develop the Interview Questionnaire

The interview questionnaire will be used to assess all candidates who are being interviewed for a particular position. Interview questions derived from the identified KSA's and personal characteristics should also, to the extent possible, reference the position's major duties.

1. Common types of hiring criteria and the development of related interview questions are briefly summarized as follows:

a. Knowledge and Experience - Assess whether the candidate has the required level of job knowledge that is both essential to job performance and constitutes the minimum which must be known prior to entering the position. Determine the extent to which the candidate has, in fact, ever performed the major duties of the position for which s/he is applying. These questions should deal with the more technical aspects of the position, or basic knowledge that is essential to enable the candidate to learn the job within the allotted probationary timeframe. Since this level of detailed information may be difficult to ascertain from the candidate's application, such questions are critical for those technically oriented positions where very specific skill and/or experience is required. During the actual interview, it is appropriate for the interviewer to probe further, as necessary, to evaluate the candidate's quality and level of experience. Concise, detailed notes should support any subsequent reliance on prior experience as a means of differentiating between candidates who would otherwise appear to be substantially equal.

b. Education, Training, and Special Skills - Determine if the candidate has the necessary education, training, and special skills to learn and/or perform the major duties as required. Ask about any specific coursework, training programs, and special skills which are considered desirable for the position.

c. Ability - Evaluate whether the candidate possesses the level of ability required to effectively perform the major duties. Abilities, and their relative importance, generally vary substantially based upon the nature and level of the position. The most commonly required abilities include problem-solving, oral/written communications, leadership, and interpersonal relations.

d. Personal Characteristics - To the extent possible, the simple noting of "impressions" by the interviewer should be avoided. It is, however, appropriate to ask candidates to demonstrate their application of the required personal characteristics in terms of specific job-related behaviors.

e. Willingness - For those positions with few or only very basic minimum requirements, as well as for jobs with some unpleasant or monotonous working conditions, the hiring authority/interviewer should prepare questions regarding the candidate's understanding of, and willingness to perform the major duties. The outlining and detailed disclosure of duties and working conditions in this context will serve as a realistic job preview for the candidate and may aid in self-selection.

2. Review interview questions. The following guidelines should be used in the development and evaluation of specific interview questions:

   a. Questions should be accurate, complete and easily understood. The need to clarify questions during the interview for certain candidates reduces standardization.

   b. Questions must be clearly and strictly job-related, and must be directly linked to the position's major duties.

   c. Questions must focus on the KSAs and personal characteristics necessary to perform the job at entry.

   d. Questions should reflect, as nearly as possible, the content of the specific position for which the candidate is being interviewed.

   e. To increase job-relatedness, questions should be stated in terms of sample position duties, and should be designed to elicit information on job-related behaviors.

   f. Questions should be geared to the appropriate complexity level of the job.

   g. Questions must be carefully reviewed to eliminate any possible accusation of partisan affiliation or support.

D. Conduct the Interview

1. Interview Obligations. Whatever the actual design of the interview, the interviewer must not ask any questions concerning political affiliation (or any question which could be construed as such). Politically-related topics that are to be avoided include:

   - Political affiliation;
   - Political contributions;
   - Political sponsorship or recommendation and

   In addition, it must be made clear to the interviewer that, if the candidate volunteers non-job-related information about political topics, s/he should be interrupted and the interviewer should be directed toward other topics.

2. Following is a basic agenda for conducting the structured employment interview.

   a. Put the candidate at ease and build rapport.

   b. Explain the purpose of the interview.

   c. Provide a brief description of the position and important organization characteristics.

   d. Ask the pre-established interview questions contained in the questionnaire and take notes on the candidate's response to each question, allowing the applicant to organize his/her own experiences, and to speak with spontaneity to reveal relevant information. The interviewer should probe for expansion and clarification of candidate responses to obtain adequate information for the evaluation of the candidate and, ultimately, the employment decision.

   e. After you have completed the questionnaire, inform the candidate when the decision will be made, and ask whether s/he has any questions.

E. Additional Candidate Evaluation Criteria

The hiring authority will often use other evaluation methods in addition to personal interviews. Examination of performance records for current employees and work sample tests and job or community service related references would be examples of other legitimate screening devices.

F. Rating the Candidate

The agency must have standardized procedures in place to rank all candidates interviewed for a particular position based upon the pre-established hiring criteria, interview questionnaire and scoring of the candidate's responses to each question. By ranking candidates agencies are provided one measure to further distinguish between equally qualified candidates.

It is important to note that there is no requirement for agencies to hire in rank order or to hire a particular candidate. It is not the intent of the preceding policies and procedures to mandate agency employment decisions, but to provide a consistent, fair, and objective basis to assure compliance with Rutan as well as the employment of fully qualified employees.

IV. DOCUMENTATION OF EMPLOYMENT DECISIONS

Adequate documentation of employment decisions is a critical component of the Rutan compliance program. Although there is some latitude in other aspects of the previously described employment polices and procedures, agencies must strictly adhere to their requirements for documentation of all employment decisions.

A. Documenting the Interview Process

The hiring authority is required to provide the following documentation on each candidate interviewed:

1. An interview questionnaire which briefly summarizes the candidate's responses and assigns a rating for each question.

2. A candidate evaluation form including comments reflecting the hiring authority's assessment of the candidate's qualifications against each criteria.

In some cases, it may not be necessary to evaluate the candidate against all of the hiring criteria. If, for example, prior work experience or basic skills are unacceptable, the hiring authority may decide that further evaluation of the candidate would be pointless. In such cases, documentation needs to be provided only for those criteria against which the candidate was evaluated.

B. Documenting and Filing the Employment Decision

The hiring authority must complete an employment decision form prior to the extension of the employment offer, that provides, at a minimum, the following information:

1. The candidate to be hired and the position number being filled.

2. Justification for the decision to hire the selected candidate. This justification must clearly explain the reason(s) for hiring the selected candidate and provide a general statement comparing the selected candidate with others who were interviewed. To be considered appropriate, this justification must be job-related. In addition, where the candidate selected is one who did not receive the highest score, the justification should be sufficiently well documented so as to be subject to verification and allow inferences to be drawn as to why one candidate was selected over another.

3. The date the form was completed.

4. The agency must maintain an up-to-date, chronological file of employment decision forms as well as the candidate evaluation forms and completed interview questionnaires for all interviews conducted. In addition, a copy of the position description and major responsibilities must be included for each filled position. Each file must be labeled by the position number, title, and date of the employment decision.

ABC6/175

State of Illinois
Office of the Governor
Springfield 62706
January 31, 1991

Jim Edgar
Governor

Administrative Order
Number 1 (1991)

PERSONNEL POLICIES DIRECTIVE

On June 21, 1990, the United States Supreme Court ruled for the first time, in the case of Rutan v. the Republican Party of Illinois, that decisions to hire, promote, transfer or recall from layoff employees of public bodies could not be made on the basis of such employees' political affiliation or support. The exception for policy making or confidential employees or spokespersons established in earlier cases also applies to the Rutan ruling.

I hereby commit myself and all appointees, officials and employees in my Administration to fully comply with this ruling and all other, relevant constitutional provisions, laws and United States Supreme Court decisions.

Specifically, I order that the following principles be adhered to:

1. No employee may be dismissed from a non-exempt* state position on the basis of political affiliation or support.

2. No employee may be demoted, denied consideration for a raise or promotion, or disciplined on the basis of political affiliation or support.

Furthermore, I hereby affirm and adopt the provisions of Administrative Order #1 (1990), which state in pertinent part the following.

3. All hiring and other personnel decisions affecting non-exempt individuals shall be based on the merit and qualifications of the candidates. Where the selection of a candidate is made pursuant to an interview process, the agency must use uniform, job-related criteria and interview process; the responses to such questions must be evaluated by reference to the requirements for the particular position and such evaluation must be thoroughly documented and must demonstrate the basis on which the selection was made.

4. No hiring or other personnel decisions - including promotions, transfers or recalls from layoff - may be decided on the basis of the candidate's party affiliation or support. Where practical the agency shall interview all qualified candidates on the eligibility list for the position being filled.

5. In instances where it is not practical to do so, the method used by the agency for determining the individual candidates to be interviewed for a particular position shall be based on factors related to the merits of the individual applicants, length of time on the list, random selection or any other reasonable and impartial standard.

6. No investigation shall be performed into a candidate's political affiliation, including his or her voting record, financial support, and/or willingness to work for or donate to any political party. This information shall not be reviewed or considered at any point in the employment process.

7. In making personnel decisions, agencies may consider recommendations and referrals from any source, including elected officials or representatives of any political party. However, referrals or recommendations may be considered only if they relate to the job qualifications of the particular candidate. The political affiliation of the candidate or of the elected official or party representative who provides the recommendation or referral may not be considered in making personnel decisions.

Additionally, I hereby affirm and adopt Administrative Order #2 (1990) which establishes guidelines for development of job criteria, interview questionnaires, for objectively rating candidates, and for documenting selection decisions. Administrative Order #2 is attached hereto and made a part of this order.

I further order that:

8. The Department of Central Management Services shall be responsible for developing and implementing such rules, policies, guidelines and manuals, including the training manual already prepared in conjunction with the management consulting firm of Ernst and Young, as are necessary or appropriate to ensure that the personnel policies and procedures of all agencies, boards, and commissions under my jurisdiction comply with the requirements of this Administrative Order and generally with all applicable constitutional provisions, laws and United States Supreme Court rulings concerning personnel matters, as well as with all other requirements of State law and regulations and budgetary and fiscal guidelines. The Department shall also be responsible for coordinating information about agency hiring and other employment data with the Bureau of the Budget and assisting with the administration of any budget or fiscal policies or guidelines issued by the Bureau.

9. Whether a position is exempt from the requirements of Rutan and other relevant United States Supreme Court cases shall be determined by the Department of Central Management Services in consultation with the Office of Counsel to the Governor, and such recognized experts or advisors as may be retained by that Department. Any personnel transactions for which there is a question as to whether the position is exempt from Rutan should be submitted to the Department of Central Management Services for determination in accordance with this consultation process.

10. The Department of Central Management Services shall notify the initiating agency and the Director of Executive Employment and Labor Relations in the Office of the Governor of any positions that have been determined to be exempt by that Department under Rutan.

11. The requirements of this Administrative Order and rules, policies, guidelines and manuals issued hereunder shall supersede any procedures which may still be in effect pursuant to Executive Order #5 (1980) which is revoked.

12. The procedures set forth in this Administrative Order apply to all personnel transactions of agencies, boards, and commissions subject to my control or direction whether or not the position affected by the personnel transaction in question is under the jurisdiction of the Personnel Code.

*As used in this Order, "non-exempt" refers to an employee who is not exempt from the requirements of Rutan and has no relevance to whether such employee is or is not exempt from the Illinois Personnel Code.

OFFICE OF THE GOVERNOR
JRTC, 100 W. RANDOLPH, SUITE 16-100
CHICAGO, ILLINOIS 60601

PAT QUINN
GOVERNOR

Administrative Order
Number 2 (2009)
December 10, 2009

DIRECTIVE TO STATE AGENCIES, UPDATING GUIDELINES FOR COMPLIANCE WITH THE *RUTAN* DECISION

This Administration is firmly committed to adhering to the principles articulated in the United States Supreme Court decision, *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) ("*Rutan*"), and its progeny, as well as Administrative Order No. 1 (1990), No. 2 (1990), and No. 1 (1991) (collectively, the "Prior Administrative Orders"), all of which prohibit consideration of political affiliation or support (or lack thereof) in connection with hiring, promotion, transfer, or recall from layoff, with respect to employment positions covered by the *Rutan* decision ("*Rutan*-covered positions").[1]

It is the intent of this Directive (i) to provide guidance and clarification with respect to certain aspects of the Prior Administrative Orders, all of which are hereby affirmed and shall remain in effect, and (ii) to announce certain new guidelines and procedures relating to personnel transactions for *Rutan*-covered positions. It is not the intent of this Directive to mandate a single, specific set of personnel procedures to be used in connection with every single personnel transaction or to limit the ability of agencies, boards, and commissions to impose job-related requirements and procedures (e.g., background checks, drug testing, residency requirements, job-related driver's license requirements), in addition to those set forth below, prior to making an offer of employment, so long as they are not inconsistent with any policies or procedures described herein, or any applicable laws. Instead, through the guidelines and procedures set forth below, this Directive seeks to ensure that applicable decision-making processes comply with *Rutan* and rely upon politically neutral, merit-based criteria.

I. Scope

This Directive shall apply to all personnel transactions relating to *Rutan*-covered positions of State agencies, boards, and commissions under the jurisdiction of the Office of the Governor ("OOG"), whether or not the positions affected by the personnel transactions in question are under the jurisdiction of the Personnel Code and Rules. That is, this Directive applies to both "code" and "non-code" positions under the jurisdiction of the OOG.

[1] As used in this Directive, "Rutan-covered" refers to an employment position that is subject to the requirements of *Rutan*.

In the event of a conflict between this Directive and the requirements of a collective bargaining agreement, the collective bargaining agreement shall govern. In the event of a conflict between this Directive and any policies or procedures relating to employment positions or personnel transactions that are set by statute (*e.g.*, the Veteran Preference set forth in 20 ILCS 415/8b.7), the policies and procedures set by statute shall govern.

II. Employment Applications

A. Submission of Applications

1. The Bureau of Personnel in the Department of Central Management Services ("CMS") has served and shall continue to serve as the central point of intake for all employment applications under the jurisdiction of the Personnel Code and Rules ("coded classifications").

2. Each *Rutan*-covered position shall be posted on the Work 4 Illinois website, <http://www.work.illinois.gov>, which can be accessed from home or through public access computers at most public libraries or State offices.

3. Any employee of an agency, board, or commission under the jurisdiction of the OOG who receives a personnel request, referral, or recommendation for a *Rutan*-covered position shall refer the person making the request, referral, or recommendation to CMS Governmental Affairs for disposition.

B. Grading of Applications

1. For coded classifications under the jurisdiction of the OOG, subject to any time limitation on when applications will be accepted and how long an application can remain active, CMS personnel shall grade each application for a classification in the order in which the application has been received and shall not grade any application out of order. Subject to the limitations, above, all other classifications under the jurisdiction of the OOG, but not under the jurisdiction of the Personnel Code and Rules ("non-code positions") shall be graded in the order received by the employing agency, board, or commission.

2. Each application shall have the name of the applicant and any references or any other personally identifiable information redacted so that the grading can be done on a blind basis. CMS personnel shall perform any necessary credential verification in a manner that preserves the integrity of the blind grading process. As soon as practicable, CMS will move towards a fully automated system.

3. The grader shall employ objective, merit-based criteria in his or her grading of applications. Grading shall be free from all political considerations.

4. All documents and data regarding applications for *Rutan*-covered positions shall be available for regular auditing.

C. Creation of Eligibility Lists

In creating an open competitive eligible list, to be utilized by an agency for an open *Rutan*-covered position, CMS shall redact the names of the applicants and other personally identifiable information so that the selection of candidates for an interview pool can be done on a blind basis.

D. Job Descriptions

Job descriptions shall be reviewed and, if necessary, updated prior to any *Rutan*-covered posting, to reflect current duties, responsibilities, and requirements.

III. The Interview, Evaluation, and Selection Process

Administrative Order No. 2 (1990) contains detailed procedures and guidelines for conducting applicant interviews for *Rutan*-covered positions in a manner intended to ensure compliance with *Rutan*. This Directive reaffirms the applicability of the interview, evaluation, and selection guidelines set forth in Administrative Order No. 2 (1990) and supplements that Order with the following additional procedures and guidelines:

A. Training of Interviewers

1. CMS and other State agencies, boards, and commissions have training programs to orient agency employees responsible for making personnel decisions to the State's *Rutan* hiring procedures and corresponding interview and selection methods ("*Rutan* training"). *Rutan* training and certification has proven to be an effective component of the State's *Rutan* compliance program. The current website to register for CMS's *Rutan* training is <http://www.state.il.us/cms/2_servicese_edu>.

2. Any agency employee who participates in the interview of a candidate for a *Rutan*-covered position must have successfully completed *Rutan* training. A non-certified member of an interview panel may only function in a technical expert capacity; he or she may ask specific technical follow-up questions to clarify a response and assist the certified interviewers in

understanding technical responses given by the interviewee, but he or she may not participate in the evaluation and scoring process.

3. As soon as practicable, but no later than six months after the date of this Directive, CMS shall develop a Refresher Course for re-certification of *Rutan* interviewers. The Refresher Course may be offered online or in any other appropriate format. The Refresher Course for interviewers shall review key elements of the State's *Rutan* compliance program, offer updates as to changes or enhancements in compliance policies and practices, and include an evaluative component to ensure that those taking the Refresher Course continue to have an appropriate knowledge of compliance guidelines and procedures. Once the Refresher Course is implemented, each *Rutan* interviewer must successfully complete the Refresher Course and be re-certified at least once every 3 years.

B. Interview Panels

1. *Rutan* interviewers must make their assessments of candidates based upon their responses to a pre-determined and uniform set of job description-related questions that are developed prior to posting and posed during the interview (as outlined in Administrative Order No. 2 (1990)), in an atmosphere where interviewers are free of advance knowledge of candidates and of outside influences. *Rutan* interviewers must be insulated from any attempts to sway their assessments or hinder their objectivity. No interview panel should include, either as interviewers or as technical advisors, any person who is related to, or otherwise would have a conflict of interest in connection with evaluating, any of the applicants for the position.

2. Since multi-member interviewer panels provide greater input and reduce the risk of improper influence in the hiring process for *Rutan*-covered positions, agencies shall utilize such panels rather than single interviewers in the interview and evaluation process. Members of the interview panel must remain consistent throughout the course of the interview process for a position. A technical advisor who has not completed training to be a certified *Rutan* interviewer shall not be considered a member of an interview panel for purposes of determining the numerical composition of the panel. Under limited circumstances, the Director of CMS or his or her designee may approve the use of single interviewers for *Rutan* interviews and evaluations, but only after the director of the requesting agency provides written justification for the use of a single interviewer.

C. Interview, Evaluation, and Selection of Candidates

1. Administrative Order No. 2 (1990) contains appropriate guidelines for the interview and evaluation of candidates, and it is hereby affirmed. In addition to those guidelines, the following guidelines shall also apply to the interview and evaluation process for all *Rutan*-covered positions.

2. To the extent practicable, the agency shall interview all reachable applicants. In situations where it is not practical to interview all reachable applicants, the agency shall use a standardized method to select the names of candidates to interview for a position. Such a method shall be based on: (i) factors related to the merits of the individual applicants, (ii) random selection, or (iii) any other reasonable, impartial, and legally compliant standard. In the event that an agency uses a method other than random selection, however, it shall create a written record, specifically identifying the alternative selection method used and the justification for its use.

3. Prior to commencing interviews for a *Rutan*-covered position, the interview panel shall ensure that the Hiring Criteria and Interview Questionnaire agreed upon for the interviews and developed prior to posting are preserved and made a part of the *Rutan* file for that position. *Rutan* files must be maintained separately from employee personnel files.

4. Copies of the Interview Questionnaire, which shall include the interviewer(s) summary(ies) of a candidate's responses to each question and the weighted score assigned by the interviewer(s) thereto, shall be placed in the *Rutan* file and preserved.

5. A Candidate Evaluation Form, reflecting the interview assessments of the candidate's qualifications against each criterion for the position at issue, should be preserved for each candidate interviewed and made a part of the *Rutan* file for the position. Each member of the interview panel shall sign and date the form and certify that the evaluation was not based on political party affiliation or support (or lack thereof).

6. The Employment Decision Form for the position shall be preserved and made a part of the *Rutan* file for the position. The form shall include a written justification for the agency's decision as to the candidate chosen to be hired for the position. The agency director or his/her designee shall sign and date the form and certify that the employment decision was not based on political party affiliation or support (or lack thereof).

7. In the event that an agency decides to cancel an opening rather than hire any of the interviewed candidates, a written justification for the cancellation decision shall be included in the *Rutan* file.

D. Retention of Records

1. Each agency shall maintain *Rutan* files for each job position number in chronological order, so that hiring decisions can be audited.

2. *Rutan* files shall be maintained for a period of three years from the date of the employment decision or in accordance with agency record retention policies, whichever is longer, at which time the files shall be transferred to the State Records Center for disposition in accordance with the State Records Act, 5 ILCS 160/1 *et seq.*

IV. Savings Clause

Nothing in this Directive shall be construed to contravene the terms of any collective bargaining agreement or any State or federal law.

V. No New Rights Created

Nothing in this Directive is intended to create any new right or benefit, substantive or procedural, enforceable at law by a party against the State of Illinois, its agencies, boards, commissions, officers, or employees, or any person.

VI. Severability

If any provision of this Directive is found invalid by a court of competent jurisdiction, the remaining provisions shall remain in full force and effect.

VII. **Effective Date**

This Directive shall become effective immediately.

Unless otherwise noted, to the extent any new requirements in this Directive are not already fully in place, the responsible State agencies, boards, and commissions under the jurisdiction of the OOG shall have 120 days to become fully compliant.

Pat Quinn

Governor Pat Quinn

ATTACHMENT B

OFFICE OF THE GOVERNOR
JRTC, 100 W. RANDOLPH, SUITE 16-100
CHICAGO, ILLINOIS 60601

PAT QUINN
GOVERNOR

TO: AGENCY, BOARD, AND COMMISSION HEADS

FROM: JOHN SCHOMBERG, GENERAL COUNSEL

CC: RYAN CROKE, CHIEF OF STAFF

SIMONE MCNEIL, ACTING DIRECTOR, DEPARTMENT OF CENTRAL MANAGEMENT SERVICES

SUBJECT: CONTINUED *RUTAN* COMPLIANCE & MANDATORY TRAINING

DATE: JULY 3, 2014

The purpose of this memorandum is to reinforce the importance of your agency's continued compliance with hiring and personnel practices that are consistent with the U.S. Supreme Court's 1990 decision in *Rutan v. Republican Party of Illinois* ("*Rutan*")[1] and directives from Governor Quinn's Administrative Order No. 2 (2009) and previous *Rutan* Administrative Orders.[2]

I. Background: *Rutan* and Illinois Administrative Orders

In *Rutan*, the U.S. Supreme Court held that the First Amendment of the U.S. Constitution prohibits State agencies from considering political affiliation or support (or lack thereof) in connection with employment positions covered by the *Rutan* decision. The limited number of positions that are exempt from *Rutan* (*i.e.*, "*Rutan*-Exempt" positions) are explicitly determined to be so by the Department of Central Management Services ("CMS"). Such positions are policymaking, spokesperson, or confidential positions. Since the *Rutan* decision was issued in June 1990, Governor Quinn and Governors Thompson and Edgar have each issued Administrative Orders that set forth guidelines and procedures to ensure that political affiliation is not considered in employment decisions (e.g. hiring, promotion, transfer, recall from layoff, etc.) relating to any position covered by the *Rutan* decision (*i.e.*, "*Rutan*- Covered" positions).

---

[1] A copy of *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), is attached hereto as Exhibit A.
[2] Administrative Order No. 1 (1990), No. 2 (1990), No. 1 (1991), and No. 2 (2009) are attached hereto as Exhibit B.

II. Action Steps

To further ensure that all State agencies, boards, and commissions under the jurisdiction of the Office of the Governor continue to comply with *Rutan* and the referenced Administrative Orders, the Governor is mandating the following actions from you and your staff:

- Executive *Rutan* Training- In the coming weeks, there will be a cabinet meeting at which the Governor's cabinet will receive Executive *Rutan* Training from the personnel experts at CMS. Additionally, in the coming weeks, there will be mandatory Executive *Rutan* Training for all executive level staff at all agencies, boards, and commissions. This will be an executive-level overview to further ensure that all agency executives continue to maintain compliance with and awareness of the requirements of the *Rutan* decision and the *Rutan* process. Further details regarding the dates, times, and locations for these training sessions will be circulated in the very near future.

- Annual Employee Evaluations and Job Description Reviews- Consistent with existing personnel rules and sound personnel management practices, all employees (both *Rutan*-Covered and *Rutan*-Exempt) must receive a written performance evaluation on an annual basis. As part of this annual review, supervisors must review the employee's job description to ensure the accuracy of the job description as compared to the duties being performed. If discrepancies exist, the job description must be clarified or the employee's duties must be revised to be consistent with the current description. Any clarification to a *Rutan*-Exempt job description must be submitted to CMS's Bureau of Personnel to determine whether the position remains *Rutan*-Exempt or must be reclassified as *Rutan*-Covered.

