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Patronage Politics: Democracy's Antidote to Enforced Neutrality in Civil Service

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NOTES

PATRONAGE POLITICS: DEMOCRACY'S ANTIDOTE TO ENFORCED NEUTRALITY IN CIVIL SERVICE—*Branti v. Finkel*, 445 U.S. 507 (1980).

INTRODUCTION

> [W]hen . . . all who [hold] office hold by tenure of partisan zeal and party service . . . the certain, direct and inevitable tendency . . . is to convert the entire body of those in office into corrupt and supple instruments of power and to raise up a host of hungry, greedy and subservient partisans, ready for every service, however base or corrupt.[1]

Despite this early warning issued by a special Senate Committee inquiring into executive patronage under Andrew Jackson,[2] patronage remains a long-accepted tradition in American political life.[3] Patronage is alternately credited with "democratizing American politics"[4] and criticized for inducing government inefficiency and cor-

1. SPECIAL SENATE COMMITTEE, REPORT ON EXTENT OF EXECUTIVE PATRONAGE, S. DOC. NO. 109, 23d Cong., 2d Sess. 45 (1835), *reported in* AGE OF JACKSON, University of South Carolina Press (1972) [hereinafter cited as EXECUTIVE PATRONAGE]. *See* Brief for Respondent at 11, 445 U.S. 507 (1980).

2. Democrat Andrew Jackson assumed the presidency in 1829, after a succession of Republican administrations spanning nearly thirty years. *See generally* A. SCHLESINGER, THE AGE OF JACKSON (1945). Immediately, he set about dismantling the Republican adminstrative machine that had come to regard "[o]ffice . . . as a species of property, and government . . . as a means of promoting individual interests." *Id.* at 46 (quoting from Jackson's First Annual Message to Congress, December 1829). But Jackson firmly believed that government was an "instrument created solely for the service of the people." *Id.* His doctrine of "rotation in office" was intended to narrow the gap between the people and the government and to expand political participation. Although the plan was an honest attempt at reform, it evolved into the "spoils system," in which office served as a reward for political service. Those who received the rewards exploited them as rapidly as possible before the next election when the "spoils" would be redistributed. *Id.* The dispersal of patronage appointments under Jackson was so rampant that a special Senate Committee issued a poignant warning (quoted in introductory text) against unmoderated, partisan appointments made in total disregard of merit. *See* EXECUTIVE PATRONAGE, *supra* note 1. If Jackson saw the potential danger in patronage, he regarded it as a necessary antidote to the self-perpetuating bureaucracy that had preceded him. A. SCHLESINGER, THE AGE OF JACKSON at 47 (1945).

3. For a survey of patronage practices in American politics, see C. FISH, THE CIVIL SERVICE AND THE PATRONAGE (1905); D. ROSENBLOOM, FEDERAL SERVICE AND THE CONSTITUTION (1971); F. SORAUF, POLITICAL PARTIES IN THE AMERICAN SYSTEM (1964) [hereinafter cited as SORAUF]; and M. TOLCHIN & S. TOLCHIN, TO THE VICTOR (1972).

4. *See* Elrod v. Burns, 427 U.S. 347, 378 (1976) (Powell, J., dissenting). By providing incentives in the forms of jobs, upward social mobility, and other rewards,

ruption.[5] Reform efforts have greatly diffused the power of "professional" politicians by reducing the number of patronage appointments[6] and by placing most public employees within a competitive civil service.[7] But a danger that overrides both the malady and the cure in public employment practices is the burden they may impose on first amendment rights.[8]

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patronage broadens the base of political participation. As political activism increases, party loyalties intensify so that diverse special interests are molded into national party goals. In the process, party leaders acquire a new sense of accountability to the electorate. *Id.* at 379, *cited in* Branti v. Finkel, 445 U.S. 507, 522 n.1 (Powell, J., dissenting) (1980). *See also* SORAUF, *supra* note 3, at 90-91. *Contra*, M. WEBER, ECONOMY AND SOCIETY (Eng. ed. 1968), *construed in* H. JACOBY, THE BUREAUCRATIZATION OF THE WORLD 147-48 (1973) [hereinafter cited as JACOBY]. Weber takes the view that bureaucracy (i.e., the civil service), rather than patronage, is the democratizing medium in politics. He finds "bureaucratization" undersirable, but inevitable:

