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Constitutional Limitations On Patronage Practice: Branti v. Finkel

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this tendency by its lack of emphasis on the precise steps necessary to bring a redhibition action.[72] Louisiana courts will have to reiterate some of these formal requirements in order to keep the redhibition statutes sharply defined.

Whether broadly or narrowly interpreted, however, *Philippe v. Browning Arms Co.* is a milestone in both tort and redhibition law in Louisiana. *Philippe* synthesizes the two procedurally, and adds substantive weight to the increasingly important area of products liability.

Lois E. Hawkins

CONSTITUTIONAL LIMITATIONS ON PATRONAGE PRACTICE: *Branti v. Finkel*

Defendant, the newly-appointed Democratic Public Defender of Rockland County, New York, attempted to dismiss the plaintiffs, two Republican[1] assistant public defenders. In an attempt to retain their jobs plaintiffs sought an injunction,[2] alleging that the sole reason for the attempted discharges was their political affiliation.[3] On appeal, the United States Supreme Court *held* that the discharge of an

72. Philippe v. Browning Arms Co., 395 So. 2d at 318 n.13 (La. 1981). *Compare* this language *with* the precise scheme discussed at notes 43-45, *supra*.

1. Plaintiff Finkel switched his party registration from Republican to Democrat in 1977 in an apparent attempt to improve his chances of being retained when a new Democratic public defender was appointed. This move failed; the Supreme Court found that the parties still regarded Finkel as a Republican.

2. Suit was brought under 42 U.S.C. § 1983 (1976) and 28 U.S.C. § 1343(3) (1976).

3. As Republicans, the plaintiffs were unable to obtain the recommendation or sponsorship of a Democratic legislator or chairperson, and the defendant Branti sought to replace them with persons who had such sponsorship. Branti also attempted to argue that he would have fired the plaintiffs anyway because they were incompetent, but the Court found the district court's finding that the plaintiffs were satisfactorily performing their jobs was supported adequately by the record. 445 U.S. 507, 512, at n.6. Under *Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), a plaintiff seeking to prove dismissal for the exercise of his first amendment rights must show that he would not have been dismissed "but for" the protected conduct. For lower court discussions of the *Mount Healthy City* burden of proof in a patronage dismissal case see *Rosaly v. Ignacio*, 593 F.2d 145 (1st Cir. 1979); *Miller v. Board of Educ. of Lincoln*, 450 F. Supp. 106 (S.D. W. Va. 1978); *Tanner v. McCall*, 441 F. Supp. 503 (M.D. Fla. 1977), *aff'd in part, rev'd in part*, 625 F.2d 1183 (5th Cir. 1980); *Lasco v. Koch*, 428 F. Supp. 468 (S.D. Ill. 1977).

assistant public defender solely because of his political affiliation would violate his first and fourteenth amendment rights to freedom of political association under the United States Constitution.[4] *Branti v. Finkel*, 445 U.S. 507 (1980).

Lower courts[5] early had sustained the practice of patronage dismissal[6] by accepting two arguments: the "waiver" theory and the "right-privilege" distinction. The waiver theory states that employees who obtain their jobs through patronage "waive" their right to challenge a dismissal by the same system.[7] The right-privilege distinction declares that public employment is a privilege, which government may condition.[8]

The United States Supreme Court first held patronage dismissals unconstitutional in *Elrod v. Burns*.[9] The Court reasoned that since the system often required the employee to become closely in-

4. "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. Some first amendment protections are applicable to the states through the fourteenth amendment. *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1931).

5. The Seventh Circuit was the only circuit court to find the practice unconstitutional. *See* Burns v. Elrod, 509 F.2d 1133 (7th Cir. 1975) *aff'd*, 427 U.S. 347 (1976); Illinois State Employees v. Lewis, 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973); Shakman v. Democratic Organization, 435 F.2d 267 (7th Cir. 1970), *cert. denied*, 402 U.S. 909 (1971).

6. Patronage dismissals are part of the general practice of political patronage, which is the system of rewarding political supporters with government jobs, contracts and other government benefits. Elrod v. Burns, 427 U.S. 347, 353 (1976).