- ePar Verification That Employees Will Be Working Within Job Description- In the coming weeks, the ePar system will be updated to require agency, board, and commission personnel staff and all agency, board, and commission heads who approve ePars to verify that an employee filling a position, whether that position is *Rutan*-Covered or *Rutan*-Exempt, will be carrying out the duties and responsibilities contained in that employee's job description. If any agency approver cannot verify that is the case, then the job description review, detailed above, should be undertaken at the time of hiring, promotion, transfer, etc. and the job description should be updated to reflect the prospective employee's actual duties and responsibilities.

- Review of *Rutan*-Exempt Positions- In addition to any already-existing reviews related to *Rutan* and personnel and in addition to the job description review by employee supervisors, detailed above, agency, board, and commission internal audit staffs must at least annually review a sample of *Rutan*-Exempt hires to ensure that those hires are carrying out the duties and responsibilities contained in their job descriptions. The results

of such audits must be shared with the Office of the Governor Deputy Chief of Staff and Associate General Counsel working with that agency, board, or commission.

If an agency, board, or commission already undertakes such a review, at least annually, the results of the most recent review should be provided to the Office of the Governor immediately. If an agency, board, or commission is not already conducting such a review, such a review should be undertaken immediately, to be completed and provided to the Office of the Governor no later than December 31, 2014.

Please circulate this memorandum to all employees within your agency, board, or commission.

In August 2009, the Governor signed into law provisions expanding the jurisdiction of the Office of the Executive Inspector General ("OEIG") to include ensuring compliance with *Rutan*. **If an employee is aware of any potential *Rutan* violations (e.g. failures to follow the *Rutan* hiring process, the use of political considerations in *Rutan*-Covered hiring, etc.), he or she should—and has a duty to—report any such violations to the OEIG. Complaints can be securely and anonymously filed electronically or by fax by going to the OEIG's website at http://www2.illinois.gov/oeig/Pages/FileaComplaint.aspx. The employee may also notify his or her supervisor and the agency, board, or commission's Ethics Officer.** If any employee has any questions regarding the *Rutan* process, he or she should contact the agency's Human Resources staff or Ethics Officer. Agency Human Resources staff or Ethics Officers should use CMS's Bureau of Personnel as a resource in answering employee questions.

As stated above, the Quinn Administration continues to be wholly committed to complying with *Rutan* principles and to ensuring that employees are appropriately classified as either *Rutan*-Covered or *Rutan*-Exempt. We expect all State employees to remain committed to and accountable for the same. For those vast number of State employee positions that are *Rutan*-Covered, the Administration not only expects, but demands, that the *Rutan* hiring process continue to be followed and that politics continue to play no role. For all agency, board, and commission heads, the Governor looks forward to your continued leadership and vigilance on this issue, including ensuring that the action steps, above, are carried out and ensuring that your agency, board, or commission maintains a culture of compliance.

J.F.S.

EXHIBIT A

Supreme Court of the United States
Cynthia RUTAN, et al., Petitioners
v.
REPUBLICAN PARTY OF ILLINOIS, et al.
Mark FRECH, et al., Petitioners
v.
Cynthia RUTAN, et al.

Nos. 88-1872, 88-2074.
Argued Jan. 16, 1990.
Decided June 21, 1990.
Rehearing Denied Aug. 30, 1990.
See 497 U.S. 1050, 111 S.Ct. 13.

Former and present low-level public employees and employment applicant brought action challenging Governor's use of political considerations in hiring, rehiring, transferring, and promoting. The United States District Court for the Central District of Illinois, Baker, Chief Judge, 641 F.Supp. 249, dismissed complaint, and appeal was taken. The Court of Appeals for the Seventh Circuit affirmed in part, reversed in part, and remanded initially, 848 F.2d 1396, and on rehearing en banc, 868 F.2d 943. Certiorari was granted. The Supreme Court, Justice Brennan, held that: (1) promotions, transfers, and recalls based on political affiliation or support are impermissible infringements on public employees' First Amendment rights, and (2) conditioning hiring decisions on political belief and association violates applicants' First Amendment rights in absence of vital governmental interest.

Court of Appeals decision affirmed in part, reversed in part, and remanded.

Justice Stevens filed a concurring opinion.

Justice Scalia filed a dissenting opinion in which Chief Justice Rehnquist and Justice Kennedy joined, and in which Justice O'Connor joined as to Parts II and III.

West Headnotes

[1] Constitutional Law 92 ⚿1475(5)

92 Constitutional Law
92XVII Political Rights and Discrimination
92k1471 Public Employees and Officials
92k1475 Political Affiliation; Patronage
92k1475(5) k. Adverse Action in General. Most Cited Cases
(Formerly 92k82(11))

Constitutional Law 92 ⚿1475(7)

92 Constitutional Law
92XVII Political Rights and Discrimination
92k1471 Public Employees and Officials
92k1475 Political Affiliation; Patronage
92k1475(7) k. Promotion. Most Cited Cases
(Formerly 92k82(11))

States 360 ⚿53

360 States
360II Government and Officers
360k53 k. Appointment or Employment and Tenure of Agents and Employees in General. Most Cited Cases

That low-level public employees had no legal entitlement to promotion, transfer, or recall was not determinative of their claims that promotions, transfers, and recalls based on political affiliation or support were impermissible infringement on their First Amendment rights; government could not rely on basis that infringed employees' constitutionally protected interests to deny them valuable benefits. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 92 ⚿1475(5)

92 Constitutional Law
92XVII Political Rights and Discrimination
92k1471 Public Employees and Officials
92k1475 Political Affiliation; Patronage

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92k1475(5) k. Adverse Action in General. Most Cited Cases
(Formerly 92k82(11))

Constitutional Law 92 ⇐1475(7)

92 Constitutional Law
92XVII Political Rights and Discrimination
92k1471 Public Employees and Officials
92k1475 Political Affiliation; Patronage
92k1475(7) k. Promotion. Most Cited Cases
(Formerly 92k82(11))

Promotions, transfers, and recalls after layoffs based on political affiliation or support are impermissible infringement on First Amendment rights of low-level public employees; such patronage practices are not sufficiently narrowly tailored to serve vital government interests in securing effective employees, in securing employees who will loyally implement policies, or in preserving democratic process. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 92 ⇐1475(5)

92 Constitutional Law
92XVII Political Rights and Discrimination
92k1471 Public Employees and Officials
92k1475 Political Affiliation; Patronage
92k1475(5) k. Adverse Action in General. Most Cited Cases
(Formerly 92k91, 92k82(11))

It was not necessary that employment decision based on patronage be the "substantial equivalent of a dismissal" for decision to violate low-level public employee's rights under First Amendment; this test is unduly restrictive because it fails to recognize that there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 92 ⇐1181

92 Constitutional Law
92X First Amendment in General
92X(B) Particular Issues and Applications
92k1180 Public Employees and Officials
92k1181 k. In General. Most Cited Cases
(Formerly 92k82(11))

Constitutional Law 92 ⇐1446

92 Constitutional Law
92XVI Freedom of Association
92k1446 k. Public Employees and Officials. Most Cited Cases
(Formerly 92k82(11), 92k91)

First Amendment prevents government, except in most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate; it is not merely tenure provision, protecting public employees from actual or constructive discharge. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 ⇐1150

92 Constitutional Law
92X First Amendment in General
92X(A) In General
92k1150 k. In General. Most Cited Cases
(Formerly 92k82(3))

What the First Amendment precludes government from commanding directly, it also precludes government from accomplishing indirectly. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 92 ⇐1474(1)

92 Constitutional Law
92XVII Political Rights and Discrimination
92k1471 Public Employees and Officials
92k1474 Political Beliefs or Discrimination in General
92k1474(1) k. In General. Most Cited Cases
(Formerly 92k91)

Constitutional Law 92 ⇐1474(2)

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92 Constitutional Law
92XVII Political Rights and Discrimination
92k1471 Public Employees and Officials
92k1474 Political Beliefs or Discrimination in General
92k1474(2) k. Adverse Action. Most Cited Cases
(Formerly 92k82(11))

Constitutional Law 92 ⚖1475(4)

92 Constitutional Law
92XVII Political Rights and Discrimination
92k1471 Public Employees and Officials
92k1475 Political Affiliation; Patronage
92k1475(4) k. Appointment and Hiring; Qualifications. Most Cited Cases
(Formerly 92k82(11))

Conditioning public hiring decisions on political belief and association violates First Amendment rights of applicants in absence of vital governmental interest. U.S.C.A. Const.Amend. 1.

***2730 Syllabus** FN**

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

*62 The Illinois Governor issued an executive order instituting a hiring freeze, whereby state officials are prohibited from hiring any employee, filling any vacancy, creating any new position, or taking any similar action without the Governor's "express permission." Petitioners in No. 88-1872 and cross-respondents in No. 88-2074-an applicant for employment, employees who had been denied promotions or transfers, and former employees who had not been recalled after layoffs-brought suit in the District Court, alleging that, by means of the freeze, the Governor was operating a political patronage system; that they had suffered discrimination in state employment because they had not been Republican Party supporters; and that this discrimination violates the First Amendment. The District Court dismissed the complaint for failure to state a claim upon which relief could be granted. The Court of Appeals affirmed in part and reversed in part. Noting that *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547, and *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574, had found that the patronage practice of discharging public employees on the basis of their political affiliation violates the First Amendment, the court held that other patronage practices violate the Amendment only when they are the "substantial equivalent of a dismissal," *i.e.*, when they would lead reasonable persons to resign. The court concluded, based on *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260, that rejecting an employment application did not impose a hardship comparable to the loss of a job. Thus, it dismissed the hiring claim, but remanded the others for further proceedings.

Held: The rule of *Elrod* and *Branti* extends to promotion, transfer, recall, and hiring decisions based on party affiliation and support, and petitioners and cross-respondents have stated claims upon which relief may be granted. Pp. 2734-2739.

(a) Promotions, transfers, and recalls based on political affiliation or support are an impermissible infringement on public employees' First Amendment rights. Even though petitioners and cross-respondents *63 have no legal entitlement to the promotions, transfers, and recalls, the government **2731 may not rely on a basis that infringes their constitutionally protected interests to deny them these valuable benefits. *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570. Significant penalties are imposed on those employees who exercise their First Amendment rights. Those who do not compromise their beliefs stand to lose the considerable increases in pay and job satisfaction attendant to promotions, the shorter commuting hours and lower maintenance expenses incident to transfers to more convenient work loca-

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tions, and even the jobs themselves in the case of recalls. As in *Elrod* and *Branti,* these patronage practices are not narrowly tailored to serve vital government interests. A government's interest in securing effective employees can be met by discharging, demoting, or transferring persons whose work is deficient, and its interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing high-level employees on the basis of their political views. Likewise, the "preservation of the democratic process" is not furthered by these patronage decisions, since political parties are nurtured by other, less intrusive and equally effective methods, and since patronage decidedly impairs the elective process by discouraging public employees' free political expression. Pp. 2735-2737.

(b) The standard used by the Court of Appeals to measure alleged patronage practices in government employment is unduly restrictive because it fails to recognize that there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy. Pp. 2737-2738.

(c) Patronage hiring places burdens on free speech and association similar to those imposed by patronage promotions, transfers, and recalls. Denial of a state job is a serious privation, since such jobs provide financial, health, and other benefits; since there may be openings with the State when business in the private sector is slow; and since there are occupations for which the government is the sole or major employer. Under this Court's sustained precedent, conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so. See, *e.g., Branti, supra,* 445 U.S., at 515-516, 100 S.Ct., at 1293. There is no such government interest here, for the same reasons that the government lacks justification for patronage promotions, transfers, and recalls. It is inappropriate to rely on *Wygant* to distinguish hiring from dismissal in this context, since that case was concerned with the least harsh means of remedying past wrongs and did not question that *some* remedy was permissible when there was sufficient evidence of past discrimination. Here, however, it is unnecessary to consider whether not being hired is less burdensome *64 than being discharged, because the government is not pressed to do *either* on the basis of political affiliation. Pp. 2738-2739.

868 F.2d 943 (CA7 1989), affirmed in part, reversed in part, and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post,* p. 2740. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C.J., and KENNEDY, J., joined, and in which O'CONNOR, J., joined as to Parts II and III, *post,* p. 2746.

Mary Lee Leahy argued the cause for petitioners in No. 88-1872 and respondents in No. 88-2074. With her on the briefs were *Michael R. Berz, Cheryl R. Jansen,* and *Kathryn E. Eisenhart.*

Thomas P. Sullivan argued the cause for respondents in No. 88-1872 and petitioners in No. 88-2074. With him on the briefs were *Jeffrey D. Colman, Michael J. Hayes,* and *Roger P. Flahaven.*†

† Briefs of *amici curiae* urging reversal in both cases were filed for the American Federation of Labor and Congress of Industrial Organizations by *George Kaufmann* and *Laurence Gold;* and for the North Carolina Professional Fire Fighters Association by *J. Michael McGuiness. C. Richard Johnson* filed a brief for the Independent Voters of Illinois-Independent Precinct Organization et al. as *amici curiae* urging reversal in No. 88-1872. *Richard H. Chanin* and *Jeremiah A. Collins* filed a brief for the National Education Association as *amicus curiae* urging reversal in No. 88-1872 and affirmance in No. 88-2074.

Hector Rivera Cruz, Secretary of Justice of Puerto

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Rico, *Jorge E. Perez Diaz,* Solicitor General, and *Lino J. Saldaña* filed a brief for the Commonwealth of Puerto Rico as *amicus curiae* urging affirmance in both cases.

Justice BRENNAN delivered the opinion of the Court.

To the victor belong only those spoils that may be constitutionally obtained. *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), and **2732*Branti v. Finkel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), decided that the First Amendment forbids government officials to discharge or threaten to discharge public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved. *65 Today we are asked to decide the constitutionality of several related political patronage practices-whether promotion, transfer, recall, and hiring decisions involving low-level public employees may be constitutionally based on party affiliation and support. We hold that they may not.

I

The petition and cross-petition before us arise from a lawsuit protesting certain employment policies and practices instituted by Governor James Thompson of Illinois.[FN1] On November 12, 1980, the Governor issued an executive order proclaiming a hiring freeze for every agency, bureau, board, or commission subject to his control. The order prohibits state officials from hiring any employee, filling any vacancy, creating any new position, or taking any similar action. It affects approximately 60,000 state positions. More than 5,000 of these become available each year as a result of resignations, retirements, deaths, expansions, and reorganizations. The order proclaims that "*no* exceptions" are permitted without the Governor's "express permission after submission of appropriate requests to [his] office." Governor's Executive Order No. 5 (Nov. 12, 1980), Brief for Petitioners and Cross-Respondents 11 (emphasis added).

FN1. The cases come to us in a preliminary posture, and the question is limited to whether the allegations of petitioners Rutan et al. state a cognizable First Amendment claim sufficient to withstand respondents' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Therefore, for purposes of our review we must assume that petitioners' well-pleaded allegations are true. *Berkovitz v. United States,* 486 U.S. 531, 540, 108 S.Ct. 1954, 1961, 100 L.Ed.2d 531 (1988).

Three of the five original plaintiffs who brought the lawsuit-Rutan, Taylor, and Moore-are petitioners in No. 88-1872, and we refer to them as "petitioners." The defendants in the lawsuit are various Illinois and Republican Party officials. We refer to them as "respondents" because they are the respondents in No. 88-1872. They are also the cross-petitioners in No. 88-2074. Four of the five original plaintiffs-Rutan, Taylor, Standefer, and O'Brien-are named as cross-respondents in No. 88-2074.

*66 Requests for the Governor's "express permission" have allegedly become routine. Permission has been granted or withheld through an agency expressly created for this purpose, the Governor's Office of Personnel (Governor's Office). Agencies have been screening applicants under Illinois' civil service system, making their personnel choices, and submitting them as requests to be approved or disapproved by the Governor's Office. Among the employment decisions for which approvals have been required are new hires, promotions, transfers, and recalls after layoffs.

By means of the freeze, according to petitioners and cross-respondents, the Governor has been using the Governor's Office to operate a political patronage system to limit state employment and beneficial employment-related decisions to those who are supported by the Republican Party. In review-

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ing an agency's request that a particular applicant be approved for a particular position, the Governor's Office has looked at whether the applicant voted in Republican primaries in past election years, whether the applicant has provided financial or other support to the Republican Party and its candidates, whether the applicant has promised to join and work for the Republican Party in the future, and whether the applicant has the support of Republican Party officials at state or local levels.

Five people (including the three petitioners) brought suit against various Illinois and Republican Party officials in the United States District Court for the Central District of Illinois.[FN2] They alleged that they had suffered**2733 discrimination with respect to state employment because they had not been supporters of the State's Republican Party and that this discrimination violates the First Amendment. Cynthia B. *67 Rutan has been working for the State since 1974 as a rehabilitation counselor. She claims that since 1981 she has been repeatedly denied promotions to supervisory positions for which she was qualified because she had not worked for or supported the Republican Party. Franklin Taylor, who operates road equipment for the Illinois Department of Transportation, claims that he was denied a promotion in 1983 because he did not have the support of the local Republican Party. Taylor also maintains that he was denied a transfer to an office nearer to his home because of opposition from the Republican Party chairmen in the counties in which he worked and to which he requested a transfer. James W. Moore claims that he has been repeatedly denied state employment as a prison guard because he did not have the support of Republican Party officials.

FN2. The five originally brought this action both individually and on behalf of those similarly situated. The Seventh Circuit, noting that the District Court had failed to address the class-action questions, reviewed the case as one brought by individuals only. 868 F.2d 943, 947 (1989). We therefore have only the claims of the individuals before us.

The two other plaintiffs, before the Court as cross-respondents, allege that they were not recalled after layoffs because they lacked Republican credentials. Ricky Standefer was a state garage worker who claims that he was not recalled, although his fellow employees were, because he had voted in a Democratic primary and did not have the support of the Republican Party. Dan O'Brien, formerly a dietary manager with the mental health department, contends that he was not recalled after a layoff because of his party affiliation and that he later obtained a lower paying position with the corrections department only after receiving support from the chairman of the local Republican Party.

The District Court dismissed the complaint with prejudice, under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief could be granted. 641 F.Supp. 249 (1986). The United States Court of Appeals for the Seventh Circuit initially issued a panel opinion, 848 F.2d 1396 (1988), but then reheard the appeal en banc. The court affirmed the District Court's decision in part and reversed in part. 868 F.2d 943 (1989). Noting that this Court had previously determined that the patronage practice of discharging*68 public employees on the basis of their political affiliation violates the First Amendment, the Court of Appeals held that other patronage practices violate the First Amendment only when they are the "substantial equivalent of a dismissal." *Id.*, at 955. The court explained that an employment decision is equivalent to a dismissal when it is one that would lead a reasonable person to resign. *Ibid.* The court affirmed the dismissal of Moore's claim because it found that basing hiring decisions on political affiliation does not violate the First Amendment, but remanded the remaining claims for further proceedings.[FN3]

FN3. The Seventh Circuit explained that Standefer's and O'Brien's claims might be cognizable if there were a formal or informal system of rehiring employees in

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their positions, 868 F.2d, at 956-957, but expressed considerable doubt that Rutan and Taylor would be able to show that they suffered the "substantial equivalent of a dismissal" by being denied promotions and a transfer. *Id.*, at 955-956.

Rutan, Taylor, and Moore petitioned this Court to review the constitutional standard set forth by the Seventh Circuit and the dismissal of Moore's claim. Respondents cross-petitioned this Court, contending that the Seventh Circuit's remand of four of the five claims was improper because the employment decisions alleged here do not, as a matter of law, violate the First Amendment. We granted certiorari, 493 U.S. 807, 110 S.Ct. 48, 107 L.Ed.2d 17 (1989), to decide the important question whether the First Amendment's proscription of patronage dismissals recognized in **2734*Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), and *Branti v. Finkel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), extends to promotion, transfer, recall, or hiring decisions involving public employment positions for which party affiliation is not an appropriate requirement.

II

A

In *Elrod, supra,* we decided that a newly elected Democratic sheriff could not constitutionally engage in the patronage practice of replacing certain office staff with members of *69 his own party "when the existing employees lack or fail to obtain requisite support from, or fail to affiliate with, that party." *Id.,* 427 U.S., at 351, 373, 96 S.Ct., at 2679, 2689 (plurality opinion), and 375, 96 S.Ct., at 2690 (Stewart, J., joined by BLACKMUN, J., concurring in judgment). The plurality explained that conditioning public employment on the provision of support for the favored political party "unquestionably inhibits protected belief and association." *Id.,* at 359, 96 S.Ct., at 2683. It reasoned that conditioning employment on political activity pressures employees to pledge political allegiance to a party with which they prefer not to associate, to work for the election of political candidates they do not support, and to contribute money to be used to further policies with which they do not agree. The latter, the plurality noted, had been recognized by this Court as "tantamount to coerced belief." *Id.,* 427 U.S., at 355, 96 S.Ct., at 2681 (citing *Buckley v. Valeo,* 424 U.S. 1, 19, 96 S.Ct. 612, 634-635, 46 L.Ed.2d 659 (1976)). At the same time, employees are constrained from joining, working for or contributing to the political party and candidates of their own choice. *Elrod, supra,* 427 U.S., at 355-356, 96 S.Ct., at 2681. "[P]olitical belief and association constitute the core of those activities protected by the First Amendment," the plurality emphasized. 427 U.S., at 356, 96 S.Ct., at 2681. Both the plurality and the concurrence drew support from *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), in which this Court held that the State's refusal to renew a teacher's contract because he had been publicly critical of its policies imposed an unconstitutional condition on the receipt of a public benefit. See *Elrod, supra,* 427 U.S., at 359, 96 S.Ct., at 2682 (plurality opinion) and 375, 96 S.Ct., at 2690 (Stewart, J., concurring in judgment); see also *Branti, supra,* 445 U.S., at 514-516, 100 S.Ct., at 1292-1293.

The Court then decided that the government interests generally asserted in support of patronage fail to justify this burden on First Amendment rights because patronage dismissals are not the least restrictive means for fostering those interests. See *Elrod, supra,* 427 U.S., at 372-373, 96 S.Ct., at 2689 (plurality opinion) and 375, 96 S.Ct., at 2690 (Stewart, J., concurring in judgment). The plurality acknowledged that a government has a significant interest in ensuring that it has effective and efficient employees. It expressed*70 doubt, however, that "mere difference of political persuasion motivates poor performance" and concluded that, in any case, the government can ensure employee effectiveness and efficiency through the less drastic means of discharging staff members whose work is inadequate. 427 U.S., at 365-366, 96 S.Ct., at 2685-2686. The plurality also found that a govern-

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ment can meet its need for politically loyal employees to implement its policies by the less intrusive measure of dismissing, on political grounds, only those employees in policymaking positions. *Id.*, at 367, 96 S.Ct., at 2686-2687. Finally, although the plurality recognized that preservation of the democratic process "may in some instances justify limitations on First Amendment freedoms," it concluded that the "process functions as well without the practice, perhaps even better." Patronage, it explained, "can result in the entrenchment of one or a few parties to the exclusion of others" and "is a very effective impediment to the associational and speech freedoms which are essential to a meaningful system of **2735 democratic government." *Id.*, at 368-370, 96 S.Ct., at 2688.[FN4]

FN4. Justice SCALIA's lengthy discussion of the appropriate standard of review for restrictions the government places on the constitutionally protected activities of its employees to ensure efficient and effective operations, see *post,* at 2747-2752, is not only questionable, it offers no support for his conclusion that patronage practices pass muster under the First Amendment. The interests that Justice SCALIA regards as potentially furthered by patronage practices are not interests that the government has in its capacity as an employer. Justice SCALIA describes the possible benefits of patronage as follows: "patronage stabilizes political parties and prevents excessive political fragmentation," *post,* at 2752; patronage is necessary to strong, disciplined party organizations, *post,* at 2752-2753; patronage "fosters the two-party system," *post,* at 2754; and patronage is "a powerful means of achieving the social and political integration of excluded groups," *post,* at 2754-2755. These are interests the government might have in the structure and functioning of society as a whole. That the government attempts to use public employment to further such interests does not render those interests employment related. Therefore, even were Justice SCALIA correct that less-than-strict scrutiny is appropriate when the government takes measures to ensure the proper functioning of its internal operations, such a rule has no relevance to the restrictions on freedom of association and speech at issue in these cases.