> [Bureaucratization is] undersirable because it [stands] in the way of true democracy and the development of self-responsible, socially active citizens, and because it [leads] to their "passive" democratization, that is, to their "levelling." It [is] inevitable because it [is] a phenomenon characteristic of *mass* democracy . . . [and] has its roots in the efforts of industrial society to realize technical objectivity and to integrate man into a mechanized system.

Id. at 147.

5. 445 U.S. at 522 n.1; 427 U.S. at 379.

6. *Id.*

7. In the competitive civil service, appointments and promotions are based on merit, rather than political favoritism. For an excellent discussion of "merit" in the various categories of public servants (elected and appointed personnel, career professionals and paraprofessionals, and blue- and white-collar general civil service), see E. REDFORD, DEMOCRACY IN THE ADMINISTRATIVE STATE (1969).

8. U.S. CONST. amend. I. When a person is required to pledge allegiance to a political party, work for or contribute to the party's candidate, or obtain the sponsorship of a particular party in order to get or to keep a job, he is likely to be coerced into compromising his true political beliefs. This aspect of the patronage system may be an unconstitutional infringement on first amendment rights. *See, e.g.*, Branti v. Finkel, 445 U.S. 507, 513; Elrod v. Burns, 427 U.S. 347, 355-56; and Buckley v. Valeo, 424 U.S. 1, 19 (1976). On the other hand, the cost of job security free from such demands may be unduly high. An employee in the civil service may be insulated from political coercion and favoritism, but severe restraints may be placed on his right to be politically active. *See, e.g.*, The Hatch Political Activity Act, ch. 410, 53 Stat. 1147 (1939); ch. 641, 540 Stat. 767 (1940) (codified in scattered sections of 5, 18 U.S.C.), *upheld in* United Pub. Workers v. Mitchell, 330 U.S. 75 (1947). *Mitchell* was affirmed 26 years later in United States Civil Serv. v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973). *See also* note 36 *infra*. For other examples of legislative restraints on political expression by public employees, *see* Adler v. Board of Educ., 342 U.S. 485 (1952) and Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam by an equally divided Court*, 341 U.S. 918 (1951) (sustaining legislation that conditioned public employment on signing loyalty oaths or nonmembership in certain political organizations). This line of cases focused on the right/benefit distinction in characterizing public employment—a concept which was later repudiated. *See* Board of Regents v. Roth, 408 U.S. 564, 571 (1972). *See also* Perry v. Sindermann, 408 U.S. 593, 597 (1972) (government may not deny a benefit to a person on a basis that infringes constitutionally protected interests, especially freedom of speech); notes 50-52 and accompanying text *infra*.

Employment practices ranging from patronage appointments and dismissals to more subtle restraints on the political activities of public employees have been the focus of frequent judicial review.[9] In the ongoing conflict between government interests in a loyal, efficient work force and first amendment interets of free political expression and affiliation, the Supreme Court has recently tightened its standard of scrutiny.[10] In 1976, in *Elrod v. Burns*,[11] a divided Court found that "a nonpolicymaking, nonconfidential government employee cannot be discharged or threatened with discharge from a job he is satisfactorily performing on the sole ground of his political beliefs."[12] Lacking definitive criteria for determining whether a position is "nonpolicymaking" and "nonconfidential," the Court in *Branti v. Finkel*[13] refined the *Elrod* principle. Under the new *Branti* rule, the hiring authority must demonstrate that party affiliation is an appropriate requirement for the effective performance of the particular public office.[14] Absent such a showing, a person's continued employment cannot be conditioned upon his allegiance to the in-party.[15]

The impact of *Branti* may extend well beyond patronage dismissals. Its language is sufficiently broad to apply to political appointments, transfers, promotions, contract awards, and other popular forms of patronage.[16] Carried to a logical end, *Branti* could so stifle

9. *See, e.g.*, cases cited in note 8 *supra* and notes 37-53 *infra*.

