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An Objective and Practical Test for Adjudicating Political Patronage Dismissals

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NOTES

AN OBJECTIVE AND PRACTICAL TEST FOR ADJUDICATING POLITICAL PATRONAGE DISMISSALS

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I. INTRODUCTION

The phrase, "To the victor belong the spoils"¹ captures the spirit of the "spoils system"² but ignores injury to those non-civil service, public employees who wrongly lose their positions when the political hierarchy is subsequently restructured. Not without substantial merit in the upper echelons of politics, political patronage does however stand as a formidable bar to job security, efficiency and satisfaction at the lower levels of government employment. This issue has piqued the interests of both the legal profession and the hiring authorities. Both groups want answers to the questions: which public employees are immune from discharge because of their political affiliation, and if such employees are nevertheless improperly discharged, whether there is a resulting cause of action?³

¹ Note, *Constitutional Law: The Impact of Branti v. Finkel on Political Patronage Employment*, 34 OKLA L. REV. 93, 93 (1981)(authored by Marilyn Matteson Edens).

² The spoils system has not been declared unconstitutional. See *American Fed'n of State, County & Mun. Employees v. Shapp*, 443 Pa. 527, 280 A.2d 375, 380 (Barbieri, J., dissenting), *reh'g denied*, 443 Pa. 527, 280 A.2d 375 (1971).

³ The court held that the issue of political patronage does not present a non-justiciable political question even though the petitioners did not argue that the decision should be left to either the executive or the legislature. Had this argument been suggested, it would not have been an obstacle to adjudication. There is also no bar to adjudication under the separation of powers doctrine. The executive does have the responsibility to see that the

The present state of the law rests generally on the inconsistent application of *Elrod v. Burns*⁴ and its prodigy, *Branti v. Finkel*.⁵ Current decisions disallow most plaintiffs' suits based on their status as policymakers and/or confidential employees or employees of whom political affiliation with the governing party is an appropriate requirement. The *Elrod* and *Branti* tests set down extremely ambiguous guidelines for courts and attorneys to apply, and as such, courts continue to search for new methods by which to determine which complaints state a legitimate cause of action. Though most commentators argue that finding such a "bright-line"⁶ on the patronage spectrum is an impossible task, one which must be left to a case-by-case analysis,⁷ this discussion will suggest that the true and workable standard focuses on an objective examination of the individual employee's job title, description and those duties performed on a day-to-day basis. The line should be drawn at the point where a public employee is no longer simply a clerical, administrative assistant but has an actual voice in the manner in which the government is run.

II. POLITICAL PATRONAGE PARAMETERS

A. Patronage Defined

Political patronage has been defined as "the discretionary favors of government in exchange for political support"⁸ and more cynically as "all those posts, distributed at the discretion of political leaders, the pay for which is greater than the value of the public services performed."⁹ One scholar suggested that:

[p]atronage exists because of human nature, offering rewards in a democracy in which men have a choice of conduct. It is both an extension of the electoral process, providing public officials with the tools to govern, and a diminution of the electoral process,

laws are faithfully executed, but the solution to this challenge is that the separation of powers doctrine does not apply between the federal judiciary and the states. *Elrod v. Burns*, 427 U.S. 347, 352 (1976).

⁴ *Id.* at 347.

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

⁶ Note, *Constitutional Limitations on Patronage Practice: Branti v. Finkel*, 42 LA. L. REV. 310, 319 (1981)(authored by Brenda Harelson Verbois). This article concludes that a "bright-line rule" would be either "overinclusive or underinclusive," and thus it would not adequately resolve the federal questions involving patronage practice. This author would prefer a case-by-case approach.

⁷ Simses, *The First Amendment Implications of Political Patronage Dismissals*, 27 LOY. L. REV. 219, 235 (1981).

⁸ M. TOLCHIN & S. TOLCHIN, *TO THE VICTOR* 323 (1971).

⁹ Simses, *supra* note 7, at 219.

robbing legislators of the ability to decide issues solely on the basis of conscience and reason.¹⁰

More specifically, political patronage is the hiring and firing of non-civil service, public employees without regard to their merit, but in response to a substitution of one political ideology for another in the governing body. Under any definition, political patronage occurs independently of which political party is in power,¹¹ and is subject to substantial abuse. While there are numerous ways in which patronage is dispensed,¹² the most visible manifestation is the dismissal of non-civil service, public employees.

B. Justifications and Rebuttal

Lest political appointments and dismissals appear totally unjustified, experience demonstrates that the practice can be appropriate in higher levels of government for a number of reasons. Political leaders do need loyal supporters who can effectuate their policies, and patronage serves this essential function.¹³ Other traditional justifications include: 1) efficiency of public employees; 2) accountability and responsiveness to the public; 3) preservation of the democratic process; 4) strengthening of political parties; 5) performance of quasi-welfare functions;¹⁴ and 6) helping minorities obtain social acceptance.¹⁵

On the other side of this controversy, critics of political patronage argue that these considerations do not reflect reality. Opponents primarily contend that patronage: 1) causes substantial disruption when a large turnover occurs; 2) ignores experience; 3) provides a disincentive to

¹⁰ M. TOLCHIN & S. TOLCHIN, *supra* note 8, at 26.

¹¹ *Id.* at 14.

¹² Some of the more common examples of political patronage include: 1) public contracts for defense, highway and building projects; 2) tax abatements; 3) judgeships and other appointed positions such as receiverships and trusteeships; 4) improved public services for cooperative wards; and 5) assistance in navigating the "maze of federal and state bureaucracy . . . to obtain far-ranging services. . . ." *Id.* at 323. This paper will however, concentrate solely on patronage dismissals.

¹³ *Elrod*, 427 U.S. at 367. One constitutional law scholar contended that "[n]o matter how wise the chief, he has to have the right Indians to transform his ideas into action, to get the job done." Visser v. Magnarelli, 530 F. Supp. 1165, 1174 (N.D. N.Y. 1982)(quoting Peters, *A Kind Word for the Spoils System*, WASH. MONTHLY, Sept. 1976, at 30).

¹⁴ Note, *A Constitutional Analysis of the Spoils System—The Judiciary Visits Patronage Place*, 57 IOWA L. REV. 1320, 1325-26 (1972)[hereinafter cited as *Patronage Place*]. Proponents maintain that patronage strengthens political parties. They argue that patronage maintains active party organization, promotes intra-party cohesion, attracts voters and supporters and finances parties and candidates. Murray, *Patronage Dismissals Under a First Amendment Analysis: The Aftermath of Branti v. Finkel*, 25 ST. LOUIS U.L.J. 189, 189 (1981).

¹⁵ S. LUBELL, *THE FUTURE OF AMERICAN POLITICS* 76-77 (1952).

work hard;¹⁶ and 4) results in losses to political parties and policy information.¹⁷ The dramatic differences between these two poles of thought have generated a substantial amount of controversy over the merits and disadvantages of the practice of political patronage.

C. *Usage and Decline*

Though the twentieth century witnessed the most dramatic and well-known example of excessive patronage at the municipal level in Chicago under the late Mayor Richard Daley,¹⁸ the practice of hiring loyalty was first used in the newly formed United States during the presidency of George Washington.¹⁹ The first instance of a politically-motivated discharge occurred under the Adams administration, and the practice blossomed under Thomas Jefferson.²⁰ Stimulated by the joint motives of promulgating grass roots politics and raising revenue for costly political campaigns, Andrew Jackson popularized the custom of patronage hiring and firing during his years in office.²¹ Within a few decades, however, patronage abuses precipitated the birth of the modern civil service system.²² This push for federal employment and discharge based on merit²³ was paralleled at the state and local government levels,²⁴

¹⁶ *Patronage Place*, *supra* note 14, at 1327.

¹⁷ Pollock, *The Cost of the Patronage System*, 189 ANNALS 29, 30 (1937). Other traditional arguments against patronage are: 1) moral losses under a "back-scratching" philosophy; 2) excessive demands on employees to wine and dine supporters; 3) salary in excess of the work performed; 4) ignorance of young and fresh ideas; and 5) unbusinesslike favoritism. *Id.* at 29-34. Although some of these arguments may be weak today, they were argued by staunch opponents of political patronage.

¹⁸ *Legal Decisions of Interest-Patronage Hiring and Firing as Unlawful Conduct*, 6 CURRENT MUN. PROBS. 490, 490 (1980).

