



1981

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Cindy Pladzieqicz, *Increased Limitations on Patronage Practices: Branti v. Finkel*, 35 Sw L.J. 675 (1981)
<https://scholar.smu.edu/smulr/vol35/iss2/8>

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NOTE

INCREASED LIMITATIONS ON PATRONAGE PRACTICES: BRANTI V. FINKEL

SHORTLY after Peter Branti was appointed public defender of Rockland County, New York, by the newly elected, Democrat-controlled county legislature, he executed termination notices for six of the nine assistant public defenders then in office.¹ Among those discharged were Republicans Aaron Finkel and Alan Tabakman, who had been appointed when the Republicans previously had controlled the legislature. Finkel and Tabakman, described by Branti as competent attorneys, were discharged solely because they did not have the necessary Democratic sponsors.² Alleging violation of their rights under the first³ and four-

1. The county legislature appoints the Rockland County public defender for a term of six years. The public defender then appoints nine assistants who serve at his discretion. In substance, however, the county legislators make the hiring decisions pursuant to a sponsorship program.

2. Political sponsorship is the practice of hiring for patronage positions only those persons who have been recommended by political party leaders. Sponsorship generally is obtained by pledging allegiance to a political party, working for party candidates, or contributing money to the party. See *Elrod v. Burns*, 427 U.S. 347, 355 (1976). The sponsorship procedures followed in *Branti* are described at 445 U.S. at 510 n.5. The Reagan administration has used a similar procedure recently to fill approximately 1,500 lower level patronage positions. See *TIME*, Mar. 16, 1981, at 32. Under the Reagan program prospective appointees must obtain "political clearance" from a Reagan assistant prior to their appointment. *Id.*

3. The first amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. While not explicitly guaranteed by the first amendment, freedom of political belief and association has long been recognized as implicit in the right to free speech. See *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (political patronage restricts free speech); *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (per curiam) (limits on political campaign expenditures infringe free speech); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (compelling a professor to disclose the content of his lectures, his knowledge of a political party, and his knowledge of the party's adherents infringes free speech). See generally Emerson, *Freedom of Association and Freedom of Expression*, 74 *YALE L.J.* 1 (1964); Rice, *The Constitutional Right of Association*, 16 *HASTINGS L.J.* 491 (1965). In *Elrod* the Supreme Court stated: "Our concern with the impact of patronage on political belief and association does not occur in the abstract, for political belief and association constitute the core of those activities protected by the First Amendment." 427 U.S. at 356. The Court found that "to the extent [that patronage] compels or restrains belief and association, [it] is inimical to the process which undergirds our system of government and is 'at war with the deeper traditions of democracy embodied in the First Amendment.'" *Id.* at 357 (quoting *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 576 (7th Cir. 1972), cert. denied, 410 U.S. 928 (1973)).

teenth⁴ amendments, Finkel and Tabakman sued to enjoin Branti from discharging them from their positions as assistant public defenders.⁵ The district court granted the injunction, holding that because assistant public defenders are not confidential or policymaking personnel they may not be discharged solely on the basis of party affiliation.⁶ The Court of Appeals for the Second Circuit affirmed in an unpublished memorandum opinion.⁷ The United States Supreme Court granted certiorari. *Held, affirmed*: The discharge of government employees based solely on their political affiliation is prohibited unless such affiliation is an appropriate requirement for effective job performance. *Branti v. Finkel*, 445 U.S. 507 (1980).

I. THE FIRST AMENDMENT AND PATRONAGE DISMISSALS

Traditionally, the courts have treated government employment as a privilege revocable at the will of the hiring authority.⁸ The traditional treatment, based on a "right-privilege" distinction,⁹ resulted from Justice Holmes's opinion in *McAuliffe v. Mayor of New Bedford*.¹⁰ In *McAuliffe* the Massachusetts Supreme Judicial Court upheld the firing of a policeman who had been dismissed for expressing political opinions in violation of department regulations.¹¹ The court stated that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."¹² Reasoning that a government employee accepts employment on the terms that are offered to him,¹³ the court concluded that the city could impose any reasonable condition on the

4. The fourteenth amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The fourteenth amendment protects first amendment freedoms from state infringement. *See, e.g.*, *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973) (constitutional protection from state infringement extends to right to associate with political parties); *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (fourteenth amendment embraces freedom of speech). *See generally* Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970).