7. *See, e.g.*, Nunnery v. Barber, 503 F.2d 1349 (4th Cir. 1974), *cert. denied* 420 U.S. 1005 (1975); American Federation of State Employees v. Shapp, 443 Pa. 527, 280 A.2d 375 (1971).

8. *See, e.g.*, Alomar v. Dwyer, 447 F.2d 482 (2d Cir. 1971), *cert. denied*, 404 U.S. 1020 (1972); Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam by an equally divided Court*, 341 U.S. 918 (1951).

9. 427 U.S. 347 (1976). *Elrod* involved Republican non-civil service employees of the Cook County, Illinois sheriff's office who were discharged by the newly-elected Democratic sheriff because they did not affiliate with the Democratic party and did not obtain its support. There was no majority opinion in *Elrod*. The Court split into a three-justice plurality opinion written by Justice Brennan, joined by Justices White and Marshall, a concurrence by Justice Stewart, joined by Justice Blackmun, a dissent by Chief Justice Burger and a dissent by Justice Powell joined by Justice Rehnquist and the Chief Justice; Justice Stevens did not participate. While the plurality limited its decision to patronage dismissals, *id.* at 353, it indicated a disapproval of "the practice of patronage," perhaps implying disapproval of the other forms of patronage. *Id.* at 355. The concurrence refused to comment on "the broad contours of the so-called patronage system. . . ." *Id.* at 374 (Blackmun & Stewart, JJ., concurring).

volved[10] with the political party in power, patronage dismissal infringed upon the employee's freedom of political association and belief[11] safeguarded by the first amendment. The *Elrod* Court summarily rejected the "waiver" argument[12] accepted by the lower courts. Relying primarily on *Perry v. Sindermann*[13] and *Keyishian v. Board of Regents*,[14] the plurality also rejected the "right-privilege" distinction: while the recipient has no "right" to a government benefit, the government may not condition the receipt of such benefit on the employee's support for the party in power—a condition the *Elrod* Court described as unconstitutional.[15]

In *Elrod*, the Court recognized that the "strict scrutiny" test should be applied to patronage dismissal cases since the interest at issue, political association, was fundamental.[16] Under this analysis, the Court would sustain the infringement on the employee's first amendment rights only if the governmental interests advanced were compelling *and* if the means used by the government were the least restrictive to achieve the desired end.[17] While the government advanced several interests to support the dismissal, the *Elrod* Court

10. Among such requirements were (1) affiliation with the party in power, (2) contribution of a part of wages to the party, (3) working for party candidates, and (4) obtaining the sponsorship of a party member. *Id.* at 355-57. These requirements reduced the amount of help, financial and otherwise, the employee could give to support his own beliefs. *Id.* at 355-56.

11. The right to associate with the political party of one's choice to advance beliefs and ideas is recognized as a right protected under the first and fourth amendments. *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233 (1977); Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973); NAACP v. Button, 371 U.S. 415, 430 (1963); Bates v. Little Rock, 361 U.S. 516, 523 (1960); NAACP v. Alabama, 357 U.S. 449, 460-61 (1958).

12. 427 U.S. at 359-60 n.13. *See generally* Breast, *The Supreme Court, 1975 Term—Patronage Firings*, 90 HARV. L. REV. 186, 187 (1976); Note, *Elrod v. Burns: Constitutional Job Security for Public Employees?*, 37 LA. L. REV. 990, 992 n.8 (1977).

13. 408 U.S. 593 (1972). *Perry* involved the dismissal of a non-tenured state college professor because of his public criticism of the school's policies. According to the *Perry* Court the plaintiff need not have a contractual right to his job for his first amendment rights to be protected. *Id.* at 597-98.

14. 385 U.S. 589 (1967). *Keyishian* also involved a non-tenured teacher; the Court implicitly based its decision on the premise that non-renewal of the teacher's contract could not be predicated on the exercise of first and fourteenth amendment rights.

15. 427 U.S. at 360, 361 & n.13.

16. *Id.* at 362.