¹⁹ C. FISH, *THE CIVIL SERVICE AND THE PATRONAGE* 13-14, 19 (1904). George Washington only removed seventeen employees for efficiency reasons, but he did appoint others to governmental positions based on their political affiliation. *Id.*

²⁰ *Id.* at 13-14, 19-20. The first employee removed from office on political grounds was the Commissioner of Revenue under John Adams, but Thomas Jefferson made 164 changes in 334 offices. *Id.* He is quoted as saying, "[i]f a due participation of office is a matter of right, how are vacancies to be obtained? Those by death are few; by resignation, none. Can any other mode than that of removal be proposed?" S. PADOVER, *THE COMPLETE JEFFERSON* 518 (1943).

²¹ M. TOLCHIN & S. TOLCHIN, *supra* note 8, at 323-26. Abraham Lincoln also used this device extensively to his advantage.

²² Public concern regarding the widespread use and abuse of political patronage prompted the United States Congress to pass the Pendleton Act of 1883 and the Hatch Political Activities Act of 1939. The Pendleton Act established the civil service system where appointments and dismissals are made based on a non-partisan analysis. The Hatch Political Activities Act limited the political activities of federal employees. Simses, *supra* note 7, at 219-20. The constitutionality of the Hatch Act was upheld by the Supreme Court in *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947).

²³ *Recent-Cases-Public Employees-Freedom of Association-Discharge of Non-policy-*

and the state courts were relatively successful in curbing²⁵ some of the more blatant abuses of the spoils system.²⁶

It is evident that many public employees are still not covered by the civil service system. Therefore, the status of their employment is still open to public controversy and debate in the courts. There should, however, be a point on the public employee pyramid beyond which the political patronage machine cannot extend.

III. HISTORY OF THE CAUSE OF ACTION

A municipal, county or state employee who is dismissed solely for political reasons presently may file suit for deprivation of first and fourteenth amendment rights of free speech and assembly²⁷ under title 42 of the United States Code.²⁸ Recognition of a claim against patronage

making Public Employees on Ground of Political Affiliation Infringes Employees' Freedom of Association, 26 VAND. L. REV. 1090, 1091 (1973)[hereinafter cited as *Recent Cases*].

²⁴ *Simmes*, *supra* note 7, at 220.

²⁵ *Patronage Place*, *supra* note 14, at 1321. Merit systems at the state level were accompanied by 1) new methods of political financing, 2) greater need for job expertise, 3) increased issue orientation, and 4) new incentives for political campaigns. Sorauf, *The Silent Revolution in Political Patronage*, 20 PUB. ADMIN. REV. 28, 34 (1960).

²⁶ Tammany Hall was the home of excessive and destructive political patronage practices for many years. Its origins can be traced to 1787, but it was not until 1809 that citizens began to criticize its "political machinations." J. MUSHKAT, *TAMMANY: THE EVOLUTION OF A POLITICAL MACHINE* vii (1971). Though Tammany may have begun as social group for patriots, it changed with the dawn of the Industrial Revolution. "Boss" rule soon took over as management, and the abuses began. Because competitive civil service did not occur until 1883, public jobs for political supporters were abundant. A "city boss could reward a follower with a job-as policeman, garbage collector, street inspector, watchman, or office clerk-with tenure at the pleasure of the boss." W. MOSCOW, *THE LAST OF THE BIG-TIME BOSSES* 19 (1971).

²⁷ U.S. CONST. amend. I. "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. XIV, § 1 states:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or 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.

One scholar suggests that "[a] system permitting patronage dismissals may also violate equal protection by creating an invidious statutory classification that protects some public employees-those under a civil service scheme-from improper discharge but denies that protection to others." Comment, *Patronage Dismissals: Constitutional Limits and Political Justifications*, 41 U. CHI. L. REV. 297, 306 (1974)(authored by Glen S. Howard).

²⁸ Civil Action for Deprivation of Rights, 42 U.S.C. 1983 (1979). This statute reads:

Every person, who, under color of statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of

dismissal has created a great deal of litigation in the federal courts²⁹ in the last twenty years. The cause of action, however, stems from a much older line of cases on first amendment rights. These cases hold that an employee's interest in making public comments³⁰ or first amendment assertions³¹ cannot be abridged unless there is an overriding state interest, backed by means that are rationally related to the goal sought so as not to unnecessarily abridge first amendment freedoms.³² One landmark case capsules this principle as follows:

though a person has no "right" to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests especially his interest in freedom of speech.³³

the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

To bring suit under this statute, a plaintiff must show that the defendant acted under color of state law and that the defendant deprived plaintiff of a federal right, either statutory or constitutional. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). The Supreme Court has held that Congress intended that municipalities and other local governments could be sued under this statute. *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Today, this statute is the primary avenue by which public employees challenge wrongful political discharge.

²⁹ *Illinois State Employees Union, Council 34 v. Lewis*, 473 F.2d 561, 576 (7th Cir. 1972)(Campbell, J., concurring), *cert. denied*, 410 U.S. 928 (1973). In this case, one judge feared that the federal courts would become "super civil service commissions." *Id.* While there has been a great deal of litigation in the federal courts, Justice Campbell's worst fears have not been realized.

³⁰ See *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). The Court balanced the state's interest in promoting the efficiency of employees in public office against the teacher's right to make public comment. The court held that the employee's rights were paramount because only state interference which is necessary to meet a justifiable state end will be tolerated. *Id.* at 568. Such an interest was not present in this case.

³¹ *Keyishian v. Board of Educ.*, 385 U.S. 589 (1967)(refusal to sign certificate that she was not a Communist was upheld because first amendment rights should not be strictly circumscribed). See also *Wieman v. Updegraff*, 344 U.S. 183 (1952).

³² See *Buckley v. Valeo*, 424 U.S. 1 (1976). There is no constitutional violation if patronage practices promote significantly important state interests. However, the means chosen must be the least restrictive means possible. Like the *Elrod* Court, the *Branti* Court held that political firings "chill" first amendment rights and must therefore "survive exacting scrutiny." *Branti*, 445 U.S. at 515.

³³ *Perry v. Sinderman*, 408 U.S. 593, 597 (1972). See also *Board of Regents v. Roth*, 408 U.S. 564 (1972). Both cases rejected the right-privilege distinction that government employment was a privilege and not a right. Note, *Constitutional Law-First Amendment Protects Public Employees' Political Beliefs*, 55 TUL. L. REV. 576, 577 (1981)(authored by David Meyer Dubin). *Contra Alomar v. Dwyer*, 447 F.2d 482 (2d Cir. 1971)(plaintiff had no

The "right to associate with the political party of one's choice"³⁴ was again defended in *Illinois State Employees' Union v. Lewis*.³⁵ In this case, the court rejected the theory that public employees waive their right to constitutional protection against politically-motivated discharge when they accept patronage positions.³⁶ The right to be free of patronage dismissal was, however, qualified in later cases. It could be circumscribed if the employer believed that the power to dismiss based on political affiliation was within his constitutional authority.³⁷ The right to be free of patronage discharge could also be overridden if the court found that the employee served at the "pleasure" of his or her superior³⁸ or if the employee held substantial quasi-legislative and quasi-judicial powers such that there was no protection against patronage dismissal.³⁹

The state of confusion over the proper standard to apply in political patronage cases prompted the Supreme Court to hear arguments on this issue and prescribe a new test in *Elrod v. Burns*.⁴⁰ In this landmark decision, the Court considered the question of whether non-civil service, public employees in the Cook County Sheriff's Office could be validly dismissed for political reasons by the newly elected sheriff.⁴¹ In holding that these three employees, a bailiff/security guard, a process server and an employee in the office, each stated a claim for deprivation of constitutional rights, the Court concluded that permissible dismissals should be strictly limited to policy-making positions.⁴² The court held that

constitutional right to public employment and could not object to at-will dismissal), *cert. denied*, 404 U.S. 1020 (1972).

³⁴ *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973).

³⁵ *Illinois State Employees' Union, Council 34 v. Lewis*, 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973).

³⁶ *Id.* at 573-74. *See also Shapp*, 443 Pa. at 529, 280 A.2d at 378, where the court states that "those who, figuratively speaking, live by the political sword, must be prepared to die by the political sword." This quote illustrates the waiver theory that one who accepts patronage employment waives his or her right to contest patronage dismissal.

³⁷ *Young v. Coder*, 346 F. Supp. 165 (M.D. Pa. 1972)(Superintendent of Flood Control did not exceed his constitutional authority under the spoils system when he dismissed an employee for political reasons).

