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Patronage and Public Employment after *Branti v. Finkel*

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Notes and Comments

Patronage and Public Employment After

Branti v. Finkel

I. Introduction

The constitutionality of patronage practices¹ in public employment, specifically dismissals, has been questioned in recent years.² Political parties' use of the spoils system to staff government positions was severely restricted by the Supreme Court's decision in *Branti v. Finkel*.³ The *Branti* Court held that party affiliation is an appropriate dismissal criterion only if allegiance to a particular political party is necessary for effective performance of the public office involved.⁴ Applying this test, the Court held that two Republican assistant public defenders were deprived of their First and Fourteenth Amendment⁵ rights when

1. Patronage practices include:

placing loyal supporters in government jobs that may or may not have been made available by political discharges. Nonofficeholders may be the beneficiaries of lucrative government contracts. . . . Favored wards may receive improved public services.

Elrod v. Burns, 427 U.S. 347, 353 (1976).

In *Elrod*, public employees were threatened with dismissal to make way for patronage appointments. They could avoid dismissal only if they joined the party in power, campaigned for that party's candidates and contributed a portion of their salaries to the party. Obtaining the sponsorship of a powerful party member would also preserve one's employment, but sponsorship generally followed the actions outlined above. *Id.* at 355.

In *Branti v. Finkel*, 445 U.S. 507 (1980), the Court examined a less coercive system. In *Branti*, adherents of the losing party were simply terminated; they were not asked or expected to shift their allegiance. *Id.* at 516.

2. See, e.g., *Elrod v. Burns*, 427 U.S. 347 (1976); *Ramey v. Harber*, 431 F. Supp. 657 (W.D. Va. 1977), *aff'd in part, rev'd in part*, 589 F.2d 753 (4th Cir. 1978).

3. 445 U.S. 507 (1980).

4. *Id.* at 518.

5. The First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. CONST. amend. I. The Fourteenth Amendment provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

fired by the newly-appointed Democratic public defender solely because of their political beliefs.⁶

Respondents Finkel and Tabakman were appointed as assistant public defenders in Rockland County, New York, in 1971 and 1975 respectively.⁷ Assistant public defenders traditionally serve at the pleasure of the public defender, who is in turn appointed for a term of six years by the county legislature.⁸ In 1977, control of the legislature shifted from the Republicans to the Democrats. Branti, a Democrat, was appointed in 1978 to replace the incumbent Republican public defender whose term had expired.⁹

Immediately after Branti's appointment, he began executing termination notices for six of the nine assistants who had served under his Republican predecessor.¹⁰ Finkel and Tabakman, both Republicans, were among this group. Respondents commenced an action in the United States District Court for the Southern District of New York to enjoin Branti from terminating their employment on the sole grounds of their political beliefs.¹¹ The

6. *Branti v. Finkel*, 445 U.S. 507, 520 (1980).

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

8. *Id.*

9. *Id.* at 1284-85.

10. Other than respondents, two Democrats and two Republicans were not reappointed. *Id.* n. 2.

The nine replacement appointees, their party affiliation and the manner in which their names were submitted are as follows:

1. John Allison, Democrat, submitted by Clarkstown delegation of the legislature.
2. Lorna Bernard, Democrat, submitted by Democratic chairman of Orangetown.
3. Gerard Blumenfeld, Democrat, submitted by Chairperson of Rockland County Democratic Committee.
4. John Costa, Democrat, submitted by Clarkstown delegation of the legislature.
5. Wayne Feinberg, Democrat, submitted by Stony Point delegation of the legislature.
6. John McAlevy, Democrat, submitted by Ramapo delegation of the legislature.
7. John McCabe, Democrat, submitted by a legislator from Haverstraw.
8. William Nelson, Democrat, submitted by Clarkstown delegation of the legislature.
9. Manuel Sanchez, no party affiliation, reappointed because of his ability to speak Spanish.

Id. at 1287 & n. 8.

11. *Id.* at 1285. Jurisdiction was predicated on 42 U.S.C. § 1983 (1976) and 28 U.S.C. § 1343(3) (1976). *Id.* n. 3.

district court granted the injunction,¹² relying on *Elrod v. Burns*,¹³ which held that a nonpolicymaking, nonconfidential public employee could not be discharged based solely on his political beliefs.¹⁴ On appeal, the Second Circuit Court of Appeals summarily affirmed the district court's action.¹⁵ The Supreme Court granted certiorari¹⁶ and affirmed in a six-to-three decision.¹⁷ In reaching its decision, the Court formulated a revised standard for determining the constitutionality of patronage dismissals.¹⁸

This note, in its examination of *Branti v. Finkel*, focuses on the Court's expansion of the *Elrod*¹⁹ doctrine. Following an exploration of prior case law and an analysis of the *Branti* opinions, this note concludes that the decision and the attendant curtailment of patronage is constitutionally justified. It predicts that the *Branti* standard²⁰ will be extended to other patronage employment practices, but that the vagueness of the standard will result in confusion in its application.

II. Background

A. Previous Case Law

The practice of dismissing employees when the party in power changes violates the protection of political activity long recognized as a part of the First Amendment. The Court has

12. *Id.* at 1293. The order directed *Branti* to permit Finkel and Tabakman to work as assistant public defenders and to pay them normal assistants' salaries. Merely paying plaintiffs' wages would not satisfy the order. *Id.* at 1285 n. 4.

13. 427 U.S. 347 (1976).

14. *Id.* at 375 (Stewart & Blackmun JJ., concurring). The district court accepted this statement as the rule to be applied. *Finkel v. Branti*, 457 F. Supp. 1284, 1289 (S.D.N.Y. 1978).

15. *Finkel v. Branti*, 598 F.2d 609 (2d Cir. 1979) (memorandum opinion, unpublished opinion of the court reproduced in the Appendix to petitioner's Petition for Certiorari).

16. *Branti v. Finkel*, 443 U.S. 904 (1979).

17. *Branti v. Finkel*, 445 U.S. 507 (1980). Justice Stevens wrote the majority opinion, in which Chief Justice Burger and Justices Brennan, White, Marshall and Blackmun joined. *Id.* at 508. Justice Stewart filed a dissent, as did Justice Powell. *Id.* at 520-21. Justice Rehnquist joined in Justice Powell's dissent, and Justice Stewart joined in Part I of Justice Powell's dissent. *Id.* at 521.

18. *Id.* at 518.

19. See notes 13 & 14 and accompanying text *supra*.

20. See text accompanying note 4 *supra*.

held repeatedly that freedom of speech includes the right to work for the advancement of political ideals.²¹ This right encompasses a broad range of political activity.²² The Court has noted that "[t]he First Amendment protects political association as well as political expression,"²³ and in *Kusper v. Pontikes*,²⁴ the Court specifically recognized the right to affiliate with one's chosen political party.²⁵

The Court may view a violation of these political freedoms as either direct or indirect. In some instances the same action may cause both an indirect and a direct infringement.²⁶ A direct infringement results if the complained of action "compels or restrains belief [or] association."²⁷ An indirect infringement results

21. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). Justice Harlan wrote, "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of . . . freedom of speech. It is immaterial whether the beliefs sought to be advanced pertain to political, economic, religious or cultural matters. . . ." *Id.* At issue in that case was Alabama's demand, during injunction proceedings to stop NAACP activity in the state, for a membership list. The Court held the demand unconstitutional. *Id.* at 466.

22. The Court has

relied on the right of association guaranteed by the First Amendment in holding that state action which denies individuals the freedom to form groups for the advancement of political ideas, as well as the freedom to campaign and vote for the candidates chosen by those groups, is unconstitutional absent a strong subordinating interest.

Newcomb v. Brennan, 558 F.2d. 825, 828 (7th Cir.), *cert. denied*, 434 U.S. 968 (1977) (citing *Buckley v. Valeo*, 424 U.S. 1, 39-59 (1976)); *Bullock v. Carter*, 405 U.S. 134 (1972); *Williams v. Rhodes*, 393 U.S. 23 (1968). See e.g., *United States v. Robel*, 389 U.S. 258 (1967) (association rights of Communist Party members); *Wieman v. Updegraff*, 344 U.S. 183 (1952) (loyalty oath denying past Communist associations held unconstitutional).