10. *See, e.g.*, Branti v. Finkel, 445 U.S. 507 and Elrod v. Burns, 427 U.S. 347.

11. 427 U.S. 347. Justice Brennan announced the judgment of the Court in an opinion joined by Justices White and Marshall. Justice Stewart, joined by Justice Blackmun, concurred in the result. Chief Justice Burger wrote a dissenting opinion, as did Justice Powell, who was joined by the Chief Justice and by Justice Rehnquist. Justice Stevens did not participate. *Cf.* note 27 *infra* (alignment of Court in Branti v. Finkel). Four years later in Branti v. Finkel, 445 U.S. 507 (1980), Justice Stevens wrote for the majority and predictably opposed patronage dismissals. Justice Stevens' views on patronage were made clear in his opinion in Illinois State Employees Council 34 v. Lewis, 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 943 (1973), in which he stated that the entire spoils system "is actually at war with the deeper traditions of democracy embodied in the First Amendment [sic]." 473 F.2d at 576. Justice Stewart moved from a concurring opinion in *Elrod* to a dissent in *Branti*, apparently unwilling to abandon the policymaking-nonpolicymaking focus of *Elrod*.

12. 427 U.S. at 375.

13. 445 U.S. 507 (1980).

14. *Id.* at 518.

15. *Id.* at 519.

16. *See, e.g.*, Delong v. United States, 621 F.2d 618 (4th Cir. 1980) (public employee appeals summary judgment in favor of government in employee's action challenging reassignment and transfer for political patronage reasons). The Fourth Circuit Court of Appeals remanded for reconsideration in light of *Branti v. Finkel*, decided only six weeks earlier, and held that the *Branti* principle must be construed to provide protection against a wider range of patronage burdens than threatened or actual dismissal. *Id.* at 623. In dictum the *Delong* court suggested that *Branti's* expanded ap-

American principles of participatory democracy that only those persons able to prove their political neutrality would be eligible for reward in the public service.[17]

FACTS OF THE CASE

On January 3, 1978, Public Defender Peter Branti, newly appointed by the Democrat-dominated Rockland County Legislature,[18] issued termination notices to six of the nine assistant public defenders who had served under his Republican predecessor. Aaron Finkel and Alan Tabakman[19] were among the six assistants, all Republicans, whose employment Branti sought to terminate.[20]

The following day, Finkel and Tabakman brought action to enjoin Branti from terminating their employment and from attempting to alter their employment status. Relying on *Elrod v. Burns*,[21] the assistants claimed that they were nonpolicymaking, nonconfidential government employees who were satisfactorily performing their jobs

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plication should be confined to those patronage practices found to be the substantial equivalent of dismissal. *Id.* at 624.

17. *See generally* JACOBY, *supra* note 4. *See also* notes 113-19 and accompanying text *infra*.

18. Rockland County, N.Y., is governed by an eighteen member legislature elected from each of the County's five towns in proportion to its population. The legislature functions also as the executive in appointing department heads (including the public defender and the county attorney), who in turn appoint assistants. There are some fifty assistant-level appointments; nine of these are assistant public defenders who serve[d] at the pleasure of their department head, the public defender. *See* Branti v. Finkel, 445 U.S. at 509.