³⁸ *Moldawsky v. Lindsay*, 341 F.Supp. 1393 (S.D. N.Y. 1972)(former City Marshal, who opposed the defendant's re-election, served at the "pleasure" of the mayor and could be discharged for his political affiliation).

³⁹ *Adams v. Walker*, 492 F.2d 1003 (7th Cir. 1974)(Chairman of Liquor Control Commission, who was specifically exempted from civil service, lost based on his status as a policymaker).

⁴⁰ *Elrod v. Burns*, 427 U.S. 347 (1976).

⁴¹ *Id.* at 349.

⁴² *Id.* at 367. *See also Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982). In this case, the court relied on *Elrod* but set the standard as "whether the position, held by the individual authorizes, either directly or indirectly, meaningful input into government decisionmaking on issues where there is room for principled disagreement on goals and their implementation." *Id.* at 1170. This standard comes close to the objective

"[n]onpolicymaking individuals usually have only limited responsibility and are therefore not in a position to thwart the goals of the in-party."⁴³ The Court, however, confused the issue when it qualified the blanket ban on dismissal of nonpolicymakers by acknowledging that there was no obvious line between policymakers and nonpolicymakers, and even someone with a large number of responsibilities might not qualify as a policymaker.⁴⁴ The Court concluded that the "nature of the responsibilities is critical"⁴⁵ and created a two-prong test to apply to the adjudication of political patronage cases. The first prong determines whether the employee's duties are broad in scope or highly defined,⁴⁶ and the second prong questions whether an employee is "an adviser or [one who] formulates plans for the implementation of broad goals."⁴⁷

While the *Elrod* test was used extensively in the next few years,⁴⁸ the federal courts still toyed with other possible standards which might prove more workable. One of these cases was *McCollum v. Stahl*.⁴⁹ In this case, the court applied an "alter ego" test to deputy sheriffs. Because the deputies' actions could expose the sheriff to civil liability, the court held that they were not exempt from patronage dismissal.⁵⁰ A different test was applied when deputy city attorneys were terminated by the chief city attorney for political reasons. The court held that when the deputies' personal loyalty to their superiors was in question, they could be validly dismissed.⁵¹

Even these standards ultimately proved inadequate, and the Supreme Court was again compelled to consider the issue of political patronage dismissal. In *Branti v. Finkel*,⁵² the Court addressed the issue of whether assistant public defenders have a cause of action for patronage dismissal. Although the Court upheld the plaintiffs' rights to retain their jobs as in *Elrod*, the Court also refined and narrowed its former decision. Rather than rely on the labels "policymaker" and "confidential" employee, the

standard when it specifies "governmental" policymaking as the attribute which makes one a policymaker.

⁴³ *Elrod*, 427 U.S. at 367.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 368.

⁴⁸ See, e.g., *Alfaro De Quevedo v. De Jesus Schuck*, 556 F.2d 591 (1st Cir. 1977)(narrow responsibilities and well-defined duties rarely indicate a policymaker); *Rosenthal v. Rizzo*, 555 F.2d 390 (3d Cir.) (court asks whether public employee is merely a "soldier" or a "top line" employee), cert. denied, 434 U.S. 892 (1977).

⁴⁹ *McCollum v. Stahl*, 579 F.2d 869 (4th Cir. 1978), cert. denied, 440 U.S. 912 (1979).

⁵⁰ *Id.* at 872.

⁵¹ *Newcomb v. Brennan*, 558 F.2d 825 (7th Cir.), cert. denied, 434 U.S. 968 (1977). See also *Stegmaier v. Trammell*, 597 F.2d 1027 (5th Cir. 1979)(employee held a position of confidence, trust and loyalty as the sole deputy and assistant to an elected official).

⁵² *Branti v. Finkel*, 445 U.S. 507 (1980).

Branti Court concluded that the true "question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the office involved."⁵³ Under this test there was no question that political affiliation was not required to hold the position of assistant public defender because the chief duty of this office was and is to zealously represent clients in controversy with the state.⁵⁴ Any policymaking or confidentiality occurs within the attorney-client relationship and outside the realm of partisan politics.⁵⁵ The explicit reference to the policymaking standard, however, showed that the Court still considered the *Elrod* factors to be of some import. Although it is not the ultimate criterion, the policymaking standard is still an important factor in deciding which employees are exempt from dismissal based on political affiliation.⁵⁶

As suggested earlier, neither of these standards provides a sufficiently concrete approach to patronage dismissals. The *Elrod* Court hinted that the true criterion was generally policymaking ability but backed off from a specific and tangible rule. The *Branti* Court refined the *Elrod* formula but still did not establish an exact standard for future courts to apply to numerous other public occupations. It is therefore the purpose of this Note to pinpoint that point on the political patronage spectrum at which a government employer can no longer avoid liability for dismissing employees based on their political affiliation.

IV. THE OBJECTIVE STANDARD

A. *The Proposed Standard*

The word "policymaker" is subject to various interpretations, but in the context of political patronage, it may have one of three definitions. Virtually every employee may, to some extent, be considered a policymaker, even if his or her decisions have no effect on others.⁵⁷ A second type of policymaker may direct the day-to-day administration of governmental bodies or subordinate employees without directly or indirectly influencing the operation of the governing party's economic, social or political programs. Others, however, hold key roles in determining which

⁵³ *Id.* at 518.

⁵⁴ *Id.* at 519.

⁵⁵ *Id.*

⁵⁶ The *Branti* factors include "the employee's responsibilities, primary duties, capacity for policymaking, or confidential relationship." Ward, *Branti v. Finkel: A Fresh Look at the Spoils System*, 1 N. ILL. U.L. REV. 103, 112 (1980). These are the factors upon which the objective standard builds.

⁵⁷ Note, *Constitutional Law-First Amendment-Patronage Dismissals Not Permitted Unless Party Affiliation Relevant to Job Performance*, 29 KAN. L. REV. 286, 288 (1981)(authored by John J. Murphy).

policies to promote and execute in accord with particular political ideologies. Each of these types of policymakers were impliedly included within the "sliding scale"⁵⁸ test applied in *Elrod*. The *Elrod* test therefore unjustly sanctions political patronage dismissals of employees in the first two categories who have no connection to the creation of political policy. Perhaps the Court did not want to restrict the definition of policymaker only to those employees at the top of the governmental structure,⁵⁹ but this uncertainty evidences a great weakness in the decision. It is also uncertain whether the *Elrod* test applied to policymaking employees or protects nonpolicymaking, nonconfidential employees.⁶⁰ This inherent vagueness in the Court's conclusions is a major argument for a more clear-cut standard. Alone, the policymaking/nonpolicymaking dichotomy may provide a good test for employees "at either end of the political spectrum,"⁶¹ but it does not furnish attorneys and federal judges with guidelines specific enough to prepare and adjudicate patronage cases, respectively.

In attempting to refine and limit the macroscopic and ambiguous standard constructed in *Elrod*, the *Branti* Court held that valid patronage dismissals should be limited to those positions for which loyalty to the governing party is an essential requirement.⁶² While this standard recognizes both the inevitability and necessity of some patronage at the higher levels of government and the fact that "party affiliation is not necessarily relevant to every . . . position,"⁶³ the Court still does not set a standard delineating which specific positions properly require political affiliation. The Court decided that an assistant public defender's duty was to zealously represent his or her client, and therefore, "employment . . . cannot properly be conditioned upon . . . allegiance to the political party in control . . .,"⁶⁴ but the court left the decision regarding

⁵⁸ Comment, *Patronage Dismissals and Compelling State Interests: Can the Policy-making/Nonpolicymaking Distinction Withstand Strict Scrutiny?*, 1978 S. ILL. U.L.J. 278, 284-85 (1978)(authored by Kenneth G. Yalowitz).

⁵⁹ *Id.* at 285.

⁶⁰ *Id.*

⁶¹ *Nunnery v. Barber*, 503 F.2d 1349, 1354 (4th Cir. 1974), *cert. denied*, 420 U.S. 1005 (1975).

⁶² *Branti v. Finkel*, 445 U.S. 507 (1980).

⁶³ *Id.* at 518. A university football coach's ability does not depend on whether he or she is a Republican or a Democrat. This example is not very useful because a coach formulates neither political nor governmental policies. The Court also provides the example of an election judge and points out that partisan identification is required, but this has nothing to do with his or her policymaking authority. The Court's example of a governor who may deem subordinate positions party positions points out the exact weakness in the *Branti* decision. The decision rests in the hands of the employer instead of with an objective analysis.