23. *Buckley v. Valeo*, 424 U.S. 1, 11 (1976).

24. 414 U.S. 51 (1973).

25. *Id.* at 56-57.

26. In *Elrod v. Burns*, 427 U.S. 347 (1976), the patronage practices described in note 1 *supra* had both indirect and direct effects. To the extent that these practices encouraged employees to compromise their beliefs and to pretend adherence to the party in power, the effect was direct. *Id.* at 357. If the employee did not bow before the threat of dismissal, his exercise of First Amendment rights was penalized, and the effect was indirect. *Id.* at 359.

In *Shelton v. Tucker*, 364 U.S. 479 (1960), teachers disputed the validity of a state statute which required them to disclose, in an annual affidavit, all organizations to which they belonged or contributed. In requiring disclosure of associational ties, the statute directly impaired the teacher's rights of free association. *Id.* at 490. If a teacher avoided those ties which "might displease those who control[ed] his professional destiny . . .," the infringement on constitutionally protected rights was indirect. *Id.* at 486.

27. *Elrod v. Burns*, 427 U.S. 347, 357 (1976).

when the behaviors and attitudes which the government intends should prevail are impelled by roundabout means.²⁸ Thus, receipt of a public benefit may not be conditioned, as a reward, on an individual's relinquishment of his constitutionally protected rights.²⁹

When the Court discovers either a direct or an indirect infringement of protected political rights, the standard it employs is strict scrutiny.³⁰ Most, but not all, violations will be held unconstitutional; "the prohibition on encroachment of First Amendment protections is not an absolute. Restraints are permitted for appropriate reasons."³¹ The formulation which the Court uses in measuring the appropriateness of a government's reasons is stated variously from case to case. While in one case the Court asks that the "State come . . . forward with sufficient proof to justify" its action,³² in another it inquires whether the means employed "broadly stifle fundamental personal liberties when the end can be more narrowly achieved."³³ The Court may require that the State's interest be compelling³⁴ to balance the individual's loss of freedom. No matter how the Court formulates the standard, the burden is on the government to show that it has met the standard articulated.³⁵

The Supreme Court first applied these standards to the question of patronage dismissals in *Elrod v. Burns*.³⁶ In that case, the Court evaluated the traditional prerogative of the newly-elected sheriff of Cook County, Illinois, to replace non-

28. The government may not act to "produce a result which [it] could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

29. See, e.g., *Perry v. Sindermann*, 408 U.S. 593 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Speiser v. Randall*, 357 U.S. 513 (1958).

30. *Buckley v. Valeo*, 424 U.S. 1, 64 (1976); *NAACP v. Alabama*, 357 U.S. 449, 464-65 (1958).

31. *Elrod v. Burns*, 427 U.S. 347, 360 (1976).

32. *Speiser v. Randall*, 357 U.S. 513, 529 (1958); *NAACP v. Alabama*, 357 U.S. 449, 463 (1958).

33. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

34. *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957) (Frankfurter, J., concurring).

35. *Elrod v. Burns*, 427 U.S. 347, 362 (1976).

36. *Id.* The Court had denied review in two previous cases involving similar facts: *Illinois State Employees Union, Council 34 v. Lewis*, 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 943 (1973); and *Alomar v. Dwyer*, 447 F.2d 482 (2d Cir. 1971), *cert. denied*, 404 U.S. 1020 (1972).

civil service employees who did not win the support of his party.³⁷

In an opinion which failed to command a majority,³⁸ Justice Brennan declared that patronage, to the extent that it compels or restrains belief, is inimical to the Constitution.³⁹ He stated:

In short, if conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights.⁴⁰

Justice Brennan would have limited permissible patronage dismissals to employees in policymaking positions,⁴¹ whom he described as having "responsibilities that are not well-defined or are of broad scope."⁴²

In a short concurring opinion, Justice Stewart restated the issue as "whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs."⁴³ He and Justice Blackmun

37. *Elrod v. Burns*, 427 U.S. 347, 351-52 (1976). The plaintiffs were four employees: a process server, a chief deputy of the process division, a bailiff and security guard, and one other. All were members of the Republican party when the new sheriff, a Democrat, took office. Three were dismissed, and the fourth was threatened with dismissal, because they were not members of the Democratic Party and had failed to obtain the sponsorship of a party member. *Id.* at 350-51. For a discussion of the means by which these employees might have obtained sponsorship, see note 1 *supra*.

38. *Elrod v. Burns*, 427 U.S. 347 (1976). Justice Brennan wrote the plurality opinion, in which Justices White and Marshall joined. *Id.* at 349. Justice Stewart wrote a concurring opinion in which Justice Blackmun joined. *Id.* at 374. Chief Justice Burger dissented separately, *id.* at 375, and joined in another dissent written by Justice Powell and also joined by Justice Rehnquist. *Id.* at 376.

39. *Id.* at 357.

40. *Id.* at 363. Justice Brennan noted that, in determining whether a vital government end was furthered, "care must be taken not to confuse the interest of partisan organizations with governmental interests." *Id.* at 362.

41. *Id.* at 367, 372.

42. *Id.* at 368. Justice Brennan stated, "No clear line can be drawn between policymaking and nonpolicymaking positions." *Id.* at 367. Instead, this issue was to be treated, on remand, as a question of fact on which the state had the burden of proof. *Id.* at 368.

43. *Id.* at 374, 375. (Stewart, J., concurring).

agreed that such an individual cannot be dismissed.⁴⁴ This re-statement of the case has been cited by other courts as the *Elrod* Court's holding.⁴⁵

Neither the plurality nor the concurrence suggested that the employees had a protected right to retain their government jobs or that the employees were entitled to a due process hearing before they could be dismissed.⁴⁶ Rather, the Court relied on *Keyshian v. Board of Regents*⁴⁷ and *Perry v. Sindermann*,⁴⁸ which held that a public employee who had no contractual right to his job nonetheless could not be dismissed for engaging in constitutionally protected speech.⁴⁹ Therefore, the dismissed patronage employee need not show even the expectation of continued employment.

The dismissed employee must, however, demonstrate that his political beliefs were the sole cause of his discharge.⁵⁰ If he fails to do so, or if his former employer succeeds in controverting his proofs on this issue, *Mt. Healthy Board of Education v. Doyle*⁵¹ would deny him relief. In *Mt. Healthy*, the Court held that

the fact that the protected conduct played a "substantial part" in the actual decision not to renew would [not] necessarily amount to a constitutional violation justifying remedial action. . . . The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct.⁵²

A government can therefore escape liability to a discharged employee if it can show that he would have been terminated on

44. *Id.*

45. See, e.g., *Finkel v. Branti*, 457 F. Supp. 1284 (S.D.N.Y. 1978). See notes 53-55 and accompanying text *infra*.

46. *Elrod v. Burns*, 427 U.S. 347, 359-60 (1976).

47. 385 U.S. 589 (1967).

48. 408 U.S. 593, 597 (1972) ("[T]here are some reasons upon which the government may not rely.").

49. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Keyshian v. Board of Regents*, 385 U.S. 589, 605-06 (1967).

50. See Justice Stewart's formulation of the issue, text accompanying note 43 *supra*.

51. 429 U.S. 274 (1977). In *Mt. Healthy*, a teacher's contract was not renewed after the teacher had been involved in several incidents which showed a lack of maturity and judgment; he also had criticized the school administration publicly. *Id.*

52. *Id.* at 285-86.

other grounds.

