Branti v. Finkel: A Fresh Look At The Spoils System

Patronage¹ and the spoils system date back to the very beginning of this country's existence.² The use of patronage has invoked various responses throughout its history.³ This note will discuss the constitutionality of patronage dismissals.⁴ The Supreme Court has long regarded the use of patronage as an interference with first amendment freedoms.⁵

There are many prices we pay for the freedom secured by the first amendment; the risk of undue influence is one of them, confirming what we have long known: freedom is hazardous, but some

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¹ Patronage has been defined as the “allocation of the discretionary favors of government in exchange for political support.” M. Tolchin & S. Tolchin, To The Victor at 323 (1971) [hereinafter referred to as Tolchin].


³ Although George Washington, John Adams and Thomas Jefferson made limited use of patronage appointments, it was not until the Presidencies of Jackson and Lincoln that the practice became widespread. Eventually, the practice became so pervasive and corrupt that reforms were necessary. The Pendleton Act, ch.27, 22 Stat.403 (1883), established a federal civil service where appointments and dismissals were done on a non-partisan basis. Later, the Hatch Act, ch.410, 53 Stat.1147 (1939) (codified in scattered sections of 18 U.S.C.§5) limited federal employee's political activity. These restrictions were later extended to state and local government employees. For a listing of these “Little Hatch Acts” see Broaderick v. Oklahoma, 413 U.S. 501, 601 n.2 (1973). The constitutionality of the Hatch Act was upheld by the Supreme Court in United Public Workers v. Mitchell, 330 U.S. 75 (1947).

⁴ Public employment is only one form of patronage. Party faithful may also receive such benefits as public contracts for defense, highway, and building projects; tax abatements; judgeships and other courtroom patronage such as receiverships and trusteeships; improved public services for cooperative wards; and assistance in navigating “the maze of federal and state bureaucracy to obtain the far-ranging services to which they are entitled.” Tolchin, supra note 1.

⁵ U.S. Const. amend. I provides:
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 to peacefully assemble, and to petition the Government for a redress of grievances.
restraints are worse.6

The Supreme Court, in Branti v. Finkel,7 reduced restraints on the first amendment by holding that a public employee could not be discharged solely because of his choice of political party if such affiliation would not affect the performance of the public office involved. The significance of the Branti decision lies in the Court's expansion of the protective coverage supplied in Elrod v. Burns8 to reach indirect methods of coercion that control a public employee's freedom of choice.

This note will focus on two aspects of the Branti decision. First, the role of the first amendment and its applicability to patronage dismissals will be examined. Second, the Court's modification of the Elrod decision will be analyzed in light of the new standard adopted by the Court.

**THE FACTUAL BACKGROUND**

Aaron Finkel and Alan Tabakman, assistant public defenders in Rockland County, New York, were dismissed by petitioner Branti, County Public Defender, when control of the county legislature shifted from the Republican to the Democratic party.9

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7. 100 S. Ct. 1287 (1980).
8. 427 U.S. 347 (1976). The Court held that nonpolicymaking, nonconfidential employees could not be dismissed for purely partisan reasons.
9. The Rockland County Public Defender is appointed by the county legislature for a term of six years and he, in turn, appoints the assistant public defenders. Public employees in Rockland County are categorized as either "unclassified" or "classified." Unclassified positions include teachers, elected officials, legislators, and the District Attorney. Classified positions consist of four subdivisions:
   a) A competitive class with minimum qualifications and competitive civil service examinations;
   b) A non-competitive class with minimum qualifications but no examination;
   c) A labor class, consisting of unskilled labor;
   d) An exempt class, for which no examination is deemed practicable or feasible.

