

# The Burger Court Opinion Writing Database

## *Branti v. Finkel*

445 U.S. 507 (1980)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

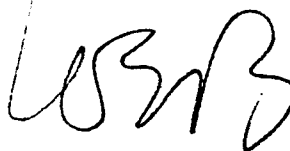
March 28, 1980

RE: 78-1654 - Branti v. Finkel

Dear John:

This confirms my join.

Regards,

A handwritten signature in dark ink, appearing to be "LFB", written in a cursive, stylized manner.

Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

February 7, 1980

RE: No. 78-1654 Branti v. Finkel, et al.

Dear John:

I agree.

Sincerely,

*Bill*

Mr. Justice Stevens

cc: The Conference

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Stevens  
Mr. Justice O'Connor  
Mr. Justice Souter  
Mr. Justice Ginsburg  
Mr. Justice Breyer

From: Mr. Justice Stewart

Circulated: 12 FEB 1980

1st DRAFT

Recirculated: \_\_\_\_\_

## SUPREME COURT OF THE UNITED STATES

No. 78-1654

Peter Branti, as Public Defender } On Writ of Certiorari to  
of Rockland County, Petitioner, } the United States Court  
v. } of Appeals for the Sec-  
Aaron Finkel and Alan Tabakman. } ond Circuit.

[February —, 1980]

MR. JUSTICE STEWART, dissenting.

I joined the judgment of the Court in *Elrod v. Burns*, 427 U. S. 347, because it is my view that, under the First and Fourteenth Amendments, "a nonpolicymaking, nonconfidential government employee can[not] be discharged . . . from a job that he is satisfactorily performing upon the sole ground of his political beliefs." *Id.*, at 375. That judgment in my opinion does not control the present case for the simple reason that the respondents here clearly are not "nonconfidential" employees.

The employees in the *Elrod* case were three process servers and a juvenile court bailiff and security guard. The respondents in the present case are lawyers, and the employment positions involved are those of assistants in the office of the Rockland County Public Defender. The analogy to a firm of lawyers in the private sector is a close one, and I can think of few occupational relationships more instinct with the necessity of mutual confidence and trust than that kind of professional association.

I believe that the petitioner, upon his appointment as Public Defender, was not constitutionally compelled to enter such a close professional and necessarily confidential association with the respondents if he did not wish to do so.\*

\*Contrary to repeated statements in the Court's opinion, the present case does not involve "private political beliefs," but public affiliation with a political party.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

March 27, 1980

Re: No. 78-1654, Branti v. Finkel

Dear Lewis,

I agree with Part I of your dissenting  
opinion and would appreciate being so noted.

Sincerely yours,

P.S.  
/

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

February 7, 1980

Re: No. 78-1654 - Branti v. Finkel

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Dear John,

You proposed opinion in this case gives me some pause. As I understand it, you propose and adopt a substantially different standard than was embraced by the plurality in Elrod; and my initial impression is that your standard would permit considerably more political dismissals than would the Elrod standard, although concededly the latter is not self defining. In any event, if your standard is that much different, it should perhaps be applied in the first instance by the lower courts. But I am not at rest, will be away for a few days and perhaps will just concur in the result.

Sincerely yours,



Mr. Justice Stevens

Copies to the Conference

cmc

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

February 26, 1980

Re: No. 78-1654 - Branti v. Finkel

---

Dear John,

Please join me.

Sincerely yours,



Mr. Justice Stevens

Copies to the Conference

cmc

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

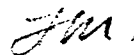
February 13, 1980

Re: No. 78-1654 - Branti v. Finkel

Dear John:

Please join me.

Sincerely,



T.M.

Mr. Justice Stevens

cc: The Conference



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

February 15, 1980.

Re: No. 78-1654 - Branti v. Finkel

Dear John:

Please join me.

Sincerely,



Mr. Justice Stevens

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

February 7, 1980

No. 78-1654 Branti v. Finkel

Dear John:

In accordance with my Conference vote, I plan to circulate a dissent in this case.

As I am now backed up a bit, it may be some time before I can get to this.

Sincerely,

*Lewis*

Mr. Justice Stevens

Copies to the Conference

LFP/lab

February 21, 1980

No. 78-1654 Branti v. Finkel

PERSONAL

Dear Chief:

In commencing work today on my dissent in the above case, I have started with your dissenting opinion - and my dissenting opinion which you joined - in Elrod.

I am quoting you in the first paragraph to the effect that the Court's view, is a significant (I think unprecedented) intrusion on the legislative branch.

Potter has written what in effect is a brief dissent along the lines of what he wrote in Elrod which Harry then joined. Harry now has joined John, as have WJB and TM. Byron is writing separately.

I write to summarize for you the situation as I now see it. I add only that with television eroding the role of the political parties, a Court opinion constitutionalizing civil service could very well finish them off. We will then find ourselves governed at all levels by people who look beautiful on television, and who have been able to hire a good "speech" coach. No other qualifications will be necessary.