⁶⁴ *Id.* at 519.

other forms of employment to the discretion of the "hiring authority."⁶⁵ The standard the Court purports to apply is whether or not a governor or other political leader "believe[s] that the official duties of various assistants . . . cannot be performed effectively unless those persons share his political beliefs and party commitments."⁶⁶ A subjective standard such as this would permit any administration to argue persuasively that political identity for a particular position is a necessity, though the underlying motive would simply be to keep those promises made to monetary and ideological supporters.

Besides general criticisms that the *Branti* test is too ambiguous and hard to apply,⁶⁷ other remarks have been lodged against the decision.⁶⁸ One court suggested that there are hardly any offices for which party affiliation would be indispensable to the effective performance of one's duties.⁶⁹ The same court pointed out that membership in the same party as the President is not required for the effective performance of a Cabinet office.⁷⁰ This proposition raises serious questions about more stringent requirements in parallel state, county and municipal governments. It is also important to note that the standard proposed in the *Branti* decision is not the holding, but is dictum, and the case does not even raise the issue of a policymaking employee.⁷¹

All of these criticisms point to the necessity of a more concrete and objective standard which limits valid dismissals to political policymakers—a position defined by actual duties rather than the opinion of the political party chiefs. Those employees who simply perform clerical, administrative or blue-collar functions should be unequivocally exempt from political patronage discharge, while those who create and implement policies and programs of the political party in power should be subject to the risk of patronage dismissal. With regard to the definition of who is a confidential employee, there must be a more careful distinction drawn between those employees whom the employer trusts and those in whom the employer confides political secrets and from whom he or she garners advice. The former occupy positions of trust and confidence because of their job performance and personal relationship to their superior, whereas the latter occupy positions which may objectively require party identification. These specific guidelines can serve as helpful

⁶⁵ *Id.* at 518.

⁶⁶ *Id.*

⁶⁷ *Brunton v. United States*, 518 F. Supp. 223, 238 (S.D. Ohio 1981).

⁶⁸ *Visser v. Magnarelli*, 530 F. Supp. 1165 (N.D. N.Y. 1982) (*Branti* test is vague and requires reconsideration). The *Branti* Court did not even reach a majority decision. Justice Brennan wrote the plurality opinion, and most scholars agree that this is where one finds the holding, but it is still open to debate.

⁶⁹ *Garetto v. Cooperman*, 510 F. Supp. 816, 819 (S.D. N.Y. 1981), *aff'd*, 794 F.2d 676 (2d Cir. 1984).

⁷⁰ *Id.*

⁷¹ *Id.*

extensions to the *Elrod-Branti* test and thereby provide a more workable standard for future courts to apply.

B. Application to Particular Employees

A logical starting point in an analysis of which employees should and should not qualify for protection against patronage dismissal naturally commences at those levels for which there should be the most obvious exemption. Therefore, this section will begin with a discussion of the rights of secretaries, clerical personnel and blue-collar workers and then proceed to a discussion of the status of various types of law enforcement employees. This will be followed by an analysis of the rights of attorneys and their assistants. The final and most complex topic will be the right of executive and administrative directors and chairpersons as well as intermediaries within their offices.

The first inquiry is whether or not secretaries who are dismissed due to their political affiliations have any recourse against their former employer for deprivation of constitutional rights. *Nekolny v. Painter*⁷² and *Soderbeck v. Burnett*⁷³ are the only major federal cases to directly address a secretary's rights on this issue. The seventh circuit allowed a secretary-dispatcher's suit in *Nekolny* under the *Branti* standard of political affiliation as an appropriate requirement for the particular occupation involved⁷⁴ and awarded a secretary-bookkeeper damages for political discharge in *Soderbeck* under the *Elrod-Branti* combination.⁷⁵ The court reached the only logical conclusion possible under the tests they used and under the suggested objective extension of *Branti*. A regular secretary is not a policymaker, a confidential employee or one whose position requires political loyalty. His or her jobs ordinarily include dictation, typing, filing and similar activities. Under an objective analysis, none of these functions cross over into the sphere of political policymaking. Consequently, regular secretaries have an unencumbered right to be free of patronage dismissal.

Solving this relatively simple case does not, however, resolve the more controversial issue concerning the status of a personal secretary. *Soderbeck* suggested that a personal secretary at political odds with his

⁷² *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982).

⁷³ *Soderbeck v. Burnett County*, 752 F.2d 285 (7th Cir.), *cert. denied*, 471 U.S. 1117 (1985).

⁷⁴ *Nekolny*, 653 F.2d at 1169.

⁷⁵ *Soderbeck*, 752 F.2d at 285. The plaintiff's duties were identical to those performed by the other six employees in the office. They all did typing, janitorial work and domestic chores for the prisoners. It was not until after the plaintiff was dismissed that the title of "confidential secretary" was created. The court held that simply her status as the former sheriff's wife was not sufficient justification to allow termination of an employee who had otherwise performed her job satisfactorily.

or her employer should be subject to valid patronage dismissal⁷⁶ because "political antipathy can serve as a decent proxy for a lack of trust and loyalty."⁷⁷ This approach, however, fails to recognize that personal loyalty and trustworthiness or loyalty to one's job are not the equivalent of partisan loyalty. To fail to differentiate political loyalty from loyalty based on "formal structural relationships"⁷⁸ unjustly places all secretaries in one category. A personal secretary only crosses the line between constitutional protection and valid dismissal when he or she becomes a "secretary-plus."⁷⁹ This title implies more than just a faithful and dutiful relationship with an employer; it signifies the difference between a typist and either a political confidant or advisor to a political policymaker. The most clear-cut illustration of this distinction is found in *Soderbeck* itself. The court pointed out that had Rosalyn Carter been President Carter's secretary, she could have been validly removed by President Reagan.⁸⁰ The extenuating circumstances presented in this hypothetical evidence one of the few instances in which a personal secretary should be legitimately dismissed based on political affiliation. The general rule should still be that the duties of a personal secretary do not automatically propel the position to one subject to valid patronage dismissal.

The objective standard will also apply equally well to the issue of whether other clerical personnel can be validly discharged based on their political affiliation. Generally, a clerk is defined as "a person working in an office performing such tasks as keeping records, attending to correspondence, or filing"⁸¹ or "a person who keeps the records and performs

⁷⁶ *Id.* at 288.

⁷⁷ *Meeks v. Grimes*, 779 F.2d 417, 420 (7th Cir. 1985)(former city court bailiffs appointed by judge claimed unconstitutional patronage discharge).

⁷⁸ K. BOULDING, *THE ORGANIZATIONAL REVOLUTION: A STUDY ON THE ETHICS OF ECONOMIC REORGANIZATION* 8-40 (1953). See also W. WHYTE, JR., *THE ORGANIZATION MAN* (1956).

⁷⁹ This term was created for use in this Note. The difference between a regular secretary and a secretary plus is under consideration in Ohio in the case of *Faughender v. North Olmsted*, No. C86-630 (N.D. Ohio filed Feb. 25, 1986).

⁸⁰ *Soderbeck*, 752 F.2d at 288. An Ohio case presently on appeal directly addresses this situation. In *Crumbley v. Swietyniowski*, No. C85-1230 (N.D. Ohio filed Apr. 26, 1985), plaintiff, the private secretary to the City Service Director, brought suit for wrongful dismissal based on her political affiliations. While the lower court held that her civil rights had been violated, defendants argued that she held a confidential, policymaking position and had clearly demonstrated that she was no longer a loyal employee.

The case of *Faughender v. North Olmsted*, No. C86-630 (N.D. Ohio filed Feb. 25, 1986) presents yet another situation where the court will be compelled to distinguish between a secretary and a "secretary plus." In this case, plaintiff was hired as a secretary to the Safety Director of North Olmsted but later accepted a transfer to the position as secretary to the Democratic Mayor. She was later terminated when a Republican defeated the Democratic incumbent and replaced plaintiff with one of her friends.

⁸¹ *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 250 (1st ed. 1969).

the regular business of a court or legislative body.”⁸² Circumspection of these limited duties will compel the conclusion that a clerk does not occupy a position from which he or she can be validly discharged for political reasons.