Since there is no executive in Rockland County, the legislature performs the function of executive. The legislature appoints the department heads, and members of the exempt class are generally appointed by a department head. Assistant county attorneys and assistant public defenders fall into the exempt class. These appointments were determined by a Democratic caucus after the 1977 elections delivered a Democratic majority. The district court found that the selection process employed, in appointing the nine assistant public defenders, eliminated from
kel and Tabakman alleged that they were nonpolicymaking, non-confidential government employees who were satisfactorily performing their duties, and, therefore, the politically motivated dismissal violated the first and fourteenth amendments.\textsuperscript{10}

The district court held that the dismissals would be allowed pursuant to \textit{Elrod} only if assistant public defenders were the type of policymaking, confidential employees who may be discharged solely on the basis of their political affiliations.\textsuperscript{11} The district court, after considering the facts, decided that the respondents did not fall within this category\textsuperscript{12} and, therefore, the dismissal violated first and fourteenth amendment principles. The court of appeals affirmed the district court's decision that an assistant public defender was neither a policymaker nor a confidential employee.\textsuperscript{13}

consideration candidates who were affiliated with the Republican Party. The only non-Republican considered was unregistered and spoke Spanish. The district court found that Branti's only reason for terminating their employment was that they "were not recommended or sponsored pursuant to the procedures that had been decided upon by the Democratic Caucus." 457 F. Supp. 1284, 1288 (S.D.N.Y. 1978).

10. U.S. CONST. amend. XIV, §1 provides in part:
No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

11. 457 F. Supp. at 1285. Upon assuming office, Sheriff Elrod summarily dismissed or threatened with dismissal four non-civil service employees. The employees' positions were: a chief deputy in the Process Division of the Sheriff's Office; a juvenile court security guard and bailiff; a process server; and an office employee. Since these employees refused to affiliate with or to obtain sponsorship from the Democratic Party, Elrod sought to have them discharged. The Supreme Court found that such patronage dismissals infringe on first amendment freedoms of political belief and association. In that context, the Court held that, except with regard to policy-making public employees, the defendants had failed to demonstrate an overriding governmental interest which would justify such interference with first amendment rights. 427 U.S. at 372-73.

12. 457 F. Supp. at 1291. The district court began its assessment of whether or not the plaintiffs were policymakers within the guidelines applied in \textit{Elrod}. The court first considered whether plaintiffs had responsibilities that were not well defined or that were of a broad scope, and, second, whether the plaintiffs formulated or implemented broad goals.

Next, the district court considered \textit{Ramey v. Harber}, 431 F. Supp. 657 (W.D. Va. 1977), in which a policymaker was defined as "one who controls or exercises a role in the decision-making process as to the goals and general operating procedure of the office." \textit{Id.} at 666 n.15.

13. 598 F.2d 609 (2d Cir. 1979).
ANALYSIS OF THE COURT OPINION

The Supreme Court in *Branti* held that a public employee could not be discharged solely because of his choice of political party. In reaching this conclusion, the Court considered whether the employees in question were impermissibly discharged under the doctrine of *Elrod* and whether the hiring authority had sufficiently demonstrated that party affiliation was an appropriate requirement for the position. This analysis will discuss the role of the first amendment in the patronage context as established in *Elrod* and further developed by *Branti*. The *Branti* Court's new standard for determining the constitutionality of patronage practices and its modification of the *Elrod* standard will then be evaluated.

The Role of the First Amendment

The first amendment was first applied to patronage dismissals in the *Elrod* decision. The *Branti* Court adopted Justice Brennan's conclusion in *Elrod*;14 the constitutionality of patronage dismissals is to be determined by the rule established in *Board of Education v. Barnette*.15 Although the facts of the *Barnette* case did not concern political patronage,16 the Court there held that the Bill of Rights prohibited attempts of public officials to coerce or interfere with the public's beliefs.17 Justice Brennan, speaking for the plurality in *Elrod*, stated that the practice of patronage dismissals interferes with the employee's first amendment rights of political belief and association.18 Political belief and association has been held to constitute the core of those activities protected by the first

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14. 100 S. Ct. 1292.
15. 319 U.S. 624 (1943).
16. In *Barnette*, the Court held that the action of a state legislature compelling a flag salute and a pledge of each public school student went beyond constitutional limitations and invaded the "sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." Id. at 642.
17. Justice Jackson, writing for the plurality in *Barnette*, stated the rule eloquently:
   If 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.
18. 427 U.S. at 356.
amendment. Justice Brennan elaborated by stating that the practice of patronage dismissals abridges these first amendment rights by forcing employees to join or support the party in power in order to retain their jobs. In concluding his analysis in *Elrod*, Justice Brennan stated that the inevitable tendency of such a system is to coerce employees into compromising their true beliefs. According to Justice Brennan, this impact on freedom of association and belief could distort the electoral process.