17. *Id.* at 362-63. *See* Buckley v. Valeo, 424 U.S. 1 (1976); Kusper v. Pontikes, 414 U.S. 51, 58 (1973); Williams v. Rhodes, 393 U.S. 23, 31-33 (1968); United States v. Robel, 389 U.S. 258, 265 (1967); Sherbert v. Verner, 374 U.S. 398, 406 (1963); NAACP v. Button, 371 U.S. 415, 464-66 (1963); Shelton v. Tucker, 364 U.S. 479, 488-89 (1960); United Public Workers v. Mitchell, 330 U.S. 75, 96 (1947).

rejected each one.[18] However, the Court expressly recognized "[t]he need for political loyalty of employees, not to the end that effectiveness and efficiency be insured, but to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate."[19]

The *Elrod* Court declared that this interest is not so compelling as to justify *all* patronage dismissals. The plurality observed that the interest may be served in a less restricted manner by limiting the employees who could be discharged because of their political affiliation to "policy-making"[20] and "confidential" employees.[21]

In an attempt to guide lower courts in categorizing employees the *Elrod* Court stated:

The *nature* of the responsibilities is critical. . . . An employee

18. The government first advanced its interest in insuring "effective government and the efficiency of public employees." 427 U.S. at 364. The Court countered that political association was not a proper basis for imputing ill will, *id.* at 365, and noted the inefficiency resulting from "wholesale replacement" of employees after a political changeover. *Id.* at 364. The Court also stated that a less restrictive means, discharge for cause (such as for insubordination or for poor job performance) was available to meet this end. The government also urged its interest in preserving the democratic process by preserving the two-party system. The dissent accepted the importance of this interest, stating that patronage furthers the stability of political parties (which are necessary elements in the democratic process) by providing rewards for participating in party activity. *Id.* at 368-79. The plurality rejected the contention that patronage was necessary for the survival of the two-party system. *Id.* at 369.

19. *Id.* at 367.

20. *Id.*

21. *Id.* at 374 (Blackmun & Stewart, JJ., concurring). See note 9, *supra*. The concurring opinion generally has been regarded by lower courts as narrower than the plurality opinion, and is viewed as the holding of the Court. *See, e.g.*, Stegmaier v. Trammel, 597 F.2d 1027, 1033-34 (5th Cir. 1979); Alfaro de Quevado v. DeJesus Schuck, 556 F.2d 591, 592 n.2 (1st Cir. 1977); Tanner v. McCall, 441 F. Supp. 503, 511-12 (M.D. Fla. 1977); Ramey v. Harber, 431 F. Supp. 657, 662 (W.D. Va. 1977), *aff'd in part, rev'd in part*, 589 F.2d 753 (4th Cir. 1978). *See generally* Marks v. United States, 430 U.S. 188, 193 (1977).

Several lower courts have tried to resolve the question whether "confidential" is a separate criteria which alone would justify permitting a patronage dismissal, or whether it is ancillary to the policymaking criteria. In other words, is a "confidential" employee one in a confidential relationship to the policymaking process? *Compare* McCollum v. Stahl, 579 F.2d 869 (4th Cir. 1978), *cert. denied*, 440 U.S. 912 (1979); Stegmaier v. Trammel, 597 F.2d 1027 (5th Cir. 1979) *and* Catterson v. Caso, 472 F. Supp. 833 (E.D.N.Y. 1979) *with* Rosenthal v. Rizzo, 555 F.2d 390 (3d Cir. 1977), *cert. denied*, 434 U.S. 892 (1977); Loughney v. Hickey, 480 F. Supp. 1352 (M.D. Pa. 1979), *remanded*, 625 F.2d 1063 (3d Cir. 1980) *and* Finkel v. Branti, 457 F. Supp. 1284 (S.D.N.Y. 1978), *aff'd*, 598 F.2d 609 (2d Cir. 1979).

> with responsibilities not well-defined or of broad scope more likely functions in a policymaking position. . . . [C]onsideration should also be given to whether the employee acts as an advisor or formulates plans for the implementation of broad goals.[22]

This distinction has been criticized as vague and difficult to follow,[23] but the lower courts have used it to determine whether certain positions were protected.[24] Several lower panels construed the decision narrowly and as limited to its facts.[25] On the other hand, other courts gave *Elrod* a broad reading, extending the rationales to the failure to rehire,[26] demotions,[27] and undesirable transfers.[28]

In the instant case, *Branti v. Finkel*,[29] the defendant, a Democrat, was appointed public defender by a predominantly democratic legislature.[30] After the plaintiffs' terms as assistant public defenders expired the defendant failed to reappoint them because they were

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22. 427 U.S. at 467-68.