19. Finkel and Tabakman had served as assistant public defenders since March 1971 and September 1975, respectively. Finkel was appointed under Democrat, Arnold Becker, and continued in office under Becker's Republican successor, Frank Barone. Barone served a full six-year term, 1972-78, and Finkel served as an assistant through the entire period. At the time of his original appointment Finkel was a registered Republican. In February 1977, it appeared that the next public defender would be a Democrat. In an effort to enhance his chance of being retained under a new public defender, Finkel filed to change his party affiliation to Democrat, effective January 1, 1978. It is clear from the record, however, that both parties continued to regard him as Republican. Tabakman was a registered Republican at the time of his appointment in 1975, and he remains so today. *Id.*

20. Those assistants who were retained and the six who were to be appointed received Branti's endorsement, but they were actually selected by Democratic legislators or chairpersons under procedures set down by the Democratic caucus. See note 18 *supra*. These procedures excluded from consideration candidates with non-Democratic party affiliations. One possible exception was Manuel Sanchez who was retained as an assistant although he was not registered with any party. *See* 445 U.S. at 510 n.5. It has been suggested that Sanchez was retained because he speaks Spanish. 457 F. Supp. at 1287 n.8.

21. 427 U.S. 347.

and that Branti's attempt to replace them on solely political grounds violated their rights under the first and fourteenth amendments.[22]

On January 4, 1978, District Judge Broderick issued a temporary restraining order preventing Branti from terminating or attempting to terminate, alter, change, or in any way affect the plaintiffs' employment status as of December 31, 1977. That order remained in effect throughout the trial and was made permanent on September 29, 1978, when the district court's decision was announced.[23]

The district court found that Finkel and Tabakman had been satisfactorily performing their jobs as assistant public defenders and were being terminated solely because of their political affiliation with the Republican Party. Judge Broderick held that the assistant public defenders are neither policymakers nor confidential employees, and are therefore protected from dismissal by guarantees of the first and fourteenth amendments.[24] The Second Circuit Court of Appeals affirmed,[25] specifically holding that the district court's findings of fact were adequately supported by the record.[26] The United States Supreme Court granted certiorari and affirmed.

DECISION OF THE SUPREME COURT

In a 6-3 decision,[27] the Court held that the first and fourteenth amendments protect an assistant public defender who is satisfactorily

22. U.S. CONST. amends. I, XIV. The first amendment includes the "freedom to associate with others for the common advancement of political beliefs and ideas. . . . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973). The fourteenth amendment provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ." Finkel and Tabakman contend that the selection procedures established by the Democratic caucus and enforced through Branti's attempt to dismiss them constitute state action abridging their constitutional privileges under the first amendment. *See also* note 8 *supra*.

23. From January through May 1978, Branti kept Finkel and Tabakman on the payroll, but would not let them perform their duties. Judge Broderick clarified his order and insisted that the plaintiffs must be permitted to work as assistants and must be paid the normal salaries for their positions. He reiterated that the constitutional right being upheld by the order was the right not to be dismissed from public employment upon the sole basis of one's political beliefs. 445 U.S. at 509 n.3 (citing 457 F. Supp. at 1285-86 n.4). *See also* Brief of Respondent at 5, 445 U.S. 507.

24. 457 F. Supp. at 1285.

25. Finkel v. Branti, 598 F.2d 609 (2d Cir. 1979) (unpublished memorandum opinion).

26. 445 U.S. at 511 (citing unpublished memorandum opinion of the Second Circuit for *Finkel v. Branti*).

27. Justice Stevens delivered the opinion of the Court, in which Chief Justice Burger and Justices Brennan, White, Marshall, and Blackmun joined. Justice Stewart

performing his job from being discharged solely on the basis of his political association.[28] Writing for the majority, Justice Stevens framed the ultimate inquiry in *Branti* as "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[29]

The *Branti* decision encompassed two underlying determinations. First, the Court held that government employees are not required to prove that they, or other employees, have been coerced into changing their political allegiance.[30] In *Branti*, it was sufficient for Finkel and Tabakman to show that they were about to be discharged solely because they were not affiliated with or sponsored by the Democratic Party.[31] Second, the test enunciated in *Branti* substantially modified the *Elrod* focus on "nonpolicymaking-nonconfidentiality,"[32] emphasizing instead the relevance of party affiliation to the efficient discharge of the employee's governmental responsibilities.[33] Applying this modified test to the facts of *Branti*, the Court concluded 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."[34]

ANALYSIS

To understand how respondents, Aaron Finkel and Alan Tabakman, enjoyed constitutional protection against being discharged from their positions as assistant public defenders for solely political reasons, it is necessary to address several preliminary issues.