In addition to the potentially harmful effect the political patronage system may have on the democratic system as a whole, Justice Brennan emphasized in *Elrod* that the practice had the effect of imposing an unconstitutional condition on the receipt of a public benefit. Briefly stated, the doctrine of "unconstitutional

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19. *Id.*

20. 427 U.S. at 355-56. Justice Brennan continued:

An individual who is a member of the out-party maintains affiliation with his own party at the risk of losing his job. He works for the election of his party's candidates and espouses its policies at the same risk. The financial and campaign assistance that he is induced to provide another party furthers the advancement of that party's policies to the detriment of his party's views and ultimately his own beliefs, and any assessment of his salary is tantamount to coerced belief. *See* Buckley v. Valeo, 424 U.S. 1, 19 (1976). Even a pledge of allegiance to another party, however ostensible, only serves to compromise the individual's true beliefs. Since the average public employee is hardly in the financial position to support his party and another, or to lend his time to two parties, the individual's ability to act according to his beliefs and to associate with others of his political persuasion is constrained, and support for his party is diminished.

*Id.*

21. Given the increasingly pervasive character of government employment, the power to starve political opposition by commanding partisan support, financial or otherwise, may have a significant impact on the formation and expression of political beliefs. 427 U.S. at 356.

22. Justice Brennan stated in *Elrod*, 427 U.S. at 357, citing inter alia Illinois State Employees Union v. Lewis, 473 F.2d 561, 576 (7th Cir. 1972), that "[p]atronage, . . . to the extent it compels or restrains belief and association, is inimical to the process which undergirds our system of government and is at war with the deeper traditions of democracy embodied in the first amendment."

23. The doctrine of "unconstitutional conditions" was most clearly stated in the commerce clause case, *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583 (1926). In that case, a California statute required that a certificate of public convenience and necessity be obtained by private carriers from the Railroad Commission. This requirement, in effect, subjected private carriers to all the Commission rules and regulations applicable to public carriers. The *Frost* Court stated:
conditions” holds that “whatever an express constitutional provision prevents the government from doing directly it forbids the government from doing indirectly.”24 This doctrine has been most frequently applied to protect first amendment rights.25 The principle, therefore, is particularly applicable to patronage dismissals. In the patronage context, it must first be determined whether the employee's job is a benefit of the type that cannot be subjected to an unconstitutional condition. Traditionally, the right-privilege distinction barred a public employee's constitutional claim for relief.26 It was believed that a public job was a privilege, therefore not de-

It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.

It. at 593-94.


25. Perry v. Sinderman, 408 U.S. 593 (1972); Pickering v. Board of Education, 391 U.S. 563 (1968) (plaintiff's dismissal from teaching job for criticism of school administration violated freedom of speech); Baggett v. Bullitt, 377 U.S. 360 (1964) (loyalty oath required of state employees held overbroad and an unconstitutional condition upon employment); Torcaso v. Watkins, 367 U.S. 488 (1960) (state could not deny appellant office to which he was appointed on basis of his refusal to declare belief in God); Note, Unconstitutional Conditions, 73 HARV. L. REV. 1595 (1960). See also, Keyishian v. Board of Regents, 385 U.S. 589 (1967) (the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected); Bruff, Unconstitutional Conditions Upon Public Employment: New Departures in the Protection of First Amendment Rights, 21 HASTINGS L.J. 129 (1969); French, Unconstitutional Conditions: An Analysis, 50 GEO. L.J. 234 (1961); Note, Another Look at Unconstitutional Conditions, 117 U. PA. L. REV. 144 (1968).