5. *Finkel v. Branti*, 457 F. Supp. 1284 (S.D.N.Y. 1978).

6. *Id.* at 1285. In so holding, the district court relied on *Elrod v. Burns*, 427 U.S. 347, 375 (1976), in which the Supreme Court delineated the pre-*Branti* standard for patronage dismissals. Under this criterion the dismissal of a government employee solely because of political belief was permissible only when the employee's work could be characterized as confidential or policymaking. *Id.* at 346-68, 375. For a discussion of the *Elrod* standard, see text accompanying notes 50-65 *infra*.

7. *Branti v. Finkel*, 598 F.2d 609 (2d Cir. 1979).

8. *See, e.g.*, *Bailey v. Richardson*, 182 F.2d 46, 51 (D.C. Cir. 1950) (civil service employment is a privilege not guaranteed by first amendment), *aff'd per curiam by an equally divided Court*, 341 U.S. 918 (1951); *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892) (policeman's job is privilege terminable at will).

9. Under the right-privilege distinction, the government could deny a right to a person only for specific, constitutionally permissible reasons. A privilege, however, could be denied for any reason. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 478 (1978). For further discussion of the right-privilege distinction, see Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

10. 155 Mass. 216, 29 N.E. 517 (1892).

11. 29 N.E. at 517-18.

12. *Id.* at 517.

13. *Id.* at 518.

employees holding offices within its control.¹⁴ Similarly, in *Bailey v. Richardson*¹⁵ the Court of Appeals for the District of Columbia Circuit applied the right-privilege distinction to uphold the firing of a civil service employee on the grounds of suspected involvement in the Communist Party.¹⁶ The *Bailey* court reiterated the *McAuliffe* right-privilege distinction¹⁷ and stated that although the first amendment protected freedom of speech and assembly, it did not guarantee government employment.¹⁸

Protection against termination of employment for unconstitutional reasons was extended to nonpatronage public employees¹⁹ for the first time in *Keyishian v. Board of Regents*.²⁰ In *Keyishian* the plaintiffs, faculty members at a state university, had been required by state statute and regulations²¹ to sign a certificate that they were not and never had been Communists. Each plaintiff had been informed that failure to sign such a certificate would result in dismissal.²² Finding the statutes unconstitutional,²³ the Supreme Court rejected the traditional right-privilege distinction.²⁴ Rather, the Court stated that "the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."²⁵

14. *Id.*

15. 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam by an equally divided Court*, 341 U.S. 918 (1951).

16. 182 F.2d at 65.

17. The court, however, did not cite *McAuliffe* in its discussion.

18. 182 F.2d at 59. The court stated:

[T]here is no basic right to Government employ, any more than there is to employment by any other particular employer. . . . [A]n office created by an act of Congress . . . depends for its continuance . . . upon the will of its creator, and the possession of [that office] may be burdened with any conditions not prohibited by the Constitution.

Id. at 60 (quoting *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867)). The court expressly held that Congress and the President may, in the interests of governmental efficiency, restrict or prohibit free exercise of the right to political speech and assembly. 182 F.2d at 59-60.

19. Nonpatronage employment refers to those government positions that are filled and vacated on a basis other than political affiliation. Patronage employment may be defined as the practice of hiring or dismissing government employees for partisan political reasons. See *Elrod v. Burns*, 472 U.S. 347, 353-54 (1976). For background on the history of patronage practices, see C. FISH, *THE CIVIL SERVICE AND THE PATRONAGE* (1904); M. TOLCHIN & S. TOLCHIN, *TO THE VICTOR* . . . (1972).

20. 385 U.S. 589 (1967).

21. Texts of the relevant statutes and regulations appear in the appendix to the Supreme Court's opinion. *Id.* at 610-20.

22. The plaintiffs refused to sign and were dismissed or threatened with dismissal. *Id.* at 592.

23. The Court held the statutes unconstitutional because "they proscribe mere knowing membership [in the Communist Party] without any showing of specific intent to further the unlawful aims of the Communist Party of the United States or of the State of New York." *Id.* at 609-10.

24. *Id.* at 605-06. The Supreme Court reiterated its abandonment of the right-privilege distinction in *Sugarman v. Dougall*, 413 U.S. 634 (1973): "[T]his Court now has rejected the concept that constitutional rights turn upon whether a government benefit is characterized as a 'right' or as a 'privilege.'" *Id.* at 644 (quoting *Graham v. Richardson*, 403 U.S. 365, 374 (1971)).