*71 Four years later, in *Branti, supra,* we decided that the First Amendment prohibited a newly appointed public defender, who was a Democrat, from discharging assistant public defenders because they did not have the support of the Democratic Party. The Court rejected an attempt to distinguish the case from *Elrod,* deciding that it was immaterial whether the public defender had attempted to coerce employees to change political parties or had only dismissed them on the basis of their private political beliefs. We explained that conditioning continued public employment on an employee's having obtained support from a particular political party violates the First Amendment because of "the coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one's job." 445 U.S., at 516, 100 S.Ct., at 1294. "In sum," we said, "there is no requirement that dismissed employees prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance." *Id.*, at 517, 100 S.Ct., at 1294. To prevail, we concluded, public employees need show only that they were discharged because they were not affiliated with or sponsored by the Democratic Party. *Ibid.*[FN5]

FN5. *Branti v. Finkel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), also refined the exception created by *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), for certain employees. In *Elrod,* we suggested that policymaking and confidential employees probably could be dismissed on the basis of their political

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views. *Id.*, at 367, 96 S.Ct., at 2686-2687 (plurality opinion) and 375, 96 S.Ct., at 2690 (Stewart, J., concurring in judgment). In *Branti*, we said that a State demonstrates a compelling interest in infringing First Amendment rights only when it can show that "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti, supra,* 100 U.S., at 518, 100 S.Ct., at 1295. The scope of this exception does not concern us here as respondents concede that the five employees who brought this suit are not within it.

B

[1] We first address the claims of the four current or former employees. Respondents urge us to view *Elrod* and *Branti* *72 as inapplicable because the patronage dismissals at issue in those cases are different in kind from failure to promote, failure to transfer, and failure to recall after layoff. Respondents initially contend that the employee petitioners' and cross-respondents' First Amendment rights have not been infringed because they have no entitlement to promotion, transfer, or rehire. We rejected just such an argument in *Elrod,* 427 U.S., at 359-360, 96 S.Ct., at 2683 (plurality opinion) and 375, 96 S.Ct., at 2690 (Stewart, J., concurring in judgment), and *Branti,* 445 U.S., at 514-515, 100 S.Ct., at 1293, as both cases involved state workers who were employees at will with no legal entitlement to continued employment. In *Perry,* 408 U.S., at 596-598, 92 S.Ct., at 2696-2697, we held explicitly that the plaintiff teacher's lack of a contractual or tenure right to re-employment**2736 was immaterial to his First Amendment claim. We explained the viability of his First Amendment claim as follows:

"For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, *there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests-especially, his interest in freedom of speech.* For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' *Speiser v. Randall,* 357 U.S. 513, 526 [78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958)]. Such interference with constitutional rights is impermissible." *Id.*, 408 U.S., at 597, 92 S.Ct., at 2697 (emphasis added).

Likewise, we find the assertion here that the employee petitioners and cross-respondents had no legal entitlement to promotion, transfer, or recall beside the point.

*73 [2][3][4] Respondents next argue that the employment decisions at issue here do not violate the First Amendment because the decisions are not punitive, do not in any way adversely affect the terms of employment, and therefore do not chill the exercise of protected belief and association by public employees.[FN6] This is not credible. Employees who find themselves in dead-end positions due to their political backgrounds *are* adversely affected. They will feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold, in order to progress up the career ladder. Employees denied transfers to workplaces reasonably close to their homes until they join and work for the Republican Party will feel a daily pressure from their long commutes to do so. And employees who have been laid off may well feel compelled to engage in whatever political activity is necessary to regain regular paychecks and positions corresponding to their skill and experience.[FN7]

FN6. Respondents' reliance on *Johnson v. Transportation Agency, Santa Clara County,* 480 U.S. 616, 107 S.Ct. 1442, 94

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L.Ed.2d 615 (1987), to this effect is misplaced. The question in *Johnson* was whether the Santa Clara County affirmative-action program violated the anti-discrimination requirement of Title VII of the Civil Rights Act of 1964. In that context, we said that the denial of a promotion did not unsettle any legitimate, firmly rooted expectations. We did not dispute, however, that it placed a burden on the person to whom the promotion was denied. We considered Johnson's expectations in discussing whether the plan unnecessarily trammeled the rights of male employees-*i.e.*, whether its goal was pursued with an excessive, rather than reasonable, amount of dislocation. Our decision that promotion denials are not such an imposition that Title VII prevented Santa Clara from considering gender in order to redress past discrimination does not mean that promotion denials are not enough of an imposition to pressure employees to affiliate with the favored party.

FN7. The complaint in this case states that Dan O'Brien was driven to do exactly this. After being rejected for recall by the Governor's Office, he allegedly pursued the support of a Republican Party official, despite his previous interest in the Democratic Party.

*74 The same First Amendment concerns that underlay our decisions in *Elrod, supra,* and *Branti, supra,* are implicated here. Employees who do not compromise their beliefs stand to lose the considerable increases in pay and job satisfaction attendant to promotions, the hours and maintenance expenses that are consumed by long daily commutes, and even their jobs if they are not rehired after a "temporary" layoff. These are significant penalties and are imposed for the exercise of rights guaranteed by the First Amendment. Unless these patronage practices are narrowly tailored to further vital government interests, we must conclude that they impermissibly encroach on First Amendment freedoms. See **2737*Elrod, supra,* 427 U.S., at 362-363, 96 S.Ct., at 2684 (plurality opinion) and 375, 96 S.Ct., at 2690 (Stewart, J., concurring in judgment); *Branti, supra,* 445 U.S., at 515-516, 100 S.Ct., at 1293.

We find, however, that our conclusions in *Elrod, supra,* and *Branti, supra,* are equally applicable to the patronage practices at issue here. A government's interest in securing effective employees can be met by discharging, demoting, or transferring staff members whose work is deficient. A government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views. See *Elrod, supra,* 427 U.S., at 365-368, 96 S.Ct., at 2685-2687 (plurality opinion); *Branti, supra,* 445 U.S., at 518, and 520, n. 14, 100 S.Ct., at 1294-1295, and 1295, n. 14. Likewise, the "preservation of the democratic process" is no more furthered by the patronage promotions, transfers, and rehires at issue here than it is by patronage dismissals. First, "political parties are nurtured by other, less intrusive and equally effective methods." *Elrod, supra,* 427 U.S., at 372-373, 96 S.Ct., at 2689 (plurality opinion). Political parties have already survived the substantial decline in patronage employment practices in this century. See *Elrod, supra,* at 369, and n. 23, 96 S.Ct., at 2688, and n. 23 (plurality opinion); see also L. Sabato, Goodbye to Good-time Charlie 67 (2d ed. 1983) ("The number of patronage positions has significantly decreased in virtually every state"); Congressional Quarterly Inc., State Government,*75 CQ's Guide to Current Issues and Activities 134 (T. Beyle ed. 1989-1990) ("Linkage[s] between political parties and government office-holding ... have died out under the pressures of varying forces [including] the declining influence of election workers when compared to media and money-intensive campaigning, such as the distribution of form letters and advertising"); Sorauf, Patronage and Party, 3 Midwest J.

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Pol. Sci. 115, 118-120 (1959) (many state and local parties have thrived without a patronage system). Second, patronage decidedly impairs the elective process by discouraging free political expression by public employees. See *Elrod,* 427 U.S., at 372, 96 S.Ct., at 2689 (plurality opinion) (explaining that the proper functioning of a democratic system "is indispensably dependent on the unfettered judgment of each citizen on matters of political concern"). Respondents, who include the Governor of Illinois and other state officials, do not suggest any other overriding government interest in favoring Republican Party supporters for promotion, transfer, and rehire.

We therefore determine that promotions, transfers, and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees. In doing so, we reject the Seventh Circuit's view of the appropriate constitutional standard by which to measure alleged patronage practices in government employment. The Seventh Circuit proposed that only those employment decisions that are the "substantial equivalent of a dismissal" violate a public employee's rights under the First Amendment. 868 F.2d, at 954-957. We find this test unduly restrictive because it fails to recognize that there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy. See *Elrod, supra,* 427 U.S., at 356-357, 96 S.Ct., at 2681 (plurality opinion); *West Virginia Bd. of Education v. Barnette,* 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943).[FN8] *76 The First Amendment is not a tenure provision, protecting public **2738 employees from actual or constructive discharge. The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate.

FN8. The Seventh Circuit's proffered test was not based on that court's determination that other patronage practices do not burden the free exercise of First Amendment rights. Rather, the court chose to defer to the political process in an area in which it felt this Court had not yet spoken clearly. 868 F.2d, at 953-954. The court also expressed concern that the opposite conclusion would open state employment to excessive interference by the Federal Judiciary. *Ibid.* We respect but do not share this concern.

> Our decision does not impose the Federal Judiciary's supervision on any state government activity that is otherwise immune. The federal courts have long been available for protesting unlawful state employment decisions. Under Title VII, 42 U.S.C. §§ 2000e(a), (f), and 2000e-2(a) (1982 ed.), it is a violation of federal law to discriminate in any way in state employment (excepting certain high-level positions) on the basis of race, color, religion, sex, or national origin. Moreover, the First Amendment, as the court below noted, already protects state employees not only from patronage dismissals but also from "even an act of retaliation as trivial as failing to hold a birthday party for a public employee ... when intended to punish her for exercising her free speech rights." 868 F.2d, at 954, n. 4.

Whether the four employees were in fact denied promotions, transfers, or rehires for failure to affiliate with and support the Republican Party is for the District Court to decide in the first instance. What we decide today is that such denials are irreconcilable with the Constitution and that the allegations of the four employees state claims under 42 U.S.C. § 1983 (1982 ed.) for violations of the First and Fourteenth Amendments. Therefore, although we affirm the Seventh Circuit's judgment to reverse

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the District Court's dismissal of these claims and remand them for further proceedings, we do not adopt the Seventh Circuit's reasoning.

C

[5][6] Petitioner James W. Moore presents the closely related question whether patronage hiring violates the First Amendment.*77 Patronage hiring places burdens on free speech and association similar to those imposed by the patronage practices discussed above. A state job is valuable. Like most employment, it provides regular paychecks, health insurance, and other benefits. In addition, there may be openings with the State when business in the private sector is slow. There are also occupations for which the government is a major (or the only) source of employment, such as social workers, elementary school teachers, and prison guards. Thus, denial of a state job is a serious privation.

Nonetheless, respondents contend that the burden imposed is not of constitutional magnitude.[FN9] Decades of decisions by this Court belie such a claim. We premised *Torcaso v. Watkins,* 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961), on our understanding that loss of a job opportunity for failure to compromise one's convictions states a constitutional claim. We held that Maryland could not refuse an appointee a commission for the position of notary public on the ground that he refused to declare his belief in God, because the required oath "unconstitutionally invades the appellant's freedom of belief and religion." *Id.,* at 496, 81 S.Ct., at 1684. In *Keyishian v. Board of Regents of Univ. of New York,* 385 U.S. 589, 609-610, 87 S.Ct. 675, 687, 17 L.Ed.2d 629 (1967), we held a law affecting appointment and retention of teachers invalid because it premised employment on an unconstitutional restriction of political belief and association. In *Elfbrandt v. Russell,* 384 U.S. 11, 19, 86 S.Ct. 1238, 1242, 16 L.Ed.2d 321 (1966), we struck down a loyalty oath which was a prerequisite for public employment.

FN9. To the extent that respondents also argue that Moore has not been penalized for the exercise of protected speech and association rights because he had no claim of right to employment in the first place, that argument is foreclosed by *Perry v. Sindermann,* 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972). See *supra,* at 2735-2736.

Almost half a century ago, this Court made clear that the government "may not enact a regulation providing that no Republican ... shall be appointed to federal office." *Public Workers v. Mitchell,* 330 U.S. 75, 100, 67 S.Ct. 556, 569, 91 L.Ed. 754 (1947). What the *78 First Amendment precludes the government**2739 from commanding directly, it also precludes the government from accomplishing indirectly. See *Perry,* 408 U.S., at 597, 92 S.Ct., at 2697 (citing *Speiser v. Randall,* 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958)); see *supra,* at 2735. Under our sustained precedent, conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so. See *Elrod,* 427 U.S., at 362-363, 96 S.Ct., at 2684 (plurality opinion) and 375, 96 S.Ct., at 2690 (Stewart, J., concurring in judgment); *Branti,* 445 U.S., at 515-516, 100 S.Ct., at 1293; see also *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (unemployment benefits); *Speiser v. Randall, supra* (tax exemption). We find no such government interest here, for the same reasons that we found that the government lacks justification for patronage promotions, transfers, or recalls. See *supra,* at 2735-2738.

The court below, having decided that the appropriate inquiry in patronage cases is whether the employment decision at issue is the substantial equivalent of a dismissal, affirmed the trial court's dismissal of Moore's claim. See 868 F.2d, at 954. The Court of Appeals reasoned that "rejecting an employment application does not impose a hardship upon an employee comparable to the loss of [a] job." *Ibid.,* citing *Wygant v. Jackson Bd. of Educa-*

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tion, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion). Just as we reject the Seventh Circuit's proffered test, see *supra,* at 2737-2738, we find the Seventh Circuit's reliance on *Wygant* to distinguish hiring from dismissal unavailing. The court cited a passage from the plurality opinion in *Wygant* explaining that school boards attempting to redress past discrimination must choose methods that broadly distribute the disadvantages imposed by affirmative-action plans among innocent parties. The plurality said that race-based layoffs placed too great a burden on individual members of the nonminority race, but suggested that discriminatory hiring was permissible, under certain circumstances, even though it burdened white applicants, because the burden was less intrusive than the loss of an existing job. *79 476 U.S., at 282-284, 106 S.Ct., at 1851-1852. See also *id.,* at 294-295, 106 S.Ct., at 1857-1858 (WHITE, J., concurring in judgment).

Wygant has no application to the question at issue here. The plurality's concern in that case was identifying the least harsh means of remedying past wrongs. It did not question that *some* remedy was permissible when there was sufficient evidence of past discrimination. In contrast, the Governor of Illinois has not instituted a remedial undertaking. It is unnecessary here to consider whether not being hired is less burdensome than being discharged, because the government is not pressed to do *either* on the basis of political affiliation. The question in the patronage context is not which penalty is more acute but whether the government, without sufficient justification, is pressuring employees to discontinue the free exercise of their First Amendment rights.

If Moore's employment application was set aside because he chose not to support the Republican Party, as he asserts, then Moore's First Amendment rights have been violated. Therefore, we find that Moore's complaint was improperly dismissed.

III

We hold that the rule of *Elrod* and *Branti* extends to promotion, transfer, recall, and hiring decisions based on party affiliation and support and that all of the petitioners and cross-respondents have stated claims upon which relief may be granted. We affirm the Seventh Circuit insofar as it remanded Rutan's, Taylor's, Standefer's, and O'Brien's claims. However, we reverse the Seventh Circuit's decision to uphold the dismissal of Moore's claim. All five claims are remanded for proceedings consistent with this opinion.

It is so ordered.

**2740 Justice STEVENS, concurring.

While I join the Court's opinion, these additional comments are prompted by three propositions advanced by Justice SCALIA in his dissent. First, he implies that prohibiting imposition*80 of an unconstitutional condition upon eligibility for government employment amounts to adoption of a civil service system. Second, he makes the startling assertion that a long history of open and widespread use of patronage practices immunizes them from constitutional scrutiny. Third, he assumes that the decisions in *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), and *Branti v. Finkel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), represented dramatic departures from prior precedent.

Several years before either *Elrod* or *Branti* was decided, I had occasion as a judge on the Court of Appeals for the Seventh Circuit to evaluate each of these propositions. *Illinois State Employees Union, Council 34, Am. Federation of State, Cty., and Municipal Employees, AFL-CIO v. Lewis,* 473 F.2d 561 (1972), cert. denied, 410 U.S. 928, 93 S.Ct. 1364, 35 L.Ed.2d 590 (1973). With respect to the first, I wrote:

> "Neither this court nor any other may impose a civil service system upon the State of Illinois. The General Assembly has provided an elaborate system regulating the appointment to specified positions solely on the basis of merit and fitness, the grounds for termination of such employment,

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and the procedures which must be followed in connection with hiring, firing, promotion, and retirement. A federal court has no power to establish any such employment code.

"However, recognition of plaintiffs' claims will not give every public employee civil service tenure and will not require the state to follow any set procedure or to assume the burden of explaining or proving the grounds for every termination. It is the former employee who has the burden of proving that his discharge was motivated by an impermissible consideration. It is true, of course, that a prima facie case may impose a burden of explanation on the State. But the burden of proof will remain with the plaintiff employee and we must assume that the trier of fact will be able to differentiate between those discharges which are politically motivated and *81 those which are not. There is a clear distinction between the grant of tenure to an employee-a right which cannot be conferred by judicial fiat-and the prohibition of a discharge for a particular impermissible reason. The Supreme Court has plainly identified that distinction on many occasions, most recently in *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

"Unlike a civil service system, the Fourteenth Amendment to the Constitution does not provide job security, as such, to public employees. If, however, a discharge is motivated by considerations of race, religion, or punishment of constitutionally protected conduct, it is well settled that the State's action is subject to federal judicial review. There is no merit to the argument that recognition of plaintiffs' constitutional claim would be tantamount to foisting a civil service code upon the State." 473 F.2d, at 567-568 (footnotes and citations omitted).

Denying the Governor of Illinois the power to require every state employee, and every applicant for state employment, to pledge allegiance and service to the political party in power is a far cry from a civil service code. The question in this case is simply whether a Governor may adopt a rule that would be plainly unconstitutional if enacted by the General Assembly of Illinois.[FN1]

FN1. Despite Justice SCALIA's imprecise use of the term, *post,* at 2758, the legal issue presented in this litigation is plainly not a "political question." See *Elrod v. Burns,* 427 U.S. 347, 351-353, 96 S.Ct. 2673, 2678-2679, 49 L.Ed.2d 547 (1976) (plurality opinion); *Illinois State Employees Union, Council 34, Am. Federation of State, Cty., and Municipal Employees, AFL-CIO v. Lewis,* 473 F.2d 561, 566-567 (1972), cert. denied, 410 U.S. 928, 93 S.Ct. 1364, 35 L.Ed.2d 590 (1973).

**2741 Second, Justice SCALIA asserts that "when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down." *Post,* at 2748; *post,* at 2752 (a "clear and continuing tradition of our people" *82 deserves " *dispositive* effect"). The argument that traditional practices are immune from constitutional scrutiny is advanced in two plurality opinions that Justice SCALIA has authored, but not by any opinion joined by a majority of the Members of the Court.[FN2]

FN2. See *Michael H. v. Gerald D.,* 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989) (plurality opinion); *Burnham v. Superior Court of California, Marin County,* 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990) (plurality opinion). Justice SCALIA's additional reliance on *Bowers v. Hardwick,* 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), *post,* at 2752, is misplaced because in that case the Court used a history of state criminal prohibitions to support its refusal to extend the doctrine of substantive due process to previously unprotected conduct. The question

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> in these cases is whether mere longevity can immunize from constitutional review state conduct that would otherwise violate the First Amendment.

In the *Lewis* case, I noted the obvious response to this position: "[I]f the age of a pernicious practice were a sufficient reason for its continued acceptance, the constitutional attack on racial discrimination would, of course, have been doomed to failure." 473 F.2d, at 568, n. 14. See, *e.g., Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).[FN3] I then added *83 this comment on the specific application of that argument to patronage practices:

> FN3. Ironically, at the time of the adoption of the Bill of Rights, the party system itself was far from an "accepted political nor[m]." *Post,* at 2748. Our founders viewed it as a pathology:
>
> "Political discussion in eighteenth-century England and America was pervaded by a kind of anti-party cant. Jonathan Swift, in his *Thoughts on Various Subjects,* had said that 'Party is the madness of many, for the gain of the few.' This maxim, which was repeated on this side of the Atlantic by men like John Adams and William Paterson, plainly struck a deep resonance in the American mind. Madison and Hamilton, when they discussed parties or factions (for them the terms were usually interchangeable) in *The Federalist,* did so only to arraign their bad effects. In the great debate over the adoption of the Constitution both sides spoke ill of parties. The popular sage, Franklin (who was not always consistent on the subject), gave an eloquent warning against factions and 'the infinite mutual abuse of parties, tearing to pieces the best of characters.' George Washington devoted a large part of his political testament, the Farewell Address, to stern warnings against 'the baneful effects of the Spirit of Party.' His successor, John Adams, believed that 'a division of the republic into two great parties.... is to be dreaded as the greatest political evil under our Constitution.' Similar admonitions can be found in the writings of the arch-Federalist Fisher Adams and the 'philospher of Jeffersonian democracy,' John Taylor of Caroline. If there was one point of political philosophy upon which these men, who differed on so many things, agreed quite readily, it was their common conviction about the baneful effects of the spirit of party." R. Hofstadter, The Idea of a Party System 2-3 (1969) (footnote omitted).
>
> Our contemporary recognition of a state interest in protecting the two major parties from damaging intraparty feuding or unrestrained factionalism, see, *e.g., Storer v. Brown,* 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974); *post,* at 2754-2755, has not disturbed our protection of the rights of individual voters and the role of alternative parties in our government. See, *e.g., Anderson v. Celebrezze,* 460 U.S. 780, 793, 103 S.Ct. 1564, 1572, 75 L.Ed.2d 547 (1983) (burdens on new or small parties and independent candidates impinge on associational choices); *Williams v. Rhodes,* 393 U.S. 23, 32, 89 S.Ct. 5, 11, 21 L.Ed.2d 24 (1968) (there is "no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them").

"Finally, our answer to the constitutional question is not foreclosed by the fact that the 'spoils system has been entrenched in American history for almost two hundred years.' *Alomar v. Dwyer,* 447 F.2d 482, 483 (2d Cir.1971). For most of that period it was assumed, without serious question

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or debate, that since a public employee has no constitutional right to his job, there can be no valid constitutional objection to his summary removal. See *Bailey v. Richardson,* 86 U.S.App.D.C. 248, 182 F.2d 46, 59 (1950), affirmed per curiam by an equally divided Court, 341 U.S. 918 [71 S.Ct. 669, 95 L.Ed. 1352 (1951)]; **2742*Adler v. Board of Education,* 342 U.S. 485 [, 72 S.Ct. 380, 96 L.Ed. 517 (1952)]. But as Mr. Justice Marshall so forcefully stated in 1965 when he was a circuit judge, 'the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.' *Keyishian v. Board of Regents,* 345 F.2d 236, 239 (2d Cir.1965). The development of constitutional law subsequent to the Supreme Court's unequivocal repudiation of the line of cases ending with *Bailey v. *84 Richardson* and *Adler v. Board of Education* is more relevant than the preceding doctrine which is now 'universally rejected.' " 473 F.2d, at 568 (footnotes and citations omitted).

With respect to Justice SCALIA's view that until *Elrod v. Burns* was decided in 1976, it was unthinkable that patronage could be unconstitutional, see *post,* at 2748-2749, it seems appropriate to point out again not only that my views in *Lewis* antedated *Elrod* by several years, but, more importantly, that they were firmly grounded in several decades of decisions of this Court. As explained in *Lewis:*

"[In 1947] a closely divided Supreme Court upheld a statute prohibiting federal civil service employees from taking an active part in partisan political activities. *United Public Workers v. Mitchell,* 330 U.S. 75 [67 S.Ct. 556, 91 L.Ed. 754 (1947)]. The dissenting Justices felt that such an abridgment of First Amendment rights could not be justified. The majority, however, concluded that the government's interests in not compromising the quality of public service and in not permitting individual employees to use their public offices to advance partisan causes were sufficient to justify the limitation on their freedom.

