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Constitutional Law - A New Test for Political Firings

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NOTES

CONSTITUTIONAL LAW—A NEW TEST FOR POLITICAL FIRINGS—*Branti v. Finkel*, 445 U.S. 507 (1980).

INTRODUCTION

The question of whether a government employee may be dismissed solely because of his political party affiliation is of continuing importance to some twelve and a half million employees at all levels of government.[1] The right to associate with the political party of one's choice is protected by the first and fourteenth amendments to the Constitution of the United States.[2] Therefore, dismissal of a government employee solely because he is a Democrat or Republican infringes on his first amendment right to free political association.[3] Although lower-echelon employees are protected by civil service restrictions on patronage removals, most higher level employees are not.[4]

Before 1976, it was held that the government's interest in ensuring a loyal, efficient and responsible administration justified patronage dismissals.[5] Then, the Supreme Court of the United States in *Elrod v. Burns*[6] held patronage removals to be an unconstitutional violation of the first and fourteenth amendments except when the dismissed official could be properly classified as a "policymaking" or "confidential" employee.[7]

The Supreme Court recently changed the *Elrod* standard in

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1. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 218 (1971).

2. Elrod v. Burns, 427 U.S. 347, 357 (1976) (citing *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973) which said that "[t]here can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments.").

3. 427 U.S. at 360.

4. Branti v. Finkel, 445 U.S. 507, 522 n.1 (1980) (Powell, J., dissenting opinion).

5. American Federation of State, County and Municipal Employees v. Shapp, 443 Pa. 527, 280 A.2d 375, 378 (1971).

6. 427 U.S. 347.

7. *Id.* at 368, 375.

Branti v. Finkel.[8] Mr. Justice Stevens,[9] dissatisfied with the *Elrod* standard, reasoned that the party in power does not have an overriding government interest in seeing every policymaking, confidential position filled only with someone who belongs to the political party of the new administration.[10] The *Branti* Court changed *Elrod* by requiring new administrations to demonstrate that party affiliation is an "appropriate requirement for the effective performance of the public office involved."[11] If the administration can meet this burden, the employee in question may be removed solely because of his political affiliation.

THE CASE

Plaintiffs in *Branti* were Republicans serving as assistant public defenders in Rockland County, New York.[12] After an election, a new Democrat-dominated administration came to power and, shortly thereafter, executed plaintiffs' termination notices. Plaintiffs brought suit in Federal district court to enjoin the administration from terminating plaintiffs' employment. The trial court found that plaintiffs had been performing their duties satisfactorily and that they were threatened with dismissal solely because they were Republicans.[13] Applying the *Elrod* standard, the court found that an assistant public defender does not participate in policy formulations, nor is his position one requiring a confidential relationship with a policymaker.[14] Based on these findings, the trial court granted the injunction holding that the new administration could not terminate plaintiffs' employment as assistant public defenders.[15] Specifically, any attempted political firing would violate plaintiffs' first and fourteenth[16] amendment rights to associate

8. 445 U.S. 507.

9. Mr. Justice Stevens was a member of the Supreme Court when *Elrod* was decided but did not participate in the consideration of that case. 427 U.S. at 374.

10. 445 U.S. at 518.

11. *Id.*

12. Finkel v. Branti, 457 F. Supp. 1284, 1286 (S.D.N.Y. 1978). The district court noted that an assistant public defender is not protected by civil service constraints.

13. *Id.* at 1292.

14. *Id.* at 1291.

15. *Id.* at 1293.