25. 385 U.S. at 605-06 (quoting *Keyishian v. Board of Regents*, 345 F.2d 236, 239 (2d Cir. 1965)).

The Supreme Court again addressed a public employee's claim of unconstitutional dismissal in *Perry v. Sindermann*.²⁶ In *Perry* a state college professor claimed that his teaching contract had not been renewed solely because he had criticized publicly the college's board of governors.²⁷ The Court held that dismissal on such a basis would be a violation of the plaintiff's constitutional right to freedom of speech.²⁸ In so holding, the Court reiterated its position in *Keyishian* that the government may not deny a person a benefit for reasons that would infringe his constitutionally protected interests.²⁹

Despite the Supreme Court's restrictions on government employee dismissal in *Perry* and *Keyishian*, subsequent state and federal decisions refused to extend similar protection to patronage employees.³⁰ The courts relied, instead, on the traditional right-privilege approach³¹ to deny relief to public employees who had been dismissed for patronage reasons. In *Alomar v. Dwyer*³² the Second Circuit considered the permissibility of patronage dismissals. Alomar, a Democrat, had been employed by the city of Rochester for three years as a bilingual stenographer and as a neighborhood services representative. After gaining control of the city government in 1970, the Republicans asked Alomar to change her party affiliation to Republican. When Alomar refused to do so, the city manager discharged her. Relying on *Bailey v. Richardson*,³³ the court found Alomar's job to be a privilege terminable at will³⁴ and concluded that the Constitution does not prohibit the dismissal of government employees on the basis of their political beliefs, activities, or affiliations.³⁵

Similarly, in *American Federation of State, County & Municipal Employees v. Shapp*³⁶ the Pennsylvania Supreme Court considered the patronage

26. 408 U.S. 593 (1972).

27. *Id.* at 595. The plaintiff also alleged that the manner in which his employment had been terminated violated his procedural due process right. *Id.*

28. *Id.* at 597-98. The Court did not reach the merits of the plaintiff's claims, as the case had been decided by the district court on a motion for summary judgment. *Id.* at 595-96. The Supreme Court affirmed the judgment of the court of appeals, which had remanded the case to the district court. *Id.* at 603.

29. *Id.* at 597-98.

30. See, e.g., *Alomar v. Dwyer*, 447 F.2d 482 (2d Cir. 1971) (bilingual stenographer and neighborhood services representative), *cert. denied*, 404 U.S. 1020 (1972); *American Fed'n of State, County & Mun. Employees v. Shapp*, 443 Pa. 527, 280 A.2d 375 (1971) (various state transportation department employees). For a definition of patronage employment, see note 19 *supra*.

31. See text accompanying notes 8-18 *supra*.

32. 447 F.2d 482 (2d Cir. 1971), *cert. denied*, 404 U.S. 1020 (1972). For commentary on *Alomar*, see Note, *A Constitutional Analysis of the Spoils System—The Judiciary Visits Patronage Place*, 57 IOWA L. REV. 1320, 1330-33 (1972).

33. 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam by an equally divided Court*, 341 U.S. 918 (1951); see text accompanying notes 15-18 *supra*.

34. 447 F.2d at 483.

35. *Id.* (quoting *Bailey v. Richardson*, 182 F.2d 46, 59 (D.C. Cir. 1950), *aff'd per curiam by an equally divided Court*, 341 U.S. 918 (1951)). The court stated that "the sole protection for government employees who have been dismissed for political reasons must be found in civil service statutes or regulations." 447 F.2d at 483. The court noted that Alomar did not have protected status under New York civil service law. *Id.*

36. 443 Pa. 527, 280 A.2d 375 (1971). For commentary on *Shapp*, see Note, *Non-Civil*

dismissal of some 2,000 Republican state employees by the newly elected Democratic governor. As in *Alomar*, the Pennsylvania Supreme Court adopted the traditional right-privilege approach and held that patronage employees could be discharged on the basis of their political affiliation.³⁷ The court, however, also relied on a waiver theory in upholding the patronage dismissals, stating that "[t]hose who, figuratively speaking, live by the political sword must be prepared to die by the political sword."³⁸ Under this theory, the court found that because the employees had obtained their jobs by patronage practices, they should not be heard to complain when fired for patronage reasons.³⁹