serving of constitutional protection.27

The right-privilege distinction was rejected by the Supreme Court in *Board of Regents v. Roth*28 and *Perry v. Sindermann*.29 Although *Perry* was primarily concerned with principles underlying the grant or denial of procedural due process, the *Branti* Court was particularly interested in the *Perry* Court's interpretation of the unconstitutional conditioning of public employment in the patronage context.30 *Perry* held that even a public servant with no constitutional or statutory rights to his job could not be dismissed simply for exercising his first amendment rights. However, he may be summarily dismissed without a hearing or statement of reasons.31 The Court cited two other cases, *Shelton v. Tucker*32 and *Keyishan v. Board of Regents*,33 in reaffirming the principle that public employment, even of nontenured employees, is a benefit

27. The most quoted opinion supporting the "no right to public employment" analysis is *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892), in which Justice Holmes wrote that "[t]he petitioner may have a constitutional right to talk politics, but he has no right to be a policeman." *Id.* at 220, 29 N.E. at 517.


29. 408 U.S. 593 (1972). In *Perry*, respondent was employed under a series of one year contracts in a state college system with no formal tenure. When the Regents decided not to renew his contract, he filed suit alleging that the decision was based upon his public criticism of the college administration and thus violated his first amendment rights. The Court held that if the statements were the basis for dismissal, his rights had been infringed. Respondent was entitled to a hearing at which he could offer proof of an impermissible basis for his dismissal. *Id.* at 597.

30. The Court stated:

[Government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which [it] could not command directly. *Speiser v. Randall*, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.

100 S. Ct. at 293.

31. 408 U.S. at 596-98.

32. 364 U.S. 479 (1960). In *Shelton*, a state statute, compelling every teacher to file annually an affidavit listing all memberships in and contributions to organizations, was held invalid as overbroad in impairing the freedom of association of teachers hired on a year-to-year basis.

33. 385 U.S. 589 (1967). The Court found the New York Feinberg Law to be overbroad and unconstitutional. The Court rejected the premise that "public employment . . . may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action." *Id.* at 615.
that triggers the unconstitutional condition analysis. Together, Perry, Shelton, and Keyishian indicate that the government may not deny a benefit such as public employment merely on the basis of political affiliation. Patronage dismissals clearly restrict activities protected by the first amendment.

The Branti Court expands upon this first amendment analysis by declaring, "[i]f the first amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes." The Court relied on three cases as authority for its holding that patronage dismissals of public employees violate the first amendment: United Public Workers v. Mitchell, Wiemann v. Updegraff, and Cafeteria & Restaurant Workers v. McElroy. The Court cited dicta from each of the three cases which tended to show that political affiliation is not a valid condition to public employment. However, the theory that patronage dismissals impinge on first amendment freedoms is not without serious objection. Justice Powell in his Elrod dissent contended that no first

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34. 100 S. Ct. at 1293.
35. 330 U.S. 75 (1947). In Mitchell, federal employees unsuccessfully challenged the constitutionality of the Hatch Act; see note 3 supra.
36. 344 U.S. 183 (1952). The Wieman Court held an Oklahoma statute unconstitutional which required every state employee to sign an oath that he did not belong either to a Communist front organization or a subversive group.
37. 367 U.S. 886 (1961). In Cafeteria Workers, the Court held that the summary revocation of the security clearance of a civilian employee on a Naval installation did not violate her right to due process.
38. In Mitchell, the Court stated that "Congress may not enact a regulation providing that no Republican, Jew, or Negro shall be appointed to a federal office. . . . None would deny such limitations. . . ." 330 U.S. at 100. This principle was reaffirmed in Weiman. The Court in Cafeteria Workers concluded that " . . . Rachel Brawner could not constitutionally have been excluded from the Gun Factory . . . because she was a Democrat or a Methodist." 367 U.S. at 898.
39. 100 S. Ct. at 1293.
40. Justice Powell, dissenting in Branti, contended that the majority was incorrect in concluding "that the First Amendment prohibits the use of membership in a national political party as a criterion for the dismissal of public employees." Id. at 1298 (Powell, J. dissenting).