First, it is important to trace the historical development of first amendment rights in public employment, culminating in the *Elrod* test.

Second, the *Branti* decision itself involves two inquiries: 1) How much political coercion will be tolerated in the public service? 2) Of what relevance is party affiliation to the effective performance of the particular public office involved? The *Branti* Court places the burden of answering this latter question squarely on the hiring authority and thus reinforces a presumption in favor of continued public employment.

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filed a dissenting opinion. Justice Powell filed a separate dissent in which Justice Rehnquist joined and in Part I of which Justice Stewart joined. 445 U.S. at 508. *Cf.* note 11 *supra* (alignment of Court in *Elrod*).

28. 445 U.S. at 507 syl., 513-20.
29. *Id.* at 518.
30. *Id.* at 517.
31. *Id.* at 517 (citing 427 U.S. at 350).
32. Branti v. Finkel, 445 U.S. at 518.
33. *Id.* at 518-19.
34. *Id.* at 519.

Finally, it is important to consider how the new *Branti* rule may impact on other patronage practices including political appointments, transfers, promotions, and contract awards. If *Branti* means the end of patronage in American politics, it could also mean the blanket imposition of political neutrality in all levels of public service. As the political activity of the individual public employee is neutralized, his involvement and his stake in the political system wanes. When this happens across the board in the public service, the resulting system bears little resemblance to a participatory democracy.

A. *First Amendment Rights in Public Employment—Historical Development*

Patronage requirements and other restrictions on the political activities of public employees have not always enjoyed the Court's strict scrutiny. In fact, the Supreme Court has a long history of upholding federal and state legislation aimed at civil service reform and curbing patronage abuses,[35] even though such decisions have subordinated employees' first amendment rights to government interests in a loyal, efficient work force. In 1947, for example, the Court considered the constitutionality of the Hatch Act[36] in *United Public Workers v. Mit-*

35. The first civil service reform legislation was the Pendleton Act. Act of January 16, 1883, ch. 27, 22 Stat. 403. The Pendleton Act was directed at entry into federal service rather than promotion or termination, but it did prohibit removal of an employee for failure to work for or contribute to a political party. In 1897, Civil Service Rule II was passed, § 8 of which provided that federal employees could not be removed "except for *just* cause" (emphasis added). When this was translated into the Lloyd-LaFollette Act in 1913, the language was changed to prohibit removal "except for such cause as will promote the *efficiency* of said service" (emphasis added). An interesting shift had occurred between 1897 and 1913 in that the government's interest in "justice" in the civil service had been surpassed by the government's interest in "efficiency." The Lloyd-LaFollette Act is now codified at 5 U.S.C. § 7501 et seq. The Statement of Purpose of the Civil Service Reform Act of 1978, 1978 U.S. CODE CONG. & ADMIN. NEWS, 2739-40, states that "the merit system principles . . . shall govern." This Act is credited as being the most comprehensive approach to civil service reform since the Pendleton Act. Farkas v. Thornburgh, 493 F. Supp. 1168, 1170-71 n.9 (E.D. Pa. 1980).

36. The Hatch Political Activity Act, ch. 410, 53 Stat. 1147 (1939); ch. 640, 54 Stat. 767 (1940) (codified in scattered sections of 5, 18 U.S.C.). The Hatch Political Activity Act has been amended several times since its original enactment in 1939. *See* Vaughn, *Restrictions on the Political Activities of Public Employees: The Hatch Act and Beyond*, 44 GEORGE WASHINGTON L. REV. 516 (1976).