In 1972 the Seventh Circuit first extended constitutional protection to patronage employees in *Illinois State Employees Union v. Lewis*.⁴⁰ The Democratic plaintiffs in *Lewis* had been employed by the Illinois secretary of state in positions as building employees, clerical workers, and license examiners.⁴¹ When a Republican was appointed to fill the unexpired term of the then Democratic secretary of state, the Republican dismissed the plaintiffs.⁴² Although the court declined to rely on the *Shapp* waiver theory⁴³ and rejected the right-privilege distinction,⁴⁴ it stated that compelling state interests may justify the curtailment of a nonpolicymaking public servant's first amendment rights.⁴⁵ The court concluded, however, that the state had not met its burden of establishing that its interests⁴⁶ justified such an infringement of the employees' constitutional liberties.⁴⁷ Although the court viewed the patronage system unfavorably as a whole,⁴⁸ the opinion

Service Employees Are Employees at Will and May Be Summarily Discharged on Account of Political Association, 17 VILL. L. REV. 750 (1972).

37. *Id.* at 378.

38. *Id.*

39. *Id.* The Fourth Circuit most recently applied the *Shapp* waiver theory in *Nunnery v. Barber*, 503 F.2d 1349, 1358-59 (4th Cir. 1974), *cert. denied*, 420 U.S. 1005 (1975). The plaintiff in *Nunnery* had been discharged from her job as manager of a state-owned liquor store because she did not actively support the Republican Party. The court held that because the plaintiff had accepted her job aware of its patronage classification, she had waived her right to complain of being dismissed for political reasons. 503 F.2d at 1359-60. See generally Comment, *Patronage Dismissals: Constitutional Limits and Political Justifications*, 41 U. CHI. L. REV. 297, 312-17 (1974).

40. 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973). The majority opinion in *Lewis* was written by then Judge John Paul Stevens. For commentary on *Lewis*, see Note, *Discharge of Non-policy-making Public Employees on Ground of Political Affiliation Infringes Employees' Freedom of Association*, 26 VAND. L. REV. 1090 (1973).

41. 473 F.2d at 563.

42. *Id.*

43. *Id.* at 574. Though not rejecting the *Shapp* waiver theory, the court concluded that there was insufficient evidence in the record to support a factual basis for such a defense. *Id.* at 573-74.

44. *Id.* at 568.

45. *Id.* at 572. The court stated that government interests could not justify surrender, as opposed to mere curtailment, of an employee's first amendment rights. *Id.*

46. The state interests advanced were effective supervision of employees and the need for broad employer discretion. *Id.* at 574.

47. *Id.* at 576.

48. Judge Stevens found the long-standing tradition of patronage practices in American politics insufficient to justify its infringement of first amendment freedoms. *Id.* at 568. Stevens described the patronage system as a mechanism that inhibits the free political choice of

left unquestioned the right of the hiring authority to dismiss a policymaking employee on the basis of political affiliation.⁴⁹

The United States Supreme Court first considered the propriety of patronage dismissals in *Elrod v. Burns*.⁵⁰ The Republican plaintiffs in *Elrod* had been employed by the sheriff's office in Cook County, Illinois, in various nonpolicymaking capacities.⁵¹ When the Democratic defendant became sheriff, he discharged the plaintiffs solely because they had not obtained Democratic sponsorship as required by local practice.⁵² The defendant in *Elrod* advanced three governmental interests to support the patronage dismissals: (1) increased governmental effectiveness and efficiency; (2) the need for political loyalty among employees to ensure effective implementation of policy; and (3) the preservation of the democratic process through patronage-generated party support.⁵³

In a plurality decision⁵⁴ three Justices decided that patronage dismissals fall within the prohibitions of *Keyishian* and *Perry* because threatened dismissal for failure to support the favored party inhibits and penalizes the exercise of protected belief and association.⁵⁵ The plurality noted, however, that the prohibitions were not absolute and that infringement of first amendment freedoms resulting from patronage firings was permissible when some "vital government end . . . outweigh[ed] the loss of constitutionally protected rights."⁵⁶ Citing other less restrictive alternatives avail-

millions of public servants. "While the patronage system is defended in the name of democratic tradition," he wrote, "its paternalistic impact on the political process is actually at war with the deeper traditions of democracy embodied in the First Amendment." *Id.* at 576.

49. *Id.* at 574.