In the four years between the *Elrod* and *Branti* decisions, lower federal courts had many opportunities to deal with the issues raised by patronage dismissal of public employees. These courts generally viewed Justice Stewart's restatement of the issue as the holding of *Elrod*.⁵³ Many of these cases cite *Marks v. United States*⁵⁴ as the basis for their conclusion that the plurality's statement of the case must be taken as its holding.⁵⁵ Accordingly, the courts inquired whether the plaintiff before them was a nonpolicymaking, nonconfidential employee and, therefore, protected from politically motivated dismissal under *Elrod*.⁵⁶

Courts were less certain, however, whether a particular employee functioned as a policymaker or a confidential employee. In *Ramey v. Harber*,⁵⁷ the district court noted that "the term 'policymaker' presents an elusive factual question. . . . Obviously, the term may assume different connotations in different forms of employment."⁵⁸ Justice Brennan's definition of a policymaker as one with broad responsibilities and ill-defined objectives⁵⁹ has often been cited as the starting point of a full inquiry into the nature of a specific position.⁶⁰

53. "[M]ost judicial interpretations of *Elrod* have found that a *policymaking, confidential* employee can be discharged from a job that he is satisfactorily performing upon the sole ground of his political beliefs." *Stegmaier v. Trammell*, 597 F.2d 1027, 1034 (5th Cir. 1979).

54. 430 U.S. 188 (1977). In *Marks*, the Court held that [w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . ."

Id. at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976)) (opinion of Stewart, Powell and Stevens, JJ.).

55. See, e.g., *Davis v. Williams*, 598 F.2d 916 (5th Cir. 1979), *cert. denied*, 49 U.S.L.W. 3289 (U.S. Oct. 20, 1980); *Alfaro de Quevedo v. De Jesus Schuck*, 556 F.2d 591 (1st Cir. 1977); *Catterson v. Caso*, 472 F. Supp. 833 (E.D.N.Y. 1979).

56. *Catterson v. Caso*, 472 F. Supp. 833, 836 (E.D.N.Y. 1979).

57. 431 F. Supp. 657 (W.D. Va. 1977), *aff'd in part, rev'd in part*, 589 F.2d 753 (4th Cir. 1978).

58. *Id.* at 666 n. 15.

59. *Elrod v. Burns*, 427 U.S. 347, 368 (1976). See note 42 and accompanying text *supra*.

60. See, e.g., *Committee to Protect the First Amend. Rights of Employees of the Dep't of Agriculture v. Bergland*, 626 F.2d 875, 878-79 (D.D.C. 1979), *cert. denied*, ___ U.S. ___, 100 S. Ct. 3012 (1980); *Stegmaier v. Trammell*, 597 F.2d 1027, 1035 (5th Cir.

In pursuing their inquiries, courts have examined civil service statutes,⁶¹ statutes creating the government positions,⁶² and the day-to-day responsibilities of the employees.⁶³ In *Committee to Protect the First Amendment Rights of Employees of the Department of Agriculture v. Bergland*,⁶⁴ the court of appeals held that a Civil Service Commission classification of a particular position as nonpolicymaking did not end the inquiry.⁶⁵ Rather, it was one factor of many to be considered;⁶⁶ in determining constitutional rights, the court refused to be bound by an administrative determination, the correctness of which it questioned.⁶⁷ A court must consider all available information in deciding whether a position involves policymaking.

Courts have had to grope for the intended meaning of "non-confidential" in *Elrod*. Justice Brennan did not discuss confiden-

1979). In *Davis v. Williams*, 598 F.2d 916 (5th Cir. 1979), *cert. denied*, 49 U.S.L.W. 3289 (U.S. Oct. 20, 1980), Judge Rubin called for the establishment of guidelines to clarify the responsibilities of public employees and to protect their rights. *Id.* at 921.

61. *See, e.g.*, *Committee to Protect the First Amend. Rights of Employees of the Dep't of Agriculture v. Bergland*, 626 F.2d 875 (D.C.C. 1979), *cert. denied*, ___ U.S. ___, 100 S. Ct. 3012 (1980); *Finkel v. Branti*, 457 F. Supp. 1284 (S.D.N.Y. 1978), *aff'd*, 445 U.S. 507 (1980).

62. *See, e.g.*, *Newcomb v. Brennan*, 558 F.2d 825, 827 (7th Cir.), *cert. denied*, 434 U.S. 968 (1977); *Catterson v. Caso*, 472 F. Supp. 833, 837 (E.D.N.Y. 1979).

63. *See, e.g.*, *Catterson v. Caso*, 472 F. Supp. 833, 837-38 (E.D.N.Y. 1979); *Ramey v. Harber*, 431 F. Supp. 657, 666 (W.D. Va. 1977), *aff'd in part, rev'd in part*, 589 F.2d 753 (4th Cir. 1978), *cert. denied*, 442 U.S. 910 (1979).

64. 626 F.2d 875 (D.C.C. 1979), *cert. denied*, ___ U.S. ___, 100 S. Ct. 3012 (1980).

65. *Id.* at 879. In *Committee to Protect*, former Department of Agriculture employees, who had been dismissed from positions as state directors of the Farmers Home Administration and state executive directors of the Agricultural Stabilization and Conservation Service, sought the protection of *Elrod*. Their employment had been terminated, allegedly on partisan political grounds, shortly after President Carter took office.

Secretary Bergland contended that *Elrod*'s protections were unavailable to these former employees because they were policymakers. *Id.* at 876-78. The district court and the court of appeals agreed "that the positions occupied by the members of appellant's group were policymaking and therefore the discharge of the incumbents did not infringe upon their constitutional rights." *Id.* at 881.

66. *Id.* at 880. "[W]e, of course, take into consideration the determination of the Civil Service Commission." *Id.*

67. *Id.* at 879 & n. 14. The court reported several Civil Service Commission classifications with which the court disagreed, noting that "there are substantial numbers of attorneys in government service classified as Schedule A [not policymaking or confidential]." *Id.* at 880. Instead, to reach its determination, the court examined published job descriptions, the testimony of witnesses and plaintiffs, and the general nature of the positions. *Id.* at 879.

tiality, except to note that considerations of "loyalty of employees" are "inadequate to validate patronage wholesale."⁶⁸ Neither does Justice Stewart offer an explanation of "nonconfidential" in his concurrence.⁶⁹ Thus, one of the elements of *Elrod's* holding, as accepted by the lower courts, was never defined by *Elrod* itself.⁷⁰

In their search for the *Elrod* Court's intent, courts have looked in two distinct directions. At least one court has given "nonconfidential" an independent meaning, unrelated to the policymaking process. In *Stegmaier v. Trammell*,⁷¹ the court held that

[w]hen, by statute, a deputy clerk is empowered to conduct all business which the clerk is authorized to conduct, . . . and when, by statute, the clerk is subject to civil liability and fines for failure to perform his statutory duty, . . . [he] must be afforded the opportunity to select his single deputy clerk; he must be able to select a deputy in whom he has total trust and confidence and from whom he can expect, without question, undivided loyalty.⁷²

This court seems to view "confidential" in the sense of confidence in the employee's competence, ability and willingness to

68. *Elrod v. Burns*, 427 U.S. 347, 367 (1976). Presumably, Justice Brennan would allow individual firings of employees who were shown to be disloyal. He stated, "[E]mployees may always be discharged for good cause, such as insubordination or poor job performance, when those bases in fact exist." *Id.* at 366.

69. *Id.* at 375. Apparently Justice Stewart would not require that a government wait until a confidential employee disclosed privileged material before dismissing that employee in favor of one whose loyalty is known.

70. See *The Supreme Court, 1975 Term—Patronage Firings*, 90 HARV. L. REV. 186, 194 & n. 41 (1976).

Certainly elected officials should be permitted to dismiss their predecessors' personal secretaries and a few others who work closely with such officials in positions requiring a relationship of mutual trust. However, courts should construe the exception narrowly and guard against efforts to invoke it in support of across-the-board patronage dismissals.

Id. at 194 n. 41. Justice Stevens, when he served on the court of appeals, mentioned "considerations of personal loyalty" as a possible justification of patronage in a decision otherwise condemning patronage dismissals. *Illinois State Employees Union, Council 34 v. Lewis*, 473 F.2d 561, 574 (7th Cir. 1972), *cert. denied*, 410 U.S. 943 (1973).

71. 597 F.2d 1027 (5th Cir. 1979). In *Stegmaier*, the court first found that the discharged deputy circuit clerk could not be a policymaker since the circuit clerk was not. *Id.* at 1034-35. The court then determined that the deputy circuit clerk was a confidential employee and thus outside the protections of *Elrod*. *Id.* at 1040.