23. "Such a distinction proves simple at either end of the employment spectrum, but would be almost impossible to accomplish where the groups shade together." Comment, *Patronage Dismissal and Compelling State Interests, Can the Policymaking/Nonpolicymaking Distinction Withstand Strict Scrutiny?*, 1978 S. ILL. U.L.J. 278, 287 (1978) (quoting Nunnery v. Barber, 503 F.2d 1349, 1354 (4th Cir. 1974)). *See* Comment, *Political Patronage and the Fourth Circuit's Test of Dischargeability after Elrod v. Burns*, 15 WAKE FOREST L. REV. 655, 668 (1979).

24. For positions considered policymaking, *see, e.g.*, Newcomb v. Brennan, 558 F.2d 825 (7th Cir.), *cert. denied*, 434 U.S. 968 (1977) (a deputy city attorney is a policymaker because he has "broad powers and duties described in both the City Charter and the Milwaukee Code of Ordinances.") (*Id.* at 827 (footnotes omitted)); Alfaro de Quevado v. DeJesus Schuck, 556 F.2d 591, 593 (1st Cir. 1977) (the director of an Office of Criminal Justice was a policymaker because she had "broad discretion to carry out hazily defined purposes and to render advice.") (*Id.* at 593); Rivera Morales v. Benitez de Rexach, 541 F.2d 882, 885 (1st Cir. 1976) (an assistant secretary of education was a policymaker because the "position was one of trust, involving minor policymaking functions.") (*Id.* at 885); Catterson v. Caso, 472 F. Supp. 883, 837 (E.D.N.Y. 1979) (a county district attorney was a policymaker because he "has considerable discretion in operating his office.") (*Id.* at 837); Rosenberg v. Redevelopment Auth. of Philadelphia, 428 F. Supp. 498, 501 (E.D. Pa. 1977) (the director of a Real Estate Department was a policymaker because he was "directly involved in the formulation of policies of the RDA . . . .") (*Id.* at 501). For positions considered nonpolicymaking, *see, e.g.*, Savage v. Pennsylvania, 475 F. Supp. 524 (E.D. Pa. 1979) (a liquor control board examiner); Vincent v. Maeras, 447 F. Supp. 775 (S.D. Ill. 1978) (a communications technician); Dyke v. Otlowski, 154 N.J. Super. 377, 381 A.2d 413 (1977) (senior housing inspectors).

25. *See* Ramey v. Harber, 589 F.2d 753, 760-61 (4th Cir. 1978) (Hall, J., concurring); Mulherin v. O'Brien, 588 F.2d 853, 857, (1st Cir. 1978).

26. See note 38, *infra*.

27. Morris v. City of Kokomo, 381 N.E.2d 510, 516 (1978).

28. Johnson v. Bergland, 586 F.2d 993, 995 (4th Cir. 1978).

29. 445 U.S. 507 (1980).

30. 445 U.S. at 509.

not sponsored by the Democratic party.[31] Plaintiffs obtained an injunction, blocking the public defender's actions.[32] On appeal the Supreme Court rejected each point the defendant raised to distinguish the instant case from *Elrod*.[33] The *Branti* Court shifted the focus of examination from whether an employee is a policymaker to "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement of the public office involved."[34] The Court stated that party affiliation is an appropriate requirement for employment only when "an employee's private political beliefs would interfere with the discharge of his public duties. . . ."[35]

Examination of *Branti* indicates that the *Elrod* decision was not an anomaly limited to its unique facts.[36] In *Branti* a clear majority[37]

31. *Id.* at 508.