Justice Powell suggested that the Court's reliance on Barnette, Perry, and Keyishian is without precedence since issues concerning patronage were not discussed in those cases. Justice Powell, while reviewing the factual settings of these
amendment rights are violated when public employees lose their positions obtained through participation in the patronage system.41

Before concluding its first amendment analysis, the Branti Court revealed that the coercive effect of patronage systems was an influential factor in its decision. The Court rejected the argument that Elrod only prohibited dismissals resulting from an employee's failure to succumb to political coercion.42 To limit Elrod to this extent, the Court suggested, would virtually overrule the principles established in Elrod. The Court stated emphatically, "[w]hile it would perhaps eliminate the more blatant forms of coercion described in Elrod, it would not eliminate the coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one's job."43

The type of coercion the Branti Court was concerned with was not the actual job loss44 of the employee; rather, it was the fact that the threat of job loss would force employees to change their political affiliation.45 The Branti Court re-examined Brennan's observations in Elrod that political sponsorship is often purchased at the price of political contributions or campaign work in addition to a simple declaration of allegiance to the party. The Court con-

opinions, focused only on the narrow facts and holdings of the cases. Justice Powell stated that, "Board of Education v. Barnett, . . . did not involve public employment. In that case, the Court declared that a state statute compelling each public school student to pledge allegiance to the flag violated the First Amendment." Id. at 1299 n.7 (Powell, J. dissenting).

Justice Powell believed that the constitutionality of appointing or dismissing public employees should depend on the governmental interests served by patronage. Citing Buckley, Justice Powell states, "[n]o constitutional violation exists if patronage practices further sufficiently important interests to justify tangential burdening of First Amendment rights." Id. at 1299. Therefore, according to Justice Powell, the appropriateness of party affiliation for some government positions could not be "answered in a principled manner without identifying and weighing the governmental interest served by patronage." Id.

41. 427 U.S. at 380-81 (Powell, J. dissenting). Only requests that the employee change his political affiliation, contribute to, or work for the party's candidates should bring the action within the rule of Elrod.

42. 100 S. Ct. at 1293-94.

43. Id.


45. Finkel had changed his party registration from Republican to Democratic in 1977 hoping to increase his chances of being reappointed by the new Democratic public defender.
cluded that the realization that one must have a sponsor in order to retain one's job is very likely to lead to the same type of coercion as that described by the plurality in Elrod.\textsuperscript{46}

The facts in Elrod involved direct coercion: a demand that the employees in question change their party affiliation or face discharge. The Court in Branti curtailed a more elusive strain of coercion. The type of coercion discussed in Branti forces employees to change their beliefs or associations through an unspoken threat of discharge. Although Branti did not demand that Finkel change his party registration, the change was made for no reason other than to avoid discharge.\textsuperscript{47} This is an example of how an indirect threat to employment can be transformed into overt political pressure. Therefore, by making it known that employment is conditioned upon membership to the in-party, the patronage system is able to manipulate public employee's beliefs and associations in violation of their first amendment rights. The Court in Branti extends the Elrod holding to cover a wider range of coercive practices affecting a person's first amendment rights of belief and association.

\textit{The Standard Adopted by the Court}

Although the Court in Branti applied the first amendment analysis employed in Elrod, the plurality did not follow Elrod's test for determining whether patronage firings impose an impermissible burden.\textsuperscript{48} The standard the Branti Court adopted places the burden on the hiring authority to demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.\textsuperscript{49}

The decision in Branti set forth several factors to be considered in determining whether political affiliation is an appropriate basis for dismissal of a government employee. The employee's responsibilities, primary duties, capacity for policy making, or confidential relationship are all to be given relatively equal weight in the determination.\textsuperscript{50} The Court considered the appropriateness of

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\item [46.] 100 S. Ct. at 1294 n.11.
\item [47.] Id. at 1290 n.4.
\item [48.] The test the Elrod Court created was in line with the traditional analysis of first amendment cases. The Court defined the test as follows: the practice must "further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights." 427 U.S. at 363.
\item [49.] 100 S. Ct. at 1295.
\item [50.] In Elrod, the Court stated that the nature of an employee's responsibili-
party affiliation for various types of employees and found an obvious example in state election laws which require precincts to be supervised by two election judges of different parties.