16. *Id.* Presumably, the trial court meant that the due process clause of the fourteenth amendment incorporates the first amendment right of association thus making the latter applicable to the states.

with the political party of their choice.[17] The Second Circuit Court of Appeals affirmed the trial court's decision.[18] The Supreme Court then granted certiorari to consider the standard required by the first amendment in political firing cases.[19]

BACKGROUND

Prior to the 1970's, courts were reluctant to overturn patronage dismissals.[20] Most attacks on patronage dismissals were based on due process rather than first amendment arguments.[21] Continued government employment was considered a mere privilege, not a right or entitlement within the meaning of due process.[22] Those not qualified for protection under the civil service system were considered employees-at-will and could be dismissed summarily without a pretermination hearing.[23]

In *Alomar v. Dywer*,[24] plaintiff was dismissed from her position as a "Neighborhood Services Representative" for the City of Rochester because she was a Democrat.[25] Relief was denied for failure to state a claim upon which relief could be granted.[26] The Second Circuit Court of Appeals expressly held that such government action does not deny one the right to associate with the political party of one's choice.[27] During the same period, the Pennsylvania Supreme Court refused to grant injunctive relief to some 5,000 employees of the Pennsylvania Department of Transportation who were threatened with termination by a newly-elected ad-

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17. *Id.*

18. Finkel v. Branti, 598 F.2d 609 (2d Cir. 1979) (an unpublished memorandum opinion with cite appearing in tables).

19. 445 U.S. at 511.

20. Alomar v. Dwyer, 447 F.2d 482 (2d Cir. 1971), *cert. denied*, 404 U.S. 1020 (1972); American Federation of State, County and Municipal Employees v. Shapp, 443 Pa. 527, 280 A.2d 375 (1971).

21. *See, e.g.*, Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961).

22. *Id.* at 897.

23. *Id.* at 896-97 (citing *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959) which said if an employee does not qualify for civil service protection, then he is at the complete mercy of the firing authority and can be dismissed "at any time without the giving of a reason. . . .").

24. 447 F.2d 482.

25. *Id.*

26. *Id.*

27. *Id.* at 483.

ministration.[28] The court rationalized that a state employee coming into his position as the result of the spoils system should not later be heard to complain of dismissal for the same reason.[29] The refusal to recognize first amendment rights in the area of patronage dismissals was based on the view that the first amendment does not guarantee continued government employment.[30]

Neither the Court of Appeals nor the Pennsylvania Supreme Court followed earlier suggestions from the United States Supreme Court that political affiliation by itself may not be appropriate grounds for dismissal of some government employees. Dictum in one case indicated that a cafeteria worker in a United States gun factory could not have been dismissed from her employment simply because she was a Democrat or a Methodist.[31] Dictum in another case recognized that "Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.' "[32]

During the 1960's and 1970's, the Supreme Court considered numerous cases which dealt with public employees' rights under the first amendment. For example, in *Keyishian v. Board of Regents*,[33] a New York statute barred members of the Communist Party from public employment. The Supreme Court held the statute unconstitutional because it violated the Communist Party members' first amendment right of political association.[34] In *Perry v. Sindermann*,[35] the Supreme Court recognized that a government

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28. 443 Pa. at ___, 280 A.2d at 378.

29. *Id.* *See also* Scott v. Philadelphia Parking Authority, 402 Pa. 151, ___, 166 A.2d 278, 280 (1960) saying that "[w]ithout more, an appointed public employee takes his job subject to the possibility of summary removal by the employing authority." The *Scott* case could be read as standing for the proposition that in all public employment contracts not subject to civil service constraints, there is an implied condition that the employee may be summarily dismissed by the firing authority.

30. Bailey v. Richardson, 182 F.2d 46, 59 (D.C. Cir. 1950), *aff'd mem.*, 341 U.S. 918 (1951). Plaintiff in *Bailey* had been disqualified from employment by the United States Government because of her possible involvement with a communist political association.

31. 367 U.S. at 898 (plaintiff's discharge upheld for other reasons).

32. United Public Workers v. Mitchell, 330 U.S. 75, 100 (1947) (principle reaffirmed in *Wieman v. Updegraff*, 344 U.S. 183, 191-92 (1952) (citing *Mitchell*)).

33. 385 U.S. 589 (1967).

34. *Id.* at 595.