So obvious a conclusion has not been easily reached in the federal courts. These courts have been slow to recognize the vagueness of the *Branti* standard and have therefore reached inconsistent conclusions. One court held that though the plaintiff's job as a county circuit clerk entailed purely “ministerial” functions⁸³ and that her duties were highly specified under the state constitution,⁸⁴ she was nevertheless properly dismissed. The court reasoned that she was a confidential employee based on her status as the “single deputy and assistant to an elected official.”⁸⁵ This holding hinges on the same illogic discussed with regard to a secretary's status; trust is not necessarily the equivalent of political loyalty. The better reasoned decisions are in accord with the conclusion reached under the objective test. They hold that clerical personnel cannot be dismissed on patronage grounds⁸⁶ so long as they perform their appointed tasks. Working in an office according to the prescribed bureaucratic rules⁸⁷ has nothing to do with the political process. Just as bailiffs are not classified as confidential employees because of their duty to protect the integrity of the court,⁸⁸ so are clerks exempt from dismissal because of their corresponding duty to perform their responsibilities efficiently. Based on an objective analysis of the duties performed by clerks,⁸⁹ it is evident that they occupy a second category of employees who are exempt from patronage dismissal.

Parallel to the situation of a confidential secretary, there may exist a type of hybrid clerk who performs more than ministerial functions. If this is the case, and the clerk is simply a misnamed political advisor or

⁸² *Id.*

⁸³ *Stegmaier v. Trammell*, 597 F.2d 1027, 1038 (5th Cir. 1979).

⁸⁴ *Id.* at 1037.

⁸⁵ *Id.* at 1030.

⁸⁶ See *Stuart v. Coyne*, No. 82-2286, slip op. (N.D. Ohio Mar. 7, 1985) (prevailing plaintiff was hired by the City of Brook Park and assigned to the Recreation Department as a clerical worker, but was later transferred to the Department of Taxation as a tax clerk), *appeal dismissed*, No. 85-3284, slip op. (6th Cir. Ct. App. June 5, 1985). See also *Barnes v. Bosley*, 745 F.2d 501 (8th Cir. 1984) (state's interests may override employees' but not in the case of clerks), *cert. denied*, 471 U.S. 1017 (1985). A similar result should obtain in the case of *Jordan v. Coyne*, No. C83-4368 (N.D. Ohio filed Oct. 27, 1983) (wife of Superintendent of Brook Park Waste Water Treatment Facility, who worked as an office clerk for the city, sued for wrongful political patronage dismissal).

⁸⁷ *Barnes*, 745 F.2d at 508.

⁸⁸ *Meeks*, 779 F.2d at 421.

⁸⁹ *Visser v. Magnarelli*, 530 F. Supp. 1165 (N.D. N.Y. 1982). This clerk attended council meetings, kept the council journal, and copied all ordinances, public notices and ads. However, she did not determine the agenda of the meetings. *Id.* at 1166-67.

political confidant,⁹⁰ the result would parallel the conclusion reached with regard to a "secretary-plus."

Blue-collar workers comprise a third class of public employees who should always be exempt from patronage dismissal. Though this conclusion is self-evident under an objective examination which focuses on those duties performed by manual laborers, one federal court was not so convinced. In *Horton v. Taylor*,⁹¹ the court remanded the case of a road-grader operator to the district court because there was a possibility that he could be the "alter ego"⁹² of the county judge due to his visibility to and conversation with⁹³ many of the citizens in a small, rural Arkansas county.⁹⁴ This decision ignores both the *Elrod* test which generally restricts patronage dismissals to policymakers⁹⁵ and the *Branti* standard limiting dismissals to positions which require political affiliation.⁹⁶ It is, however, most contrary to a concrete analysis of the duties performed by such an employee. Road-graders are hired to repair and resurface the roads and highways, not to socialize with the citizens. If a personal rapport develops between the two groups, it is simply the result of natural good-will and friendliness. To allow a judge or any other type of employer to award loyal supporters with this type of position would sanction any type of political dismissal. The proper result is to allow building employees, janitors,⁹⁷ and bus drivers⁹⁸ recovery for patronage discharge since their positions are the farthest removed from the policymaking sphere. This conclusion will apply equally well to future cases involving sanitary engineers, repairpersons, snow removal employees and the like.

The field of law enforcement encompasses a broad range of job classifications. Whether or not employees under this job description have a constitutional right not to be discharged because of their political affiliation depends on the position they hold in this sub-hierarchy of

⁹⁰ See *Grossart v. Dinaso*, 758 F.2d 1221 (7th Cir. 1985). A bookkeeper's title was changed to Executive Administrative Assistant to the Board, and she was the highest paid unelected official in town. Though she began as a clerical worker, her status changed when her title and responsibilities changed.

⁹¹ *Horton v. Taylor*, 767 F.2d 471 (8th Cir. 1985).

⁹² *Id.* at 475.

⁹³ *Id.*

⁹⁴ *Id.* at 471.

⁹⁵ *Elrod*, 427 U.S. at 347.

⁹⁶ *Branti*, 445 U.S. at 507.

⁹⁷ *Illinois State Employees' Union, Council 34 v. Lewis*, 473 F.2d 561 (7th Cir. 1972), cert. denied, 410 U.S. 928 (1973). See also *Bubulsky v. Brookpark*, No. 85-1289, slip op. (N.D. Ohio April 8, 1986). In this case, a chairwoman was promoted to custodian but was subsequently terminated for political reasons. If her suit had not been barred by the statute of limitations, she would have prevailed on her § 1983 claims for wrongful political patronage dismissal. *Id.*

⁹⁸ *Nekolny*, 653 F.2d at 1164.

public employment. This section will discuss the three major categories of executive directors, sheriffs and their deputies in order to determine which employees have a cause of action under the objective test.

Although there is authority which holds that a chief of police may obtain a preliminary injunction against dismissal from office by a lame duck board,⁹⁹ the proper result should be that employees of his caliber enjoy positions requiring major political policy decisions on the manner in which the law is enforced. Police directors typically work closely with the mayor, rendering and receiving confidential advice.¹⁰⁰ In fact, under most statutes, employees of this type would be classified as employees who serve "at the pleasure of the mayor."¹⁰¹ The jobs and functions they perform are far from ministerial or merely administrative, and as such, these offices may legitimately require party identification.

The second category of public law enforcement personnel includes the office of sheriff. This is also a position which may legitimately require political affiliation with the party in power. The office of captain in the sheriff's office has been deemed an office for which political affiliation is a proper requirement since captains help the sheriff implement new policy and procedures.¹⁰² The county sheriffs are on par with city police directors because of their close relationship to superiors. Public interest in the efficient and effective performance and implementation of law enforcement agencies and policies compels the conclusion that sheriffs are subject to patronage discharge without subsequent recourse.

The final category of law enforcement personnel consists of sheriffs' deputies. The federal courts have been inconsistent in their approach to the question of deputies' rights in patronage cases, some awarding damages,¹⁰³ and others finding for the hiring authority.¹⁰⁴ The state of confusion over the correct standard to apply necessitates the operation of a more concrete test. The suggested approach canvasses the particular duties performed by the deputies to resolve the conflict. Deputies' duties mainly consist of serving civil process, transporting prisoners to and from jail¹⁰⁵ or simply performing clerical functions similar to those performed by the successful plaintiffs in *Elrod*.¹⁰⁶ None of these typical functions

⁹⁹ *Kuhlmann v. Bloomfield Township*, 521 F. Supp. 1242 (E.D. Wis. 1981).

¹⁰⁰ *Mele v. Fahy*, 579 F. Supp. 1576 (D. N.J. 1984).

¹⁰¹ *Moldawsky v. Lindsay*, 341 F. Supp. 1393, 1396 (S.D. N.Y. 1972).

¹⁰² *Joyner v. Lancaster*, 553 F. Supp. 809 (M.D. N.C. 1982).

¹⁰³ See *Barrett v. Thomas*, 649 F.2d 1193 (5th Cir. 1981), *cert. denied*, 456 U.S. 925 (1982); *Hinton v. Vetter*, 507 F. Supp. 92 (D. N.H. 1981); *Hollifield v. McMahan*, 438 F. Supp. 591 (D. Tenn. 1977).

¹⁰⁴ See *Tanner v. McCall*, 625 F.2d 1183 (5th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981); *Serna v. Manzano*, 616 F.2d 1165 (10th Cir. 1980); *Francia v. White*, 594 F.2d 778 (10th Cir. 1979); *Whited v. Fields*, 581 F. Supp. 1444 (W.D. Va. 1984).

¹⁰⁵ *Hinton*, 507 F. Supp. at 92.