"There was no dispute within the Court over the proposition that the employees' interests in political action were protected by the First Amendment. The Justices' different conclusions stemmed from their different appraisals of the sufficiency of the justification for the restriction. That justification-the desirability of political neutrality in the public service and the avoidance of the use of the power and prestige of government to favor one party or the other-would condemn rather than support the alleged conduct of defendant in this case. Thus, in dicta, the Court unequivocally stated that the Legislature could not require allegiance to a particular political faith as a condition of public employment:

*85 " 'Appellants urge that federal employees are protected by the Bill of Rights and that Congress may not "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work." None would deny such limitations on Congressional power but, because there are some limitations it does not follow that a prohibition against acting as ward leader or worker at the polls is invalid.' 330 U.S. 75, 100, 67 S.Ct., at 569-570.

"In 1952 the Court quoted that dicta in support of its holding that the State of Oklahoma could not require its employees to profess their loyalty by denying past association with Communists. *Wieman v. Updegraff,* 344 U.S. 183, 191-192 [73 S.Ct. 215, 219, 97 L.Ed. 216 (1952)]. That decision did not recognize any special right to public employment; rather, it rested on the impact of the requirement on the citizen's First Amendment rights. We think it unlikely that the Supreme Court would consider these plaintiffs' interest in freely associating with members of the Democratic Party less worthy of protection than the Oklahoma employees' interest in associating with

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Communists or former Communists.

"In 1961 the Court held that a civilian cook could be summarily excluded from a naval gun factory. **2743*Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy,* 367 U.S. 886 [81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961)]. The government's interest in maintaining the security of the military installation outweighed the cook's interest in working at a particular location. Again, however, the Court explicitly assumed that the sovereign could not deny employment for the reason that the citizen was a member of a particular political party or religious faith-'that she could not have been kept out because she was a Democrat or a Methodist.' 367 U.S., at 898 [81 S.Ct., at 1750].

*86 "In 1968 the Court held that 'a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.' *Pickering v. Board of Education,* 391 U.S. 563, 574, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). The Court noted that although criminal sanctions 'have a somewhat different impact on the exercise of the right to freedom of speech from dismissal from employment, it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech.' *Ibid.* The holding in *Pickering* was a natural sequel to Mr. Justice Frankfurter's comment in dissent in Shelton v. Tucker that a scheme to terminate the employment of teachers solely because of their membership in unpopular organizations would run afoul of the Fourteenth Amendment. 364 U.S. 479, 496[, 81 S.Ct. 247, 256, 5 L.Ed.2d 231 (1960)].

"In 1972 the Court reaffirmed the proposition that a nontenured public servant has no constitutional right to public employment, but nevertheless may not be dismissed for exercising his First Amendment rights. *Perry v. Sindermann,* 408 U.S. 593 [92 S.Ct. 2694, 33 L.Ed.2d 570]. The Court's explanation of its holding is pertinent here:

" 'For at least a quarter century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not act. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests-especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser v. Randall,* 357 U.S. 513, 526 [78 S.Ct. 1332, 2 L.Ed.2d 1460]. Such interference with constitutional rights is impermissible.'

*87 " 'We have applied this general principle to denials of tax exemptions, *Speiser v. Randall, supra,* unemployment benefits, *Sherbert v. Verner,* 374 U.S. 398, 404-405 [83 S.Ct. 1790, 1794, 10 L.Ed.2d 965 (1963)], and welfare payments, *Shapiro v. Thompson,* 394 U.S. 618, 627 n. 6 [89 S.Ct. 1322, 1327 n. 6, 22 L.Ed.2d 600 (1969)]; *Graham v. Richardson,* 403 U.S. 365, 374 [91 S.Ct. 1848, 1853, 29 L.Ed.2d 534 (1971)]. But, most often, we have applied the principle to denials of public employment. *United Public Workers v. Mitchell,* 330 U.S. 75, 100 [67 S.Ct. 556, 569, 91 L.Ed. 754 (1947)]; *Wieman v. Updegraff,* 344 U.S. 183, 192 [73 S.Ct. 215, 219, 97 L.Ed. 216 (1952)]; *Shelton v. Tucker,* 364 U.S. 479, 485-486 [81 S.Ct. 247, 250-251, 5 L.Ed.2d 231 (1960)]; *Torcaso v. Watkins,* 367 U.S. 488, 495-496 [81 S.Ct. 1680, 1683-1684, 6 L.Ed.2d 982 (1961)]; *Cafeteria and Restaurant Workers, etc. v. McElroy,* 367 U.S. 886, 894 [81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961)]; *Cramp v. Board of Public Instruction,* 368 U.S. 278, 288 [82 S.Ct. 275, 281, 7 L.Ed.2d 285 (1961)]; *Baggett v. Bullitt,* 377 U.S. 360 [84 S.Ct. 1316, 12 L.Ed.2d 377 (1964)]; **2744*Elfbrandt v. Russell,* 384 U.S. [11,] 17 [86 S.Ct. 1238, 1241, 16

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L.Ed.2d 321 (1966)]; *Keyishian v. Board of Regents,* 385 U.S. 589, 605-606 [87 S.Ct. 675, 684-685, 17 L.Ed.2d 629 (1967)]; *Whitehill v. Elkins,* 389 U.S. 54 [88 S.Ct. 184, 19 L.Ed.2d 228 (1967)]; *United States v. Robel,* 389 U.S. 258 [88 S.Ct. 419, 19 L.Ed.2d 508 (1967)]; *Pickering v. Board of Education,* 391 U.S. 563, 568 [88 S.Ct. 1731, 1734-1735, 20 L.Ed.2d 811 (1968)]. We have applied the principle regardless of the public employee's contractual or other claim to a job. Compare *Pickering v. Board of Education, supra,* with *Shelton v. Tucker, supra.*'

"Thus the respondent's lack of a contractual or tenure "right" to reemployment for the 1969-1970 academic year is immaterial to his free speech claim....' 408 U.S., at 597, 92 S.Ct., at 2696-2698.

"This circuit has given full effect to this principle." 473 F.2d, at 569-572 (footnotes and citations omitted).

See also *American Federation of State, Cty. and Municipal Employees, AFL-CIO v. Shapp,* 443 Pa. 527, 537-545, 280 A.2d 375, 379-383 (1971) (Barbieri, J., dissenting).

To avoid the force of the line of authority described in the foregoing passage, Justice SCALIA would weigh the supposed general state interest in patronage hiring against the ***88** aggregated interests of the many employees affected by the practice. This defense of patronage obfuscates the critical distinction between partisan interest and the public interest.[FN4] It assumes that governmental power and public resources ***89** in this case employment opportunities-may appropriately be used to subsidize partisan activities even when the political affiliation of the employee or the job applicant is entirely unrelated to ****2745** his or her public service.[FN5] The premise on which this position rests would justify the use of public funds to compensate party members for their campaign work, or, conversely, a legislative enactment denying public employment to nonmembers of the majority party. If such legislation is unconstitutional-as it clearly would be-an equally pernicious rule promulgated by the executive must also be invalid.

FN4. Although Justice SCALIA's defense of patronage turns on the benefits of fostering the two-party system, *post,* at 2754, his opinion is devoid of reference to meaningful evidence that patronage practices have played a significant role in the preservation of the two-party system. In each of the examples that he cites-"the Boss Tweeds, the Tammany Halls, the Pendergast Machines, the Byrd Machines, and the Daley Machines," *post,* at 2747-patronage practices were used solely to protect the power of an entrenched majority. See Laycock, Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights, 99 Yale L.J. 1711, 1722 (1990) (describing the "hopelessness of contesting elections" in Chicago's "one-party system" when "half a dozen employees of the city and of city contractors were paid with public funds to work [a precinct] for the other side"); Johnson, Successful Reform Litigation: The *Shakman* Patronage Case, 64 Chi.-Kent L.Rev. 479, 481 (1988) (the "massive Democratic patronage employment system" maintained a "noncompetitive political system" in Cook County in the 1960's).

Without repeating the Court's studied rejection of the policy arguments for patronage practices in *Elrod,* 427 U.S., at 364-373, 96 S.Ct., at 2685-2690, I note only that many commentators agree more with Justice SCALIA's admissions of the systemic costs of patronage practices-the "financial corruption, such as salary kickbacks and partisan political activity on government-paid time," the reduced efficiency of government, and the undeniable constraint upon the ex-

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pression of views by employees, *post,* at 2755-2756-than with his belief that patronage is necessary to political stability and integration of powerless groups. See, *e.g.,* G. Pomper, Voters, Elections, and Parties 282-304 (1988) (multiple causes of party decline); D. Price, Bringing Back the Parties 22-25 (1984) (same); Comment, 41 U.Chi.L.Rev. 297, 319-328 (1974) (same); Wolfinger, Why Political Machines Have Not Withered Away and Other Revisionist Thoughts, 34 J.Politics 365, 398 (1972) (absence of machine politics in California); J. James, American Political Parties in Transition 85 (1974) (inefficient and antiparty effects of patronage); Johnston, Patrons and Clients, Jobs and Machines: A Case Study of the Uses of Patronage, 73 Am.Pol.Sci.Rev. 385 (1979) (same); Grimshaw, The Political Economy of Machine Politics, 4 Corruption and Reform 15 (1989) (same); Comment, 49 U.Chi.L.Rev. 181, 197-200 (1982) (same); Freedman, Doing Battle with the Patronage Army: Politics, Courts and Personnel Administration in Chicago, 48 Pub.Admin.Rev. 847 (1988) (race and machine politics).

Incidentally, although some might suggest that Jacob Arvey was "best known as the promoter of Adlai Stevenson," *post,* at 2753, that connection is of interest only because of Mr. Arvey's creative and firm leadership of the powerful political organization that was subsequently led by Richard J. Daley. M. Tolchin & S. Tolchin, To the Victor 36 (1971).

FN5. Neither Justice SCALIA nor any of the parties suggests that party affiliation is relevant to any of the positions at stake in this litigation-rehabilitation counselor, road equipment operator, prison guard, dietary manager, and temporary garage worker. Reliance on the difficulty of precisely dividing the positions in which political affiliation is relevant to the quality of public service from those in which it is not an appropriate requirement of the job is thus inapposite. See *post,* at 2756-2758. Difficulty in deciding borderline cases does not justify imposition of a loyalty oath in the vast category of positions in which it is irrelevant.

Justice SCALIA argues that distinguishing "inducement and compulsion" reveals that a patronage system's impairment of the speech and associational rights of employees and would-be employees is insignificant. *Post,* at 2755-2756. This analysis contradicts the harsh reality of party discipline that is the linchpin of his theory of patronage. *Post,* at 2753 (emphasizing the "link between patronage and party discipline, and between that and party success").[FN6] More importantly,*90 it rests on the long-rejected fallacy that a privilege may be burdened by unconstitutional conditions. See, *e.g.,* *Perry v. Sindermann,* 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972). There are a few jobs for which an individual's race or religion may be relevant, see *Wygant v. Jackson Bd. of Education,* 476 U.S. 267, 314-315, 106 S.Ct. 1842, 1868-1869, 90 L.Ed.2d 260 (1986) (STEVENS, J., dissenting); there are many jobs for which political affiliation is relevant to the employee's ability to function effectively as part of a given administration. In those cases-in other words, cases in which "the efficiency of the public service," *Public Workers v. Mitchell,* 330 U.S. 75, 101, 67 S.Ct. 556, 570, 91 L.Ed. 754 (1947), would be advanced by hiring workers who are loyal to the Governor's party-such hiring is permissible under the holdings in *Elrod* and *Branti.* These cases, however, concern jobs in which race, religion, and political affiliation are all equally and entirely irrelevant to the public service to be performed. When an individual has *91 been denied employment for an impermissible reason, it

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is unacceptable to balance the constitutional rights of the individual against the political interests of the party in power. It seems to me obvious that the government may not discriminate against particular individuals in hopes of advancing **2746 partisan interests through the misuse [FN7] of public funds.

FN6. The iron fist inside the velvet glove of Justice SCALIA's "inducements" and "influences" is apparent from his own descriptions of the essential features of a patronage system. See, *e.g.*, *post,* at 2755 (the worker may "urge *within the organization* the adoption of any political position; but if that position is rejected he must vote and work for the party nonetheless"); *post,* at 2753 (quoting M. Tolchin & S. Tolchin, To the Victor, at 123 (reporting that Montclair, New Jersey, Democrats provide fewer services than Cook County, Illinois, Democrats, while "the rate of issue participation is much higher among Montclair Democrats who are not bound by the fear displayed by the Cook County committeemen")); *post,* at 2753 (citing W. Grimshaw, The Political Economy of Machine Politics, 4 Corruption and Reform 15, 30 (1989) (reporting that Mayor Daley "sacked" a black committeeman for briefly withholding support for a school board nominee whom civil rights activists opposed)).

Of course, we have firmly rejected any requirement that aggrieved employees "prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance." *Branti,* 445 U.S. 507, 517, 100 S.Ct. 1287, 1294, 63 L.Ed.2d 574 (1980) . What is at issue in these cases is not whether an employee is actually coerced or merely influenced, but whether the attempt to obtain his or her support through "party discipline" is legitimate. To apply the relevant question to Justice SCALIA's example, *post,* at 2755-2756 the person who attempts to bribe a public official is guilty of a crime regardless of whether the official submits to temptation; likewise, a political party's attempt to maintain loyalty through allocation of government resources is improper regardless of whether any employee capitulates.

FN7. I use the term "misuse" deliberately because the entire rationale for patronage hiring as an economic incentive for partisan political activity rests on the assumption that the patronage employee filling a government position must be paid a premium to reward him for his partisan services. Without such a premium, the economic incentive rationale on which Justice SCALIA relies does not exist. It has been clear to Congress and this Court for over a century that refusal to contribute "may lead to putting good men out of the service, liberal payments may be made the ground for keeping poor ones in," and "the government itself may be made to furnish indirectly the money to defray the expenses of keeping the political party in power that happens to have for the time being the control of the public patronage." *Ex parte Curtis,* 106 U.S. 371, 375, 1 S.Ct. 381, 385, 27 L.Ed. 232 (1882) (upholding constitutionality of Act of Aug. 15, 1876, § 6, ch. 287, 19 Stat. 169, prohibiting nonappointed federal employees from requesting or receiving any thing of value for political purposes).

Petitioners Rutan and Taylor both allege that they are more qualified than the persons who were promoted over them.

The only systemic consideration permissible in these circumstances is not that of the controlling party, but that of the aggregate of burdened indi-

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viduals. By impairing individuals' freedoms of belief and association, unfettered patronage practices undermine the "free functioning of the electoral process." *Elrod,* 427 U.S., at 356, 96 S.Ct., at 2681. As I wrote in 1972:

> "Indeed, when numbers are considered, it is appropriate not merely to consider the rights of a particular janitor who may have been offered a bribe from the public treasury to obtain his political surrender, but also the impact on the body politic as a whole when the free political choice of millions of public servants is inhibited or manipulated by the selective award of public benefits. While the patronage system is defended in the name of democratic tradition, its paternalistic impact on the political *92 process is actually at war with the deeper traditions of democracy embodied in the First Amendment." *Lewis,* 473 F.2d, at 576.[FN8]

FN8. A decade later, in *Anderson v. Celebrezze,* 460 U.S., at 794, 103 S.Ct., at 1572, this Court decided that a law burdening independent candidates, by "limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group," would burden associational choices and thereby "threaten to reduce diversity and competition in the marketplace of ideas." We concluded that "the primary values protected by the First Amendment-'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,' *New York Times Co. v. Sullivan,* 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964)-are served when election campaigns are not monopolized by the existing political parties." *Ibid.*

The tradition that is relevant in these cases is the American commitment to examine and reexamine past and present practices against the basic principles embodied in the Constitution. The inspirational command by our President in 1961 is entirely consistent with that tradition: "Ask not what your country can do for you-ask what you can do for your country." These cases involve a contrary command: "Ask not what job applicants can do for the State-ask what they can do for our party." Whatever traditional support may remain for a command of that ilk, it is plainly an illegitimate excuse for the practices rejected by the Court today.

Justice SCALIA, with whom The Chief Justice and Justice KENNEDY join, and with whom Justice O'CONNOR joins as to Parts II and III, dissenting.

Today the Court establishes the constitutional principle that party membership is not a permissible factor in the dispensation of government jobs, except those jobs for the performance of which party affiliation is an "appropriate requirement." *Ante,* at 2732. It is hard to say precisely (or even generally) what that exception means, but if there is any category of jobs for whose performance party affiliation is not an appropriate requirement, it is the job of being a judge, where *93 partisanship is not only unneeded but positively undesirable. It is, however, **2747 rare that a federal administration of one party will appoint a judge from another party. And it has always been rare. See *Marbury v. Madison,* 1 Cranch 137, 2 L.Ed. 60 (1803). Thus, the new principle that the Court today announces will be enforced by a corps of judges (the Members of this Court included) who overwhelmingly owe their office to its violation. Something must be wrong here, and I suggest it is the Court.

The merit principle for government employment is probably the most favored in modern America, having been widely adopted by civil service legislation at both the state and federal levels. But there is another point of view, described in characteristically Jacksonian fashion by an eminent practitioner of the patronage system, George Washington Plunkitt of Tammany Hall:

> "I ain't up on sillygisms, but I can give you some arguments that nobody can answer.

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"First, this great and glorious country was built up by political parties; second, parties can't hold together if their workers don't get offices when they win; third, if the parties go to pieces, the government they built up must go to pieces, too; fourth, then there'll be hell to pay." W. Riordon, Plunkitt of Tammany Hall 13 (1963).

It may well be that the Good Government Leagues of America were right, and that Plunkitt, James Michael Curley, and their ilk were wrong; but that is not entirely certain. As the merit principle has been extended and its effects increasingly felt; as the Boss Tweeds, the Tammany Halls, the Pendergast Machines, the Byrd Machines, and the Daley Machines have faded into history; we find that political leaders at all levels increasingly complain of the helplessness of elected government, unprotected by "party discipline," before the demands of small and cohesive interest groups.

*94 The choice between patronage and the merit principle-or, to be more realistic about it, the choice between the desirable mix of merit and patronage principles in widely varying federal, state, and local political contexts-is not so clear that I would be prepared, as an original matter, to chisel a single, inflexible prescription into the Constitution. Fourteen years ago, in *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), the Court did that. *Elrod* was limited however, as was the later decision of *Branti v. Finkel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), to patronage firings, leaving it to state and federal legislatures to determine when and where political affiliation could be taken into account in hirings and promotions. Today the Court makes its constitutional civil service reform absolute, extending to all decisions regarding government employment. Because the First Amendment has never been thought to require this disposition, which may well have disastrous consequences for our political system, I dissent.

I

The restrictions that the Constitution places upon the government in its capacity as lawmaker, *i.e.,* as the regulator of private conduct, are not the same as the restrictions that it places upon the government in its capacity as employer. We have recognized this in many contexts, with respect to many different constitutional guarantees. Private citizens perhaps cannot be prevented from wearing long hair, but policemen can. *Kelley v. Johnson,* 425 U.S. 238, 247, 96 S.Ct. 1440, 1445, 47 L.Ed.2d 708 (1976). Private citizens cannot have their property searched without probable cause, but in many circumstances government employees can. *O'Connor v. Ortega,* 480 U.S. 709, 723, 107 S.Ct. 1492, 1500, 94 L.Ed.2d 714 (1987) (plurality opinion); *id.,* at 732, 107 S.Ct., at 1505 (SCALIA, J., concurring in judgment). Private citizens cannot be punished for refusing to provide the government information that may incriminate them, but government employees can be dismissed when the incriminating information that they refuse to provide relates to the performance of their jobs. *Gardner v.* **2748 *Broderick,* 392 *95 U.S. 273, 277-278, 88 S.Ct. 1913, 1915-1916, 20 L.Ed.2d 1082 (1968). With regard to freedom of speech in particular: Private citizens cannot be punished for speech of merely private concern, but government employees can be fired for that reason. *Connick v. Myers,* 461 U.S. 138, 147, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983). Private citizens cannot be punished for partisan political activity, but federal and state employees can be dismissed and otherwise punished for that reason. *Public Workers v. Mitchell,* 330 U.S. 75, 101, 67 S.Ct. 556, 570, 91 L.Ed. 754 (1947); *Civil Service Comm'n v. Letter Carriers,* 413 U.S. 548, 556, 93 S.Ct. 2880, 2886, 37 L.Ed.2d 796 (1973); *Broadrick v. Oklahoma,* 413 U.S. 601, 616-617, 93 S.Ct. 2908, 2918-2919, 37 L.Ed.2d 830 (1973).

Once it is acknowledged that the Constitution's prohibition against laws "abridging the freedom of speech" does not apply to laws enacted in the government's capacity as employer in the same way that it does to laws enacted in the government's capacity as regulator of private conduct, it may some-

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times be difficult to assess what employment practices are permissible and what are not. That seems to me not a difficult question, however, in the present context. The provisions of the Bill of Rights were designed to restrain transient majorities from impairing long-recognized personal liberties. They did not create by implication novel individual rights overturning accepted political norms. Thus, when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.[FN1] Such a venerable and accepted tradition is not to *96 be laid on the examining table and scrutinized for its conformity to some abstract principle of First Amendment adjudication devised by this Court. To the contrary, such traditions are themselves the stuff out of which the Court's principles are to be formed. They are, in these uncertain areas, the very points of reference by which the legitimacy or illegitimacy of *other* practices are to be figured out. When it appears that the latest "rule," or "three-part test," or "balancing test" devised by the Court has placed us on a collision course with such a landmark practice, it is the former that must be recalculated by us, and not the latter that must be abandoned by our citizens. I know of no other way to formulate a constitutional jurisprudence that reflects, as it should, the principles adhered to, over time, by the American people, rather than those favored by the personal (and necessarily shifting) philosophical dispositions of a majority of this Court.

> FN1. The customary invocation of *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), as demonstrating the dangerous consequences of this principle, see *ante,* at 2741 (STEVENS, J., concurring), is unsupportable. I argue for the role of tradition in giving content only to *ambiguous* constitutional text; no tradition can supersede the Constitution. In my view the Fourteenth Amendment's requirement of "equal protection of the laws," combined with the Thirteenth Amendment's abolition of the institution of black slavery, leaves no room for doubt that laws treating people differently because of their race are invalid. Moreover, even if one does not regard the Fourteenth Amendment as crystal clear on this point, a tradition of *unchallenged* validity did not exist with respect to the practice in *Brown.* To the contrary, in the 19th century the principle of "separate-but-equal" had been vigorously opposed on constitutional grounds, litigated up to this Court, and upheld only over the dissent of one of our historically most respected Justices. See *Plessy v. Ferguson,* 163 U.S. 537, 555-556, 16 S.Ct. 1138, 1145, 41 L.Ed. 256 (1896) (Harlan, J., dissenting).

I will not describe at length the claim of patronage to landmark status as one of our accepted political traditions. Justice Powell discussed it in his dissenting opinions in *Elrod* and *Branti. Elrod, supra,* 427 U.S., at 378-379, 96 S.Ct., at 2692; *Branti, supra,* 445 U.S., at 522, n. 1, 100 S.Ct., at 1296, n. 1. Suffice it to say that patronage was, without any thought that it could be unconstitutional, a basis for government employment from the **2749 earliest days of the Republic until *Elrod*- and has continued unabated *since Elrod,* to the extent still permitted by that unfortunate decision. See, *e.g.,* D. Price, Bringing Back the Parties 24, 32 (1984); Gardner, A Theory of the Spoils System, 54 Public Choice 171, 181 (1987); Toinet & Glenn, Clientelism and Corruption in the "Open" Society: The Case of the United States, in Private Patronage and Public Power 193, 202 (C. Clapham ed. *97 1982). Given that unbroken tradition regarding the application of an ambiguous constitutional text, there was in my view no basis for holding that patronage-based dismissals violated the First Amendment-much less for holding, as the Court does today, that even patronage hiring does so.[FN2]

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FN2. Justice STEVENS seeks to counteract this tradition by relying upon the supposed "unequivocal repudiation" of the right-privilege distinction. *Ante,* at 2742. That will not do. If the right-privilege distinction was once used to explain the practice, and if that distinction is to be repudiated, then one must simply devise some other theory to explain it. The order of precedence is that a constitutional theory must be wrong if its application contradicts a clear constitutional tradition; not that a clear constitutional tradition must be wrong if it does not conform to the current constitutional theory. On Justice STEVENS' view of the matter, this Court examines a historical practice, endows it with an intellectual foundation, and later, by simply undermining that foundation, relegates the constitutional tradition to the dustbin of history. That is not how constitutional adjudication works. Cf. *Burnham v. Superior Court of California, Marin County,* 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990) (opinion of SCALIA, J.). I am not sure, in any event, that the right-privilege distinction has been as unequivocally rejected as Justice STEVENS supposes. It has certainly been recognized that the fact that the government need not confer a certain benefit does not mean that it can attach any conditions whatever to the conferral of that benefit. But it remains true that certain conditions can be attached to benefits that cannot be imposed as prescriptions upon the public at large. If Justice STEVENS chooses to call this something other than a right-privilege distinction, that is fine and good-but it is in any case what explains the nonpatronage restrictions upon federal employees that the Court continues to approve, and there is no reason why it cannot support patronage restrictions as well.