Sincerely,

The Chief Justice

LFP/lab

3-19-80

1st DRAFT

**SUPREME COURT OF THE UNITED STATES** Justice Powell

No. 78-1654

Circulated: **MAR 20 1980**

Peter Branti, as Public Defender } On Writ of Certiorari to  
of Rockland County, Petitioner, } the United States Court  
v. } of Appeals for the Sec-  
Aaron Finkel and Alan Tabakman. } ond Circuit.

Recirculated: \_\_\_\_\_

[March —, 1980]

MR. JUSTICE POWELL, dissenting.

The Court today continues the evisceration of patronage practices begun in *Elrod v. Burns*, 427 U. S. 347 (1976). With scarcely a glance at almost 200 years of American political tradition, the Court holds that political affiliation is no longer a permissible criterion for the dismissal of certain public employees. Many public positions previously filled on the basis of membership in national political parties now must be staffed in accordance with a constitutionalized civil service standard that will affect the employment practices of federal, state, and local governments. Governmental hiring practices long thought to be a matter of legislative and executive discretion now will be subjected to judicial oversight. Today's decision is an exercise of judicial lawmaking that, as THE CHIEF JUSTICE wrote in his *Elrod* dissent, "represents a significant intrusion into the area of legislative and policy concerns." 427 U. S., at 375. I dissent.

I

The Court contends that its holding is compelled by the First Amendment. In reaching this conclusion, the Court largely ignores the substantial governmental interests served by patronage. Patronage is a long-accepted practice<sup>1</sup> that

<sup>1</sup> When Thomas Jefferson became the first Chief Executive to succeed a President of the opposing party, he made substantial use of appointment and removal powers. Andrew Jackson, the next President to follow an

1, 2-3, 9, 10, 11, 13

To: Mr. Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
~~Mr. Justice Marshall~~  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Powell

3-27-80

Circulated: \_\_\_\_\_

2nd DRAFT

F Dated: MAR 27 1980

## SUPREME COURT OF THE UNITED STATES

No. 78-1654

Peter Branti, as Public Defender of Rockland County, Petitioner,  
v.  
Aaron Finkel and Alan Tabakman. } On Writ of Certiorari to  
the United States Court  
of Appeals for the Sec-  
ond Circuit.

[March —, 1980]

MR. JUSTICE POWELL, with whom MR. JUSTICE REHNQUIST joins, dissenting.

The Court today continues the evisceration of patronage practices begun in *Elrod v. Burns*, 427 U. S. 347 (1976). With scarcely a glance at almost 200 years of American political tradition, the Court further limits the relevance of political affiliation to the selection and retention of public employees. Many public positions previously filled on the basis of membership in national political parties now must be staffed in accordance with a constitutionalized civil service standard that will affect the employment practices of federal, state, and local governments. Governmental hiring practices long thought to be a matter of legislative and executive discretion now will be subjected to judicial oversight. Today's decision is an exercise of judicial lawmaking that, as THE CHIEF JUSTICE wrote in his *Elrod* dissent, "represents a significant intrusion into the area of legislative and policy concerns." 427 U. S., at 375. I dissent.

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<sup>1</sup> When Thomas Jefferson became the first Chief Executive to succeed a President of the opposing party, he made substantial use of appointment

1,2,3,4,5

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
~~Mr. Justice Marshall~~  
Mr. Justice Blackman  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: \_\_\_\_\_

MAR 28 1

Re-circulated: \_\_\_\_\_

3-28-80

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 78-1654

Peter Branti, as Public Defender } On Writ of Certiorari to  
of Rockland County, Petitioner, } the United States Court  
v. } of Appeals for the Sec-  
Aaron Finkel and Alan Tabakman. } ond Circuit.

[March —, 1980]

MR. JUSTICE POWELL, with whom MR. JUSTICE REHNQUIST joins, and with whom MR. JUSTICE STEWART joins as to Part I, dissenting.

The Court today continues the evisceration of patronage practices begun in *Elrod v. Burns*, 427 U. S. 347 (1976). With scarcely a glance at almost 200 years of American political tradition, the Court further limits the relevance of political affiliation to the selection and retention of public employees. Many public positions previously filled on the basis of membership in national political parties now must be staffed in accordance with a constitutionalized civil service standard that will affect the employment practices of federal, state, and local governments. Governmental hiring practices long thought to be a matter of legislative and executive discretion now will be subjected to judicial oversight. Today's decision is an exercise of judicial lawmaking that, as THE CHIEF JUSTICE wrote in his *Elrod* dissent, "represents a significant intrusion into the area of legislative and policy concerns." 427 U. S., at 375. I dissent.

### I

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<sup>1</sup> When Thomas Jefferson became the first Chief Executive to succeed a President of the opposing party, he made substantial use of appointment

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

February 12, 1980

Re: No. 78-1654 - Branti v. Finkel

Dear John:

I was, as Harry would say, on the "downside" of this case, and will await seeing the writing of the other dissenters (or perhaps await being requested by them to write a dissent of my own, in which case I would not plan to do much more than refer to and summarize the reasons stated in Lewis' dissenting opinion in Elrod v. Burns).