72. *Id.* at 1040.

do the job.⁷³ Other courts have probed whether the employee's job responsibilities included preserving the employer's secrets.⁷⁴ In *Ramey v. Harber*,⁷⁵ the court noted that the employer "did not confide in his deputies in matters of general administrative operation and policy formulation."⁷⁶ These courts have shaped the definition of "confidential" to protect the integrity of the policymaking process.

The lower courts have not responded consistently, under either a nonpolicymaking or a nonconfidential analysis, to cases involving attorneys as employees. While some courts have been willing to examine critically the responsibilities of the individual employee,⁷⁷ others have adopted a broader view of the implications of the attorney-client relationship.⁷⁸ No court has faced the issue squarely; these latter courts would, apparently, hold that no government-employed attorney could claim the protections of *Elrod*.

A final aspect of *Elrod* which has led to confusion in the lower courts has been its applicability to patronage practices which do not amount to firings or dismissals. The *Elrod* plurality, while less than clear on this issue, condemned a broad range of patronage practices and would seemingly have been willing to

73. The court of appeals used similar language to discuss the relationship of employee and employer in *Newcomb v. Brennan*, 558 F.2d 825, 830 (7th Cir.), *cert. denied*, 434 U.S. 968 (1977). The *Newcomb* case was decided on the basis of the employee's role as a policymaker. *Id.* at 829. The court, therefore, did not articulate the constitutional significance of the employer's need to have "confidence in his deputy," *id.* at 830, nor did the court indicate whether that interest alone would have been sufficient to justify the employee's discharge.

74. See, e.g., *Catterson v. Caso*, 472 F. Supp. 833, 838 (E.D.N.Y. 1979); *Ramey v. Harber*, 431 F. Supp. 657, 666 (W.D. Va. 1977), *aff'd in part, rev'd in part*, 589 F.2d 753 (4th Cir. 1978), *cert. denied*, 442 U.S. 910 (1979).

75. 431 F. Supp. 657 (W.D. Va. 1977), *aff'd in part, rev'd in part*, 589 F.2d 753 (4th Cir. 1978), *cert. denied*, 442 U.S. 910 (1979).

76. *Id.* at 666.

77. *Newcomb v. Brennan*, 558 F.2d 825 (7th Cir.), *cert. denied*, 434 U.S. 968 (1977). While the *Newcomb* court held that plaintiff, a deputy city attorney, was a policymaker, it did so only after a detailed examination of his position, which the court found to be significantly different from that of a lesser attorney in the same office. *Id.* at 829.

78. See Committee to Protect the First Amend. Rights of Employees of the Dep't of Agriculture v. Bergland, 626 F.2d 875, 880 (D.C.C. 1979), *cert. denied*, ___ U.S. ___, 100 S. Ct. 3012 (1980), quoted at note 67 *supra*. In *Catterson v. Caso*, 472 F. Supp. 833 (E.D.N.Y. 1979), the court upheld the dismissal of a county attorney; the court noted that "[T]he confidential relationship between an attorney and his client is based on trust." *Id.* at 838.

find many of these activities unconstitutional.⁷⁹ The concurring justices were explicit in their limitation of the issue to dismissals.⁸⁰ This has led to speculation on the part of courts and commentators.⁸¹ In the courts, this lack of clarity has been most acutely felt in cases involving a failure to rehire or reappoint an employee whose term in office has expired.⁸² In *Ramey v. Harber*,⁸³ the district court discussed this issue at length:

The mere fact that plaintiffs had no vested right to reappointment cannot be dispositive of their claim of constitutional infringement. On several occasions, the United States Supreme Court has ruled that a nontenured school teacher could not be denied contract renewal solely because of the teacher's exercise of rights protected under the First and Fourteenth Amendments. . . . [P]otential for abuse of First Amendment freedoms is accentuated when the decision as to reappointment is totally within the discretion of the appointing authority.⁸⁴

The court concluded that the existence of an expectation of reappointment or continued employment is immaterial when the behavior complained of violates First Amendment rights.⁸⁵

As shown above, the lower courts had not achieved consensus on the reach and application of *Elrod*. Beyond the confusion discussed above, courts disagreed on the issue of the *Elrod* doctrine's retroactive application,⁸⁶ and at least one federal judge indicated his belief that *Elrod* applied only if "the infringement

79. *Elrod v. Burns*, 427 U.S. 347, 357 (1976). See *Will The Victor Be Denied The Spoils? Constitutional Challenges To Patronage Dismissals*, 4 HASTINGS CONST. L.Q. 165, 183 (1977).

80. *Elrod v. Burns*, 427 U.S. 347, 374 (1976) (Stewart, J., concurring).

81. See *The Supreme Court, 1975 Term—Patronage Firings*, 90 HARV. L. REV. 186, 194-96 (1976); *Will The Victor Be Denied The Spoils? Constitutional Challenges To Patronage Dismissals*, 4 HASTINGS CONST. L.Q. 165, 183-85 (1977).

82. See, e.g., *Ramey v. Harber*, 589 F.2d 753, 757 (4th Cir. 1978), cert. denied, 442 U.S. 910 (1979) ("[T]here is considerable uncertainty as to how a majority of the Supreme Court would treat a failure to rehire and other patronage practices."); *Reed v. Hamblen County*, 468 F. Supp. 2 (1978).

83. 431 F. Supp. 657 (W.D. Va. 1977), aff'd in part, rev'd in part, 589 F.2d 753 (4th Cir. 1978), cert. denied, 442 U.S. 910 (1979).

84. *Id.* at 663 (citations omitted).

85. *Id.* at 664.

86. See *Ramey v. Harber*, 431 F. Supp. 657, 667-70 (W.D. Va. 1977) (applied retroactively), aff'd in part, rev'd in part, 589 F.2d 753, 757-60 (4th Cir. 1978) (denied retroactive application), cert. denied, 442 U.S. 910 (1979).

of first amendment rights was direct and immediate, not indirect and speculative."⁸⁷ Such a broad array of views is represented in the lower courts' interpretations of *Elrod* that a court, facing a claim that a government employee's discharge was politically motivated, could find valid support for almost any determination. This uncertainty indicated a need for reinterpretation or clarification of *Elrod* which the Supreme Court met by its grant of certiorari in *Branti v. Finkel*.⁸⁸

B. *Branti v. Finkel: The Decision Below*

In *Finkel v. Branti*,⁸⁹ the United States District Court for the Southern District of New York relied on the *Elrod* doctrine to maintain Finkel and Tabakman as assistant public defenders for Rockland County. Plaintiffs commenced the action to enjoin Branti from terminating their employment or otherwise altering their employment status. Plaintiffs asserted that as nonpolycymaking, nonconfidential public employees satisfactorily performing their jobs, they could not be denied employment solely because of their party affiliation.⁹⁰ Judge Broderick accepted the plaintiff's characterization of the issues and found their claim meritorious.⁹¹ The court, therefore, enjoined Branti from terminating Finkel's and Tabakman's employment solely because of their political beliefs.

The court concluded that the injunction must issue irrespective of whether the *Elrod* plurality or concurrence was considered the rule of that case.⁹² Judge Broderick applied the tests of Justice Stewart's concurrence against the allegations of Finkel and Tabakman.⁹³ To determine whether plaintiffs occupied poli-

87. *Johnson v. Bergland*, 586 F.2d 993, 996 (4th Cir. 1978)(K.K. Hall, J., dissenting).

88. 434 U.S. 908 (1979). Perhaps the court granted certiorari in *Branti* after denying review to *Newcomb v. Brennan*, 434 U.S. 968 (1977), *Ramey v. Harber*, 442 U.S. 910 (1979), and *Committee to Protect the First Amend. Rights of Employees of the Dep't of Agriculture v. Bergland*, ___ U.S. ___, 100 S. Ct. 3012 (1980), because *Branti* presents a broader range of post-*Elrod* issues without procedural complications.

89. 457 F. Supp. 1284 (S.D.N.Y. 1978).