35. 408 U.S. 593 (1972).

employee may not be denied a government benefit for engaging in constitutionally protected speech.[36] In *Perry*, a professor had spoken out against certain policies enacted by the hiring authority at the college where he worked. The hiring authority reacted by refusing to renew his contract at the end of the teaching year. The Court said that the college could not refuse to renew the professor's contract solely because he had criticized administrative policies.[37]

Although these precedents did not address the issue of political firings directly, *Keyishian* recognized that a public employee has a constitutional right of free political association and *Perry* recognized that a government employee has a constitutionally protected right of free speech. Recognition of these rights provided the basis for the Supreme Court's attack in *Elrod v. Burns*[38] on the political patronage system—a practice which had flourished since the Jeffersonian and Jacksonian Eras.[39] In *Elrod*, the plaintiffs were government employees working in a county sheriff's office and had duties ranging from bailiff and process server to security guard and deputy.[40] Traditionally the newly-elected sheriff would remove all non-civil service employees and replace them with members of his own party.[41] Following this tradition, the newly-elected sheriff dismissed the plaintiffs when they failed to change their party status from Republican to Democrat.[42] The Supreme Court held that

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36. *Id.* at 597.

37. *Id.* at 598.

38. 427 U.S. at 360. The Court in *Branti* emphasized this when it said "[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." 445 U.S. at 515.

39. 427 U.S. at 369; *see* Illinois State Employees Union v. Lewis, 473 F.2d 561, 568 (7th Cir. 1972); Sorauf, *The Silent Revolution in Patronage*, 20 PUB. ADMIN. REV. 28 (1960).

40. 427 U.S. at 350-51.

41. *Id.* at 351.

42. *Id.* The *Elrod* Court did not directly confront the question of whether an employee who had not been actually coerced into changing party registration and who had simply been discharged without a chance to change parties could be dismissed under the patronage system. In *Elrod*, the sheriff threatened to dismiss plaintiffs unless they joined the Democratic party. The public defender in *Branti* never exerted any overt political coercion to change parties. Both plaintiffs were dismissed despite the fact that one employee (Finkel) actually did change parties in an attempt to prevent his dismissal. The *Branti* Court rejected the public defender's argument that *Elrod* demanded a showing of overt coercion. 445 U.S. at 516 n.11.

the hiring authority had unconstitutionally conditioned continued employment on the employees changing their political affiliation.[43] Only when the government can demonstrate "an overriding interest," as when higher-echelon employees are involved, may it play the spoils game.[44] The important question became: What criteria should the new administration use to determine whether a particular employee is subject to patronage dismissal? The *Elrod* plurality drew the line at the policymaking level of employment.[45] Thus, an employee responsible for formulating policy would not be protected against political firings. In a concurring opinion, Justice Stewart said that an employee whose position places him in a confidential relationship with the hiring authority also would not be protected against political firings.[46]

Elrod failed to define the precise meaning of the "policymaking" and "confidential" labels thus leaving it up to the lower courts to decide. Generally, the lower courts have interpreted "policymaker" to mean one who actively[47] or directly[48] participates in formulating governmental policy. A "confidential" employee is "one who is privy to the discussions and information involved in the policymaking process," not necessarily one who may carry out covert governmental assignments.[49] A private secretary to a policymaker is an example of a confidential employee.[50] Another court pointed out that the more a public position requires an employee to participate in policymaking, the more difficult the decision becomes so that a full factual inquiry into the nature of the employment becomes imperative.[51] The Supreme Court's creation of a new standard in *Branti* applicable to political firings was an at-

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43. *Id.* at 359.

44. 445 U.S. at 516 (citing *Elrod v. Burns*, 427 U.S. at 368).

45. 427 U.S. at 372.

46. *Id.* at 375.

47. *See* Loughney v. Hickey, 480 F. Supp. 1352, 1364 (M.D. Pa. 1979) (superintendents of refuse and highways, who acted as advisors to policymakers, were properly dismissed under the *Elrod* criteria).