32. Finkel v. Branti, 457 F. Supp. 1284 (S.D.N.Y. 1978). The district court found that the plaintiffs did not make policy affecting the overall operation of the Public Defender's office but did so in the context of specific cases, and did not come within the type of broad policymaking discussed in *Elrod*. *Id.* at 1291. The court also held that the plaintiffs were not confidential employees, because any confidential aspect of their position was with respect to their client's cases and not the policymaking process. *Id.* The district court saw the concept of "confidentiality" as ancillary to the policymaking concept. *Id.* See note 21, *supra*.

33. The defendant Branti argued that a "failure to reappoint" was distinguishable from a dismissal. 445 U.S. at 512 n.6. He next asserted that the plaintiffs had knowledge that their jobs were patronage jobs and should not have expected to be reappointed by a member of the opposing party. The Court stated that such a "waiver argument" had been rejected in *Elrod*. *Id.* Furthermore, the defendant argued that the holding in *Elrod* only prohibited "dismissals resulting from an employee's failure to capitulate to political coercion" and that a requirement of a sponsor in the dominant party was not coercion. *Id.* at 516. Some lower courts have indicated agreement with this proposed limitation on *Elrod*, declaring that as long as employees are not asked to change their political affiliation they have not been coerced. *See* Roenthal v. Rizzo, 555 F.2d 390, 394 n.1 (3d Cir. 1977) (Aldisert, J., dissenting); Committee for Protection of First Amendment Rights v. Bergland, 434 F. Supp. 314 (D.C. Cir. 1977). In *Bergland* "no facts . . . [showed] that the Secretary attempted in any way to require these persons to associate with his own party, or interfered in any way with their exercise of First Amendment rights, as was the case in *Elrod*." 434 F. Supp. at 320.

The Court answered that a plaintiff in a patronage dismissal case need not prove that he has been coerced in his political associations, but must show only that the sole reason for his dismissal was his political affiliation or lack thereof. 445 U.S. at 517. Interestingly, in *Branti*, the plaintiff Finkel had apparently felt enough pressure to change his affiliation in hopes of being retained. 445 U.S. at 516 n.11.

34. 445 U.S. at 518. An example of a position in which political affiliation *is* an appropriate requirement, i.e., where the employee's private political beliefs may interfere with effective performance of his public duty, is a governor's assistant who "write[s] speeches, explain[s] his views to the press, or communicate[s] with the legislature." *Id.*

35. *Id.* at 518.

36. *See* Mulherin v. O'Brien, 588 F.2d 853, 857 (1st Cir. 1978); Gowan v. Tally, 45 N.Y.2d 33, 379 N.E.2d 177 (1978).

37. While *Elrod* was only a plurality opinion, see note 9, *supra*, *Branti* is a majori-

not only reaffirmed disapproval of patronage dismissals, but also indicated a disapproval of other patronage practices. The Court resolved a conflict in several lower courts by extending the principles of *Elrod* to the "failure to rehire" situation.[38]

Language in *Branti* suggests that the protection of political association might even extend to patronage *hiring*. Although the opinion was limited specifically to failure to reappoint,[39] the majority found difficulty in perceiving "any justification for tying either the *selection* or retention of an assistant public defender to his party affiliation."[40] While suggestive of a disapproval of patronage hirings, the excerpt is no certain indication of the result should the Court actually confront such a situation.[41] A failure to rehire, closely analagous to a dismissal, has been called a difference of "form and not of substance."[42] On the other hand, a failure to hire arguably differs significantly from a dismissal, since a failure to hire could have less impact on a job applicant's beliefs than the threat of discharge would have on an employee. Some commentators have noted, however, that a job applicant's freedom of association might be greatly

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ty decision. The opinion was written by Justice Stevens, joined by Chief Justice Burger, and also by Justices Brennan, White, Marshall and Blackmun. Chief Justice Burger shifted from dissent in *Elrod* in which he had dissented on the grounds that the Court was intruding on state legislative concerns. *See* 427 U.S. 347, 375 (1976) (Burger, C.J., concurring). Justice Stewart, who concurred in *Elrod*, dissented in *Branti*, stating that assistant public defenders were confidential employees. 445 U.S. at 520-21 (Stewart, J., dissenting). Justices Powell and Rehnquist also dissented basically for the same reasons as they had in *Elrod*: because the contribution that patronage makes to strengthen political parties, and the contribution strong political parties in turn make to the democratic process and to accountability of government, outweighs the infringement on first amendment rights. 445 U.S. at 507, 522, 527-32 (Powell, J., dissenting).