However, the selection of a state university's football coach, although involving policy considerations, could not appropriately be based upon political affiliations. The Court further illustrated the distinction by setting forth the example of a state governor who may consider party affiliation when choosing assistants who help him write speeches, explain his views to the press, or act as his legislative liaison. The Court stated that the assistants who perform these official duties could not perform their functions effectively unless they shared the same political beliefs and party commitments as their superior.

Employee supervisors . . . may have many responsibilities, but those responsibilities may have only limited and well-defined objectives. An employee with responsibilities that are not well-defined or are of a broad scope more likely functions in a policymaking position.

427 U.S. at 367-68.

51. According to the Branti Court, the duties of the employees in question, the chief deputy of the process division of the sheriff's office and a bailiff and a security guard at the Juvenile Court of Cook County, were clearly not the type for which party affiliation would be appropriate. 100 S. Ct. at 1294.

52. Most state laws require that the judges supervising an election be of different political parties in order to ensure fairness and adequate supervision of each side. Justice Powell, in his dissent, found this example unclear:

If the mere presence of a state law mandating political affiliation as a requirement for public employment were sufficient, then the legislature of Rockland County could reverse the results of this case merely by passing a law mandating that political affiliation be considered when a Public Defender chooses his assistants.

Id. at 1297 n.3 (Powell, J. dissenting).

53. Id. at 1295.

54. Id.

55. Id. It has been recognized that the patronage system helps ensure that the policies and goals of the in-party are not undermined by insubordination and obstructionist acts of the out-party members. Patronage has also been touted for guaranteeing that subordinates will not attempt to discredit the party or sabotage its programs and that such employees will be more responsive to their superiors because they risk summary dismissal for insubordination. See, e.g., Shoen, Politics, Patronage, and the Constitution, 3 Ind. Leg. F. 35, 91 (1969); Grossman, Public Employment and Free Speech: Can They be Reconciled?, 24 Ad. L. Rev. 109, 118 (1972); O'Neil, Politics, Patronage and Public Employment, 44 U. Cin. L. Rev. 725, 737-38 (1975); Note, The First Amendment and Public Employees - An Emerging Constitutional Right to be a Policeman?, 37 Geo. Wash. L. Rev.
Applying these examples to the facts in *Branti*, the Court concluded that the employment of an assistant public defender could not be conditioned upon party affiliation. The Court elaborated by stating:

it is manifest that the continued employment of an assistant public defender cannot properly be conditioned upon his allegiance to the political party in control of the county government. The primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the state.\(^{56}\)

The Court paralleled the duties of an assistant public defender to those of counsel appointed to represent indigent defendants in federal criminal proceedings. The Court determined that the principal responsibility of appointed counsel was to serve the interests of his client.\(^{57}\) It is significant to note that in reaching its conclusion, the

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56. 56 S. Ct. at 1295. Although the *Branti* Court determined that the labels of “policymaker” or “confidential” were only peripheral considerations, the Court did contrast and analogize the responsibilities of an assistant public defender with those of a prosecutor and counsel appointed to represent indigent defendants in federal criminal proceedings. Although the Court specifically reserved opinion as to whether the deputy of a prosecutor would be protected from patronage dismissals their denial of certiorari in Newcomb v. Brennan, 558 F.2d 825 (7th Cir. 1977), cert. denied, 434 U.S. 68, may reflect their inclinations. Newcomb was a deputy city attorney and, as such, he stood in a position between the city attorney and the assistant city attorneys. He was dismissed from his appointed position due to his plans to run for Congress. Newcomb charged that his superior, the city attorney, and the incumbent congressman conspired to coerce him into withdrawing from the race. The court of appeals permitted a supervisor to discharge any employee occupying a sensitive policymaking position if the employee’s activity could be classified as an expression of personal or political disloyalty. Newcomb was labeled a policymaker by the district court based on three facts: the deputy city attorney was exempted from civil service, he had no established term of office, and he had broad powers and duties. *Id.* at 827.