48. *See* Savage v. Pennsylvania, 475 F. Supp. 524, 535 (E.D. Pa. 1979) (a hearing examiner for a liquor control board was held to be a non-policymaking, nonconfidential employee and was ordered reinstated).

49. Rosenthal v. Rizzo, 555 F.2d 390, 393 n.5 (3rd Cir. 1977) (the *Elrod* test was construed as requiring consideration of both the "confidential" and "policymaking" labels rather than either confidential or policymaking considerations).

50. *See* Finkel v. Branti, 457 F. Supp. at 1291.

51. Retail Clerks International Assoc. v. Leonard, 450 F. Supp. 663, 667 (E.D. Pa. 1978).

tempt to eliminate these labels and replace them with a more abstract test thus restating the same basic proposition as *Elrod*.

ANALYSIS

The *Branti* majority held that employment of an assistant public defender cannot be conditioned on party affiliation. The firing authority's dismissal of such an employee violates the first and fourteenth amendment rights to associate with the political party of one's choice.[52] The majority could have simply affirmed on the basis of *Elrod* holding that an assistant public defender is not a policymaking or confidential employee. Instead Mr. Justice Stevens set forth a new test for measuring the state's interest in political firings: "In sum, the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[53]

The *Branti* Court agreed with the *Elrod* decision in the principle that political firings significantly chill first amendment rights and must therefore "survive exacting scrutiny."[54] The government then has a heavy burden of persuading the fact-finder that the state has an "overriding interest" in dismissing the employee in question.[55] Because the critical factor concerns the nature of the public office in question, each case must turn on its own facts. *Branti* agreed that patronage dismissals must "further some vital government end by a means that is least restrictive,"[56] but it purported to abandon the labels "policymaker" and "confidential" as the only criteria for determining the nature of the employment.[57] Mr. Justice Stevens reasoned that the government does not have an overriding interest in dismissing every employee who may be considered a policymaker. For example, a university football coach makes policy, but his coaching ability does not depend on whether he is a Republican or Democrat.[58] The new standard is simply whether effective performance of the job depends on party affilia-

52. 445 U.S. at 520.
53. *Id.* at 518.
54. *Id.* at 515.
55. *Id.* at 516.
56. *Id.*
57. *Id.* at 518.
58. *Id.*

tion,[59] but the Court did not define "effective performance" or say what it meant.

Although the new test is applied easily to a football coach hypothetical and yields a clear result (should not be dismissed for political reasons), application of the test in a more difficult situation demonstrates its weakness. For example, effective performance of the duties of a United States Attorney General arguably does not depend on whether he is a Republican or Democrat as pointed out by Mr. Justice Powell in his dissent; however, it would appear imprudent to prevent the President from using party affiliation as a means for dismissing an Attorney General.[60] Applying the *Elrod* criteria to the Attorney General hypothetical would be more appropriate: Since an Attorney General stands in a confidential relationship with the President and is charged with developing government policy, a Republican President should be able to dismiss an Attorney General who is a Democrat.

If the purpose for the *Branti* standard is to provide a clear statement of the Supreme Court's position on patronage practices or to clarify a previously confused area of law, it is questionable whether the Court accomplished its purpose. In future applications, the hiring authority may not be able to determine if political affiliation is an appropriate requirement for the effective performance of the public office involved.[61] Mr. Justice Powell criticized the new standard by saying that its language is vague and likely to create confusion in its application.[62] He argued that newly-elected administrations will be at a loss as to where to draw the line with the net result being that each new appointee will have to be cautioned that his prospective employment may be jeopardized by a lawsuit initiated by the former employee who held that office.[63] The courts would in effect be called upon to implement a form of judicial civil service.[64]

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59. *Id.*

60. *Id.*

61. *Id.* at 524-25 (Powell, J., dissenting opinion).

62. *Id.* at 524.