38. 445 U.S. at 512 n.6. For lower courts discussions of the "failure to rehire" notion, see Francia v. White, 594 F.2d 778 (10th Cir. 1979); Reed v. Hamblen Cty. of Tenn., 468 F. Supp. 2d (E.D. Tenn. 1979); Ramey v. Harber, 431 F. Supp. 657 (W.D. Va.), *aff'd in part, rev'd in part*, 589 F.2d 754 (4th Cir. 1978), *cert. denied*, 442 U.S. 910 (1979).

39. 445 U.S. at 513 n.7.

40. *Id.* at 520 n.14 (emphasis added). The dissent stated that the majority "perceived no Constitutional distinction between selection and dismissal of public employees." *Id.* at 522 n.2 (Powell, J., dissenting).

41. For a discussion of the possible split of the Court on patronage hirings see Brest, *supra* note 12, at 186, 194-95 (1976). For a discussion of the extension of *Elrod* to other forms of patronage see Note, *Patronage and the First Amendment After Elrod v. Burns*, 78 COLUM. L. REV. 468, 473-78 (1978).

42. Hargrave, *The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Louisiana Constitutional Law*, 40 LA. L. REV. 717, 721 (1980).

affected by a failure to hire because of the applicant's political affiliation.[43] Nonetheless, the *Branti* Court left the issue open.[44]

Extension of the prohibition to hirings would raise problems of proof. In the case of political hiring the employer might more easily justify non-hiring on grounds other than the plaintiff's political affiliation—such as the other applicants being "better qualified."[45]

In addition to problems of proof as to cause, the plaintiff in a non-hiring case may have standing problems. A plaintiff challenging a refusal to hire may have difficulty showing "a direct, personal injury resulting from a constitutional violation that court action could cure,"[46] because he may be simply "one of many not hired,"[47] or may not be able to show that he would have been the recipient of the job if the constitutional violation had not occurred.[48] Therefore, even if the Court were to extend *Elrod* and *Branti* to prohibit patronage hirings, problems of proof and standing would be obstacles to any real practical protection for persons refused employment because of their political affiliation.

In *Branti*, the majority delineated a new standard for determining when the political affiliation of a public employee legitimately may be considered as a condition to his employment. Perhaps to promote a more analytical approach by the lower courts, the Court redefined the test to ask whether "party affiliation is an appropriate requirement for the effective performance of the public office involved."[49] While the new test redirects attention away from labeling a person a policymaker or confidential employee, the two concepts are not discarded.[50] Whether a person is a policymaking or confiden-

43. One commentator has noted that the class affected by patronage hirings is larger, and where the job market is tight applicants may be "coerced" into changing their affiliation in order to obtain a job. Brest, *supra* note 12 at 195.

44. 445 U.S. at 513 n.7.

45. Note, *supra* note 41, at 480. Under *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), the burden is on the plaintiff to show that he would not have been dismissed "but for" the protected conduct. See note 3, *supra*.

46. Note, *supra* note 41, at 480. This test for standing is stated in *Warth v. Seldin*, 422 U.S. 490, 508 (1975).

47. Note, *supra* note 41, at 480. Under *Warth* the Court will not exercise jurisdiction if the injury is so generalized as to be "shared in substantially equal measure by a large class of citizens. . . ." 422 U.S. at 499.

48. A plaintiff must be able to show that absent the constitutional violation he could have received the benefit. Note, *supra* note 41, at 481 (citing Warth v. Seldin, 422 U.S. 490, 499 (1975)).

49. 445 U.S. at 518.