The Court in *Newcomb* distinguished its decision from *Elrod* on the assumption that Newcomb would “by the nature of his political affiliation, retard the effectuation of a new administration’s policies.” *Id.* at 830.

57. The Court was citing language from *Ferri* v. *Ackerman*, 100 S. Ct. 402 (1980), in which the Supreme Court held that an attorney appointed by a federal judge to represent indigent criminal defendants is not, as a matter of federal law,
Branti Court considered the responsibilities of the particular office involved in the same manner as the Elrod Court determined whether a certain office involved policymaking or confidential positions. The standard that the Court adopted did involve a discussion of the criteria for policymaking and confidentiality suggesting perhaps that they may still be relevant factors. However, Branti broadened the Elrod standard in that "policymaker" or "confidential relationship" now seem to be only peripheral considerations.

It should be noted, however, that the Branti Court adopted the Elrod stipulation that if an "employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." Therefore, the Court implied that a balancing test might be utilized if the facts of later cases come too close to the fine line separating those positions for which party affiliation is deemed appropriate and those for which it is not.

If the Court did engage in a balancing process, the asserted governmental interest would have to be weighed against the severity of the encroachment on the employee's first amendment rights. The Court would also consider the possibility of less drastic methods for achieving the governmental interest asserted. While the Court has occasionally found the governmental interest entitled to absolute immunity in a subsequent state malpractice suit brought against him by his former client. The Ferri Court agreed that an "indispensable element of the effective performance of his responsibilities is the ability to act independently of the government and to oppose it in adversary litigation." 

However, Justice Stewart, in his Branti dissent, believed that the analogy of a public defender and his assistants to a firm of lawyers in the private sector was particularly appropriate due to the necessity of mutual confidence and trust inherent in that kind of professional association. 100 S. Ct. at 1296 (Stewart, J. dissenting). 58. The Court noted that any policymaking or confidential relationship that occurred in the public defender's exercise of his duties would relate to the needs of his clients and not to partisan political interests.

59. 100 S. Ct. at 1294, citing 427 U.S. at 366. The Court was not persuaded by the argument that patronage insures effective government and the efficiency of public employees. Rather, the Court stated, "[t]he inefficiency resulting from the wholesale replacement of public employees every time political office changes hands belies this justification." 

60. For another view on the Court's approach to balancing, see Note, Constitutional Law - Elrod v. Burns: Patronage in Public Employment, 13 Wake Forest L. Rev. 175, 182 (1977).
sufficiently compelling, it has more recently found that less drastic means exist for insuring government effectiveness and employee efficiency.

THE FUTURE OF PATRONAGE

There is much speculation that the expansion of the merit system and decisions such as Branti will create fundamental changes in the operation of political parties as we know them today. In his dissent, Justice Powell believed the Branti decision dealt a death blow to political parties. In his view, political parties are an essential element of the patronage system. According to Justice Powell, political parties, through the patronage system, serve a variety of governmental interests and without them our representative form of government would be hampered. Justice Powell enumerated the various services political parties perform. If political parties cannot offer patronage positions to their party faithful, the result, according to Justice Powell, will be a breakdown of party discipline on the national level. Justice Powell asserted that such a breakdown would inhibit the voter’s ability to hold parties responsible for the performance of its elected officials and would open the door for other forces to further inhibit the proper functioning of government. Justice Powell was specifically


62. In Elrod, the Court noted that employees could be discharged for good cause if they were insubordinate or performed poorly. 427 U.S. at 366.

63. For a general discussion on the decline of patronage due to the merit system, see D. ROSENBLOOM, FEDERAL SERVICE AND THE CONSTITUTION (1971); P. VAN Riper, HISTORY OF THE U.S. CIVIL SERVICE (1958).