50. 427 U.S. 347 (1976). See Comment, *Patronage Dismissals and Compelling State Interests: Can the Policymaking/Nonpolicymaking Distinction Withstand Strict Scrutiny?*, 1978 S. ILL. L. REV. 278; Note, *Freedom of Speech Association—Government Employees—Elrod v. Burns*, 18 B.C. INDUS. & COM. L. REV. 782 (1977); Note, *The Unconstitutionality of Patronage Dismissals of Public Employees: Elrod v. Burns*, 9 CONN. L. REV. 678 (1977); Note, *Will the Victor be Denied the Spoils? Constitutional Challenges to Patronage Dismissals*, 4 HASTINGS CONST. L.Q. 165 (1977); Note, *Elrod v. Burns: Patronage in Public Employment*, 13 WAKE FOREST L. REV. 175 (1977); Note, *Elrod v. Burns; Chipping at the Iceberg of Political Patronage*, 34 WASH. & LEE L. REV. 225 (1977).

51. 427 U.S. at 350-51.

52. *Id.* at 351.

53. *Id.* at 364-68. As suggested by Justice Powell's dissent, other government interests may be offered to support patronage dismissals. *Id.* at 382-87; see note 65 *infra*. It is likely, however, that such interests could be furthered by means less restrictive than patronage dismissals. See note 57 *infra* and accompanying text.

54. Justice Brennan, writing for the plurality, was joined by Justices White and Marshall. Justice Stewart filed an opinion concurring in the result in which Justice Blackmun joined. Justice Powell was joined in dissent by Chief Justice Burger and Justice Rehnquist. The Chief Justice also filed a separate dissenting opinion.

55. 427 U.S. at 359. The defendant also had argued that the employees had waived any objections to patronage dismissal by knowingly accepting patronage jobs. In a footnote discussion the Court stated that by holding that patronage dismissals infringe first amendment rights, it necessarily rejected the waiver theory. *Id.* at 360 n.13.

56. *Id.* at 363. The Court thus applied a strict judicial scrutiny standard of review. Under this standard, the government may not abridge first amendment rights unless it shows a compelling necessity. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 25 (1976); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 703 (1978).

able to the government,⁵⁷ the Court found each of the three interests advanced by the defendants insufficient to justify patronage dismissals of nonpolicymaking employees.⁵⁸

In the concurring opinion Justice Stewart refused to join the plurality's "wide-ranging" opinion,⁵⁹ stating that the facts did not require consideration of the permissibility of patronage hiring practices.⁶⁰ Justice Stewart did agree, however, that a "nonpolicymaking, nonconfidential . . . employee can[not] be discharged . . . upon the sole ground of his political beliefs."⁶¹

Justice Powell disagreed with both the plurality and concurring opinions.⁶² After first noting the long-standing contributions of patronage practice to party strength and democratic government,⁶³ Justice Powell asserted that the plaintiffs had waived their first amendment freedoms by accepting their positions with knowledge of customary political discharge practices.⁶⁴ Justice Powell found that, in any event, the governmental interests involved outweighed the infringement on first amendment freedoms resulting from patronage dismissals.⁶⁵

57. 427 U.S. at 366-67. The plurality noted that discharges for cause could promote government effectiveness, and confining dismissals to policymaking positions could satisfy the government's need to ensure effective implementation of policy. *Id.* The Court found unpersuasive the defendant's argument that patronage-generated party support promotes the democratic process. *Id.* at 368-69. It noted, however, that the survival of the two-party system prior to the institution of patronage practices, and after recent merit system reductions in patronage power, evidences the existence of less restrictive alternatives to achieving the contributions that patronage may make to the democratic process. *Id.* The theory that in public employment cases government interests must be promoted by the least restrictive alternative had been previously enunciated in *Shelton v. Tucker*, 364 U.S. 479 (1960). In *Shelton* the Court considered the constitutionality of a state statute that required teachers to list organizational connections as a condition to continued employment. The Court found the statute unconstitutional, stating that "[t]he breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Id.* at 488.

58. 427 U.S. at 372. See also text accompanying note 45 *supra*.

59. 427 U.S. at 374. Justice Stewart was joined by Justice Blackmun.

60. *Id.*

61. *Id.* at 375.

62. *Id.* at 376-89.