II

Even accepting the Court's own mode of analysis, however, and engaging in "balancing" a tradition that ought to be part of the scales, *Elrod, Branti,* and today's extension of them seem to me wrong.

A

The Court limits patronage on the ground that the individual's interest in uncoerced belief and expression outweighs the systemic interests invoked to justify the practice. *Ante,* *98 at 2734-2735. The opinion indicates that the government may prevail only if it proves that the practice is "narrowly tailored to further vital government interests." *Ante,* at 2736.

That strict-scrutiny standard finds no support in our cases. Although our decisions establish that government employees do not lose all constitutional rights, we have consistently applied a lower level of scrutiny when "the governmental function operating ... [is] not the power to regulate or license, as lawmaker, an entire trade or profession, or to control an entire branch of private business, but, rather, as proprietor, to manage [its] internal operatio [ns]...." *Cafeteria & Restaurant Workers v. McElroy,* 367 U.S. 886, 896, 81 S.Ct. 1743, 1749, 6 L.Ed.2d 1230 (1961). When dealing with its own employees, the government may not act in a manner that is "patently arbitrary or discriminatory," *id.,* at 898, 81 S.Ct., at 1750, but its regulations are valid if they bear a "rational connection" to the governmental end sought to be served, *Kelley v. Johnson,* 425 U.S., at 247, 96 S.Ct., at 1446.

In particular, restrictions on speech by public employees are not judged by the test applicable to similar restrictions on speech by nonemployees. We have said that "[a] governmental employer may subject its employees to such special restrictions on free expression as are reasonably necessary to promote effective government." **2750*Brown v. Glines,* 444 U.S. 348, 356, n. 13, 100 S.Ct. 594, 600, n. 13, 62 L.Ed.2d 540 (1980). In *Public Workers v. Mitchell,* 330 U.S., at 101, 67 S.Ct., at 570

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upholding provisions of the Hatch Act which prohibit political activities by federal employees, we said that "it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service." We reaffirmed *Mitchell* in *Civil Service Comm'n v. Letter Carriers,* 413 U.S., at 556, 93 S.Ct., at 2886, over a dissent by Justice Douglas arguing against application of a special standard to Government employees, except insofar as their "job performance" is concerned, *id.,* at 597, 93 S.Ct., at 2906. We did not say that the Hatch Act was narrowly tailored to meet ***99** the government's interest, but merely deferred to the judgment of Congress, which we were not "in any position to dispute." *Id.,* at 567, 93 S.Ct., at 2891. Indeed, we recognized that the Act was not indispensably necessary to achieve those ends, since we repeatedly noted that "Congress at some time [may] come to a different view." *Ibid.;* see also *id.,* at 555, 564, 93 S.Ct., at 2890. In *Broadrick v. Oklahoma,* 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), we upheld similar restrictions on state employees, though directed "at political expression which if engaged in by private persons would plainly be protected by the First and Fourteenth Amendments," *id.,* at 616, 93 S.Ct., at 2918.

To the same effect are cases that specifically concern adverse employment action taken against public employees because of their speech. In *Pickering v. Board of Education of Township High School Dist.,* 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968), we recognized:

> "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

Because the restriction on speech is more attenuated when the government conditions employment than when it imposes criminal penalties, and because "government offices could not function if every employment decision became a constitutional matter," *Connick v. Myers,* 461 U.S., at 143, 103 S.Ct., at 1688, we have held that government employment decisions taken on the basis of an employee's speech do not "abridg[e] the freedom of speech," U.S. Const., Amdt. 1, merely because they fail ***100** the narrow-tailoring and compelling-interest tests applicable to direct regulation of speech. We have not subjected such decisions to strict scrutiny, but have accorded "a wide degree of deference to the employer's judgment" that an employee's speech will interfere with close working relationships. 461 U.S., at 152, 103 S.Ct., at 1692.

When the government takes adverse action against an employee on the basis of his political affiliation (an interest whose constitutional protection is derived from the interest in speech), the same analysis applies. That is why both the *Elrod* plurality, 427 U.S., at 359, 96 S.Ct., at 2682, and the opinion concurring in the judgment, *id.,* at 375, 96 S.Ct., at 2690, as well as *Branti,* 445 U.S., at 514-515, 100 S.Ct., at 1292-1293, and the Court today, *ante,* at 2735-2736, rely on *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), a case that applied the test announced in *Pickering,* not the strict-scrutiny test applied to restrictions imposed on the public at large. Since the government may dismiss an employee for political *speech* "reasonably deemed by Congress to interfere with the efficiency of the public service," *Public Workers v. Mitchell, supra,* 330 U.S., at 101, 67 S.Ct., at 570, it follows, *a fortiori,* that the government may dismiss an employee for political *affiliation* if "reasonably necessary to promote effective government." ****2751** *Brown v. Glines, supra,* 444 U.S., at 356, n. 13, 100 S.Ct., at 600, n. 13.

While it is clear from the above cases that the normal "strict scrutiny" that we accord to government regulation of speech is not applicable in this

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field, [FN3] the precise test that **2752 replaces*101 it is not so clear; we have used various formulations. The one that appears in the case dealing with an employment practice closest in its effects to patronage is whether the *102 practice could be "reasonably deemed" by the enacting legislature to further a legitimate goal. *Public Workers v. Mitchell,* 330 U.S., at 101, 67 S.Ct., at 570. For purposes of my ensuing discussion, however, I will apply a less permissive standard that seems more in accord with our general "balancing" test: Can the governmental advantages of this employment practice reasonably be deemed to outweigh its "coercive" effects?

FN3. The Court calls our description of the appropriate standard of review "questionable," and suggests that these cases applied strict scrutiny ("even *were* Justice SCALIA correct that less-than-strict scrutiny is appropriate"). *Ante,* at 2735, n. 4 (emphasis added). This suggestion is incorrect, does not aid the Court's argument, and if accepted would eviscerate the strict-scrutiny standard. It is incorrect because even a casual perusal of the cases reveals that the governmental actions were sustained, not because they were shown to be "narrowly tailored to further vital government interests," *ante,* at 2736, but because they were "reasonably" deemed necessary to promote effective government. It does not aid the Court's argument, moreover, because *whatever* standard those cases applied must be applied here, and if the asserted interests in patronage are as weighty as those proffered in the previous cases, then *Elrod* and *Branti* were wrongly decided. It eviscerates the standard, finally, because if the practices upheld in those cases survived strict scrutiny, then the so-called "strict-scrutiny" test means nothing. Suppose a State made it unlawful for an employee of a privately owned nuclear powerplant to criticize his employer. Can there be any doubt that we would reject out of hand the State's argument that the statute was justified by the compelling interest in maintaining the appearance that such employees are operating nuclear plants properly, so as to maintain public confidence in the plants' safety? But cf. *Civil Service Comm'n v. Letter Carriers,* 413 U.S. 548, 565, 93 S.Ct. 2880, 2890, 37 L.Ed.2d 796 (1973) (Hatch Act justified by need for Government employees to "appear to the public to be avoiding [political partiality], if confidence in the system of representative Government is not to be eroded"). Suppose again that a State prohibited a private employee from speaking on the job about matters of private concern. Would we even hesitate before dismissing the State's claim that the compelling interest in fostering an efficient economy overrides the individual's interest in speaking on such matters? But cf. *Connick v. Myers,* 461 U.S. 138, 147, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983) ("[W]hen a public employee speaks ... upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior"). If the Court thinks that strict scrutiny is appropriate in all these cases, then it should forthrightly admit that *Public Workers v. Mitchell,* 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947) , *Letter Carriers, supra, Pickering v. Board of Education of Township High School Dist.,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), *Connick, supra,* and similar cases were mistaken and should be overruled; if it rejects that course, then it should admit that those cases applied, as they said they did, a reasonableness test.

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The Court's further contention that these cases are limited to the "interests that the government has in its capacity as an employer," *ante,* at 2735, n. 4, as distinct from its interests "in the structure and functioning of society as a whole," *ibid.,* is neither true nor relevant. Surely a principal reason for the statutes that we have upheld preventing political activity by government employees-and indeed the *only* substantial reason, with respect to those employees who are permitted to be hired and fired on a political basis-is to prevent the party in power from obtaining what is considered an unfair advantage in political campaigns. That is precisely the type of governmental interest at issue here. But even if the Court were correct, I see no reason in policy or principle why the government would be limited to furthering *only* its interests "as an employer." In fact, we have seemingly approved the furtherance of broader governmental interests through employment restrictions. In *Hampton v. Mow Sun Wong,* 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976), we held unlawful a Civil Service Commission regulation prohibiting the hiring of aliens on the ground that the Commission lacked the requisite authority. We were willing, however, to "assume ... that if the Congress or the President had expressly imposed the citizenship requirement, it would be justified by the national interest in providing an incentive for aliens to become naturalized, or possibly even as providing the President with an expendable token for treaty negotiating purposes." *Id.,* at 105, 96 S.Ct., at 1906. Three months after our opinion, the President adopted the restriction by Executive Order. Exec.Order No. 11935, 3 CFR 146 (1976 Comp.). On remand, the lower courts denied the *Mow Sun Wong* plaintiffs relief on the basis of this new Executive Order and relying upon the interest in providing an incentive for citizenship. *Mow Sun Wong v. Hampton,* 435 F.Supp. 37 (ND Cal.1977), aff'd, 626 F.2d 739 (CA9 1980). We denied certiorari *sub nom. Lum v. Campbell,* 450 U.S. 959, 101 S.Ct. 1419, 67 L.Ed.2d 384 (1981). In other cases, the lower federal courts have uniformly reached the same result. See, *e.g., Jalil v. Campbell,* 192 U.S.App.D.C. 4, 7, n. 3, 590 F.2d 1120, 1123, n. 3 (1978); *Vergara v. Hampton,* 581 F.2d 1281 (CA7 1978), cert. denied, 441 U.S. 905, 99 S.Ct. 1993, 60 L.Ed.2d 373 (1979); *Santin Ramos v. United States Civil Service Comm'n,* 430 F.Supp. 422 (PR 1977) (three-judge court).

B

Preliminarily, I may observe that the Court today not only declines, in this area replete with constitutional ambiguities, to give the clear and continuing tradition of our people the *dispositive* effect I think it deserves, but even declines to give it substantial weight in the balancing. That is contrary to what the Court has done in many other contexts. In evaluating*103 so-called "substantive due process" claims we have examined our history and tradition with respect to the asserted right. See, *e.g., Michael H. v. Gerald D.,* 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989); *Bowers v. Hardwick,* 478 U.S. 186, 192-194, 106 S.Ct. 2841, 2844-2846, 92 L.Ed.2d 140 (1986). In evaluating claims that a particular procedure violates the Due Process Clause we have asked whether the procedure is traditional. See, *e.g., Burnham v. Superior Court of California, Marin County,* 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990). And in applying the Fourth Amendment's reasonableness test we have looked to the history of judicial and public acceptance of the type of search in question. See, *e.g., Camara v. Municipal Court of San Francisco,* 387 U.S. 523, 537, 87 S.Ct. 1727, 1735, 18 L.Ed.2d 930

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(1967). See also *Press-Enterprise Co. v. Superior Court of California, Riverside County,* 478 U.S. 1, 8, 106 S.Ct. 2735, 2740, 92 L.Ed.2d 1 (1986) (tradition of accessibility to judicial proceedings implies judgment of experience that individual's interest in access outweighs government's interest in closure); *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 589, 100 S.Ct. 2814, 2834, 65 L.Ed.2d 973 (1980) (BRENNAN, J., concurring in judgment) ("Such a tradition [of public access] commands respect in part because the Constitution carries the gloss of history"); *Walz v. Tax Comm'n of New York City,* 397 U.S. 664, 678, 90 S.Ct. 1409, 1416, 25 L.Ed.2d 697 (1970) ("unbroken practice of according the [property tax] exemption to churches" demonstrates that it does not violate Establishment Clause).

But even laying tradition entirely aside, it seems to me our balancing test is amply met. I assume, as the Court's opinion assumes, that the balancing is to be done on a generalized basis, and not case by case. The Court holds that the governmental benefits of patronage cannot reasonably be thought to outweigh its "coercive" effects (even the lesser "coercive" effects of patronage hiring as opposed to patronage firing) not merely in 1990 in the State of Illinois, but at any time in any of the numerous political subdivisions of this vast country. It seems to me that that categorical pronouncement reflects a naive vision of politics and an inadequate appreciation of the systemic effects of patronage in promoting political stability*104 and facilitating the social and political integration of previously powerless groups.

The whole point of my dissent is that the desirability of patronage is a policy question to be decided by the people's representatives; I do not mean, therefore, to endorse that system. But in order to demonstrate that a legislature could reasonably determine that its benefits outweigh its "coercive" effects, I must describe those benefits as the proponents of patronage see them: As Justice Powell discussed at length in his *Elrod* dissent, patronage stabilizes political parties and prevents excessive political fragmentation-both of which are results in which States have a strong governmental interest. **2753 Party strength requires the efforts of the rank and file, especially in "the dull periods between elections," to perform such tasks as organizing precincts, registering new voters, and providing constituent services. *Elrod,* 427 U.S., at 385, 96 S.Ct., at 2695 (dissenting opinion). Even the most enthusiastic supporter of a party's program will shrink before such drudgery, and it is folly to think that ideological conviction alone will motivate sufficient numbers to keep the party going through the off years. "For the most part, as every politician knows, the hope of some reward generates a major portion of the local political activity supporting parties." *Ibid.* Here is the judgment of one such politician, Jacob Arvey (best known as the promoter of Adlai Stevenson): Patronage is " 'a necessary evil if you want a strong organization, because the patronage system permits of discipline, and without discipline, there's no party organization.' " Quoted in M. Tolchin & S. Tolchin, To the Victor 36 (1971). A major study of the patronage system describes the reality as follows:

> "[A]lthough men have many motives for entering political life ... the vast underpinning of both major parties is made up of men who seek practical rewards. Tangible advantages constitute the unifying thread of most successful political practitioners" *Id.,* at 22.
>
> *105 "With so little patronage cement, party discipline is relatively low; the rate of participation and amount of service the party can extract from [Montclair] county committeemen are minuscule compared with Cook County. The party considers itself lucky if 50 percent of its committeemen show up at meetings-even those labeled 'urgent'-while even lower percentages turn out at functions intended to produce crowds for visiting candidates." *Id.,* at 123.

See also W. Grimshaw, The Political Economy of Machine Politics, 4 Corruption and Reform 15,

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30 (1989); G. Pomper, Voters, Elections, and Parties 255 (1988); Wolfinger, Why Political Machines Have Not Withered Away and Other Revisionist Thoughts, 34 J. Politics 365, 384 (1972).

The Court simply refuses to acknowledge the link between patronage and party discipline, and between that and party success. It relies (as did the plurality in *Elrod, supra,* at 369, n. 23, 96 S.Ct., at 2688, n. 23) on a single study of a rural Pennsylvania county by Professor Sorauf, *ante,* at 2738-a work that has been described as "more persuasive about the ineffectuality of Democratic leaders in Centre County than about the generalizability of [its] findings." Wolfinger, *supra,* at 384, n. 39. It is unpersuasive to claim, as the Court does, that party workers are obsolete because campaigns are now conducted through media and other money-intensive means. *Ante,* at 2737. Those techniques have supplemented but not supplanted personal contacts. See Price, Bringing Back the Parties, at 25. Certainly they have not made personal contacts unnecessary in campaigns for the lower level offices that are the foundations of party strength, nor have they replaced the myriad functions performed by party regulars not directly related to campaigning. And to the extent such techniques have replaced older methods of campaigning (partly in response to the limitations the Court has placed on patronage), the political system is not clearly better off. See *Elrod, supra,* at 384, 96 S.Ct., at 2694 (Powell, J., dissenting); *Branti,* 445 *106 U.S., at 528, 100 S.Ct., at 1300 (Powell, J., dissenting). Increased reliance on money-intensive campaign techniques tends to entrench those in power much more effectively than patronage-but without the attendant benefit of strengthening the party system. A challenger can more easily obtain the support of party workers (who can expect to be rewarded even if the candidate loses-if not this year, then the next) than the financial support of political action committees (which will generally support incumbents, who are likely to prevail).

It is self-evident that eliminating patronage will significantly undermine party discipline;**2754 and that as party discipline wanes, so will the strength of the two-party system. But, says the Court, "[p]olitical parties have already survived the substantial decline in patronage employment practices in this century." *Ante,* at 2737. This is almost verbatim what was said in *Elrod,* see 427 U.S., at 369, 96 S.Ct., at 2687. Fourteen years later it seems much less convincing. Indeed, now that we have witnessed, in 18 of the last 22 years, an Executive Branch of the Federal Government under the control of one party while the Congress is entirely or (for two years) partially within the control of the other party; now that we have undergone the most recent federal election, in which 98% of the incumbents, of whatever party, were returned to office; and now that we have seen elected officials changing their political affiliation with unprecedented readiness, Washington Post, Apr. 10, 1990, p. A1, the statement that "political parties have already survived" has a positively whistling-in-the-graveyard character to it. Parties have assuredly survived-but as what? As the forges upon which many of the essential compromises of American political life are hammered out? Or merely as convenient vehicles for the conducting of national Presidential elections?

The patronage system does not, of course, merely foster political parties in general; it fosters the two-party system in particular. When getting a job, as opposed to effectuating a particular substantive policy, is an available incentive for *107 party workers, those attracted by that incentive are likely to work for the party that has the best chance of displacing the "ins," rather than for some splinter group that has a more attractive political philosophy but little hope of success. Not only is a two-party system more likely to emerge, but the differences between those parties are more likely to be moderated, as each has a relatively greater interest in appealing to a majority of the electorate and a relatively lesser interest in furthering philosophies or programs that are far from the mainstream. The stabilizing effects of such a system are obvious. See

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Toinet & Glenn, Clientelism and Corruption in the "Open" Society, at 208. In the context of electoral laws we have approved the States' pursuit of such stability, and their avoidance of the "splintered parties and unrestrained factionalism [that] may do significant damage to the fabric of government." *Storer v. Brown,* 415 U.S. 724, 736, 94 S.Ct. 1274, 1282, 39 L.Ed.2d 714 (1974) (upholding law disqualifying persons from running as independents if affiliated with a party in the past year).

Equally apparent is the relatively destabilizing nature of a system in which candidates cannot rely upon patronage-based party loyalty for their campaign support, but must attract workers and raise funds by appealing to various interest groups. See Tolchin & Tolchin, To the Victor, at 127-130. There is little doubt that our decisions in *Elrod* and *Branti,* by contributing to the decline of party strength, have also contributed to the growth of interest-group politics in the last decade. See, *e.g.,* Fitts, The Vice of Virtue, 136 U.Pa.L.Rev. 1567, 1603-1607 (1988). Our decision today will greatly accelerate the trend. It is not only campaigns that are affected, of course, but the subsequent behavior of politicians once they are in power. The replacement of a system firmly based in party discipline with one in which each office-holder comes to his own accommodation with competing interest groups produces "a dispersion of political influence that may inhibit a ***108** political party from enacting its programs into law." *Branti, supra,* at 531, 100 S.Ct., at 1301 (Powell, J., dissenting).[FN4]

> FN4. Justice STEVENS discounts these systemic effects when he characterizes patronage as fostering partisan, rather than public, interests. *Ante,* at 2744. But taking Justice STEVENS at his word, one wonders why patronage can *ever* be an "appropriate requirement for the position involved," *ante,* at 2732.

Patronage, moreover, has been a powerful means of achieving the social and political ****2755** integration of excluded groups. See, *e.g., Elrod,* 427 U.S. at 379, 96 S.Ct. at 2692 (Powell, J., dissenting); Cornwell, Bosses, Machines and Ethnic Politics, in Ethnic Group Politics 190, 195-197 (H. Bailey, Jr., & E. Katz eds. 1969). By supporting and ultimately dominating a particular party "machine," racial and ethnic minorities have-on the basis of their politics rather than their race or ethnicity-acquired the patronage awards the machine had power to confer. No one disputes the historical accuracy of this observation, and there is no reason to think that patronage can no longer serve that function. The abolition of patronage, however, prevents groups that have only recently obtained political power, especially blacks, from following this path to economic and social advancement.

> " 'Every ethnic group that has achieved political power in American cities has used the bureaucracy to provide jobs in return for political support. It's only when Blacks begin to play the same game that the rules get changed. Now the use of such jobs to build political bases becomes an "evil" activity, and the city insists on taking the control back "downtown." ' " New York Amsterdam News, Apr. 1, 1978, p. A-4, quoted in Hamilton, The Patron-Recipient Relationship and Minority Politics in New York City, 94 Pol. Sci. Q. 211, 212 (1979).

While the patronage system has the benefits argued for above, it also has undoubted disadvantages. It facilitates financial corruption, such as salary kickbacks and partisan political activity on government-paid time. It reduces the efficiency ***109** of government, because it creates incentives to hire more and less qualified workers and because highly qualified workers are reluctant to accept jobs that may only last until the next election. And, of course, it applies some greater or lesser inducement for individuals to join and work for the party in power.

To hear the Court tell it, this last is the greatest evil. That is not my view, and it has not historically been the view of the American people. Corruption and inefficiency, rather than abridgment of liberty,

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have been the major criticisms leading to enactment of the civil service laws-for the very good reason that the patronage system does not have as harsh an effect upon conscience, expression, and association as the Court suggests. As described above, it is the nature of the pragmatic, patronage-based, two-party system to build alliances and to suppress rather than foster ideological tests for participation in the division of political "spoils." What the patronage system ordinarily demands of the party worker is loyalty to, and activity on behalf of, the organization itself rather than a set of political beliefs. He is generally free to urge *within the organization* the adoption of any political position; but if that position is rejected he must vote and work for the party nonetheless. The diversity of political expression (other than expression of party loyalty) is channeled, in other words, to a different stage-to the contests for party endorsement rather than the partisan elections. It is undeniable, of course, that the patronage system entails some constraint upon the expression of views, particularly at the partisan-election stage, and considerable constraint upon the employee's right to associate with the other party. It greatly exaggerates these, however, to describe them as a general " 'coercion of belief,' " *ante,* at 2735, quoting *Branti,* 445 U.S., at 516, 100 S.Ct., at 1293; see also *ante,* at 2737; *Elrod, supra,* 427 U.S., at 355, 96 S.Ct., at 2681 (plurality opinion). Indeed, it greatly exaggerates them to call them "coercion" at all, since we generally make a distinction between inducement and compulsion. The public official *110 offered a bribe is not "coerced" to violate the law, and the private citizen offered a patronage job is not "coerced" to work for the party. In sum, I do not deny that the patronage system influences or redirects, perhaps to a substantial degree, individual political expression and political association. But like the many generations of Americans that have preceded us, I do not consider that **2756 a significant impairment of free speech or free association.

In emphasizing the advantages and minimizing the disadvantages (or at least minimizing one of the disadvantages) of the patronage system, I do not mean to suggest that that system is best. It may not always be; it may never be. To oppose our *Elrod-Branti* jurisprudence, one need not believe that the patronage system is *necessarily* desirable; nor even that it is always and everywhere *arguably* desirable; but merely that it is a political arrangement that may sometimes be a reasonable choice, and should therefore be left to the judgment of the people's elected representatives. The choice in question, I emphasize, is not just between patronage and a merit-based civil service, but rather among various combinations of the two that may suit different political units and different eras: permitting patronage hiring, for example, but prohibiting patronage dismissal; permitting patronage in most municipal agencies but prohibiting it in the police department; or permitting it in the mayor's office but prohibiting it everywhere else. I find it impossible to say that, always and everywhere, all of these choices fail our "balancing" test.