90. *Id.* at 1285. Prior to his dismissal Finkel had changed his party registration from Republican to Democrat in hopes of attaining the sponsorship of the Democratic caucus. All parties continued to regard Finkel as a Republican during the period at issue.

91. *Id.*

92. *Id.* at 1289.

93. *Id.* at 1290.

cymaking positions, the court analyzed their duties in relation to the standard enunciated by the *Elrod* plurality — “whether the employee acts as an adviser or formulates plans for the implementation of broad goals.”⁹⁴ The court ruled that the plaintiffs did not make policy with respect to the management of the public defender’s office, nor did they “act as advisor or formulate plans for the implementation of the broad goals of the office.”⁹⁵ Turning to the confidentiality issue, Judge Broderick stated that a confidential employee is one who stands in a relationship of trust to a policymaker or has access to confidential documents or materials used in the policymaking process.⁹⁶ He determined that the existence of confidential relations between plaintiffs and their clients did not bring Finkel and Tabakman in confidential contact with the policymaking process of the public defender’s office.⁹⁷

The court found that Finkel and Tabakman had performed their jobs satisfactorily prior to dismissal. Judge Broderick relied primarily on the assessment of Branti’s predecessor, Frank Barone, for an evaluation of the plaintiff’s competence. Barone considered Finkel and Tabakman adequate in their jobs and indicated he would have reappointed them had he remained as public defender.⁹⁸ While serving in the capacity of assistant district attorney, Branti also noted that Finkel and Tabakman were competent attorneys.⁹⁹

Having determined that plaintiffs were satisfactorily performing their jobs, the court concluded that the only rationale for their discharge was that they belonged to the wrong party.¹⁰⁰ *Elrod*, therefore, commanded that Finkel and Tabakman be al-

94. *Elrod v. Burns*, 427 U.S. 347, 367 (1976). See note 42 and accompanying text *supra*.

95. *Finkel v. Branti*, 457 F. Supp. 1284, 1291 (S.D.N.Y. 1978).

96. *Id.* He thus joined in the interpretation of confidentiality espoused by the 4th Circuit Court of Appeals and the United States District Court for the Eastern District of New York. See notes 74-75 and accompanying text *supra*.

97. *Finkel v. Branti*, 457 F. Supp. 1284, 1292 (S.D.N.Y. 1978).

98. *Id.*

99. At a second set of hearings on the issue, Branti stated that he no longer regarded Tabakman and Finkel as competent. Judge Broderick chose not to credit this testimony. *Id.* at n. 11.

100. Branti failed to offer any substantial nonpolitical grounds to support the discharge of plaintiffs. *Id.* at 1292.

lowed to retain their jobs.

The United States Court of Appeals for the Second Circuit unanimously affirmed the decision of the district court¹⁰¹ and ruled that "under *Elrod* . . . appellees are entitled to the relief granted by the District Court."¹⁰² Branti argued on appeal that he had valid nonpolitical reasons for discharging appellees, and, thus, the district court's holding should be reversed on the strength of *Mt. Healthy Board of Education v. Doyle*.¹⁰³ The court determined that the district court's findings of facts were not clearly erroneous and, therefore, must stand. Accordingly, *Mt. Healthy* was held inapplicable.¹⁰⁴

Branti also alleged that appellees occupied policymaking positions and were not protected by the *Elrod* doctrine.¹⁰⁵ He claimed that since the position of assistant public defender was an exempt position under the New York Civil Service Law,¹⁰⁶ it followed that the position must be policymaking or confidential. The court disagreed. It found no connection between the classification of a position as exempt and that post's relation to confidentiality or the policymaking process. The court reasoned that the exempt classification merely reflected the judgment of the legislature that civil service examinations were inappropriate for filling such positions and had nothing to do with the confidential or policymaking nature of the job.¹⁰⁷

III. *Branti v. Finkel*: The Decision

A. *The Majority*

The Supreme Court affirmed the decisions of the district

101. *Finkel v. Branti*, 598 F.2d 609 (2d Cir. 1979)(memorandum opinion, unpublished opinion of the court reproduced in the Appendix to petitioner's Petition for Certiorari).

102. *Id.* at 2a.

103. 429 U.S. 274 (1977). See notes 51-52 and accompanying text *supra*.

104. *Finkel v. Branti*, No. 78-7494 (2d Cir. filed Feb. 20, 1979), unpublished opinion of the court reproduced in the Appendix to petitioner's Petition for Certiorari, at 3a.

105. *Id.*

106. N.Y. CIV. SERV. LAW § 75 (McKinney 1977).

107. *Finkel v. Branti*, No. 78-7494 (2d Cir. filed Feb. 20, 1979), unpublished opinion of the court reproduced in the Appendix to petitioner's Petition for Certiorari, at 3a-4a. The District of Columbia Circuit has employed similar reasoning. See notes 64-67 and accompanying text *supra*.

court and court of appeals holding that Finkel and Tabakman were entitled to retain their jobs.¹⁰⁸ The Court, in so doing, departed from the standards enunciated in *Elrod* and formulated a new test to gauge the propriety of patronage dismissals. Justice Stevens,¹⁰⁹ writing for the majority,¹¹⁰ stated that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."¹¹¹

Petitioner Branti had advanced four arguments for reversal. First, he contended the action should have been dismissed since he would have discharged Finkel and Tabakman for incompetence.¹¹² Second, Branti argued that the case be treated not as a dismissal, but as a failure to reappoint; he therefore urged the Court to apply a less stringent standard.¹¹³ Third, he asserted that the *Elrod* doctrine should be limited to its facts; Branti alleged that *Elrod* applied only if government employees were coerced into pledging allegiance to a political party that they would not voluntarily support, not to a requirement that an employee be sponsored by the party in power.¹¹⁴ Finally, Branti contended that while party sponsorship may be an unconstitutional condition for continued employment of certain ministerial workers, it was an acceptable criterion for employment of assistant public defenders.¹¹⁵

Petitioner's first two arguments were summarily rejected by

108. *Branti v. Finkel*, 445 U.S. 507, 520 (1980).

109. Justice Stevens had, during his term on the court of appeals, indicated a distaste for patronage. In *Illinois State Employees Union, Council 34 v. Lewis*, 473 F.2d 561 (7th Cir. 1972), cert. denied, 410 U.S. 943 (1973), he wrote that patronage "is actually at war with the deeper traditions of democracy embodied in the First Amendment." *Id.* at 576.

110. For the division of the court, see note 17 *supra*.

111. *Branti v. Finkel*, 445 U.S. 507, 518 (1980).

112. *Id.* at 512 n. 6. This was petitioner's *Mt. Healthy* claim. See text accompanying notes 50-52 *supra*.

113. *Id.* See notes 79-84 and accompanying text *supra*.

114. *Id.* at 512. Petitioner argued that *Elrod* applied to a direct infringement of First Amendment rights, but not to an indirect violation. See notes 26-29 and accompanying text *supra*. Branti was not alone in making this argument. See note 87 and accompanying text *supra*.

115. *Id.*

the Court.¹¹⁶ Regarding the incompetence issue, Justice Stevens stated that the district court's findings of fact were adequately supported by the record, and further review of them was inappropriate.¹¹⁷ Commenting on failure to reappoint, the Court noted that mere "lack of a reasonable expectation of continued employment is not sufficient to justify a dismissal based solely on an employee's private political beliefs."¹¹⁸

The Court gave greater consideration to Petitioner's third argument, but refused to limit the application of *Elrod* to those cases in which government employees were coerced into adopting prescribed political beliefs. Justice Stevens asserted that such an interpretation would emasculate the principles set forth in that decision. He argued that if *Elrod* were limited to only the prohibition of blatant coercion, it would not protect against the more subtle "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."¹¹⁹ The Court noted that this effect was apparent in Finkel's futile attempt to save his job by changing his party registration.¹²⁰ The Court held that "there is no requirement that dismissed employees prove they . . . [were] coerced into changing, either actually or ostensibly, their political allegiance."¹²¹ Victims of patronage dismissal need only establish that they were fired solely because of their party affiliation or political beliefs.¹²²

Like the *Elrod* plurality, the Court recognized that the First Amendment protects a public employee from discharge based on

116. *Id.* n. 6.