50. The dissent took the opposite view, stating that to consider the breadth of

tial employee still appears to be significant in determining whether his political affiliation is an appropriate factor to be considered. In *Branti*, the policymaking and confidential employee indicators were used to determine that political affiliation was not an appropriate requirement for an assistant public defender. The Court's conclusion that the assistant public defender's political affiliation will have no effect on his job performance was based upon the fact that an assistant public defender does not make policy related to partisan political interests but only makes policy decisions regarding his client's cases.[51] Also, the Court reasoned that any access an assistant public defender has to confidential information is based on attorney-client relations and has no connection with partisan political interests.[52]

The Court contrasted the assistant public defender's responsibilities with those of a deputy prosecutor who has "broad responsibilities"[53] (an indicia of a policymaker in *Elrod*). Thus, while the concepts of the policymaking and confidential employee are no longer determinative, they apparently continue to be very useful tools for determining when private political beliefs will be deemed to impair job performance. Also, the Court appears to be rewording the test in order to clarify the type of policymaking referred to in *Elrod*—policymaking related to "partisan political interests."[54] The new test may be an attempt at a more functional approach to the problem. It requires not only a determination of policymaker/non-policymaker, but also an additional inquiry into whether an employee's party affiliation would interfere with the performance of his job. This determination requires a more searching inquiry into the employee's actual duties and into how the performance of those duties may be realistically related to his political beliefs. Examples of employees who fall within the *Branti* exception[55] are persons with a close relationship to a government official in a political sense, in that they are involved in helping the official express his political views.

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responsibilities is "inconsistent with the Court's assertion that the 'ultimate inquiry is not whether the label 'policymaker' . . . fits a particular position'. . . ." *Id.* at 518 n.5 (Powell, J., dissenting). However, the dissent overlooked the fact that the operative word here is "ultimate." *Id.* at 518. The Court did not mean that inquiry into whether an employee is a policymaker is no longer *relevant*, but only that the inquiry is not *determinative*.

51. *Id.* at 519.

52. *Id.*

53. *Id.* at 519 n.13.

54. See text at note 52, *supra*.

55. See note 34, *supra*.

Similarly, the Court's discussion of the relevancy of the policymaking/confidential criteria to the question of whether an assistant public defender could be discharged on the basis of political affiliation implies that persons to whom an elected official delegates broad policymaking functions may be chosen on the basis of their political affiliation.[56]

In sum, the test in *Branti* appears to be more of a redefinition of the *Elrod* test than a completely new test. Arguably, the redefined test broadens the class of protected employees in that the class of persons whose jobs are realistically related to partisan interests is smaller than the class of *all* policymakers.

One may question whether the Court succeeded in setting forth a less vague and uncertain test or merely exchanged one uncertain test for another. Determining whether an employee's political affiliation would impair the performance of his public duties may be no easier than determining whether he is a policymaker. The dissent in *Branti* characterizes the new standard as "vague" and "certain to create vast uncertainty."[57] The difficulty government officials may have in determining with certainty whether a dismissal is justified is a problem under the new test as a consequence of this vagueness.[58] The answer to this criticism, however, is that no other workable alternative exists. While some type of "bright-line test" may be desirable from the standpoint of the government, the nature of the problem does not lend itself to such a test. Considering the many thousands of public employees with infinite varieties and combinations of duties, public employment clearly does not lend itself to a "bright-line rule." The balancing of an individual's rights with the government's interest is best accomplished on a case-by-case basis. A "bright-line test" would necessarily be either overinclusive or underinclusive. While the test in *Branti* may not be as certain as could be desired, it is likely to promote a more careful case-by-case analysis by both the courts and by officials considering the discharge or non-rehiring of an employee.

Perhaps one of the most puzzling aspects of *Branti* is its indica-

56. The official may assume the employees will be more able to develop policies in line with his own views. Also included in this type of position are individuals who act as advisors to the government official, because the official could expect advice more in line with his views to come from persons with similar political beliefs. Whether an employee acted as an advisor was a question to be asked to determine if he was a policymaker in *Elrod*. 427 U.S. at 368 (1976).

57. 445 U.S. at 524 (Powell, J., dissenting).