¹⁰⁶ *Barrett*, 649 F.2d at 1201.

involve any real degree of policymaking, and any discretionary or non-discretionary decisions made while on the job must conform to statutory laws and departmental policy. Even if the deputies take on additional responsibilities, the policies and rules under which they act are still created by their superiors. One commentator described this situation most succinctly when he stated, "the absence of political cohesion between sheriff and deputy can hardly be said to undermine an intimate working relationship."¹⁰⁷ Having examined all three types of public law enforcement occupations, it is evident that this field possesses its own hierarchy of recovery for patronage dismissal within the larger scheme of public employment.

The next category of public employees is the legal branch of public employment. The particular importance of the roles played by city and county attorneys should be the major factor in deciding whether they can be rightfully discharged due to their political affiliation. The primary duty of every attorney is to zealously represent his or her clients,¹⁰⁸ and this maxim is best applied when city solicitors are called to represent their local government. Their duties typically include defending the city against all suits, rendering legal opinions to the mayor, city council and various departments¹⁰⁹ and prosecuting all civil actions.¹¹⁰ It is highly likely that party affiliation is of great import in such a position because partisan identification can mean common goals and strategy.

County solicitors have the same responsibility and authority to defend the county, its council and departments against external suits.¹¹¹ The broad discretion and the significant responsibilities delegated to this office suggest that it is a position for which party affiliation is an appropriate requirement. A political leader such as a mayor or governor should have the absolute "right to receive the complete cooperation and loyalty"¹¹² of his legal counsel. A chief state, county or city attorney occupies a prominent position in the governmental structure, and the job will almost always be a policymaking position or one from which great

¹⁰⁷ *Id.*

¹⁰⁸ MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981). EC 7-1 reads, "[t]he duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and professional regulations." *Id.* DR 7-101 discusses how a lawyer represents his clients, and DR 7-102 sets the limits on such authority.

¹⁰⁹ *Ness v. Marshall*, 660 F.2d 517, 521 (3d Cir. 1981)(positions of city solicitor and assistant city solicitor appropriately require party affiliation).

¹¹⁰ *Bavoso v. Harding*, 507 F. Supp. 313, 314 (S.D. N.Y. 1980)(Republican city council's consideration of plaintiff-nominee for corporation council's party affiliation was appropriate).

¹¹¹ *Catterson v. Caso*, 472 F. Supp. 833, 837-38 (E.D. N.Y. 1979). The county solicitor also had the authority to appoint deputies, officers and employees of the office, and to draw contracts, ordinances, and resolutions. The court concluded that he was a policymaker. *Id.*

¹¹² *Ness*, 660 F.2d at 522.

influence can be exerted on the final decisionmakers.¹¹³ An attorney can choose or at least recommend those against whom the government should bring suit.

While the placement of city or county attorneys on the patronage spectrum is relatively clear-cut, a determination of the status of their assistants is less concrete. In the seminal case of *Branti v. Finkel*,¹¹⁴ the Court addressed the issue of an assistant public defender and held that patronage dismissal violated the plaintiff's constitutional rights.¹¹⁵ This case is, however, inapposite where county, city and state attorneys are concerned. The Court clearly restricted the holding to cases in which attorneys represent individuals contesting state action.¹¹⁶ Whatever policymaking is involved relates only to the needs of the clients, and any confidentiality of information exists within the attorney-client relationship.¹¹⁷ When the city, county or state becomes the client, however, the attorney is necessarily involved in the political process, and a consideration of party affiliation is a good way to insure that there is the necessary cohesion between the employer and the employee as well as the attorney and the client.¹¹⁸ Otherwise, "the . . . attorney's office could become a battleground in which little was accomplished, to the detriment of the citizens."¹¹⁹ Though party identification is not the only way to insure legal fidelity, it can be used as a tool to justify patronage dismissal in these positions.

The final class of non-civil service, public employees under consideration is the category of departmental employees. As was pointed out earlier, clerical personnel and secretaries within any of these departments generally deserve constitutional protection against unlawful patronage discharge. However, the question still unanswered is whether their ultimate superiors and/or immediate supervisors are equally exempt from patronage dismissal. The most logical manner by which to discuss these positions is to start at the level where public employees clearly have no cause of action for politically-motivated discharge.

¹¹³ *Alfaro de Quevedo v. De Jesus Schuck*, 556 F.2d 591, 593 (1st Cir. 1977)(Director of the Office of Criminal Justice directly advises the Secretary of Justice in an area that is far from non-controversial so there is no question that party identification is an appropriate requirement).

¹¹⁴ *Branti v. Finkel*, 445 U.S. 507 (1980).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 519. See also *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979)(attorney's "principal responsibility is to serve the undivided interests of his client").

¹¹⁸ *Montaquila v. St Cyr*, 433 A.2d 206 (R.I. 1981)(court affirmed the dismissal of complaint by attorney and several assistant town attorneys who brought suit for damages for patronage dismissal).

¹¹⁹ *Newcomb v. Brennan*, 558 F.2d 825, 830 (7th Cir.) (deputy city attorney who announced intent to run for Congress could be constitutionally dismissed on patronage grounds), *cert. denied*, 434 U.S. 968 (1977).

Within the sub-category of executive directors, chairpersons, supervisors and occupations with similar titles, one finds two materially different types of employees. Some of these positions specifically involve political policymaking, whereas others merely entail bureaucratic and administrative functions. The first group should be subject to legitimate patronage dismissal, while the latter groups deserves constitutional protection equal to that which safeguards intermediary bureaucratic personnel, clericals and secretaries who work under the titled executives. The occupation of a former State Director of the Farmers Home Administration¹²⁰ is an excellent example of a job classification in which an employee should not be heard to complain about patronage dismissal. This employee duly lost his suit for deprivation of first and fourteenth amendment rights in *Brunton v. United States*¹²¹ because a majority of his responsibilities included policymaking functions. As an integral part of his job, he determined which projects and applicants would receive the billions of funds that his department could allocate.¹²² Whoever possesses this power is certainly an employee who holds one of the most important policymaking positions in the government. Funds are generally allocated depending on one's socio-economic and political beliefs, and it is common sense to realize that some politicians are not as sympathetic to the plight of farmers as others. This high level policymaker also had responsibility for recruiting, training, disciplining and supervising some 160 staff employees and their work product. As State Director, he also possessed significant influence over the type and subject matter of policies promulgated by the United States Department of Agriculture.¹²³ Under an objective examination of the duties performed and the prestigious title held, this kind of government employee is truly one for whom political affiliation is an appropriate requirement.¹²⁴ Though there is no absolute requirement, nor should there be, that executives of this sort must be of the same party as the hiring authority, it is a conveniently permissible type of government imposition. It can be a necessary requirement in order to insure the effective operation of government and the efficiency of public employees.

¹²⁰ *Brunton v. United States*, 518 F. Supp. 223 (S.D. Ohio 1981).

¹²¹ *Id.* See also *Adams v. Walker*, 492 F.2d 1003 (7th Cir. 1974)(Chairman of State Liquor Commission sued Governor).

¹²² *Brunton*, 518 F. Supp. at 230-31.

¹²³ *Id.*

¹²⁴ See *Gould v. Walker*, 356 F. Supp. 421, 422-25 (N.D. Ill. 1973)(Assistant to Director and Special Education Coordinator of the Governor's Office of Human Resources represented the state in cultural exchanges with both Mexico and Puerto Rico and helped formulate and implement policies of the governor's office). *Contra Johnson v. Bergland*, 586 F.2d 993 (4th Cir. 1978)(former federal Farmers Home Administration State Director obtained a preliminary injunction against transfer to a specially-created post with the same pay but fewer responsibilities and less prestige).

The same type of requirement should also be applied to similarly situated executives at the city and county levels. Though policy formation at these levels necessarily concerns more mundane subjects such as potholes, refuse,¹²⁵ snow removal, recreational activities and the like, these and other issues can make or break a political campaign and propel one's opponent into office. In *Ecker v. Cohalan*¹²⁶ the court found that the plaintiff's duties as the former Chief Deputy Commissioner of Parks, Conservation and Recreation for the county included representing the department at Public Safety Commission meetings, employee grievance and disciplinary hearings, and attending meetings of the Board of Trustees of Parks, Recreation and Conservation.¹²⁷ His additional duties included administrative responsibility over personnel, but the functions which propelled him to the status of a political policymaker were the representative and advisory functions he performed for his department; he was its chief advocate and spokesman.