117. *Id.*

118. *Id.* Both Petitioner and Respondent argued the application of *Perry v. Sindermann*, 408 U.S. 593 (1972). Branti stated that Finkel and Tabakman "had no reasonable expectation of being retained. . . ." Brief for Petitioner at 8. Respondents countered, alleging that "even in the absence of the continuing employment expectation, the refusal to hire those who possessed all requisite qualifications except the right political posture . . . would be violative of the First Amendment." Brief for Respondent at 10. In his reply brief, at 3, Branti answered, "there was no such implied contract, respondents had no objective expectancy of re-employment." The Court indicated that the presence or absence of the expectation of employment was irrelevant.

119. *Branti v. Finkel*, 445 U.S. 507, 516 (1980).

120. *Id.* n. 11.

121. *Id.* at 517.

122. *Id.*

his beliefs.¹²³ This freedom of political belief, the Court concluded, could be validly curtailed only on a governmental demonstration of "an overriding interest" . . . 'of vital importance,'"¹²⁴ which can only arise from the nature of the public employee's work. Branti alleged that several state interests were served by using patronage to employ public attorneys.¹²⁵ The Court concluded that these interests were not of sufficient magnitude to warrant limitation of a First Amendment freedom.

Petitioner's fourth argument claimed that even if *Elrod* did apply to the facts at issue, the Court should reverse the district court's determination that respondents were nonconfidential and nonpolicymaking employees.¹²⁶ Justice Stevens said the correct inquiry was not whether an employee was a policymaker or confidential; rather the appropriate test was to determine if "party membership was essential to the discharge of the employee's governmental responsibilities."¹²⁷ The Court noted that certain positions could be subject to politically motivated discharge even though neither confidential nor policymaking in character.¹²⁸ While the Court chose not to attempt a redefinition of policymaking and confidentiality, it did determine that respondents did not make policy concerning partisan political interests¹²⁹ nor were they in receipt of confidential political information. The policymaking which occurred and confidential relations that arose related entirely to individual clients. Relying on his comments in *Ferri v. Ackerman*,¹³⁰ Justice Stevens con-

123. *Id.* See *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961); *Wieman v. Updegraff*, 344 U.S. 183 (1952); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947).

124. *Branti v. Finkel*, 445 U.S. 507, 515-16 (1980) (quoting *Elrod v. Burns*, 427 U.S. 347, 368, 362 (1976)).

125. Branti asserted that three compelling state interests were advanced by political appointment of attorneys. First, patronage provides attorneys with an entry into the political system; second, it gives those attorneys governmental training; and third, it provides political parties with a method of recruiting and training future elective officials. These interests in concert, Branti claimed, improve the effectiveness of government. Brief for Petitioner, at 5.

126. *Id.*

127. *Branti v. Finkel*, 445 U.S. 507, 518 (1980).

128. *Id.* Justice Stevens used a precinct election judge as an example. A judge could be dismissed for changing party registration if the State's election laws required that precincts be supervised by election judges of different parties.

129. *Id.* at 519.

130. 444 U.S. 193 (1980).

cluded that partisan political concerns would hinder an assistant public defender's performance.

In sum, in determining whether a position was subject to politically motivated discharge, the Court turned the focus away from categorizing a position as confidential or policymaking. Instead, the Court held that the inquiry should center on how party membership related to job performance.

B. *The Dissents*

Justice Stewart,¹³¹ in dissent, asserted that the *Elrod* inquiry into policymaking and confidentiality should not be discarded. In his judgment, respondents were clearly confidential employees and thus not protected by *Elrod*. Analogizing the public defenders office to a private law firm, Justice Stewart concluded that the relation between public defender and assistant was by definition a confidential association. Accordingly, Stewart could find no justification for compelling Branti to associate with respondents if he did not wish to do so.¹³²

Justice Powell, in a separate five part dissent,¹³³ decried the continued evisceration of patronage, a practice, in his view, fundamental to the interests of the United States. He concluded that the majority opinion, in effect, mandated a "constitutionalized civil service standard."¹³⁴

The first section of Powell's dissent criticized the majority on two separate grounds. Preliminarily, he accused the Court of largely ignoring the "substantial governmental interests served

[T]he primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in insuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation.

Id. at 204.

131. Justice Stewart had been joined by Justice Blackmun in the *Elrod* concurring opinion.

132. *Branti v. Finkel*, 445 U.S. 507, 521 (1980) (Stewart, J., dissenting).

133. Justice Rehnquist joined in whole; Justice Stewart joined the first part of Justice Powell's dissent. See note 17 *supra*.

134. *Branti v. Finkel*, 445 U.S. 507, 521 (1980) (Powell, J., dissenting).

by patronage.”¹³⁵ Second, he stated that the “standard articulated by the Court is framed in vague and sweeping language certain to create vast uncertainty.”¹³⁶ Though a dissenter in *Elrod*, Powell found fault in the majority’s abandonment of the nonpolicymaking and nonconfidential limitations on patronage dismissals. He believed that in *Elrod* the Court at least recognized a limited role for patronage. Under the new standards, Powell alleged, elected and appointed officials would no longer know when political affiliation is an appropriate employment criterion.¹³⁷

Justice Powell alleged that the vagueness of the new standard would result in burdening the federal courts with thousands of employment decisions. He predicted that “[f]ederal judges will now be the final arbiters as to who federal, state, and local governments may employ.”¹³⁸

The second section of Powell’s dissent attacked the Court’s legal basis for its decision by questioning its choice of precedent. The Court relied on *Board of Education v. Barnette*,¹³⁹ *Keyshian v. Board of Regents*,¹⁴⁰ and *Perry v. Sindermann*,¹⁴¹ all of which ostensibly had nothing to do with political patronage. According to Powell, the constitutionality of patronage cases cannot be determined without balancing the governmental interests served by patronage against the resultant burden of First Amendment rights. With the exception of *Elrod*, none of the cases cited by the majority dealt with patronage. Accord-

135. *Id.* at 522 (Powell, J., dissenting). Justice Powell discussed this argument in detail in parts III and IV of his dissent.

136. *Id.* at 524 (Powell, J., dissenting).

137. *Id.* at 524-25 (Powell, J., dissenting). As an example, he cited the removal and appointment of United States Attorneys. Though the Attorney General should be confident in the loyalty of employees, and political affiliation has been used as an indicator of loyalty, Powell concluded that membership in a particular party could not be regarded as essential to effective performance of the duties of a United States Attorney. Thus, according to Powell, under the majority’s standard, such positions could not be filled through the operation of patronage.

138. *Id.* at 525 (Powell, J., dissenting).

139. *West Virginia State Board of Educ. v. Barnette*, 319 U.S. 624 (1943). The *Barnette* case concerned religious freedom.

140. See notes 47-49 and accompanying text *supra*.

141. See notes 48-49 and accompanying text *supra*. The *Keyshian* and *Perry* cases involved freedom of speech in academic settings and teachers’ rights to remain in their positions.

ingly, Powell claimed that it was improper to resolve a patronage issue "by reference to First Amendment cases in which patronage was neither involved nor discussed."¹⁴²

In the third part of his dissent, Justice Powell described the governmental interests served by patronage. First, he alleged that patronage appointments help build strong political parties. Through the use of such rewards, party loyalty and organization is enhanced while factionalism is minimized.¹⁴³ Second, he claimed that strong party organization helps political candidates raise the funds needed to capture the voters' attention, thereby improving the quality of public debate.¹⁴⁴ Powell predicted that the Court's decision would impede candidates' ability to present their views to the electorate.