63. *Id.* at 377-80. Tracing the roots of patronage to the administration of George Washington, Justice Powell noted that "[p]atronage practices broadened the base of political participation by providing incentives to take part in the process, thereby increasing the volume of political discourse in society." *Id.* at 379. Justice Powell argued that patronage "strengthened parties, and hence encouraged the development of institutional responsibility to the electorate on a permanent basis." *Id.*; cf. text accompanying note 48 *supra* (patronage inhibits free political choice). See generally C. FISH, *supra* note 19; D. ROSENBLUM, *FEDERAL SERVICE AND THE CONSTITUTION* (1971); Sorauf, *Patronage and Party*, 3 *MIDWEST J. POL. SCI.* 115, 115-16 (1959), all relied upon by the dissent in *Elrod*.

64. 427 U.S. at 380-81. In asserting this waiver theory, Justice Powell relied on *American Fed'n of State, County & Mun. Employees v. Shapp*, 443 Pa. 527, 280 A.2d 375 (1971). See notes 36-39 *supra* and accompanying text.

65. 427 U.S. at 382-87. The governmental interests in *Elrod* included encouraging political activity and strengthening political parties. *Id.* at 382-83; see note 63 *supra*. Justice Powell's dissent found that patronage served these interests at the local level by encouraging donations of time and money, and by enabling local parties to maintain a high profile between elections. 472 U.S. at 383-85.

II. *BRANTI V. FINKEL*

In *Branti v. Finkel* the Supreme Court applied a new standard for considering the constitutionality of patronage dismissals to strike down the dismissal of two assistant public defenders. Justice Stevens, writing for the majority,⁶⁶ initially reaffirmed the Court's position in *Elrod*⁶⁷ that the knowing acceptance of patronage employment is not a waiver of first amendment rights sufficient to justify dismissal based on political belief.⁶⁸ Having disposed of the preliminary waiver question,⁶⁹ the Court then turned to the defendant's two principal arguments for reversal. First, the majority rejected the argument that the *Elrod* holding is limited to those situations when employees are coerced into pledging allegiance to a political party that they would not otherwise support.⁷⁰ Rather, the majority found that to sustain a constitutional challenge, a discharged employee has to prove only that he was discharged because of party affiliation or lack of party sponsorship.⁷¹

Secondly, the majority addressed the defendant's argument that the position of assistant public defender is legitimately subject to political dismissal practices under the *Elrod* policymaking and confidentiality standard. Although the majority recognized that first amendment rights may have to

66. Justice Stevens was joined by Chief Justice Burger and Justices Brennan, White, Marshall, and Blackmun.

67. For a discussion of the Court's treatment of the waiver argument in *Elrod*, see note 55 *supra*.

68. 445 U.S. at 512 n.6. The defendant had argued that the plaintiffs knew they were subject to dismissal for patronage reasons when they accepted their positions and thus, had no reasonable expectation of continued employment. The Court found, however, that "the lack of a reasonable expectation of continued employment is not sufficient to justify a dismissal based solely on an employee's private political beliefs." *Id.* The defendant also argued that the plaintiffs, Finkel and Tabakman, were not dismissed, rather they simply were not reappointed after their terms of office had expired. The Court, however, refused to distinguish between a failure to reappoint and a dismissal for the purpose of applying a less stringent standard to justify the discontinuation of government employment solely on the grounds of political belief. *Id.*

69. The defendant also argued that the evidence showed that regardless of political considerations, he would have dismissed Finkel and Tabakman on the grounds of incompetence. *Id.* See *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), in which the Court held that even though a teacher's activities protected by the first amendment were a substantial factor in the decision to not renew his contract, first amendment rights are not infringed if the board of education is able to prove that it would have made the same decision in any event. *Id.* at 287. The *Branti* Court found this contention to be foreclosed by the district court's finding that the plaintiffs were discharged solely on the basis of party affiliation. 445 U.S. at 510. The Court expressed no opinion as to whether the *Mt. Healthy* holding would extend to patronage dismissals. *Id.* at 512 n.6. The barriers to patronage challenges posed by an application of the *Mt. Healthy* defense clearly could limit the impact of *Elrod* and *Branti*.