A perfect illustration of a policymaking executive at the city level is found in *Tomczak v. Chicago*.¹²⁸ In this case, a Deputy Commissioner in the City's Water Department justifiably lost his suit for unlawful patronage dismissal. Admittedly, thirty percent of his time was spent planning, developing and recommending figures for the Bureau of Water Department's budget.¹²⁹ The implementation of public policies formed by the political leaders depended on the manner in which the Commissioner allocated department funds. With his title came the power over the purse strings, and just as with the State Director in the Department of Agriculture, the power over money can be a two-edged political sword. Therefore, under an objective analysis of all of the functions he performed, this plaintiff falls within the category of public employees who carry out policymaking functions and who are consequently exempt from protection from patronage discharge.

There is a second category of directors whose titles suggest possible status as policymakers, but who simply perform administrative duties prescribed by department rules or their superiors. This category includes people such as an Administrative Assistant II in the Commercial and

¹²⁵ *Loughney v. Hickey*, 480 F. Supp. 1352, 1363 (M.D. Pa. 1979), *vacated*, 635 F.2d 1063 (3d Cir. 1980)(case of former Superintendent of Refuse and Highways remanded for consideration under *Branti*). Whether or not a Superintendent of a City Waste Water Treatment Facility is a political policymaker or exempt from patronage dismissal is presently being litigated in Ohio's northern district court. *Jordan v. Coyne*, No. C83-4368 (N.D. Ohio filed Oct. 27, 1983).

¹²⁶ *Ecker v. Cohalan*, 542 F. Supp. 896 (E.D. N.Y. 1982).

¹²⁷ *Id.* at 897.

¹²⁸ *Tomczak v. Chicago*, 765 F.2d 633 (7th Cir.), *cert. denied*, 106 S. Ct. 313 (1985). See also *Rosenberg v. Redevelopment Authority of Philadelphia*, 428 F. Supp. 498 (E.D. Pa. 1977)(Director of Real Estate Department is a policymaker).

¹²⁹ *Tomczak*, 765 F.2d at 642.

Industrial Department of the Redevelopment Authority of Philadelphia¹³⁰ or a Field Coordinator of the Staff Redevelopment Project.¹³¹ Employees with titles such as these should be exempt from patronage dismissal because they perform only supervisory functions.¹³² The test to determine the status of these employees is both conjunctive and disjunctive. Specifically, the question is whether these types of executives perform solely administrative functions such as requisitioning supplies, supervising and evaluating subordinate employees,¹³³ and/or whether they receive their "administrative and policy direction from a superior in the central office."¹³⁴ If they do, then their status and responsibilities do not contemplate political policymaking, and they should therefore be immune from patronage dismissal.

A final category of employees deserving of an exemption from unlawful termination due to political affiliation includes a menagerie of titles. These employees are not secretaries or clerks, nor are they political or administrative executives. A prime example is found in the case of *Weaver v. Bowers*.¹³⁵ Though the court refused to apply *Elrod* retroactively, dicta in the case indicates that in his position as Park Superintendent, the plaintiff was merely a "glorified foreman."¹³⁶ These kinds of white collar staff¹³⁷ employees perform their jobs according to the dictates of the department and their immediate supervisors and in no way, directly or indirectly, influence the formulation of political policy. Therefore, they deserve unqualified exemption from political patronage discharge.

C. Future Consequences and Implications

While the *Lewis* court could not "differentiate between teachers and highway maintenance workers, pilots, law clerks, drivers license examiners or janitors on the basis of mere judicial assumptions about the circumstances attending their respective employment,"¹³⁸ this has be-

¹³⁰ *Rosenthal v. Rizzo*, 555 F.2d 390 (3d Cir.), cert. denied, 434 U.S. 892 (1977).

¹³¹ *Gabriel v. Benitez*, 390 F. Supp. 988 (D. P.R. 1975), aff'd and modified, 541 F.2d 882 (1st Cir. 1976).

¹³² *Id.*

¹³³ *Gibbons v. Bond*, 523 F. Supp. 843, 851-52 (W.D. Mo. 1981), aff'd, 668 F.2d 967 (8th Cir. 1982).

¹³⁴ *Id.* at 851.

¹³⁵ *Weaver v. Bowers*, 657 F.2d 1356 (3d Cir. 1981), cert. denied, 455 U.S. 942 (1982).

¹³⁶ *Id.* at 1358.

¹³⁷ See *Rosaly v. Ignacio*, 593 F.2d 145 (1st Cir. 1979)(case of staff employees in Department of Transportation and Public Works remanded so that the court could examine plaintiff's responsibilities). This category of employees is the most difficult group to confine.

¹³⁸ *Illinois State Employees' Union, Council 34 v. Lewis*, 473 F.2d 561, 571 (7th Cir. 1972), cert. denied, 410 U.S. 928 (1973). The court commented that:

[i]t is simple to say that janitors, clerk-typists and elevator operators are

come the current task of the federal court judges. The most recent Supreme Court opinion on this issue¹³⁹ suggests a standard "that is framed in vague and sweeping language certain to create vast uncertainty."¹⁴⁰ Perhaps *Branti* is only an interim decision on the road to a clearer refinement of a proper standard for adjudicating political patronage cases.¹⁴¹ If *Branti* is only a stepping stone, then government employers can be relatively assured that their actions will be watched closely for constitutional violations. One commentator advises all officials to carefully consider all the functions an employee performs before making patronage decisions¹⁴² "because the burden is on the government to justify . . . dismissal on partisan grounds."¹⁴³

Just how burdensome this requirement could be has yet to be fully determined. Though the *Branti* Court set down three basic guidelines for hiring authorities to follow,¹⁴⁴ they did not specify restrictive parameters.¹⁴⁵ Mass firing will be very suspect and probably always unconstitutional, but individual plaintiffs may still fall prey to government bureaucracy and structural manipulation. There may yet be ways untried by which government employers can attempt to justify patronage dismissals.¹⁴⁶ Public employees do, however, have one procedural advantage; they need not show that they were coerced into changing their political affiliation in order to challenge patronage dismissal.¹⁴⁷ However, the government possesses a counterweight under the test constructed in *Mount Healthy Bd. of Educ. v. Doyle*.¹⁴⁸ In this case, the Court promulgated a "substantial factor" test.¹⁴⁹ Briefly, this test states that if the hiring authority can show that it would have dismissed the individual

non-policy making employees, but . . . what about a janitorial supervisor, the director of a stenographic pool, a personnel manager, a deputy assistant division head, a deputy director, or even a secretary to a top-echelon director or department head who may have access to confidential information?

Id. at 578.

¹³⁹ *Branti v. Finkel*, 445 U.S. 507 (1980).

¹⁴⁰ *Id.* at 524 (Powell, J., dissenting).

¹⁴¹ Casenote, *Constitutional Law-Freedom of Association Where the Government Can Demonstrate a Compelling Interest Requiring that an Employee's Political Beliefs Conform to Those of the Employer, The Employee May Be Discharged on the Basis of His Political Beliefs*. *Branti v. Finkel*, 445 U.S. 507 (1980), 58 U. DET. J. URB. L. 291, 306 (1981) (authored by Mary Jo Edwards).

¹⁴² Note, *supra* note 6, at 321 n. 67.

¹⁴³ *Id.*

¹⁴⁴ Note, *supra* note 1, at 101. The three guidelines for hiring authorities are: 1) demonstration of an overriding state interest; 2) governmental rather than partisan interests; and 3) employment of the least restrictive means. *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Recent Cases*, *supra* note 23, at 1098.

¹⁴⁷ Note, *supra* note 1, at 104.

¹⁴⁸ *Mount Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

¹⁴⁹ *Id.* at 287.

employee even in the absence of political conduct, it has satisfied its burden of proof. On the other hand, the plaintiff still has the burden "to show that his conduct was constitutionally protected, and that his conduct was a 'substantial factor'-or, . . . , that it was a 'motivating factor.'"¹⁵⁰ The Court reasoned that 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."¹⁵¹ This test seems to adequately weigh and balance the interests of both the employee and his or her governmental employer, but it has its critics. One scholar recommends the use of a rebuttable presumption in favor of the dismissed employee¹⁵² because the employer has the most access to information and should therefore be held to a slightly higher standard of proof.¹⁵³ It is more likely, however, that the *Mt. Healthy* standard will remain the proper test for adjudicating patronage dismissals in federal court.