64. Justice Powell begins his dissent in Branti by stating, “[t]he Court today continues the evisceration of patronage practices begun in Elrod. . . .” 100 S. Ct. at 1296 (Powell, J. dissenting) and concludes with, “the effect of the Court’s decision will be to decrease the accountability and denigrate the role of our national political parties.” Id. at 1301.

65. Id. at 1299-1300.

66. Specifically, Justice Powell suggested that political parties allow candidates to obtain donations of time, aid in the implementation of a new officer’s policies, raise funds, recruit potential candidates, train party workers, provide assistance to voters, and act as a liaison between voters and governmental bureaucracies. Id. at 1300.

67. Id. at 1301, citing E. COSTIKYAN, BEHIND CLOSED DOORS: POLITICS IN THE PUBLIC INTEREST, at 353-54.

concerned that the decline of party strength, due to the limitations on the use of patronage, would enable special interest groups such as labor unions to exert more influence on political candidates. He believed this would tend to make elected officials responsive only to specialized needs of small groups. However, there are those who would disagree with Justice Powell’s conclusion that the inroads into patronage will bring about the demise of political parties. The Constitution does not mandate the existence of two main political parties. Therefore, their absence would not create a question of constitutional proportion.

Another implication of the Branti decision is its possible, if not probable, extension to patronage hirings as well as firings. The plurality in Branti adopted the district court’s observation that it would be difficult at best to justify the use of party affiliation in either the selection or retention of an assistant public defender. Thus, it would appear that decisions by employers regarding employee selection or retention involve considerations of identical factors. This extension of the Court’s decision is noted and questioned by Justice Powell in his dissent. Justice Powell was primarily concerned with the constitutional implications of the extension. However, it is doubtful that such an extension to patronage


69. But see Note, 37 Louisiana L. Rev. 990, 996 (1977); Note, 26 Vand. L. Rev. 1090, 1099 (1973); and Souraf, Patronage and Party, 3 Midwest J. Pol. Sci. 115, 119 n.44 (1959) where the authors speculate on the amount and kind of support special interest groups will contribute to political parties.

70. The Court in Elrod stated the elimination of patronage practice, or the halt of patronage dismissals would not cause political parties to disappear. 427 U.S. at 369.

71. 100 S. Ct. at 1295 n.14.

72. Justice Powell stated:

[t]he Court purports to limit the issue in this case to a dismissal of public employees. . . . Yet the Court also states that it is difficult to formulate any justification for tying either the selection or retention of an assistant public defender to his party affiliation. . . . If this latter statement is not a holding of the Court, it at least suggests that the Court perceives no constitutional distinction between selection and dismissal of public employees.

Id. at 1297 n.2 (Powell, J. dissenting).

73. Id.
hirings would create an appreciable change in the operation of the patronage system. The problems inherent in sustaining the burden of proof are evident. The decision to hire must be based solely on partisan considerations. Therefore, the successful litigation of such an action is uncertain.

CONCLUSION

The Supreme Court in Branti squarely faced a long established practice that has been greatly in need of revision. Holding that a public employee could not be discharged solely because of his choice of political party, the Court severely curtailed the oppressive use of summary dismissals. The Court's decision would seem to add greater stability to employment in the public sector. The Court's extension of the Elrod decision will reach coercive practices never before challenged. By the Court's reliance on the first amendment for its holding, the actions of hiring authorities will be subjected to a higher level of scrutiny. No longer will alleged interests in governmental efficiency automatically allow employers to infringe on employee's first amendment rights. The Branti decision may even lead to an increase in governmental efficiency. Employees, who will not be replaced after elections, will now be able to gain experience, even expertise, in their various positions. In any event, the Branti decision will extend to the public employee that which most private employees have always had: the understanding that retention of employment is dependent upon job performance rather than political beliefs.

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74. See Note, The Supreme Court, 1975 Term, 90 Harv. L. Rev. 56, 196 n.50 (1976).