70. *Id.* at 516-17. The Court stated that political coercion in its most blatant form occurs when the hiring authority threatens to dismiss an employee unless the employee changes his party affiliation or contributes to party candidates. *Id.* at 516. The defendants had argued that *Elrod* prohibits only those dismissals resulting from such practices. *Id.* The Court, however, stated that the defendants' interpretation would emasculate the principles set out in *Elrod*. *Id.* The Court found that coercion of belief necessarily results from the knowledge alone that job retention is contingent on party sponsorship or affiliation. *Id.*

71. *Id.* at 517.

yield to a state's vital interests in maintaining governmental effectiveness and efficiency,⁷² it rejected the *Elrod* plurality's reasoning that the determinative factor in such a consideration is whether the employee's position is classified as confidential or policymaking.⁷³ Rather, the Court delineated a new standard, stating that the determinative factor is whether party affiliation is an "appropriate requirement for . . . effective [job] performance."⁷⁴ Noting that the primary allegiance of an assistant public defender should be to the clients he represents rather than to a political party, the Court found that conditioning a public defender's employment on party affiliation would undermine, rather than promote, effective job performance.⁷⁵

Justice Stewart, dissenting, agreed that patronage dismissals may violate first amendment rights.⁷⁶ Justice Stewart, however, would retain the standard enunciated in the plurality and in his concurring opinion in *Elrod* that political beliefs are not a proper reason for dismissal of a nonpolicymaking, nonconfidential government employee.⁷⁷ Drawing an analogy to a firm of lawyers in the private sector, Justice Stewart reasoned that the position of assistant public defender is one that instinctively requires mutual confidence and trust and should be subject, therefore, to patronage dismissal practices.⁷⁸

Justice Powell dissented, disagreeing with the majority on two grounds.⁷⁹ In Part I of his opinion Justice Powell criticized the standard adopted by the majority for determining the permissibility of patronage dismissals.⁸⁰ Noting the customary consideration of political affiliation in the selection of United States attorneys, Justice Powell argued that the sweeping language articulated in the majority's "vague" and "overbroad" opinion creates a standard that is "both uncertain in its application and impervious to legislative change."⁸¹ In Parts II-V Justice Powell turned to the more fundamental issue of whether the first amendment ever prohibits the firing of public employees on the basis of political affiliation.⁸² He argued that patronage appointments serve important governmental interests by helping to build stable political parties⁸³ and by furthering the right

72. *Id.*

73. *Id.* at 518.

74. *Id.*

75. *Id.* at 519-20.

76. *Id.* at 520.

77. *Id.*

78. *Id.* at 520-21.

79. *Id.* at 521. Justice Powell, who also wrote the dissenting opinion in *Elrod*, was joined by Justice Rehnquist and, as to Part I, by Justice Stewart.

80. *Id.* at 522-26.

81. *Id.* at 525. Powell stated that the majority's holding left uncertain the propriety of politically motivated dismissals at all levels of government, particularly dismissals of United States attorneys. *Id.*

82. *Id.* at 526-34. Powell distinguished both *Keyishian* and *Perry*, cases relied upon by the majority, from the present case by observing that neither case involved a patronage position. *Id.* at 526. For a discussion of *Keyishian* and *Perry*, see text accompanying notes 19-29 *supra*.

83. 445 U.S. at 527-32. Powell concluded that the effect of the majority decision would

of local voters to structure their government.⁸⁴ As in *Elrod*, Justice Powell concluded that the governmental interests served by patronage justify any infringement of first amendment rights resulting from patronage practices.⁸⁵

The new standard articulated in *Branti* further narrows the range of government positions that legitimately may be vacated through political discharges. Although the majority gives several examples of government positions for which political affiliation is an appropriate requirement,⁸⁶ it leaves in question the permissibility of patronage dismissals in a wide range of public jobs previously thought to be immune under the *Elrod* policymaking and confidentiality standard.⁸⁷ Accordingly, the full impact on *Branti* will depend in part on future delineations of the appropriate performance requirement standard.

The Court's opinion in *Branti* also threatens the continued existence of patronage hiring practices. Although the Court explicitly limits its holding to patronage dismissals,⁸⁸ *Branti*'s increased limitations on such practices will necessarily lessen the number of new job vacancies available for patronage appointments.⁸⁹ Additionally, the Court makes clear that future challenges to patronage hiring practices will likely be met by the imposition of limitations similar to those which *Branti* now imposes on dismissals. The Court observes that "[t]he compensation of government employees . . . must be justified by a governmental purpose."⁹⁰ Yet, such a justification would be difficult to formulate for patronage hirings. Characterizing the use of political considerations in selecting assistant public defenders as "deeply disturbing," the majority concludes that "[n]o 'compelling state interest' can be served by insisting that those who represent [indigent] defendants publicly profess to be Democrats (or Republi-

be "to decrease the accountability and denigrate the role of our national political parties," thereby increasing the influence of special interest groups. *Id.* at 531-32.