Another major question left open by the *Branti* Court is the scope of permissible government action. Patronage dismissal is certainly disallowed, but issues arise concerning actions short of dismissal. The courts are only beginning to consider the rules on patronage discharge applicable to cases involving patronage transfers,¹⁵⁴ failure to re-appoint,¹⁵⁵ lateral moves,¹⁵⁶ and resignations tantamount to dismissal.¹⁵⁷ The current question is the applicability of protection against patronage dismissal to cases involving patronage hiring.¹⁵⁸ A person who already has

¹⁵⁰ *Id.* at 287.

¹⁵¹ *Id.* at 285-86.

¹⁵² Murray, *supra* note 14, at 213.

¹⁵³ *Id.* The time at which a new political administration takes office will be the most closely watched. If at this time a dismissal occurs, it will be presumed to constitute an unconstitutional patronage discharge.

¹⁵⁴ See *Delong v. United States*, 621 F.2d 618, 624 (4th Cir. 1980). In this case the employee was left with a "Hobson's choice." This means that he was left with one of two evils, either to accept transfer to an undesirable position or resign. In this manner, refusing transfer is tantamount to dismissal. See also *Johnson v. Bergland*, 586 F.2d 993 (4th Cir. 1978)(former Federal Farmers Home Administration State Director was transferred to the specially-created post of program assistant and brought suit in federal court for reinstatement to his former position).

¹⁵⁵ See *Ramey v. Harbor*, 589 F.2d 753 (4th Cir. 1978), *cert. denied*, 442 U.S. 910 (1979). The same rules of law applied in political patronage cases might also apply to cases involving contract awards or promotions to higher positions by analogy to either cases on transfer or cases concerning patronage hiring. Note, *Patronage Politics: Democracy's Antidote to Enforced Neutrality in Civil Service-Branti v. Finkel*, 445 U.S. 507 (1980), 6 U. DAYTON L. REV. 231, 233 (1981)(authored by Mary Ann Thinnies).

¹⁵⁶ *Barrett v. Thomas*, 649 F.2d 1193 (5th Cir. 1981), *cert. denied*, 456 U.S. 925 (1982).

¹⁵⁷ *Alfaro De Quevedo v. De Jesus Schuck*, 556 F.2d 591 (1st Cir. 1977).

¹⁵⁸ Murray, *supra* note 14, at 211. The Court specifically stated that the practice at issue was dismissal, not other forms of employer actions. Thus, the case does not provide guidelines for the courts to use when examining other types of employer retaliation. *Id.*

a job naturally has a greater expectancy interest in renewal than an employee seeking employment with a particular department for the first time, but neither employee should be discriminated against because of his or her political affiliation when the jobs they seek to obtain are neither political policymaking positions or occupations for which party identification is an appropriate requirement. It is highly likely that the courts will analogize these two positions and apply the test for patronage dismissals to cases of hiring based on political affiliation.¹⁵⁹

Various solutions have been suggested to overcome both the abuses of patronage and the difficulty of differentiating plaintiffs with legitimate causes of action from those who cannot claim exemption from patronage dismissal. Some scholars suggest a statutory system based entirely on individual merit as opposed to time-consuming adjudication on a case-by-case method.¹⁶⁰ This, however, entails an increased burden on legislators to explicitly define which occupations are and are not subject to patronage dismissal.¹⁶¹ This might also mean that legislative boards or tribunals would have to be formed to consider employee grievances.¹⁶² While this would certainly increase the pressure on legislatures, it would greatly decrease the burden imposed on the federal courts by the countless number of claims filed for damages, reinstatement or both.¹⁶³ Perhaps this system would work more efficiently than the current unbalanced mix of patronage and merit that now permeates government

¹⁵⁹ *Branti v. Finkel*, 445 U.S. 507, 527 (1980)(Powell, J., dissenting). Contrary to this conclusion, a recent Sixth Circuit case held that elected officials "may weigh political factors such as party allegiance along with other factors in making subjective hiring judgments." *Avery v. Jennings*, 786 F.2d 233, 234 (6th Cir.), cert. denied, 106 S. Ct. 3276 (1986). Thus, the court concluded that an applicant for the alternative positions of secretary, clerk or office helper, who was denied consideration, could not claim that her first amendment rights had been abridged under the local public employee hiring system.

There is a significant difference between a patronage system that intentionally uses a strict political test as the standard for hiring or firing decisions, as in *Elrod*, *Branti*, *Keyishian*, *Mitchell* and *Wieman*, *supra*, and a patronage system that relies on family, friends and political allies for recommendations. The former has a single end tied to a political belief. The latter has multiple purposes

Id. at 237. Despite this pronouncement, such a distinction is at least arguable, if not invalid.

¹⁶⁰ This scheme would significantly increase the efficiency and productivity of government employees because they would know that at election time they would not be subject to losing their jobs if a new political party took office. Simses, *supra* note 7, at 235-36.

¹⁶¹ *Id.* at 234.

¹⁶² If the patronage system were to give way to administrative boards and tribunals, plaintiffs might have easier access to a forum in which they could vindicate their rights. It would also reduce costs to these same litigants and the government. Patronage use in this country is declining, and this might be a possible solution to adjudication in the federal courts. *Recent Cases*, *supra* note 23, at 1098.

¹⁶³ Note, *Constitutional Law-A New Test for Political Firings-Branti v. Finkel*, 445 U.S. 507 (1980), 3 CAMPBELL L. REV. 103, 111 (1981)(authored by James L. Seay, Jr.).

employment, but it is unlikely that political affiliation will ever be completely eliminated from the decision to hire or fire.¹⁶⁴

V. CONCLUSION

Political patronage dismissal is not a new phenomenon, but judicial recognition of claims specifically alleging improper dismissal based on political affiliation has occurred only within the last twenty years. While the federal circuit courts have struggled to establish a standard by which to adjudicate patronage dismissal cases, their struggles have resulted in a plethora of inconsistent conclusions. Neither has the Supreme Court constructed a sufficiently concrete test to determine when an employee is exempt from patronage dismissal. The *Elrod* test is flawed in not limiting dismissals to political policymakers, and the *Branti* test is inadequate as it delegates the selection of occupations requiring political affiliation to the hiring authority. This subjectivity, combined with the absence of a concrete standard applicable to other job classifications, indicates that a proper standard is needed. This Note suggests that a workable standard exists in an objective examination of the duties performed by individual employees. If these responsibilities entail political policymaking, the public employee should be subject to patronage dismissal. If, however, his or her duties include clerical or administrative tasks, the employee has a legitimate cause of action for improper patronage dismissal. If an employee is simply a loyal and trusted worker, as opposed to a political confidant, he or she should not be dismissed for political reasons. Though the courts have already established boundaries which limit the extent to which the government may circumscribe a public employee's constitutional rights of free speech and assembly, the government may not infringe these rights unless there exists a legitimate governmental interest that supercedes the employee's rights.

If the *Elrod* and *Branti* holdings theoretically vindicate plaintiffs' rights, why then have most claimants bringing suit under this line of cases been denied recovery in federal court? A logical conclusion is that the standards proposed in these cases do not specifically address the

¹⁶⁴ *Recent Cases*, *supra* note 23, at 1098. A decline in patronage practices will not destroy the institution of the political party. Neither will an increase in the use of merit as an indicator of employee capability and responsibility eliminate the effectiveness of political parties. Parties have existed since before the Constitution, and a two-party system was not mandated under the Constitution. In considering this question, one court held that the promotion of the two-party system is not a sufficiently compelling public interest to justify infringing constitutional rights. *Williams v. Rhodes*, 393 U.S. 23 (1968). See also *Board of Educ. v. Barnette*, 319 U.S. 624, 642 (1932). In this case the Supreme Court stated that, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.*

unique fact situations in each plaintiff's case. The impact of a new test will not grant every non-civil service, public employee the equivalent of civil service tenure. At-will employees will still be subject to valid dismissal for no reason or any reason, as long as the dismissal does not infringe a constitutionally protected right. Nor will recognition of plaintiffs' rights prompt governments to write political party identification into job descriptions. Party identification is not mandated for all public positions, but it may, however, be an appropriate requirement in some cases to insure the effectiveness of government and the efficiency of public employees.

The proposed approach will, however, lift the existing bar to numerous suits alleging unlawful patronage dismissal. It will allow employers to anticipate adverse legal recourse and thereby avoid costly and time-consuming litigation. In addition to preventing wholesale dismissals, the objective test will caution employers against initiating improper individual dismissals. The suggested standard will also eliminate the vagueness that has plagued the standard heretofore applied in federal courts and will provide a clearly articulated guide to adjudication of political patronage dismissals.

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