Sincerely,



Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

March 21, 1980

Re: No. 78-1654 Branti v. Finkel

Dear Lewis:

Please join me in your dissent in this case.

Sincerely,



Mr. Justice Powell

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS



To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: FEB 6 '80

Recirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 78-1654

Peter Branti, as Public Defender of Rockland County, Petitioner,  
v.  
Aaron Finkel and Alan Tabakman. } On Writ of Certiorari to  
the United States Court  
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ond Circuit.

[February —, 1980]

MR. JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether the First and Fourteenth Amendments to the Constitution protect an assistant public defender who is satisfactorily performing his job from discharge solely because of his political beliefs.

Respondents, Aaron Finkel and Alan Tabakman, commenced this action in the United States District Court for the Southern District of New York in order to preserve their positions as assistant public defenders in Rockland County, New York.<sup>1</sup> On January 4, 1978, on the basis of a showing that the petitioner public defender was about to discharge them solely because they were Republicans, the District Court entered a temporary restraining order preserving the status quo. After hearing evidence for eight days, the District Court entered detailed findings of fact and permanently enjoined<sup>2</sup> petitioner from terminating or attempting to terminate respondents' employment "upon the sole grounds of their political beliefs."<sup>3</sup> 457 F. Supp. 1284, 1285 (SDNY

<sup>1</sup> Jurisdiction was based on 42 U. S. C. § 1983 and 28 U. S. C. § 1343 (3).

<sup>2</sup> Pursuant to Rule 65 (a) (2) of the Federal Rules of Civil Procedure, the plenary trial was consolidated with the hearing on the application for a preliminary injunction.

<sup>3</sup> The District Court explained that his ruling required petitioner to retain respondents in their prior positions, with full privileges as employees: "... compliance with the judgment to be entered herein will require

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

Personal

February 11, 1980

Re: 78-1654 - Branti v. Finkel

Dear Bill:

Many thanks for your suggestions. I have made some revisions that adopt most, but not all of them.

The major difference is that I do not believe we should substitute "essential" or "necessary" for the word "relevant" on page 11. Instead, I used the intermediate word "appropriate" to illustrate my concern. I do not believe it is essential for a Democratic president to have a Democratic attorney general, for example, but it surely is appropriate if that is his preference.

In all events, I decided to go ahead and make the changes and circulate them because, after reflecting about it, I concluded that they would not have a "chilling effect" on those who are awaiting the dissent.

Respectfully,



Mr. Justice Brennan

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: \_\_\_\_\_

Recirculated: FEB 11 '80

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 78-1654

Peter Branti, as Public Defender of Rockland County, Petitioner,  
v.  
Aaron Finkel and Alan Tabakman. } On Writ of Certiorari to  
the United States Court  
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[February —, 1980]

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To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: \_\_\_\_\_

Recirculated: FEB 13 '80

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 78-1654

Peter Branti, as Public Defender of Rockland County, Petitioner,  
v.  
Aaron Finkel and Alan Tabakman. } On Writ of Certiorari to  
the United States Court  
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[February —, 1980]

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

March 20, 1980

Re: 78-1654 - Branti v. Finkel

Dear Lewis:

In response to your dissent I propose to add the following sentence at the end of footnote 6 on page 5:

"Unlike MR. JUSTICE POWELL in dissent, post, petitioners do not ask us to reconsider the holding in Elrod."

Respectfully,



Mr. Justice Powell

Copies to the Conference

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: \_\_\_\_\_

Recirculated: MAR 24 '80

7.5  
4th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 78-1654

Peter Branti, as Public Defender of Rockland County, Petitioner, v. Aaron Finkel and Alan Tabakman.	On Writ of Certiorari to the United States Court of Appeals for the Sec- ond Circuit.
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[February —, 1980]

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To: the Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: \_\_\_\_\_

Recirculated: MAR 28 '80

P. 11

5th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 78-1654

Peter Branti, as Public Defender of Rockland County, Petitioner, v. Aaron Finkel and Alan Tabakman.	On Writ of Certiorari to the United States Court of Appeals for the Sec- ond Circuit.
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To: The Chief Justice  
Mr. Justice Brennan  
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Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: \_\_\_\_\_

Recirculated: MAR 28 '80

6th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 78-1654

Peter Branti, as Public Defender of Rockland County, Petitioner,  
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[February —, 1980]

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

June 12, 1980

MEMORANDUM TO THE CONFERENCE

Re: 79-1689 - United States v. Will (p. 1)

During the Conference I overlooked the fact that there was a motion to consolidate for briefing and oral argument on the List in the above case. I thought it would comport with the sense of our discussion to direct the Clerk to grant that motion and to allow a total of one and one-half hours for oral argument. If anyone feels this is improper, please send a note to the Clerk requesting that the case be relisted, being sure to send copies to all of us.

OK

Respectfully,

*JPS*

cc: Clerk of the Court

*Mr. Justice Stevens proposal  
seems to comport w/ your Conf.  
vote.*

*Greg*