63. *Id.*

64. *Id.* at 524-26. *See generally* parts III, IV and V of the dissent strongly defended patronage practices: "In sum, the effect of the Court's decision will be to decrease the accountability and denigrate the role of our national political parties." *Id.* at 531. "The facts of this case also demonstrate that the Court's decision well may impair the right of local voters to structure their government." *Id.* at 532.

Mr. Justice Stewart, who had concurred in *Elrod*,[65] dissented in *Branti* because he was in favor of applying the policymaker-confidential approach in determining whether the state had an overriding interest in dismissing an assistant public defender.[66] Comparing the public defender's office to that of a law firm, he would have held that a confidential relationship exists between an assistant public defender and the hiring authority, who was also an attorney.[67]

CONCLUSION

In holding that the dismissal of an assistant public defender solely because of his party affiliation infringes on his first and fourteenth amendment rights, the *Branti* Court enunciated a new standard whereby the state must now demonstrate that effective performance of the public office in question is dependent on party affiliation. Although *Branti* sought to eliminate the problems with the old *Elrod* test, the new standard probably will cause as much uncertainty and difficulty in its application as did *Elrod*.[68]

One probable effect of *Branti* will be to create additional litigation in an already crowded court system. *Branti* failed to examine the alternative of deferring judgment to the statutory civil service or merit programs set up by legislative branches at all levels of government. Civil service legislation presently provides job protection to certain classified, lower-echelon governmental employees. Other higher level positions are not protected by civil service constraints. As long as the line drawn by the legislature is reasonable, why should the courts intervene? Deferring to legislative judgment would serve to reduce rather than increase the court's workload.

Another probable effect of *Branti* will be to cause the hiring authority to either create new positions or to transfer employees to other jobs. As to the latter, the Fourth Circuit Court of Appeals has recently construed the *Branti* principle to include a wider range of patronage burdens than threatened or actual dismissals.[69] The Fourth Circuit held that under the right circumstances, transfer or reassignment, when based solely on political motives may

65. 427 U.S. at 374.
66. 445 U.S. at 520-21.
67. *Id.* at 521.
68. *Id.* at 524 (Powell, J., dissenting opinion).
69. Delong v. United States, 621 F.2d 618 (4th Cir. 1980).

constitute a violation of first and fourteenth amendment rights.[70] The court remanded for further development of the facts in light of *Branti*, instructing the trial court that plaintiff must show the transfer imposed so unfair a choice as to be equivalent to dismissal.[71]

Branti may have purported to abandon the "policymaker" and "confidential" labels as the sole means for determining whether the state has an overriding interest in dismissal, but it does not follow that these labels are never appropriate. When applying *Branti*, trial courts, as well as the firing authority, probably will continue to examine the policymaking, confidential nature of the employment as at least one factor in the outcome. Certainly the fact that a public official is responsible for formulating policy based on the campaign promises of the incoming administration strongly suggests that effective performance of that position depends upon party affiliation.

Mr. Justice Stewart's enunciation of the *Elrod* standard that a nonpolicymaking, nonconfidential employee cannot be dismissed solely because of his political affiliation gave the firing authority a concrete, workable test by which political firings were to be judged. According to *Branti*, the firing authority now must show that effective performance of the employee's duties depends on his party affiliation; thus, *Branti* changes the *Elrod* standard by stating the same basic proposition in abstract terms. Since the firing authority, rather than the courts, will make the initial determination of whether it has the right to fire an employee solely for political reasons, the standard which should have been adopted is the one more certain to reach a legal result at the time dismissal is being considered. Mr. Justice Stewart's *Elrod* standard met these practical qualifications by giving the firing authority a more concrete approach when faced with the political firing question.

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70. *Id.* at 620 (plaintiff in *Delong*, a former state director of the Farmers Home Administration in Maine, was transferred to a job with somewhat lesser responsibilities but continued at the same salary).

71. *Id.* at 624.