84. *Id.* at 532-34.

85. *Id.* at 534.

86. The Court noted that although a state university's football coach formulates policy, his political affiliation would not affect his job performance. Conversely, a governor's assistants and speechwriters might not perform effectively unless those persons shared the governor's political beliefs and party affiliation. *Id.* at 518.

87. For example, both the dissent and the majority left in question the permissibility of patronage dismissals of United States attorneys. The majority expressed no opinion as to whether the deputy of a prosecutor could be dismissed on political grounds, but noted that prosecutors hold broader public responsibilities than do assistant public defenders. *Id.* at 519 n.13. The dissent argued that "it would be difficult to say, under the Court's standard, that 'partisan' concerns properly are relevant to the performance of the duties of a United States attorney." *Id.* at 524.

88. *Id.* at 513 n.7.

89. Upon entering an executive branch filled with members of the opposing Federalist Party, Republican Thomas Jefferson noted the necessity of political discharges in creating job vacancies. "Those by death are few; by resignation, none. Can any mode other than that of removal be proposed?" See S. PADOVER, *THE COMPLETE JEFFERSON* 518 (1943). More recently, Lyn Nofziger, a Reagan Administration assistant in charge of political appointments was quoted as stating: "We've got to clean out the Democrats and get our own people taken care of." *TIME*, Mar. 16, 1981, at 32.

90. 445 U.S. at 517 n.12.

cans)."⁹¹

As a practical matter, *Branti's* impact on employment practices is limited at the federal level by the growth of the civil service in recent years. Of 1.5 million federal jobs, only an estimated 3,000 are now filled with patronage appointees.⁹² Civil service employees have long been afforded the protection from political discharge that *Branti* extends to their patronage employed counterparts.⁹³ Thus, *Branti* will affect dismissal practices in only a small percentage of federal government positions.

The greater potential significance of the *Branti* decision lies in the Court's growing reluctance to permit political considerations in the distribution of government benefits.⁹⁴ In a footnote with wide-ranging implications, the Court states that "[g]overnment funds, which are collected from taxpayers of all parties on a nonpolitical basis cannot be expended for the benefit of one political party simply because that party has control of the government."⁹⁵ Rather, the distribution of such benefits must be justified by a governmental purpose.⁹⁶ Thus, *Branti* may endanger common patronage practices such as the distribution of government contracts and services on a political basis.

III. CONCLUSION

In *Branti v. Finkel* the Supreme Court held that government employees may be dismissed for political reasons only when party affiliation is an appropriate requirement for effective job performance. The Court reaffirmed its plurality position in *Elrod v. Burns* that patronage dismissals infringe first amendment freedoms of belief and association and, thus, are justifiable only when vital state interests outweigh the resulting loss of first amendment rights. It rejected, however, the principle in *Elrod* that the determinative factor in such a consideration is whether an employee may be characterized as confidential or policymaking. Rather, an employee may be dismissed for political reasons only when party affiliation is an appropriate requirement for effective job performance. Moreover, although the Court limited its holding to patronage dismissals, it made clear

91. *Id.* at 520 n.14 (quoting *Finkel v. Branti*, 457 F. Supp. 1284, 1293 n.13 (S.D.N.Y. 1978)).

92. See NEWSWEEK, Apr. 14, 1980, at 30.

93. The civil service system was founded in an effort to eliminate corruption following from the political use of patronage. See R. VAUGHN, PRINCIPLES OF CIVIL SERVICE LAW § 1.2 (1976). Accordingly, civil service laws specifically prohibit coercion of public employees to obtain political contributions or services. 18 U.S.C. § 601 (1976).

94. Among those benefits noted by the Court were the award of government contracts on a political basis and the grant of improved government services to favored constituents. 445 U.S. at 513 n.7. The distribution of these and other government benefits for political purposes has been extensive, as demonstrated by the Nixon Administration's "grantsmanship" program. Under this program, the Administration attempted to channel federal jobs, contracts, grants, subsidies, bank deposits, social need programs, and public works projects into target areas considered crucial to President Nixon's reelection. See R. VAUGHN, *supra* note 93, § 1.4.

95. 445 U.S. at 517 n.12.

96. *Id.*

that patronage hirings and the distribution of government benefits on a political basis may now require justification by a governmental purpose. Thus, *Branti* casts doubt on the continued permissibility of the 200-year-old patronage system as a whole.

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