58. *Id.*

tion that the decision in *Elrod* was based on the government's interest in effectiveness and efficiency and that the discharge of the employees involved in *Elrod* did not further the governmental interest.[59] This reasoning was not the basis of the *Elrod* decision. Moreover, the Court in *Elrod* specifically rejected dismissals on the basis of an employee's political affiliation as a means of furthering governmental effectiveness and efficiency and stated that discharge for cause was the means to this end.[60] The only interest approved by the Court in *Elrod* was the government's interest that representative government not be undercut by obstructive tactics.[61]

If the Court is changing the underlying rationale for permitting consideration of an employee's political affiliation, the change could be a significant development. The underlying rationale must be remembered when determining whether an employee may be discharged for his political affiliation. If the underlying reason for allowing some patronage dismissals is to ensure governmental effectiveness and efficiency, then the result may be different from allowing dismissals to ensure that representative government not be undercut. While the *Branti* court apparently rejected the governmental argument that an employer may not be able to work efficiently with an employee merely because he is of a different political affiliation,[62] the governmental efficiency rationale could possibly be significant in the case of active political conduct—more particularly, active political conduct against an elected official with whom the employee must work with closely.[63] Of course, an employer faced with an employee who has actively campaigned against him arguably should be able to continue his professional relationship with the employee, and as long as the employee performs his job in a competent manner and obeys the employer's directives he must be retained. If the employee is not competent or is unable to take instructions,

59. 445 U.S. at 517.

60. 427 U.S. at 366. See text at note 18, *supra*.

61. 427 U.S. at 367. See text at note 19, *supra*.

62. 427 U.S. at 364-65.

63. A lower Court opinion, *Ramey v. Harber*, 589 F.2d 753 (4th Cir. 1978), dealing with the discharge of deputy sheriffs by a newly-elected sheriff, distinguished *Elrod* because the employees in *Elrod* were discharged for a general failure to support the Democratic party, *id.* at 757, whereas the plaintiffs involved in *Ramey* had actually campaigned against the defendant sheriff. *Id.* at 756. The Court stated that the efficient operation of the sheriff's office depended on mutual cooperation and confidence between the deputies and the sheriff. *Id.* For a case reaching the opposite conclusion see Francia v. White, 594 F.2d 778, 780 (10th Cir. 1979). Viewed realistically, active political activity by an employee against an employer with whom he must work closely could impair the relationship in such a way as to make it difficult for the two to work efficiently together.

he may be discharged for cause.[64] Viewed realistically, however, a close professional relationship may be impaired by a hard-fought political campaign, with the employee and employer on opposite sides, in which the employer's job depends on his re-election. Whereas, the relationship probably would not be impaired if the two are simply of different political affiliations.

While *Branti* did not deal with active conduct by an employee against his employer, the basis of Justice Stewart's dissent seems to be that the close professional relationship between the public defender and his assistants "with the necessity of mutual confidence and trust"[65] could be impaired by mere difference of party affiliation. While one may not agree with Justice Stewart regarding mere affiliation, active conduct by the assistant public defenders against the public defender could make his position very tenable.[66]

The Court's decision in *Branti* does not answer many of the questions raised by its decision in *Elrod*. To what other forms of patronage the Court will extend its prohibition is still uncertain. The new standard for determining whether an employee's political affiliation may be considered as a condition of his employment does not appear to be easier to apply or to lend itself to more certainty.[67] The Court may have restated the test, however, in such a way that will foster a more careful and analytical approach by lower courts: an approach which will give correct results on a case-by-case basis after a careful balancing of the individual's first amendment rights and the governmental interests involved.

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64. See note 18, *supra*.

65. 445 U.S. at 520-21 (Stewart, J., dissenting).

66. Of course, this argument is only persuasive when the active political conduct was against an employer with whom the employee must work closely, as opposed to conduct only amounting to the employee's active support of just anyone not of the "correct" party.

One reason given by the Democratic Committee Chairperson that she could not help one of the plaintiffs in *Branti* to retain his job was that he had been active in the campaign of a Republican candidate for county judge. The support of a person in this position is not the type of close employee-employer relationship referred to in the text and should not have been a basis of the plaintiff's discharge under that argument.

67. Officials in government, when making decisions on employees they may discharge due to political affiliation, should carefully study the employee's duties to see if they have a real connection to partisan political concerns. If there is any doubt about the dischargeability of the employee he should be retained, because the burden is on the government to justify his dismissal on partisan grounds. 427 U.S. at 362-63. However, this should not be too great a burden on the government because it is presumed that the employee is competent and obeys the directives of his employer or he could be discharged for cause.