C

The last point explains why *Elrod* and *Branti* should be overruled, rather than merely not extended. Even in the field of constitutional adjudication, where the pull of *stare decisis* is at its weakest, see *Glidden Co. v. Zdanok,* 370 U.S. 530, 543, 82 S.Ct. 1459, 1469, 8 L.Ed.2d 671 (1962) (opinion of Harlan, J.), one is reluctant to depart from precedent. But when that precedent is not only wrong, not only recent, not only contradicted by a long prior *111 tradition, but also has proved unworkable in practice, then all reluctance ought to disappear. In my view that is the situation here. Though unwilling to leave it to the political process to draw the line between desirable and undesirable patronage, the Court has neither been prepared to rule that no such line exists (*i.e.,* that *all* patronage is unconstitutional) nor able to design the line itself in a manner that judges, lawyers, and public employees can understand. *Elrod* allowed patronage dismissals of persons in "policymaking" or "confidential" positions. 427 U.S., at 367, 96 S.Ct., at 2687 (plurality opinion); *id.,* at 375, 96 S.Ct., at 2690 (Stewart, J., concurring in judgment). *Branti* retreated from that for-

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mulation, asking instead "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S., at 518, 100 S.Ct., at 1295. What that means is anybody's guess. The Courts of Appeals have devised various tests for determining when "affiliation is an appropriate requirement." See generally Martin, A Decade of *Branti* Decisions: A Government Officials' Guide to Patronage Dismissals, 39 Am.U.L.Rev. 11, 23-42 (1989). These interpretations of *Branti* are not only significantly at variance with each other; they are still so general that for most positions it is impossible to know whether party affiliation is a permissible requirement until a court renders its decision.

A few examples will illustrate the shambles *Branti* has produced. A city cannot fire a deputy sheriff because of his political affiliation, [FN5] but then again perhaps it can, [FN6] especially if he is called the "police captain." [FN7] A county cannot fire on that basis its attorney for the department of social *112 services, [FN8] nor **2757 its assistant attorney for family court, [FN9] but a city can fire its solicitor and his assistants, [FN10] or its assistant city attorney, [FN11] or its assistant state's attorney, [FN12] or its corporation counsel. [FN13] A city cannot discharge its deputy court clerk for his political affiliation, [FN14] but it can fire its legal assistant to the clerk on that basis. [FN15] Firing a juvenile court bailiff seems impermissible, [FN16] but it may be permissible if he is assigned permanently to a single judge. [FN17] A city cannot fire on partisan grounds its director of roads, [FN18] but it can fire the second in command of the water department. [FN19] A government cannot discharge for political reasons the senior vice president of its development bank, [FN20] but it can discharge the regional director of its rural housing administration. [FN21]

FN5. *Jones v. Dodson*, 727 F.2d 1329, 1338 (CA4 1984).

FN6. *McBee v. Jim Hogg County*, 730 F.2d 1009, 1014-1015 (CA5 1984) (en banc).

FN7. *Joyner v. Lancaster*, 553 F.Supp. 809, 818 (MDNC 1982), later proceeding, 815 F.2d 20, 24 (CA4), cert. denied, 484 U.S. 830, 108 S.Ct. 102, 98 L.Ed.2d 62 (1987).

FN8. *Layden v. Costello*, 517 F.Supp. 860, 862 (NDNY 1981).

FN9. *Tavano v. County of Niagara*, 621 F.Supp. 345, 349-350 (WDNY 1985), aff'd mem., 800 F.2d 1128 (CA2 1986).

FN10. *Ness v. Marshall*, 660 F.2d 517, 521-522 (CA3 1981); *Montaquila v. St. Cyr*, 433 A.2d 206, 211 (R.I.1981).

FN11. *Finkelstein v. Barthelemy*, 678 F.Supp. 1255, 1265 (ED La.1988).

FN12. *Livas v. Petka*, 711 F.2d 798, 800-801 (CA7 1983).

FN13. *Bavoso v. Harding*, 507 F.Supp. 313, 316 (SDNY 1980).

FN14. *Barnes v. Bosley*, 745 F.2d 501, 508 (CA8 1984), cert. denied, 471 U.S. 1017, 105 S.Ct. 2022, 85 L.Ed.2d 303 (1985).

FN15. *Bauer v. Bosley*, 802 F.2d 1058, 1063 (CA8 1986), cert. denied, 481 U.S. 1038, 107 S.Ct. 1976, 95 L.Ed.2d 816 (1987).

FN16. *Elrod v. Burns*, 427 U.S. 347, 351, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

FN17. *Balogh v. Charron*, 855 F.2d 356 (CA6 1988).

FN18. *Abraham v. Pekarski*, 537 F.Supp. 858, 865 (ED Pa.1982), aff'd in part and dism'd in part, 728 F.2d 167 (CA3), cert. denied, 467 U.S. 1242, 104 S.Ct. 3513, 82 L.Ed.2d 822 (1984).

FN19. *Tomczak v. Chicago*, 765 F.2d 633

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(CA7), cert. denied, 474 U.S. 946, 106 S.Ct. 313, 88 L.Ed.2d 289 (1985).

FN20. *De Choudens v. Government Development Bank of Puerto Rico,* 801 F.2d 5, 10 (CA1 1986) (en banc), cert. denied, 481 U.S. 1013, 107 S.Ct. 1886, 95 L.Ed.2d 494 (1987).

FN21. *Rosario Nevarez v. Torres Gaztambide,* 820 F.2d 525 (CA1 1987).

The examples could be multiplied, but this summary should make obvious that the "tests" devised to implement *Branti* have produced inconsistent and unpredictable results. That uncertainty undermines the purpose of both the nonpatronage*113 rule and the exception. The rule achieves its objective of preventing the "coercion" of political affiliation, see *supra,* at 2749, only if the employee is confident that he can engage in (or refrain from) political activities without risking dismissal. Since the current doctrine leaves many employees utterly in the dark about whether their jobs are protected, they are likely to play it safe. On the other side, the exception was designed to permit the government to implement its electoral mandate. *Elrod, supra,* at 367, 96 S.Ct., at 2687 (plurality opinion). But unless the government is fairly sure that dismissal is permitted, it will leave the politically uncongenial official in place, since an incorrect decision will expose it to lengthy litigation and a large damages award, perhaps even against the responsible officials personally.

This uncertainty and confusion are not the result of the fact that *Elrod,* and then *Branti,* chose the wrong "line." My point is that there is no right line-or at least no right line that can be nationally applied and that is known by judges. Once we reject as the criterion a long political tradition showing that party-based employment is entirely permissible, yet are unwilling (as any reasonable person must be) to replace it with the principle that party-based employment is entirely impermissible, we have left the realm of law and entered the domain of political science, seeking to ascertain when and where the undoubted benefits of political hiring and firing are worth its undoubted costs. The answer to that will vary from State to State, and indeed from city to city, even if one **2758 rejects out of hand (as the *Branti* line does) the benefits associated with party stability. Indeed, the answer will even vary from year to year. During one period, for example, it may be desirable for the manager of a municipally owned public utility to be a career specialist, insulated from the political system. During another, when the efficient operation of that utility or even its very existence has become a burning political issue, it may be desirable that he be hired and fired on a political basis. The appropriate "mix" of party-based *114 employment is a political question if there ever was one, and we should give it back to the voters of the various political units to decide, through civil service legislation crafted to suit the time and place, which mix is best.

III

Even were I not convinced that *Elrod* and *Branti* were wrongly decided, I would hold that they should not be extended beyond their facts, viz., actual discharge of employees for their political affiliation. Those cases invalidated patronage firing in order to prevent the "restraint it places on freedoms of belief and association." *Elrod,* 427 U.S., at 355, 96 S.Ct., at 2681 (plurality opinion); see also *id.,* at 357, 96 S.Ct., at 2682 (patronage "compels or restrains" and "inhibits" belief and association). The loss of one's current livelihood is an appreciably greater constraint than such other disappointments as the failure to obtain a promotion or selection for an uncongenial transfer. Even if the "coercive" effect of the former has been held always to outweigh the benefits of party-based employment decisions, the "coercive" effect of the latter should not be. We have drawn a line between firing and other employment decisions in other contexts, see *Wygant v. Jackson Bd. of Education,* 476 U.S. 267, 282-283, 106 S.Ct. 1842, 1851-1852, 90 L.Ed.2d 260 (1986) (plurality opinion), and should do so here as well.

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I would reject the alternative that the Seventh Circuit adopted in this case, which allows a cause of action if the employee can demonstrate that he was subjected to the "substantial equivalent of dismissal." 868 F.2d 943, 950, 954 (1989). The trouble with that seemingly reasonable standard is that it is so imprecise that it will multiply yet again the harmful uncertainty and litigation that *Branti* has already created. If *Elrod* and *Branti* are not to be reconsidered in light of their demonstrably unsatisfactory consequences, I would go no further than to allow a cause of action when the employee has lost his position, that is, his formal title and salary. That narrow ground alone is enough to resolve the constitutional*115 claims in the present case. Since none of the plaintiffs has alleged loss of his position because of affiliation,[FN22] I would affirm the Seventh Circuit's judgment insofar as it affirmed the dismissal of petitioner Moores' claim and would reverse the Seventh Circuit's judgment insofar as it reversed the dismissal of the claims of other petitioners and of cross-respondents.

FN22. Standefer and O'Brien do not allege that their political affiliation was the reason they were laid off, but only that it was the reason they were not recalled. Complaint ¶¶ 9, 21-22, App. to Respondents' Brief in Opposition; 641 F.Supp. 249, 256, 257 (CDIll.1986). Those claims are essentially identical to the claims of persons wishing to be hired; neither fall within the narrow rule of *Elrod* and *Branti* against patronage firing.

The Court's opinion, of course, not only declines to confine *Elrod* and *Branti* to dismissals in the narrow sense I have proposed, but, unlike the Seventh Circuit, even extends those opinions beyond "constructive" dismissals-indeed, even beyond adverse treatment of current employees-to all hiring decisions. In the long run there may be cause to rejoice in that extension. When the courts are flooded with litigation under that most unmanageable of standards *(Branti)* brought by that most persistent and tenacious of suitors (the disappointed office seeker) we may **2759 be moved to reconsider our intrusion into this entire field.

In the meantime, I dissent.

U.S.Ill.,1990.
Rutan v. Republican Party of Illinois
497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52, 58 USLW 4872, 5 IER Cases 673

END OF DOCUMENT

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EXHIBIT B

State of Illinois
Office of the Governor
Springfield 62706
July 17, 1990

James R. Thompson
Governor

Administrative Order
Number 1 (1990)

DIRECTIVE TO STATE AGENCIES
REGARDING PERSONNEL PRACTICES

As you know, on Thursday, June 21, 1990, the United States Supreme Court issued its decision in Rutan v. Republican Party of Illinois, in which the Court held that promotion, transfer, recall and hiring decisions involving nonpolicymaking employees may not be decided on the basis of party affiliation and support. It has been the policy and practice of this administration to fill positions in the state only with individuals who are qualified for their positions. This will continue to be our policy.

We are reviewing the Supreme Court's decision with our attorneys to determine what actions we will take in the Rutan lawsuit in light of the Supreme Court's opinion. As part of our review of the decision, we set forth the following preliminary policies and procedures to ensure that all personnel decisions made by state agencies under the control of the Governor are in full compliance with the Supreme Court's decision:

1. All hiring and other personnel decisions shall be based on the merit and qualifications of the candidates. Where the selection of a candidate is made pursuant to an interview process, the agency must use uniform, job-related criteria and interview questions; the responses to such questions must be evaluated by reference to the requirements for the particular position and such evaluation must be thoroughly documented and must demonstrate the basis on which the selection was made.

2. No hiring or other personnel decisions - including promotions, transfers or recalls from layoff - may be decided on the basis of the candidate's party affiliation or support. Where practical the agency shall interview all qualified candidates on the eligibility list for the position being filled.

   In instances where it is not practical to do so, the method used by the agency for determining the individual candidates to be interviewed for a particular position shall be based on factors related to the merits of the individual applicants, length of time on the list, random selection or any other reasonable and impartial standard.

3. No investigation shall be performed into a candidate's political affiliation, including his or her voting record, financial support, and/or willingness to work for or donate to any political party. This information shall not be reviewed or considered at any point in the employment process.

4. In making personnel decisions, agencies may consider recommendations and referrals from any sources, including elected officials or representatives of any political party. However, referrals or recommendations may be considered only if they relate to the job qualifications of the particular candidate. The political affiliation of the candidate or of the elected official or party representative who provides the recommendation or referral may not be considered in making personnel decisions.

* * * * * * * * * * * * * * *

Please ensure that all officials and employees in your agency immediately become familiar with the terms of this order, and that they take all necessary steps to see that it is implemented. We will advise you as to any further changes in our personnel practices based upon our continuing review of the Supreme Court's decision. Thank you for your full cooperation.

State of Illinois
Office of the Governor
Springfield 62706
October 1 1990

James R. Thompson
Governor

Administrative Order
Number 2 (1990)

DIRECTIVE TO STATE AGENCIES
GUIDELINES FOR INTERVIEWING JOB CANDIDATES

The following employment policies and procedures regarding the interview process are intended to provide additional guidance and clarification to state agencies with respect to the following directive taken from the Governor's Administrative Order, Number 1, dated July 17, 1990.

> "1. All hiring and other personnel decisions shall be based on the merit and qualifications of the candidates. Where the selection of a candidate is made pursuant to an interview process, the agency must use uniform, job-related criteria and interview questions; the responses to such questions must be evaluated by reference to the requirements for the particular position and such evaluation must be thoroughly documented and must demonstrate the basis on which the selection was made."

This Directive contains principles which will assist agencies in assuring that their personnel policies and procedures relating to interviewing and selecting candidates for employment, promotion or other personnel transaction are in compliance with the requirements of the Rutan decision. Adherence to these principles will also result in the production of documentation necessary to defend against any claims that may arise under this ruling.

It is not the intent of this directive to mandate a single, specific set of personnel policies and procedures applicable to all agencies and all personnel transactions. Nor is it is the intent of this directive to mandate agency employment decisions, but to provide a consistent, fair and objective basis to assure compliance with Rutan as well as the employment of fully qualified persons.

Other employment policies such as Veterans Appointment Preference, Affirmative Action, and bargaining agreements will not be replaced by these policies and procedures. Additional screening requirements that the agency may impose prior to placing an individual on the payroll, promoting, transferring, or recalling an employee (e.g., background check, drug testing, residency) or other employment policies will not be restricted so long as they are not inconsistent with the procedures described herein. In addition, these policies and procedures address only the interview process, and do not apply where other types of selection devices are used.

I. SCOPE

A. Positions for which Principles are Relevant

The employment policies and procedures described in the following sections should be followed for all positions not specifically exempted from Rutan. A preliminary listing of those positions which, due to their policymaking or confidential nature, are clearly exempted from Rutan, will be published within the next two weeks. There will be many more positions which are not clearly exempt or non-exempt. Cataloguing and reviewing all these positions will be a time consuming effort which is too extensive to be undertaken in the time remaining to this administration. However, agencies wishing to make a determination regarding a particular position which is not included in this initial listing of exempted positions may submit the appropriate materials to CMS. In consultant with Ernst and Young and Jenner and Block, CMS will determine whether or not such a position is exempted from the requirements of the Rutan decision. In the absence of a determination that a position is exempted, this memorandum will apply to all positions.

B. Personnel Actions for which Principles are Relevant

The following principles apply to all employment decisions concerning individuals who are currently candidates to be interviewed for employment by the State or who are current State employees who are to be interviewed for promotion, transfer, or recall from layoff. Note that when the remainder of this document mentions "hiring" that this pertains to the interview activities involving both the hire of new employees and the promotion, transfer, or recall of current employees.

II. OBJECTIVES

Within the framework established by the Governor's directive, the State is committed to an interview process which will:

- Base employee selection on a candidate's ability to perform effectively on the job;
- Provide equal opportunity for State employment to all qualified job candidates;
- Prohibit the basing of employment, promotion, transfer, and recall decisions on partisan affiliation or support;
- Provide the hiring agency with maximum lawful discretion in making selection decisions; and
- Adequately document all employment, promotion, transfer and recall decisions.

III. THE INTERVIEW PROCESS

A. Approach

Following is a summary of minimum steps which should be part of an interview process to ensure compliance with the principles of the Governor's aforementioned Order. A summary of these steps is explained more fully below:

- Document and file hiring criteria for each position to be filled before conducting the interview, regardless of location:
  - Define and document major position responsibilities;
  - Define required knowledge, skills, abilities, and personal characteristics essential for competent performance in the job; and
  - Determine the relative weight of each hiring criterion.
- Develop a standardized interview questionnaire for each position to be filled to gather pertinent information about the candidate's knowledge, skill, abilities, and personal characteristics.
- Conduct a structured employment interview using a standardized interview questionnaire and note pertinent responses from the candidates that can be compared and evaluated in a consistent manner.
- Evaluate each candidate interviewed:
  - Rate the completed interview questionnaire;
  - Score each hiring criterion and note on an evaluation form;
  - Determine each candidate's overall score based on all hiring criteria; and
  - Rank all candidates interviewed by overall score.
- Document the interview process for all candidates interviewed.
- Document the employment decision.

- Maintain a chronological file of all interview questionnaires, evaluation and employment decision forms for each position when interviews were conducted.

B. Establish the Hiring Criteria

The reliability of a structured employment interview in screening qualified candidates is based on the identification of pre-established criteria for successful job performance which are required for entry into the position. Hiring criteria include major position responsibilities, knowledge, skills, abilities, and personal characteristics. As a general rule, the larger the number of qualified candidates, and/or additional identical positions to be filled, the higher the level of standardization required to assure the objectivity of the actual interviews.

The following approach to the development of hiring criteria assures that the criteria will be job-related, specific to the particular position, and essential to acceptable job performance. It is important to remember that hiring criteria which have not been pre-established should not be used as justification for the employment decision.

1. Define major position responsibilities. As a first step, this information should be obtained from existing job descriptions and class specifications. However, it is important to review this information with current job incumbents and/or the supervisor to assure its accuracy with respect to the specific position being filled. This step should produce up to ten major duties which serve as the primary areas of inquiry during the interview as well as the basis for identifying the knowledge, skills, abilities, and personal characteristics required to perform each major duty, and the subsequent development of specific interview questions. These duties should reflect the position as it is documented by the existing position description, not how it could be changed or improved.

2. Define required knowledge, skills, and abilities ("KSAs") and personal characteristics. Job-related KSAs and personal characteristics are derived from the position's major duties by focusing on such questions as "What would a candidate need to know to perform this duty?", "Can the required knowledge be obtained through formalized training or must it be learned through experience?", and "What types of behaviors are demonstrated by current incumbents who successfully perform this duty?". Once identified, the task of developing interview questions which are clearly and demonstrably job-related is greatly simplified.

   To the extent that the position's major duties, required KSAs and personal characteristics are too broadly defined, the agency may have difficulty developing questions as well as differentiating, and subsequently selecting, between qualified candidates. Conversely, being too specific may cause well qualified candidates to be eliminated from consideration. In summary, the hiring authority must be actively involved in the definition of a position's hiring criteria.

3. Weight to each hiring criteria. These weights should reflect the relative importance of each criteria to acceptable job performance.

4. Document the hiring criteria on a Candidate Evaluation Form. The hiring criteria for each position must be documented prior to the conduct of any interviews.

C. Develop the Interview Questionnaire

The interview questionnaire will be used to assess all candidates who are being interviewed for a particular position. Interview questions derived from the identified KSA's and personal characteristics should also, to the extent possible, reference the position's major duties.

1. Common types of hiring criteria and the development of related interview questions are briefly summarized as follows:

a. Knowledge and Experience - Assess whether the candidate has the required level of job knowledge that is both essential to job performance and constitutes the minimum which must be known prior to entering the position. Determine the extent to which the candidate has, in fact, ever performed the major duties of the position for which s/he is applying. These questions should deal with the more technical aspects of the position, or basic knowledge that is essential to enable the candidate to learn the job within the allotted probationary timeframe. Since this level of detailed information may be difficult to ascertain from the candidate's application, such questions are critical for those technically oriented positions where very specific skill and/or experience is required. During the actual interview, it is appropriate for the interviewer to probe further, as necessary, to evaluate the candidate's quality and level of experience. Concise, detailed notes should support any subsequent reliance on prior experience as a means of differentiating between candidates who would otherwise appear to be substantially equal.

b. Education, Training, and Special Skills - Determine if the candidate has the necessary education, training, and special skills to learn and/or perform the major duties as required. Ask about any specific coursework, training programs, and special skills which are considered desirable for the position.

c. Ability - Evaluate whether the candidate possesses the level of ability required to effectively perform the major duties. Abilities, and their relative importance, generally vary substantially based upon the nature and level of the position. The most commonly required abilities include problem-solving, oral/written communications, leadership, and interpersonal relations.

d. Personal Characteristics - To the extent possible, the simple noting of "impressions" by the interviewer should be avoided. It is, however, appropriate to ask candidates to demonstrate their application of the required personal characteristics in terms of specific job-related behaviors.

e. Willingness - For those positions with few or only very basic minimum requirements, as well as for jobs with some unpleasant or monotonous working conditions, the hiring authority/interviewer should prepare questions regarding the candidate's understanding of, and willingness to perform the major duties. The outlining and detailed disclosure of duties and working conditions in this context will serve as a realistic job preview for the candidate and may aid in self-selection.

2. Review interview questions. The following guidelines should be used in the development and evaluation of specific interview questions:

a. Questions should be accurate, complete and easily understood. The need to clarify questions during the interview for certain candidates reduces standardization.

b. Questions must be clearly and strictly job-related, and must be directly linked to the position's major duties.

c. Questions must focus on the KSAs and personal characteristics necessary to perform the job at entry.

d. Questions should reflect, as nearly as possible, the content of the specific position for which the candidate is being interviewed.

e. To increase job-relatedness, questions should be stated in terms of sample position duties, and should be designed to elicit information on job-related behaviors.

f. Questions should be geared to the appropriate complexity level of the job.

g. Questions must be carefully reviewed to eliminate any possible accusation of partisan affiliation or support.

D. Conduct the Interview

1. Interview Obligations. Whatever the actual design of the interview, the interviewer must not ask any questions concerning political affiliation (or any question which could be construed as such). Politically-related topics that are to be avoided include:

   - Political affiliation;
   - Political contributions;
   - Political sponsorship or recommendation and

   In addition, it must be made clear to the interviewer that, if the candidate volunteers non-job-related information about political topics, s/he should be interrupted and the interviewer should be directed toward other topics.

2. Following is a basic agenda for conducting the structured employment interview.

   a. Put the candidate at ease and build rapport.

   b. Explain the purpose of the interview.

   c. Provide a brief description of the position and important organization characteristics.

   d. Ask the pre-established interview questions contained in the questionnaire and take notes on the candidate's response to each question, allowing the applicant to organize his/her own experiences, and to speak with spontaneity to reveal relevant information. The interviewer should probe for expansion and clarification of candidate responses to obtain adequate information for the evaluation of the candidate and, ultimately, the employment decision.

   e. After you have completed the questionnaire, inform the candidate when the decision will be made, and ask whether s/he has any questions.

E. Additional Candidate Evaluation Criteria

The hiring authority will often use other evaluation methods in addition to personal interviews. Examination of performance records for current employees and work sample tests and job or community service related references would be examples of other legitimate screening devices.

F. Rating the Candidate

The agency must have standardized procedures in place to rank all candidates interviewed for a particular position based upon the pre-established hiring criteria, interview questionnaire and scoring of the candidate's responses to each question. By ranking candidates agencies are provided one measure to further distinguish between equally qualified candidates.

It is important to note that there is no requirement for agencies to hire in rank order or to hire a particular candidate. It is not the intent of the preceding policies and procedures to mandate agency employment decisions, but to provide a consistent, fair, and objective basis to assure compliance with Rutan as well as the employment of fully qualified employees.

IV. DOCUMENTATION OF EMPLOYMENT DECISIONS

Adequate documentation of employment decisions is a critical component of the Rutan compliance program. Although there is some latitude in other aspects of the previously described employment polices and procedures, agencies must strictly adhere to their requirements for documentation of all employment decisions.