Powell also accused the majority of denigrating national political parties. He forecast that party discipline would break down as a result of the curtailment of patronage. This in turn would lead to a decline in candidate accountability and enhance the influence of special interest groups.¹⁴⁵

Powell contended that the Court did not recognize that executive policy cannot be implemented without nonpolicymaking employees' cooperation. Justice Powell summed up this argument saying, " 'No matter how wise the chief, he has to have the right Indians to transform his ideas into action, to get the job done.' "¹⁴⁶

The dissent's fourth argument criticized the Court's opinion as producing an antidemocratic effect. According to Powell, the voters of Rockland County delegated to their chosen legislature the power to appoint a public defender,¹⁴⁷ to whom in turn was delegated the power to select and appoint assistants. These voters, while free to elect both the public defender and his assistants, chose not to do so. Instead, Powell claimed, the electorate

142. *Branti v. Finkel*, 445 U.S. 507, 527 (1980) (Powell, J., dissenting).

143. *Id.* at 527-28 (Powell, J., dissenting).

144. *Id.* at 528-29 (Powell, J., dissenting); *cf.*, *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

145. *Branti v. Finkel*, 445 U.S. 507, 532 (1980) (Powell, J., dissenting).

146. *Id.* at 530 (Powell, J., dissenting)(quoting Peters, *A Kind Word for the Spoils System*, *THE WASH. MONTHLY*, Sept. 1976, at 30).

147. *Id.* at 533 (Powell, J., dissenting). N.Y. COUNTY LAW § 716 (McKinney 1972) created the office of public defender. The public defender may appoint assistant attorneys, clerks, investigators, stenographers and other employees as he may deem necessary.

chose a system which involved the selection of certain public employees on the basis of political affiliation. Thus, the Court's decision limited the voters' ability to structure their county government as they wished.¹⁴⁸

The last point of Powell's dissent questioned the propriety of judicial action in patronage cases. He believed that any decision to confer civil service status on governmental positions should be left to the voters and their elected representatives. Powell concluded that the Court's holding had the result of replacing "political responsibility with judicial fiat."¹⁴⁹

IV. Analysis

A. *The Majority*

The Court's decision in *Branti* reaffirms the principles of *Elrod*, but alters the standards for judicial review of the propriety of patronage dismissals. Justice Stevens's opinion, supported by a majority of the Court, stands as an articulate, but not faultless, restatement of the law. The decision answers several questions left unresolved by *Elrod*; it fails, however, to provide an objective standard for determining the level of state interest required to legitimize patronage.

The Court made clear that inquiry into whether an aggrieved former employee had a reasonable expectation of continued employment is unnecessary.¹⁵⁰ Patronage cases may be decided without resort to a *Perry* due process analysis.¹⁵¹ Accordingly, employees who obtained jobs through patronage are nonetheless protected from politically motivated dismissal. Mere assertion that the beneficiaries of past patronage should lack any expectation of continued employment when the party in power shifts will not preclude or defeat such employees' attempts, through legal process, to retain their jobs.

The *Branti* standards will apply with the same force to

148. *Id.* at 533 (Powell, J., dissenting).

149. *Id.* at 534 (Powell, J., dissenting).

150. *Id.* at 512 n. 6. See note 118 and accompanying text *supra*.

151. *Perry v. Sindermann*, 408 U.S. 593 (1972). While the first part of the *Perry* decision dealt with First Amendment rights, see note 48 and accompanying text *supra*, the second part dealt with the level of interest required to trigger such due process protections as pretermination hearings.

cases dealing with failures to reappoint or rehire. A hiring authority's attempts to distinguish such conduct from dismissals, if the employment decision is predicated on political beliefs, will fail.¹⁵²

Justice Stevens rejected attempts to limit *Elrod's* application to actions which infringe directly upon protected political freedoms. Under *Branti*, a dismissed employee need not prove he was subject to blatant coercion to change his political allegiance. The Court recognized that indirect infringements can likewise motivate an employee to compromise his convictions. An individual deprived of public employment need only establish that his political beliefs were solely responsible for his discharge.¹⁵³

Like *Elrod*, the *Branti* decision acknowledged that a showing of sufficient state interest may override the constitutional protections afforded political beliefs.¹⁵⁴ Under *Elrod*, a government could demonstrate such an interest by establishing that the ex-employee had occupied a policymaking, confidential position. *Branti* shifted the focus from a search for confidential or policymaking job characteristics, to one in which the government must demonstrate that affiliation with a particular party is necessary for effective job performance. A district court need not wrestle with the difficult problem of determining if a public office is policymaking or confidential; it need only decide whether party membership is essential to the discharge of the public employee's governmental responsibilities.¹⁵⁵ The inquiry is factual and limited to answering the question: must the employee accede to the politics of a particular party to perform his job

152. *Branti v. Finkel*, 445 U.S. 507, 512 n. 6 (1980). This settles an issue which had been undecided previously. See notes 79-85 and accompanying text *supra*.

153. *Branti v. Finkel*, 445 U.S. 507, 517 (1980). This decision was clearly warranted, as the same activity can, simultaneously, infringe directly and indirectly on protected rights. See notes 26-29 and accompanying text *supra*. Further, there should have been no question on this issue, as courts respond to indirect and direct infringements with the same analysis. See text accompanying note 30 *supra*.

154. Justice Stevens wrote, "First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." *Branti v. Finkel*, 445 U.S. 507, 517 (1980).

155. *Id.* at 518. This avoids the difficult inquiry into the broad nature of the job, and ends the confusion which stems from the use of "policymaking" and "confidential" in civil service statutes. See notes 66-67 and text accompanying notes 57-69 *supra*.

efficiently?

The *Branti* majority adequately considered the government's interests in formulating the test for valid patronage dismissals. A state's primary concern is to ensure the effective performance of each public office. A state's interest is thus protected by a standard which allows dismissal when political beliefs interfere with the performance of public office. Such a standard is the alternative least intrusive on First Amendment freedoms and is constitutionally justified.

The *Branti* standard has, apparently, made it more difficult for the government to establish a need for patronage. A government now has the burden of proving that prescribed political beliefs are essential to effective job performance. The Court has implied that governments' claims of essentiality would be strictly scrutinized.¹⁵⁶ The question remains: what non-civil service positions can be subject to patronage, if any?

Justice Stevens gave little guidance on the positions considered appropriate for patronage. His primary example was a local election judge, whom the state could legitimately discharge for changing political parties, if state law required electoral precincts be supervised by judges of different parties.¹⁵⁷ Justice Stevens also indicated that the essentiality requirement was met for governors' speech writers, press secretaries and legislative liaisons. These individuals, he stated, must share the same political views as their employers to perform their jobs effectively.¹⁵⁸ Justice Stevens suggested a state university football coach as a position not appropriate for patronage, even though the position involves making policy.

Combining *Elrod* and *Branti*, ministerial and clerical employees, football coaches and assistant public defenders cannot be discharged for solely political reasons. Many more positions, however, currently staffed through patronage, are directly affected by *Branti*. Arguably, the ban on patronage firings could be extended to encompass executive positions as well as public

156. The Court quoted the *Elrod* plurality, noting that state interests must be "overriding" and "of vital importance" to legitimize patronage. *Branti v. Finkel*, 445 U.S. 507, 515-16 (1980). Justice Stevens also indicated that the state interest must be "vital." *Id.* at 517.

157. *Id.* at 518.

158. *Id.*

defenders and United States Attorneys.¹⁵⁹

The boundaries of the *Branti* standard are not yet defined. If courts apply the decision literally, governments will find it exceedingly difficult to make legitimate use of the spoils system in staffing available posts. Governments are now on notice to move cautiously when making politically motivated employment decisions. If the employer, acting without other cause, believes he can establish that party membership is critical to proper functioning in a job, he should proceed with the dismissal. If, however, the employer cannot make that determination, he should forego the dismissal. Since the issue is primarily one of fact, the district courts will define the scope of *Branti* on a case-by-case basis.

B. *The Dissents*

In praising the virtues of political patronage, Justice Powell repeated the arguments raised in his *Elrod* dissent. He accused the majority of failing to balance the state interests served by patronage against the attendant deprivation of First Amendment freedoms. Powell, however, confused partisan interests with state interests¹⁶⁰ and largely ignored the impact of patronage on individual rights.