A. Documenting the Interview Process

The hiring authority is required to provide the following documentation on each candidate interviewed:

1. An interview questionnaire which briefly summarizes the candidate's responses and assigns a rating for each question.

2. A candidate evaluation form including comments reflecting the hiring authority's assessment of the candidate's qualifications against each criteria.

In some cases, it may not be necessary to evaluate the candidate against all of the hiring criteria. If, for example, prior work experience or basic skills are unacceptable, the hiring authority may decide that further evaluation of the candidate would be pointless. In such cases, documentation needs to be provided only for those criteria against which the candidate was evaluated.

B. Documenting and Filing the Employment Decision

The hiring authority must complete an employment decision form prior to the extension of the employment offer, that provides, at a minimum, the following information:

1. The candidate to be hired and the position number being filled.

2. Justification for the decision to hire the selected candidate. This justification must clearly explain the reason(s) for hiring the selected candidate and provide a general statement comparing the selected candidate with others who were interviewed. To be considered appropriate, this justification must be job-related. In addition, where the candidate selected is one who did not receive the highest score, the justification should be sufficiently well documented so as to be subject to verification and allow inferences to be drawn as to why one candidate was selected over another.

3. The date the form was completed.

4. The agency must maintain an up-to-date, chronological file of employment decision forms as well as the candidate evaluation forms and completed interview questionnaires for all interviews conducted. In addition, a copy of the position description and major responsibilities must be included for each filled position. Each file must be labeled by the position number, title, and date of the employment decision.

ABC6/175

State of Illinois
Office of the Governor
Springfield 62706
January 31, 1991

Jim Edgar
Governor

Administrative Order
Number 1 (1991)

PERSONNEL POLICIES DIRECTIVE

On June 21, 1990, the United States Supreme Court ruled for the first time, in the case of Rutan v. the Republican Party of Illinois, that decisions to hire, promote, transfer or recall from layoff employees of public bodies could not be made on the basis of such employees' political affiliation or support. The exception for policy making or confidential employees or spokespersons established in earlier cases also applies to the Rutan ruling.

I hereby commit myself and all appointees, officials and employees in my Administration to fully comply with this ruling and all other, relevant constitutional provisions, laws and United States Supreme Court decisions.

Specifically, I order that the following principles be adhered to:

1. No employee may be dismissed from a non-exempt* state position on the basis of political affiliation or support.

2. No employee may be demoted, denied consideration for a raise or promotion, or disciplined on the basis of political affiliation or support.

Furthermore, I hereby affirm and adopt the provisions of Administrative Order #1 (1990), which state in pertinent part the following.

3. All hiring and other personnel decisions affecting non-exempt individuals shall be based on the merit and qualifications of the candidates. Where the selection of a candidate is made pursuant to an interview process, the agency must use uniform, job-related criteria and interview process; the responses to such questions must be evaluated by reference to the requirements for the particular position and such evaluation must be thoroughly documented and must demonstrate the basis on which the selection was made.

4. No hiring or other personnel decisions - including promotions, transfers or recalls from layoff - may be decided on the basis of the candidate's party affiliation or support. Where practical the agency shall interview all qualified candidates on the eligibility list for the position being filled.

5. In instances where it is not practical to do so, the method used by the agency for determining the individual candidates to be interviewed for a particular position shall be based on factors related to the merits of the individual applicants, length of time on the list, random selection or any other reasonable and impartial standard.

6. No investigation shall be performed into a candidate's political affiliation, including his or her voting record, financial support, and/or willingness to work for or donate to any political party. This information shall not be reviewed or considered at any point in the employment process.

7. In making personnel decisions, agencies may consider recommendations and referrals from any source, including elected officials or representatives of any political party. However, referrals or recommendations may be considered only if they relate to the job qualifications of the particular candidate. The political affiliation of the candidate or of the elected official or party representative who provides the recommendation or referral may not be considered in making personnel decisions.

Additionally, I hereby affirm and adopt Administrative Order #2 (1990) which establishes guidelines for development of job criteria, interview questionnaires, for objectively rating candidates, and for documenting selection decisions. Administrative Order #2 is attached hereto and made a part of this order.

I further order that:

8. The Department of Central Management Services shall be responsible for developing and implementing such rules, policies, guidelines and manuals, including the training manual already prepared in conjunction with the management consulting firm of Ernst and Young, as are necessary or appropriate to ensure that the personnel policies and procedures of all agencies, boards, and commissions under my jurisdiction comply with the requirements of this Administrative Order and generally with all applicable constitutional provisions, laws and United States Supreme Court rulings concerning personnel matters, as well as with all other requirements of State law and regulations and budgetary and fiscal guidelines. The Department shall also be responsible for coordinating information about agency hiring and other employment data with the Bureau of the Budget and assisting with the administration of any budget or fiscal policies or guidelines issued by the Bureau.

9. Whether a position is exempt from the requirements of Rutan and other relevant United States Supreme Court cases shall be determined by the Department of Central Management Services in consultation with the Office of Counsel to the Governor, and such recognized experts or advisors as may be retained by that Department. Any personnel transactions for which there is a question as to whether the position is exempt from Rutan should be submitted to the Department of Central Management Services for determination in accordance with this consultation process.

10. The Department of Central Management Services shall notify the initiating agency and the Director of Executive Employment and Labor Relations in the Office of the Governor of any positions that have been determined to be exempt by that Department under Rutan.

11. The requirements of this Administrative Order and rules, policies, guidelines and manuals issued hereunder shall supersede any procedures which may still be in effect pursuant to Executive Order #5 (1980) which is revoked.

12. The procedures set forth in this Administrative Order apply to all personnel transactions of agencies, boards, and commissions subject to my control or direction whether or not the position affected by the personnel transaction in question is under the jurisdiction of the Personnel Code.

*As used in this Order, "non-exempt" refers to an employee who is not exempt from the requirements of Rutan and has no relevance to whether such employee is or is not exempt from the Illinois Personnel Code.

OFFICE OF THE GOVERNOR
JRTC, 100 W. RANDOLPH, SUITE 16-100
CHICAGO, ILLINOIS 60601

PAT QUINN
GOVERNOR

Administrative Order
Number 2 (2009)
December 10, 2009

DIRECTIVE TO STATE AGENCIES, UPDATING GUIDELINES FOR COMPLIANCE WITH THE *RUTAN* DECISION

This Administration is firmly committed to adhering to the principles articulated in the United States Supreme Court decision, *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) ("*Rutan*"), and its progeny, as well as Administrative Order No. 1 (1990), No. 2 (1990), and No. 1 (1991) (collectively, the "Prior Administrative Orders"), all of which prohibit consideration of political affiliation or support (or lack thereof) in connection with hiring, promotion, transfer, or recall from layoff, with respect to employment positions covered by the *Rutan* decision ("*Rutan*-covered positions").[1]

It is the intent of this Directive (i) to provide guidance and clarification with respect to certain aspects of the Prior Administrative Orders, all of which are hereby affirmed and shall remain in effect, and (ii) to announce certain new guidelines and procedures relating to personnel transactions for *Rutan*-covered positions. It is not the intent of this Directive to mandate a single, specific set of personnel procedures to be used in connection with every single personnel transaction or to limit the ability of agencies, boards, and commissions to impose job-related requirements and procedures (e.g., background checks, drug testing, residency requirements, job-related driver's license requirements), in addition to those set forth below, prior to making an offer of employment, so long as they are not inconsistent with any policies or procedures described herein, or any applicable laws. Instead, through the guidelines and procedures set forth below, this Directive seeks to ensure that applicable decision-making processes comply with *Rutan* and rely upon politically neutral, merit-based criteria.

I. Scope

This Directive shall apply to all personnel transactions relating to *Rutan*-covered positions of State agencies, boards, and commissions under the jurisdiction of the Office of the Governor ("OOG"), whether or not the positions affected by the personnel transactions in question are under the jurisdiction of the Personnel Code and Rules. That is, this Directive applies to both "code" and "non-code" positions under the jurisdiction of the OOG.

[1] As used in this Directive, "Rutan-covered" refers to an employment position that is subject to the requirements of *Rutan*.

In the event of a conflict between this Directive and the requirements of a collective bargaining agreement, the collective bargaining agreement shall govern. In the event of a conflict between this Directive and any policies or procedures relating to employment positions or personnel transactions that are set by statute (*e.g.*, the Veteran Preference set forth in 20 ILCS 415/8b.7), the policies and procedures set by statute shall govern.

II. Employment Applications

A. Submission of Applications

1. The Bureau of Personnel in the Department of Central Management Services ("CMS") has served and shall continue to serve as the central point of intake for all employment applications under the jurisdiction of the Personnel Code and Rules ("coded classifications").

2. Each *Rutan*-covered position shall be posted on the Work 4 Illinois website, <http://www.work.illinois.gov>, which can be accessed from home or through public access computers at most public libraries or State offices.

3. Any employee of an agency, board, or commission under the jurisdiction of the OOG who receives a personnel request, referral, or recommendation for a *Rutan*-covered position shall refer the person making the request, referral, or recommendation to CMS Governmental Affairs for disposition.

B. Grading of Applications

1. For coded classifications under the jurisdiction of the OOG, subject to any time limitation on when applications will be accepted and how long an application can remain active, CMS personnel shall grade each application for a classification in the order in which the application has been received and shall not grade any application out of order. Subject to the limitations, above, all other classifications under the jurisdiction of the OOG, but not under the jurisdiction of the Personnel Code and Rules ("non-code positions") shall be graded in the order received by the employing agency, board, or commission.

2. Each application shall have the name of the applicant and any references or any other personally identifiable information redacted so that the grading can be done on a blind basis. CMS personnel shall perform any necessary credential verification in a manner that preserves the integrity of the blind grading process. As soon as practicable, CMS will move towards a fully automated system.

3. The grader shall employ objective, merit-based criteria in his or her grading of applications. Grading shall be free from all political considerations.

4. All documents and data regarding applications for *Rutan*-covered positions shall be available for regular auditing.

C. Creation of Eligibility Lists

In creating an open competitive eligible list, to be utilized by an agency for an open *Rutan*-covered position, CMS shall redact the names of the applicants and other personally identifiable information so that the selection of candidates for an interview pool can be done on a blind basis.

D. Job Descriptions

Job descriptions shall be reviewed and, if necessary, updated prior to any *Rutan*-covered posting, to reflect current duties, responsibilities, and requirements.

III. The Interview, Evaluation, and Selection Process

Administrative Order No. 2 (1990) contains detailed procedures and guidelines for conducting applicant interviews for *Rutan*-covered positions in a manner intended to ensure compliance with *Rutan*. This Directive reaffirms the applicability of the interview, evaluation, and selection guidelines set forth in Administrative Order No. 2 (1990) and supplements that Order with the following additional procedures and guidelines:

A. Training of Interviewers

1. CMS and other State agencies, boards, and commissions have training programs to orient agency employees responsible for making personnel decisions to the State's *Rutan* hiring procedures and corresponding interview and selection methods ("*Rutan* training"). *Rutan* training and certification has proven to be an effective component of the State's *Rutan* compliance program. The current website to register for CMS's *Rutan* training is <http://www.state.il.us/cms/2_servicese_edu>.

2. Any agency employee who participates in the interview of a candidate for a *Rutan*-covered position must have successfully completed *Rutan* training. A non-certified member of an interview panel may only function in a technical expert capacity; he or she may ask specific technical follow-up questions to clarify a response and assist the certified interviewers in

understanding technical responses given by the interviewee, but he or she may not participate in the evaluation and scoring process.

3. As soon as practicable, but no later than six months after the date of this Directive, CMS shall develop a Refresher Course for re-certification of *Rutan* interviewers. The Refresher Course may be offered online or in any other appropriate format. The Refresher Course for interviewers shall review key elements of the State's *Rutan* compliance program, offer updates as to changes or enhancements in compliance policies and practices, and include an evaluative component to ensure that those taking the Refresher Course continue to have an appropriate knowledge of compliance guidelines and procedures. Once the Refresher Course is implemented, each *Rutan* interviewer must successfully complete the Refresher Course and be re-certified at least once every 3 years.

B. Interview Panels

1. *Rutan* interviewers must make their assessments of candidates based upon their responses to a pre-determined and uniform set of job description-related questions that are developed prior to posting and posed during the interview (as outlined in Administrative Order No. 2 (1990)), in an atmosphere where interviewers are free of advance knowledge of candidates and of outside influences. *Rutan* interviewers must be insulated from any attempts to sway their assessments or hinder their objectivity. No interview panel should include, either as interviewers or as technical advisors, any person who is related to, or otherwise would have a conflict of interest in connection with evaluating, any of the applicants for the position.

2. Since multi-member interviewer panels provide greater input and reduce the risk of improper influence in the hiring process for *Rutan*-covered positions, agencies shall utilize such panels rather than single interviewers in the interview and evaluation process. Members of the interview panel must remain consistent throughout the course of the interview process for a position. A technical advisor who has not completed training to be a certified *Rutan* interviewer shall not be considered a member of an interview panel for purposes of determining the numerical composition of the panel. Under limited circumstances, the Director of CMS or his or her designee may approve the use of single interviewers for *Rutan* interviews and evaluations, but only after the director of the requesting agency provides written justification for the use of a single interviewer.

C. Interview, Evaluation, and Selection of Candidates

1. Administrative Order No. 2 (1990) contains appropriate guidelines for the interview and evaluation of candidates, and it is hereby affirmed. In addition to those guidelines, the following guidelines shall also apply to the interview and evaluation process for all *Rutan*-covered positions.

2. To the extent practicable, the agency shall interview all reachable applicants. In situations where it is not practical to interview all reachable applicants, the agency shall use a standardized method to select the names of candidates to interview for a position. Such a method shall be based on: (i) factors related to the merits of the individual applicants, (ii) random selection, or (iii) any other reasonable, impartial, and legally compliant standard. In the event that an agency uses a method other than random selection, however, it shall create a written record, specifically identifying the alternative selection method used and the justification for its use.

3. Prior to commencing interviews for a *Rutan*-covered position, the interview panel shall ensure that the Hiring Criteria and Interview Questionnaire agreed upon for the interviews and developed prior to posting are preserved and made a part of the *Rutan* file for that position. *Rutan* files must be maintained separately from employee personnel files.

4. Copies of the Interview Questionnaire, which shall include the interviewer(s) summary(ies) of a candidate's responses to each question and the weighted score assigned by the interviewer(s) thereto, shall be placed in the *Rutan* file and preserved.

5. A Candidate Evaluation Form, reflecting the interview assessments of the candidate's qualifications against each criterion for the position at issue, should be preserved for each candidate interviewed and made a part of the *Rutan* file for the position. Each member of the interview panel shall sign and date the form and certify that the evaluation was not based on political party affiliation or support (or lack thereof).

6. The Employment Decision Form for the position shall be preserved and made a part of the *Rutan* file for the position. The form shall include a written justification for the agency's decision as to the candidate chosen to be hired for the position. The agency director or his/her designee shall sign and date the form and certify that the employment decision was not based on political party affiliation or support (or lack thereof).

7. In the event that an agency decides to cancel an opening rather than hire any of the interviewed candidates, a written justification for the cancellation decision shall be included in the *Rutan* file.

D. Retention of Records

1. Each agency shall maintain *Rutan* files for each job position number in chronological order, so that hiring decisions can be audited.

2. *Rutan* files shall be maintained for a period of three years from the date of the employment decision or in accordance with agency record retention policies, whichever is longer, at which time the files shall be transferred to the State Records Center for disposition in accordance with the State Records Act, 5 ILCS 160/1 *et seq.*

IV. Savings Clause

Nothing in this Directive shall be construed to contravene the terms of any collective bargaining agreement or any State or federal law.

V. No New Rights Created

Nothing in this Directive is intended to create any new right or benefit, substantive or procedural, enforceable at law by a party against the State of Illinois, its agencies, boards, commissions, officers, or employees, or any person.

VI. Severability

If any provision of this Directive is found invalid by a court of competent jurisdiction, the remaining provisions shall remain in full force and effect.

VII. Effective Date

This Directive shall become effective immediately.

Unless otherwise noted, to the extent any new requirements in this Directive are not already fully in place, the responsible State agencies, boards, and commissions under the jurisdiction of the OOG shall have 120 days to become fully compliant.

Pat Quinn

Governor Pat Quinn

IN THE EXECUTIVE ETHICS COMMISSION
OF THE STATE OF ILLINOIS

RECEIVED
AUG 15 2014
EXECUTIVE
ETHICS COMMISSION

IN RE: ANN SCHNEIDER 11-01567

RESPONDENT'S SUGGESTIONS FOR REDACTION / PUBLIC RESPONSE

Please check the appropriate line and sign and date below. If no line is checked the Commission will not make your response public if the redacted report is made public.

✓ Below is my public response. Please make this response public if the summary report is also made public; or

_____ Below are my suggestions for redaction. I do not wish for these suggestions to be made public.

[redacted]
Respondent's Signature

8/15/14
Date

Instructions: Please write or type suggestions for redaction or a public response on the lines below. If you prefer, you may attach separate documents to this form. Return this form and any attachments to:

Illinois Executive Ethics Commission
401 S. Spring Street, Room 513 Wm. Stratton Building
Springfield, IL 62706

My copy of this report did not include page 10 or 11.

August 15, 2014

Executive Director Chad Fornoff
Illinois Executive Ethics Commission
401 South Spring Street
Room 513, William Stratton Building
Springfield, IL 62706

Re: Ann Schneider 11-01567
Response to OEIG Final Report

Dear Mr. Fornoff:

In response to the OEIG final report you have provided, I make the following response:

I first began working with the Illinois Department of Transportation (IDOT) in 2005 as the Director and Chief Fiscal Officer of the Office of Finance and Administration. In 2010, I was appointed Chief Operating Officer in the Secretary's Office where I was responsible for six offices and four divisions of IDOT. In this capacity, I served as a liaison with the Governor's Office and the Illinois General Assembly. In 2011, I was appointed Secretary for the IDOT and was unanimously confirmed by the Illinois Senate one month later.

In each of these roles, I have tried to do my best to not only follow but improve the policies and goals of IDOT at both the agency and division level. During my tenure, I oversaw the delivery of the Illinois Jobs Now capital program – the largest in State history that created 140,000 jobs; served as Chair of the National Freight Advisory Committee; led the Illiana Public-Private Partnership Initiative; created the State Freight Advisory Committee; established Zero Fatalities as Illinois' Traffic Safety Goal to eliminate fatalities on the State's highways and protect workers who work every day to maintain and build our transportation system; directed the creation and strategy behind the State's first actionable long-range transportation plan; and established Intergovernmental Executive Strategic Highway Safety Committee which has helped to reduce fatalities below 1,000 for a record 5 years in a row, among many other accomplishments. As a result of my personal and collaborative efforts at IDOT, I was honored with several awards including the IDOT Outstanding Service Award in 2010, the Groundbreakers Award, Federation of Women Contractors in 2012, Woman of the Year, WTS (Women's Transportation Seminar) in 2012 to name just a few.

In my experience, persons who serve as Directors and Secretaries of State agencies rarely, if ever, are able to achieve significant progress through micromanagement. I have actively encouraged IDOT employees at all levels to do their jobs to the best of their abilities. I do not believe it is necessary or even beneficial to interfere with the day-to-day activities of every employee at IDOT. To do so would not only be impossible, given the number of employees, but would also take away from my ability to forge ahead with developing policies and programs including, but

not limited to, the development of jobs and improved safety in Illinois in the area of transportation services.

The allegations in the report focus generally on hiring practices and job development and classification. In my supervisory roles at IDOT, I had little direct involvement with most of the activities the OEIG has determined violates preferred hiring and employment Directives, Orders and practices. When I was recommended to serve as Director and Chief Fiscal Officer of the Office of Finance and Administration, I was not asked any questions about my understanding and familiarity with the forms being used at IDOT or the specifics of the hiring processes for *Rutan*-covered or *Rutan*-exempt candidates. It was not a secret that before working for IDOT, I would not have been made familiar with these forms and processes. The minutia of detail expected in this report is rarely found in the resumes of those assuming the top position of any large agency or organization.

Throughout my tenure at IDOT, I was committed to provide the highest level of service to the Agency and the State. Whenever a question came to me, I relied on the legal opinion and advice of the agency's chief counsel, but more often than not questions related to hiring practices never reached my level. I also insisted that for the 93% of positions at IDOT that were *Rutan*-covered, that the proper processes were followed to ensure fair and competitive hiring.

I am very proud of what I was able to accomplish at the Department of Transportation during my 3 year tenure as Secretary, including advancing IDOT's commitment to diversity, sustainability, job creation and freight mobility, while ensuring that Illinois remains the transportation hub of the nation. During my tenure, the Department gained the respect of the transportation industry and earned bipartisan support in the General Assembly.

As it relates to the specific allegations, I respond as follows:

1. **The Report establishes that allegations against me concerning the hiring of my step-daughter are UNFOUNDED.** I agree with the OEIG's finding.

2. **The Report asserts that I improperly was involved in creating and/or classifying positions at IDOT as *Rutan*-exempt.** I deny this allegation. As it relates to each and every claim relating to *Rutan*-exempt positions, it is undisputed that employees of CMS were responsible for classifying positions as either *Rutan*-covered or *Rutan*-exempt. Neither I nor my office played any role in the classification process. I did not direct or encourage my staff to unnecessarily or inappropriately create job descriptions with the intent to have CMS classify them as *Rutan*-exempt in order to circumvent Administrative Directives or personnel policies.

3. **The Report suggests that I had either an active role or took a passive position which resulted in an increase in the number of *Rutan*-exempt employees in the Division of Aeronautics.** I deny this allegation. When I and my staff received these

anonymous complaints about the number of staff assistants in the Division of Aeronautics, we forwarded these complaints to the OEIG for further investigation and assistance. My interpretation of the complaints was that persons employed within the Division of Aeronautics were upset that many *Rutan*-exempt staff assistants were being assigned to positions in their division. In addition, the complaints asserted that these staff assistants did not have the qualifications sufficient for the positions. These positions had been classified by CMS as *Rutan*-exempt. Once CMS designates a position as *Rutan*-exempt, I did not believe that I was legally able to appeal and change CMS's classification. It was my understanding that one of the stated purposes for giving CMS this duty was to increase the likelihood of an impartial assessment and to decrease the Agency's ability to influence these determinations to avoid just these types of allegations. Referencing the second sentence above during my tenure at IDOT, we did not receive an answer from the OEIG with recommendations as to how to address the issue. We were of the understanding that the OIEG would continue to investigate and assist us in assessing the complaints and suggest a solution through the cooperation of our State agencies and resources. How can the OEIG make this allegation against me, when I had forwarded the complaints to them for their investigation and received no answer or recommendations?

5. **The Report suggests that I was responsible for filling *Rutan*-covered positions with *Rutan*-exempt hires and that I independently submitted and approved ePARs to the Governor's Office with the intent to recommend unqualified persons to fill *Rutan*-covered positions.** I deny this allegation. At no time did either I or my staff fill a *Rutan*-covered position with a *Rutan*-exempt person. At IDOT I tried to create a culture that we were one team and we had to get the job done safely and as efficiently and effectively as possible. Did I create a culture where people would step up and pitch in to get the job done, yes I did. Therefore, I would agree and admit that there were times that *Rutan*-exempt individuals were asked to fulfill job duties that were not clearly identified in their job descriptions. It was and is my opinion that performing tasks that were not clearly specified in one's job description does not convert either the person or the position to *Rutan*-covered status. This conclusion was supported by Agency counsel, Ellen Schanzle-Haskins who specifically advised us that such task assignments were not a violation of *Rutan*. The singular purpose of asking employees to complete necessary work was to accomplish the task at hand.

   It is my recollection that vast majority of *Rutan*-exempt hires were chosen from those recommended to me or my staff by the Governor's office. The Governor's office would have been provided resumes of all such candidates and would have requested that we complete the process of having the recommended person approved for the open position. Neither I nor my staff were in a position to reject the recommended individuals for these exempt positions as no additional interview process was required.

6. **The Report suggests that I was unable to define the term "technical" as it related to the use of that term in a job description at IDOT.** I admit that I could not give a definition of that term beyond the common use. I did not write the job description or provide direction to whoever wrote it. This is not a task that I would consider requires the attention of either a Director within or Secretary of a State agency.

7. **The Report suggests that I inappropriately ignored the results of a 2005 internal audit of IDOT which referenced some of the same issues that were investigated by the OEIG in this audit.** First, I deny that the 2005 audit related to any actions taken on my part as the report was a summary of an investigation based upon what had occurred before my employment with IDOT. Second, many of the audit findings were rejected. The audit had already been addressed by my predecessors. No one suggested to me that I was required to go back and re-evaluate prior responses or provide my own assessment as to what had happened before I was employed at IDOT. This is not a duty of either a Director within or Secretary of a State agency.

If the OEIG and the Executive Ethics Commission are going to hold agency heads and senior management responsible for these hires, then in general, I would agree with many of the OEIG recommendations which support increased education for those in hiring and management positions concerning *Rutan*; using independent contractors to audit job classifications and descriptions; reducing the number of *Rutan*-exempt positions overall; and eliminating unnecessary positions altogether. I believe I asserted a similar position while serving as Secretary for the IDOT. It would also be my recommendation that consultation with the Directors of each Agency be required when determining employment needs as it relates to the balance of *Rutan*-covered vs. exempt positions.

I would also point out that the *Rutan* training for executives and senior level management that had been presented by CMS did NOT cover the level of detail included in this report, which again is not something an agency head would be aware of in order to oversee or not inappropriately delegate as suggested by the findings.

In my roles as Director and Secretary of IDOT, I have strived to do what I thought was best for the Agency and the people of Illinois. I worked hard to set positive goals for IDOT which I feel were successfully achieved by me and my staff during my tenure. This OEIG investigation suggests that I engaged in efforts to sabotage IDOT divisions with incompetent political hires. The facts establish that to the extent political hires were made, they did not originate from me or my staff. Under the law it is my understanding that the Governor has the authority to hire whoever he deems

appropriate for *Rutan*-exempt positions, but I support any effort to reduce the number of PURELY political positions at IDOT.

It hurt me deeply that I was not able to prepare a defense to refute the charges against me and prove that the charges were unfounded.

This report AND the chance that it's going to be made public have wreaked havoc on me personally, professionally and emotionally. I have always worked hard my entire career to do what is right and ethical and in the best interest of the taxpayers whom I served. I pray that you do not make this report public.

Nevertheless, to the extent this report is made public, I would ask that my response be made public to accompany the report.

Sincerely,

Ann Schneider

RECEIVED
AUG 15 2014
EXECUTIVE ETHICS COMMISSION

IN THE EXECUTIVE ETHICS COMMISSION
OF THE STATE OF ILLINOIS

IN RE: GARY HANNIG #11-01507

RESPONDENT'S SUGGESTIONS FOR REDACTION / PUBLIC RESPONSE

Please check the appropriate line and sign and date below. If no line is checked the Commission will not make your response public if the redacted report is made public.

__X__ Below is my public response. Please make this response public if the summary report is also made public; or

_____ Below are my suggestions for redaction. I do not wish for these suggestions to be made public.

Respondent's Signature

8/15/14
Date

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Illinois Executive Ethics Commission
401 S. Spring Street, Room 513 Wm. Stratton Building
Springfield, IL 62706

See attachment

TM II Rutan-exempt positions at IDOT were well established and accepted since the 1990s at IDOT.

Rutan-exempt TM II Staff Assistant positions have been in place at IDOT since the 1990s, apparently without complaint or issue. The position of Technical Manager II was well established and accepted as a Rutan-exempt position and exempt from Rutan long before I arrived as Secretary of Transportation in 2009. (Exempt from Rutan, means the appointment can be made for political or other reasons, without competing with others. Rutan-exempt staff can also be fired if the political affiliation of the administration changes). In fact, the OEIG report establishes that when I became Secretary, there were 52-59 Rutan-exempt Staff Assistant IIs working in various positions among the 5200 employees at IDOT who were then in place at the agency (Report page 33). The TM II position was apparently established as Rutan-exempt in the 1990s (Report page 42 footnote)

The OEIG mistakenly states that "IDOT has created 'technical positions', some of which are classified as Technical Managers that are fully exempt from the Personnel Code" (page 11). It was the General Assembly who made this distinction in 20 ILCS 4/5/4(c)(12).

My arrival at IDOT and my understanding of IDOT reputation with respect to enforcement of Rutan in hiring.

I was not aware of any issue or disagreement as to how TMs were hired or what duties they were performing. In fact, IDOT had a close working relationship with CMS and the OEIG, co-sponsoring Ethics in the Workplace seminars most years and working together.

During my two plus years as IDOT Secretary (2009 -2011) no entity ever raised an issue with respect to any of the Technical Manager Rutan-exempt positions at IDOT. Neither the Inspector General, the Illinois Auditor General, the federal auditors, my internal IDOT auditor, the Governor's legal counsel assigned to IDOT, CMS who classified TM IIs, nor the unions who represented Rutan covered employees ever suggested that the classification of Technical Managers II should be anything other than Rutan-exempt. No one raised a question as to what duties the Rutan exempt staff were performing. As I told the Inspector General when the OEIG interviewed me in 2014 (3 years after I had left the position as Secretary) this issue as to TM IIs and duties assigned had not passed over my desk (Report page 168)[1].

Consequently, because of past approved practice and no thought that there were perceived problems, the TM II staff assistant jobs were filled consistent with the rules pertaining to Rutan-exempt positions. Had any of these entities expressed concerns, I would have taken immediate action.

What was on my plate as Secretary of IDOT from 2009-2011 and staffing needs

During my two plus years running the agency, I focused on passing a $31 billion capital bill and rolling out the largest road program in the history of the state with near record low IDOT staff. Federal stimulus monies were coming into the agency quickly. In order to receive this funding and complete many needed road projects, I was required to pay overtime and add new staff. Although the Federal Highway Administration was skeptical and felt that IDOT could not adequately staff the stimulus projects, IDOT rose to the task. Under my leadership, we negotiated and began the $1.3 billion high speed rail from Chicago to St. Louis. We brought highway fatalities down to their lowest level since 1926. We laid the groundwork for the Elgin O'Hare Western Bypass, the Illiana expressway and the South Suburban Airport. We broke ground on the Stan Musial Veterans Bridge in East St. Louis which is now complete. We significantly improved diversity at the agency and on construction projects. I ordered the agency to resume inspections of all bridges, including local bridges. My best recollection is that we closed at least one unsafe local bridge and repaired many, many more. In short, we were unaware of any Rutan classification questions. We were proudly working to help the Illinois economy and to provide Illinois jobs.

If handled properly and according to statute, this three year long, expensive investigation could have been averted and the OEIG could have satisfactorily resolved the issues discussed in the OEIG report.

The OEIG has spent the last three years and countless taxpayers' dollars investigating IDOT and the end result, as outlined in their 250 plus page report, is that they believe the agency should reclassify about 48 technical manager positions out of the 5200 staff at IDOT. (Page 135)

The Report indicates that in October 2012 before senior staff at IDOT were interviewed and first became aware of OEIG concerns about TM IIs, the senior staff and the Ethics Officer at IDOT attempted to reach out to the OEIG to get direction from the OEIG as they had been able to do in the past. The meeting was proposed to explain what IDOT policies were and to ask for

guidance. This request for a meeting happened before a full blown OEIG investigation was underway. The IDOT staff asked the OEIG to meet to:

> "Discuss IDOT's personnel policies- primarily pertaining to Rutan- exempt hiring and the basis for our policies." (Report page 7)

This request was made in light of IDOT's belief that they were entitled to meet with the OEIG, since the statutory duties of the OEIG require the OEIG:

> "(6) to assist and coordinate the Ethics Officers for State agencies under the jurisdiction of the Executive Inspector General and to **work with those ethics officers.**" 5 ILCS 430/20-20(6)

Further, as noted on the OEIG website, the OEIG has the responsibility to:

> "educate public employees and appointees regarding issues of ethics and integrity and specifically about laws and policies that govern their conduct." (OEIG website)

The IDOT Ethics Officer, Chief Counsel and Office of Chief Compliance had enjoyed a good relationship with the OEIG in the past. This October 2012 attempt to try to work with and gain an understanding of what the OEIG thought IDOT might be doing wrong was a sensible and sincere request. IDOT suggested who they would send to meet, including the Ethics Officer, but left it to the OEIG to pick the attendees. (page 7)

Not only did the OEIG summarily turn down IDOT's meeting request, they gave no hint as to their concerns or interpretations of the Rutan caselaw. Instead, the OEIG chose to proceed with another two years of full blown investigation, without explanation.

Even now the OEIG has the audacity to imply in their report that IDOT's Ethics Officer and staff attempts to contact and sit down with the OEIG in October of 2012, which Illinois law clearly allows, was somehow inappropriate and sinister (Report pages 7 and 8).

Instead of "assisting" IDOT senior staff to understand that a perceived problem existed, the OEIG reviewed:

> "thousands of documents, conducting over 100 interviews...throughout the State...creating 65 requests for documents and more than 300 investigative reports." (Report page 8)

only to find that there were no violations of the Rutan case but instead, violations of a 2009 Administrative Order.

Had the OEIG agreed to sit down and discuss their concerns and legal interpretations with IDOT (or IDOT's Ethics Officer as required by statute), IDOT management could have addressed the issues (that IDOT did not realize existed) and together IDOT and the OEIG could have fixed the problems and saved the taxpayers thousands of dollars. Instead, the OEIG, by their admission, rather than assist IDOT and educating it, launched an investigation that lasted three years and cost the taxpayer thousands of dollars.

In the interest of the taxpayers, this kind of OEIG over-reaching is counterproductive, destroys agencies and people for no reason.

The most important lesson of the OEIG investigation of IDOT is its lack of significance

1. **The OEIG has found that there was no Rutan violation;**
   The OEIG has now found in this report that no Rutan violations have occurred (iv) but that IDOT has violated an Administrative Order:

   > "IDOT's actions may not have violated Rutan's proscription of political hiring.., But they did violate the Administrative Orders' requirement that Rutan-covered hiring be based on merit".

In looking at the OEIG final report, I noticed that the opinion of IDOT's lawyer and legal staff (which was not sought until December of 2012) was criticized. The OEIG apparently does not agree with the opinion of IDOT legal staff. However it is obvious that the IDOT legal opinion was based on interpretation of actual cases decided by the courts that have interpreted Rutan (page 200, line 164). The OEIG said that these cases don't apply to this investigation because the cases deal with Rutan firing rather than Rutan hiring, even though the hiring cases IDOT counsel uses to support their legal position dealt with job descriptions such as those in question here (page 201). So the OEIG criticized IDOT's legal opinion but admits:

> "we (OEIG) are aware of no case holding that the job description controls the context of patronage hiring. We are aware of no case that even addresses the issue..." (page 201)

I am not a lawyer, but it seems reasonable to me that a legal opinion of IDOT's lawyers which is based on actual cases is preferable to the contrary legal opinion of the OEIG which the OEIG admits is based on no cases. The OEIG is not a court, but seems to be attempting to act as one.

2. **The OEIG has found violations of the Governor's Administrative Order #2 (December 2009) in certain hiring scenarios where the hire occurred before the order was issued:**

It is interesting to note that after a 3 year investigation the OEIG says IDOT violated Administrative Order #2 with respect to the hiring of some employees. The OEIG is simply in error in its allegation that some IDOT employees violated an Administrative Order of the Governor. The hiring of several employees couldn't have violated Administrative Order #2 because their hires took place before Administrative Order #2 even existed. Administrative Order #2 was issued in December 2009 and yet the OEIG claims IDOT violated the Order by the hiring of these employees in circumvention of the Executive Order #2.

A look at hiring dates reveals employee:

#74 (hired 2007) (page 90) and founded against IDOT at page 238 as circumventing 2009 Administrative Order #2.

#1 (hired 2008) (page 148) and founded against IDOT at page 237 as circumventing 2009 Administrative Order.

#53 (hired 2008) (page 51) and founded against IDOT at page 237 as circumventing 2009 Administrative Order.

The OEIG unfairly and erroneously found a violation with regard to IDOT and these employees but it seems impossible to be accused of hiring a staff member in violation of an order that did not yet exist. This is simply shoddy work by the Inspector General.

The OEIG suggests, for example, as to Employee #1's hire in 2008 that the hire circumvented Administrative Order #2 which was not issued until a year later. (Report page 237) They criticize hiring of unqualified individuals but make no mention of the fact that employee #1 had a degree in communications and that there was no political implication in the hire.

Administrative Order #2 did not exist in 2008 and it is not a law but is still used as a basis for a "founded" complaint against IDOT by the OEIG.

The OEIG seems to think it can serve as a court. In reality, neither the OEIG nor the Executive Ethics Commission is a court of law and it is disingenuous for either body to imply that it can provide a legal interpretation of Rutan. Rutan is limited to cases involving political hiring, firing, promotion and termination. Many of these TM IIs were not political hires and the OEIG found no Rutan violations. Thus the OEIG was relegated to enforcing an Administrative Order, which wasn't in place in many instances at the time the hires in question were made.

Conclusion

In conclusion, when IDOT reached out to the OEIG in 2012 to try to get direction, the OEIG was statutorily mandated and honor bound to work with the IDOT Ethics Officer to try to help IDOT management understand and comply with perceived job classification and hiring issues. They had an obligation to work with the ethics officer and educate IDOT specifically about their interpretation of the laws and policies that govern IDOT's hiring policies. Instead, the OEIG and now the Executive Ethics Commission if they choose to publish this report, are apparently conducting a game of "gotcha" and spending taxpayer dollars when all could have been resolved when IDOT attempted to reach out to the OEIG.

[1] Lastly, I would point out that in my interview a few months ago the Inspector General put a 2014 Personnel Manual in front of me and asked if I was familiar with it. In fact, it was pointed out to the Inspector General that the document was dated well after I left the agency. In spite of this obvious error, the Inspector General continued asking questions about the manual as if he had not made a mistake. He continued the questioning as if I should be familiar with this document and raises my lack of familiarity in his report. This kind of injustice could only occur in a flawed process where the prosecutor is also the judge and jury. Obviously the outcome of the investigation had already been decided before I was interviewed.

RECEIVED
AUG 18 2014
EXECUTIVE ETHICS COMMISSION

IN THE EXECUTIVE ETHICS COMMISSION
OF THE STATE OF ILLINOIS

IN RE: MATTHEW HUGHES #11-01567

RESPONDENT'S SUGGESTIONS FOR REDACTION / PUBLIC RESPONSE

Please check the appropriate line and sign and date below. If no line is checked the Commission will not make your response public if the redacted report is made public.

_X_ Below is my public response. Please make this response public if the summary report is also made public; or

_____ Below are my suggestions for redaction. I do not wish for these suggestions to be made public.

Respondent's Signature

8/18/14
Date

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Illinois Executive Ethics Commission
401 S. Spring Street, Room 513 Wm. Stratton Building
Springfield, IL 62706

See attached response document ...

I never had the authority to approve or permanently hire Rutan-Exempt employees at the Illinois Department of Transportation. In the 10 years I spent with the Department, at no point in time did I possess the required level of authority to approve the hire of a Rutan-exempt candidate. Any implication that I did is factually inaccurate. The workflow associated with the hiring process in place at the time of this investigation, supported by the ePar system, reflects where that authority lies. An investigation such as this, in which the Office of the Executive Inspector General spent 2 plus years requesting documents, reviewing emails, conducting-in person interviews and reviewing policy and procedure, could not have credibly drawn any other conclusion.

It is evident that I cooperated fully during the course of this investigation. It is also evident, as indicated in this report, that I had sought the advice of the Agency's then Chief Counsel to seek legal opinion on the subject of assigning employees who were exempt from Rutan, duties typically deemed to be of a nature covered by Rutan. I was advised by Counsel at that time that it was allowable to do so. Therefore, out of necessity to maintain some semblance of continuity of operations, the practice became common. Headcounts were historically low and workloads associated with both federal stimulus dollars (American Recovery and Reinvestment Act of 2009) and the State's largest ever Capital Infrastructure Bill (Illinois Jobs Now!) were critically high. On the advice of IDOT's Chief Counsel at the time, the legal opinion of which is included in this report, this practice was allowed. This report discounts such legal opinion, but it was an opinion from the Chief Counsel, and I relied on it in good faith.

As Director of Finance and Administration, at my direction, the Department issued a Request for Proposals (RFP) for a management consultant to conduct a Business Process Review. One of the required deliverables was to be an extensive report detailing the hiring and recruitment processes at the Department and specifically in my Office. The consultant conducted a thorough review of all hiring activities as well as some of information technology functions at the Department. The purpose of this initial engagement was to identify ways to improve upon those activities and to become more effective. Recommendations were made to me as a result of the initial review and a subsequent RFP was issued for the purpose of implementing those recommendations. The consultant is currently in the process of implementing improvements to date. In summary, consistent with the transcripts of my two extensive interviews with the Office of the Executive Inspector General, I recognized the need for improvements and took deliberate and documentable steps to make changes to hiring practices I inherited after being promoted twice over the course of 5 years.

8/18/14

IN THE EXECUTIVE ETHICS COMMISSION
OF THE STATE OF ILLINOIS

IN RE: MICHAEL WOODS, JR #11-01567

RESPONDENT'S SUGGESTIONS FOR REDACTION / PUBLIC RESPONSE

Please check the appropriate line and sign and date below. If no line is checked the Commission will not make your response public if the redacted report is made public.

✓ Below is my public response. Please make this response public if the summary report is also made public; or

_____ Below are my suggestions for redaction. I do not wish for these suggestions to be made public.

[signature] 8-20-14

Respondent's Signature Date

Instructions: Please write or type suggestions for redaction or a public response on the lines below. If you prefer, you may attach separate documents to this form. Return this form and any attachments to:

Illinois Executive Ethics Commission
401 S. Spring Street, Room 513 Wm. Stratton Building
Springfield, IL 62706

I would like to express my appreciation to the Executive Ethics Commission for offering me the opportunity to respond to the OEIG's investigatory findings. I approached each OEIG interview mindful of my duty to answer their questions honestly and correctly. After reviewing the OEIG report, I feel obligated to provide a more realistic and complete description of my role as Bureau Chief of Personnel Management as opposed to the one depicted by the OEIG. I would also like to offer my analysis on the OEIG investigation along with my recommendations for meaningful solutions to fix a broken system that has been in place years before I became the Bureau Chief.

The OEIG report frequently states that I "approved the hiring of multiple Rutan-exempt Staff Assistants." In fact, my role in the hiring process of Rutan-exempt employees was much more limited than the one described throughout this report. The OEIG's description of my role could give the reader of this report the impression that I had a great deal of influence or even unilateral decision making power over the hiring process for Rutan-exempt positions. That is not true.

My role as IDOT's Bureau Chief of Personnel Management was more concentrated in the processing of paperwork than deciding who to hire for Rutan-exempt positions. Under no circumstances did I have the authority to fill a Rutan-exempt vacancy. Prior to being hired, every Rutan-exempt candidate required approval from my superiors at the Illinois Department of Transportation and ultimately members of the Governor's Office. The vast majority of the candidates for Rutan-exempt positions came pre-approved from my superiors (i.e. Director of Finance & Administration, Secretary of IDOT and/or Deputy Chiefs of Staff Mark Harris or Sean O'Shea).

Early in my tenure as Bureau Chief of Personnel Management and before the OEIG investigation was initiated, IDOT's Director of Finance & Administration and I, sought the advice of IDOT's Chief Legal Counsel, Ellen Shanzle-Haskins. Ms. Shanzle-Haskins gave us her legal opinion that it was not inappropriate to hire Rutan-exempt Staff Assistants even though some of them would be performing Rutan-covered duties. We relied upon her legal advice since neither the Director of Finance & Administration nor I are lawyers and the IDOT Chief Counsel has the responsibility of giving us legal advice about personnel related matters.

The OEIG report alleges that I "failed to implement the 2005 Office of Internal Audit recommendations.....thus engaging in nonfeasance and mismanagement." My first year at IDOT was in 2009, four years after the 2005 audit. During my tenure at IDOT, I was never made aware of that 2005 audit. Therefore, I was not in a position to implement those audit recommendations and I did not "engage in nonfeasance and mismanagement" for failing to do so.

Another conclusion in the OEIG report is that I allegedly "allowed the hire of multiple Staff Assistants without knowing if they were indeed qualified to perform the duties they actually did, and failed to maintain a well-motivated staff, thus engaging in nonfeasance and mismanagement....." I disagree that I engaged in nonfeasance and mismanagement especially under the circumstances involved. As I stated earlier, I was the lowest level employee in the approval process to fill a Rutan-exempt vacancy including the filling of Staff Assistant positions. IDOT's Director of Finance & Administration, the Secretary of

IDOT, the Governor's Office of Management & Budget, the Governor's Deputy Chief of Staff and the Governor's Chief of Staff were all required to approve personnel action requests pertaining to the hiring of Rutan-exempt positions.

It should be noted that the Staff Assistant job descriptions do not possess required job qualifications. To my understanding, this has been the case for Staff Assistant positions and the rest of the Technical Manager positions for the last 30 years. To my knowledge there has never been an examination or grading process in place for hiring Staff Assistants or other Technical Managers. Consequently, it can be difficult to more accurately assess an applicant's qualifications to fill those positions.

The OEIG's conclusion that I allegedly "failed to maintain a well-motivated staff" is inaccurate and it is not something that is objectively verifiable by the OEIG or anyone else. Therefore, in my opinion, it is an inappropriate conclusion for the OEIG to attempt to make in its report. Such a subjective allegation without empirical data to support it gives the impression that the OEIG is trying to pile on findings instead of engaging in objective analysis and providing meaningful solutions. I diligently focused on building a trusting and engaging work environment. I continuously sought feedback from my staff. I feel very confident in saying that I had as good, if not a better, relationship with the Bureau of Personnel Management staff than any of my predecessors over the last 12 years.

It also appears that the OEIG investigation is, at best, incomplete. Although, the OEIG investigated this matter for more than 2 years and interviewed numerous people, it does not appear that they interviewed former Governor's Office Deputy Chief of Staff Mark Harris. Mr. Harris was in place during the time at issue in the OEIG report. To my understanding the Chief of Staff relies heavily upon the input from his/her Deputy Chief of Staff. I have no reason to believe that the Governor's Chief of Staff was aware of the duties that were actually performed by Rutan-exempt IDOT Staff Assistants. However, Mr. Harris and current Deputy Chief of Staff Sean O'Shea were aware.

I have absolutely no reason to believe that the Governor, himself, was aware of the IDOT Staff Assistant hirings or the duties performed by those Staff Assistants. The number of IDOT Staff Assistants at issue is probably quite small compared to the total number of state employees under the purview of the Governor's Office.

As part of this response, I would also like to give some recommendations that might help address the situations set out in the OEIG report. Numerous state agencies and entities fall under the purview of the Governor's Office. To my knowledge, IDOT is the largest agency under the jurisdiction of the Governor's Office which has its own personnel system that is outside of the Illinois Personnel Code (also referred to as the CMS Personnel Code). Perhaps a remedy to be considered is to incorporate the IDOT Personnel Code under the CMS Personnel Code.

I agree with the OEIG's assessment that IDOT's Technical Personnel Code inherently possesses various flaws that make it ripe for reform. While CMS can certainly lack efficiency at times, in my opinion, its personnel code is more sophisticated than IDOT's

Technical Personnel Code. The CMS Personnel Code is equipped with safeguards that could help prevent situations similar to those identified in this report.

IDOT's technical classification system has been a problem that dates back at least 30 years ago. The legislation that exempted IDOT from the CMS Personnel Code provided few details on how the technical code would be enforced. Technical employees at IDOT do not have the same job protection that employees under the CMS Personnel Code have and instead work at the will of the Secretary of Transportation and Office of the Governor.

One proposal that has been made to address the situations set out in the OEIG report is to reclassify many of the Staff Assistants at issue in the OEIG report into Rutan-covered job descriptions without those employees going through the Rutan interview process. Personally, I disagree with this proposal. When I was the Bureau Chief of Personnel Management, I was adamant that a Rutan-exempt employee, such as a Staff Assistant, Legislative Liaison and others, not be able to transfer into a Rutan-covered position without first going through the Rutan hiring process. That process includes posting of the position and job description, accepting applications for the position, and interviewing and scoring the applicants for the position.

I am sure that there are other ways to effectively address the issues set out in the OEIG report. I am prepared to assist in helping to formulate the other ways to address those issues.

Once again, I appreciate the opportunity to respond to the OEIG's findings.

Sincerely,

Mike Woods Jr.