An actual or threatened patronage dismissal imposes a substantial burden on the affected employee's First Amendment rights. He can compromise his beliefs and, by so doing, hope to retain his job, or he can side with his conscience and suffer the loss of his employment. To leave this person without a remedy is to deny the basic freedoms guaranteed by the First Amendment. If anything, such coercion has a negative affect on national politics. A true national commitment to uninhibited, wide-open and robust political debate¹⁶¹ cannot coexist with inhibition of political belief and association through threat of economic loss. The First Amendment tolerates no such quid pro quo; neither do pa-

159. The Reagan Administration has not yet moved to replace incumbent United States Attorneys. Deputy Attorney General Ed Schmalz stated that he does not foresee problems in this area, but admits that the Justice Department is preparing to address the issue. *Rockland Journal-News*, Feb. 23, 1981, at 1, col. 1.

160. See note 40 *supra*.

161. *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

tronage appointees waive their First Amendment rights.

The dissent's contention that the majority's decision produced an antidemocratic result was, similarly, ill-founded. Justice Powell's assertion was based on the notion that the voters of Rockland County delegated the power to pick assistants to the public defender. That power, however, was at all times held by the local Democratic caucus.¹⁶² At best, Branti held a mere veto power; he could reject a prospective assistant whose name was submitted by the caucus. Thus, patronage practices had usurped the democratic process envisioned by Justice Powell.

C. Subsequent Cases

Since the *Branti* decision was announced on March 31, 1980, several federal courts have applied the decision.¹⁶³ Their treatment of *Branti* runs from conservative application to very broad interpretation.

The Fifth Circuit Court of Appeals, in *Tanner v. McCall*,¹⁶⁴ cited *Branti* in determining that former employees of a sheriff's department had not been discharged solely for political reasons. The court regarded *Branti* as merely reaffirming *Elrod* with minor modification and reasoned that *Branti* rejected only *Elrod*'s blanket exception for policymakers. According to the Fifth Circuit, employers need only show that party affiliation is "relevant or essential"¹⁶⁵ to staff a policymaking job through patronage.

This approach largely ignores the language of *Branti*; the Fifth Circuit apparently intends to maintain its focus on policymaking and confidentiality. Further, the court has limited *Branti* by allowing patronage on a showing that party affiliation is merely relevant to a position.

162. *Branti v. Finkel*, 445 U.S. 507, 510 n. 5 (1980).

163. See, e.g., *Van Ooteghem v. Gray*, 628 F.2d 488 (5th Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3289 (U.S. Jan. 20, 1981) (No. 80-1284); *Tanner v. McCall*, 625 F.2d 1183 (5th Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3547 (U.S. Jan. 14, 1981) (No. 80-1227); *Farkas v. Thornburgh*, 493 F. Supp. 1168 (E.D. Pa. 1980).

164. 625 F.2d 1183 (5th Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3547 (U.S. Jan. 14, 1981) (No. 80-1227). Plaintiffs were six former employees of a county sheriff's department who were not reappointed when Sheriff McCall was elected. McCall had conducted interviews with nearly all the former appointees; during those interviews he did not ask the candidates their political views or whom they had supported in the election. McCall failed to reappoint only 25% of the former employees. *Id.* at 1191.

165. *Id.* at 1190 (emphasis added).

In *Farkas v. Thornburgh*,¹⁶⁶ the United States District Court for the Eastern District of Pennsylvania held that former employees of a state agency had not established that their discharge was politically motivated. Under *Branti*, the court reasoned that "the relevant inquiry requires determination of whether defendant discharged plaintiffs *solely* because of their affiliation with the Democratic party. . . ." ¹⁶⁷ The court noted that "[a]lthough *Branti* did not expressly overrule *Elrod*, *Branti* certainly made unconstitutional dismissals which would have passed muster under *Elrod*." ¹⁶⁸

In *Mazus v. Pennsylvania Department of Transportation*,¹⁶⁹ the Third Circuit Court of Appeals considered whether *Elrod* principles should be extended to hiring systems. Without mentioning *Branti*, the court held that the hiring system at issue was valid, stating, "The Supreme Court has not considered whether *Elrod* applies to patronage hirings as well as firings." ¹⁷⁰ In a vigorous dissent, Judge Sloviter reasoned that according to *Elrod* and *Branti*, "[e]mployment decisions based on political affiliation are themselves of questionable legality." ¹⁷¹ He concluded that the majority had ignored the policy direction implicit in *Branti*.

Though no court has yet held that *Branti* applies to hiring practices, the Fourth Circuit has determined "that the *Elrod-Branti* principle must be construed to provide protection against a wider range of patronage burdens than threatened or actual dismissals." ¹⁷² In *Delong v. United States*,¹⁷³ the court examined

166. 493 F. Supp. 1168 (E.D. Pa. 1980). Plaintiffs were former employees of the Pennsylvania Department of Revenue. The court decided against them and found that several valid reasons existed for their discharge. See *Mt. Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). For a discussion of *Mt. Healthy*, see notes 50-52 and accompanying text *supra*.

167. *Farkas v. Thornburgh*, 493 F. Supp. 1168, 1173 (E.D. Pa. 1980).

168. *Id.* at 1179 n. 23. The court, in dicta, speculated on whether *Branti* should be given retroactive effect, and concluded that justice required only a prospective application of *Branti*. *Id.*

169. 629 F.2d 870 (3d Cir. 1980). Plaintiff alleged that she was the victim of sex discrimination because defendants had not offered her a job as a roadworker.

170. *Id.* at 873.

171. *Id.* at 880 (Sloviter, J., dissenting).

172. *Delong v. United States*, 621 F.2d 618 (4th Cir. 1980). Delong was a state director of the Farmers Home Administration in Maine and a Republican. After the change in national government in 1977, he was ordered back to Washington. Delong alleged that

whether an undesirable transfer was prohibited by *Elrod* and *Branti*. The court reasoned that certain burdensome transfers could be equivalent to dismissals. The court noted that if "the challenged reassignment and transfer can reasonably be thought to have imposed so unfair a choice between continued employment and the exercise of protected beliefs and associations, [it is] tantamount to the choice imposed by threatened dismissal."¹⁷⁴

Certainly, *Branti* will eventually encompass the entire scope of public employment administration, including hirings, and transfers. The majority of the Supreme Court has agreed that patronage is constitutional only when the "hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."¹⁷⁵ The Court's use of the term "hiring" must be considered more than gratuitous.

The Court's opinion requires lower courts to determine if party affiliation is necessary to proper job functioning. If the propriety of patronage is determined by job responsibilities, it matters little whether the issue is obtaining or maintaining the post. In both circumstances, economic coercion is used to further purely partisan interests. The burden on the First Amendment in either situation is essentially unchanged.

V. Conclusion

Use of political patronage to staff governmental positions is contrary to the Constitution, unless political affiliation is essential to the performance of the public office in question. If affiliation to a particular party is an appropriate prerequisite to em-

his new assignment had no responsibility, required him to do petty jobs, and forced him to travel excessively. The Fourth Circuit remanded the case for determination of the level of burden imposed by Delong's transfer.

This case arose from the group of employment decisions that spawned *Committee to Protect the First Amend. Rights of Employees of the Dep't of Agriculture v. Bergland*, 626 F.2d 875 (D.C.C. 1979), *cert. denied*, — U.S. —, 100 S. Ct. 3012 (1980) and *Johnson v. Bergland*, 586 F.2d 993 (4th Cir. 1978). See notes 64-67 and accompanying text *supra*.

173. 621 F.2d 618 (4th Cir. 1980).

174. *Id.* at 624.

175. *Branti v. Finkel*, 445 U.S. 507, 518 (1980)(emphasis added).

ployment, valid state interests will be present which will outweigh the attendant burdens on individuals' First Amendment rights. Labeling positions policymaking or confidential is no longer a relevant pursuit in patronage cases.

While *Branti v. Finkel* does not mark the abolition of the patronage system, it represents a significant curtailment of the practice. The extent of the proscription remains to be determined, and lower courts still have some latitude in resolving these issues. Clearly, however, much truth has been taken from the adage, "To the victors belong the spoils of the enemy!"¹⁷⁶

Barry P. Biggar

176. William Learned Marcy, in a speech to the United States Senate, January, 1832.