> The federal bureaucracy grew in both size and influence between 1883, when the Pendleton Act was enacted, and 1939, when the Hatch Act was enacted. Federal positions had multiplied. . . . Many . . . positions were outside the classified service and outside the reach of the civil service political neutrality rule. Congress feared the development of a partisan political machine run with federal employees. That fear, combined with hostility toward the administration and the

chell.[37] The plaintiff in *Mitchell* challenged in particular section 9(a) of the Act, which prohibited federal civil servants from taking "any active part in political management or in political campaigns."[38] The Court upheld the legislation and concluded that such restraints were necessary to insulate civil servants of every rank and function from political coercion or favoritism.[39] In the words of the *Mitchell* Court:

> Congress recognizes danger to the [civil] service in that political rather than official effort may earn advancement. . . . Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees . . . we see no constitutional objection.[40]

A few years later, in *Adler v. Board of Education*,[41] the Court ruled that restraints that were reasonably related to a legitimate government end were constitutionally permissible.[42] In 1952, the *Adler* Court upheld a New York State civil service law prohibiting public school employees from belonging to organizations advocating the overthrow

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> bureaucracy, stimulated Congress . . . to adopt legislation . . . that incorporated the civil service neutrality rule and expanded coverage of political restrictions to both classified and nonclassified employees.

Id. at 518. In 1940, Congress extended Hatch Act coverage to state and local employees principally employed in positions financed by the federal government. As amended, the Act restricts partisan political activity of government employees in two ways: it prohibits the use of official authority or influence to interfere with an election; and it bars employees from taking an active part in political management or in political campaigns. For an excellent discussion of the pros and cons of proposed revisions to the Hatch Act *see* AMERICAN ENTERPRISE INSTITUTE, LEGISLATIVE ANALYSES, HATCH ACT REVISION (1978). Those supporting revision of the Act claim that it "is ambiguously worded and overbroad in scope, infringing upon First Amendment [sic] freedoms without compelling reason; that it bears little reference to current political conditions; and that it is not supported by the American public or by federal employees themselves." *Id*. at 11. In general, those opposing revision of the Act "emphasize the need to guard against politicization of the bureaucracy. . . . They maintain that without its protection, both the bureaucracy and the public would be made vulnerable to political coercion." *Id*. at 15.

37. 330 U.S. 75 (1947).

38. 18 U.S.C. § 61h (Supp. V 1940). The plaintiff was employed as a roller in a United States mint and served as a Democratic Ward Executive Committeeman in Philadelphia.

39. 330 U.S. at 98-99. *Mitchell* was affirmed in United States Civil Serv. v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973). Justice Douglas dissented in *Mitchell* and in *Letter Carriers*, despite the majority's attempt to justify such "imposed political neutrality." *Id*. at 562-67. Justice Douglas insisted that where first amendment freedoms were at stake, no employment could be conditioned on their surrender. *Id*. at 596-97 (Douglas, J., dissenting).

40. 330 U.S. at 98-99.

41. 342 U.S. 485 (1952).

42. *Id*. at 494-95.

of the United States government.[43] Later that same year, however, the Court in *Wiemann v. Updegraff*[44] recognized that restrictions on mere membership may be overly broad and may proscribe membership that is totally innocent.[45] The *Wiemann* Court ruled that a state could not require its employees to sign loyalty oaths denying past affiliation with Communists.[46] In 1967, in *Keyishian v. Board of Regents*,[47] the Court laid out a test permitting membership restrictions only with proof of the employee's intent to further the goals of a particular subversive organization.[48]

Thus by the time of *Keyishian*, the Court had become less permissive of restrictions on the political activities of public employees. First amendment guarantees included "the freedom to associate with others for the common advancement of political beliefs and ideas . . . [and] the right to associate with the political party of one's choice [was recognized] as an integral part of this basic constitutional freedom."[49]

In 1972, the Court in *Perry v. Sindermann*[50] pointed out that:

> [f]or at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable public benefit [i.e., public employment] 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 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 association, his exercise of those freedoms would be penalized and inhibited. . . . Such interference with constitutional rights is impermissible.[51]

In *Perry*, the Court acknowledged that the first amendment protects a

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43. *Id.*
44. 344 U.S. 183 (1952).
45. *Id.* at 191.
46. *Id.*
47. 385 U.S. 589 (1967).
48. *Id.*
49. Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973) (recognizing employee's right to change political parties). *See also* Buckley v. Valeo, 424 U.S. 1 (1976); Broadrick v. Oklahoma, 413 U.S. 601 (1973); and Keyishian v. Board of Educ., 385 U.S. 589 (1967).
50. 408 U.S. 593 (1972).
51. *Id.* at 597. The right/benefit distinction referred to in *Perry* grew out of Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950) *aff'd per curiam by an equally divided Court*, 341 U.S. 918 (1951). *Bailey* rejected the notion that public employment was a right based on fourteenth amendment "liberty" or "property" interests. This right/ benefit distinction was later repudiated in Board of Regents v. Roth, 408 U.S. 564, 571 (1972) and in Perry v. Sindermann, 408 U.S. 593, 597 (1972).

public employee from discharge based on his exercise of free political expression or association. Such constitutional protection is rarely absolute, but the strictest judical scrutiny will be required before such protection is forfeited to a compelling state interest.[52] Four years later this standard was applied in *Elrod v. Burns*,[53] in a case challenging the constitutionality of patronage dismissals.

B. *The Elrod Test*

In 1976, a divided Supreme Court[54] found that the discharge or threatened discharge of non-civil service employees of the Cook County, Illinois Sheriff's Office, solely because they had failed to affiliate with or obtain the sponsorship of the Democratic Party, constituted an unconstitutional infringement of their first amendment rights.[55]

The *Elrod* plurality outlined the following test:

> [I]f conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some *vital governmental 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.[56]

Several governmental interests were proffered to justify patronage dismissals: the need for an efficient and unified work force; the need to preserve the democratic process; and the need to insure that policies sanctioned by the electorate are effectively implemented. None of these interests were found sufficiently compelling to justify across the board patronage dismissals as the least restrictive means of achieving that end. The Court said that unity and efficiency in the work force could best be insured through the merit system and through case by case review. The Court was not convinced that cessation of patronage dismissals would have a negative impact on partisan politics and the democratic process. Finally, the Court felt that policy implementation could be fully protected by limiting patronage dismissals to policymaking positions, since nonpolicymaking employees would not be in a position to thwart the goals of a new administration.[57] Therefore, the *Elrod* plurality concluded that the government's interest in the effective implementation of policies newly endorsed by the electorate was

52. *See, e.g.*, Branti v. Finkel, 445 U.S. at 516; Elrod v. Burns, 427 U.S. at 368 & 362; and Buckley v. Valeo, 424 U.S. 1 at 94.
53. 427 U.S. 347 (1976).
54. *See* note 11 *supra*.
55. Elrod v. Burns, 427 U.S. at 373.
56. *Id.* at 563-64 (footnote omitted, emphasis added).
57. *Id.* at 364-73.

sufficiently compelling to justify the dismissal of policymaking employees on solely political grounds.[58]

Writing for the plurality, Justice Brennan pointed out that there is no clear line between policymaking and nonpolicymaking positions.[59] He did, however, suggest several criteria to aid in such a determination. The recommended guidelines focus on the nature and extent of the employee's responsibilities and his role in formulating and/or implementing broad goals.[60] The broader or less defined an employee's responsibilities, and the more involved he is in decision-making and goal-setting, the more likely he is a policymaker.[61]

In his concurring opinion, Justice Stewart viewed the issue to be "whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs."[62] The dual criteria of "nonpolicymaking-nonconfidentiality"[63] emerged as the test for those government positions entitled to *Elrod* protection against discharge for solely political reasons.[64]

The *Elrod* test is generally applied in two stages. First, it must be determined whether a particular employee was selected for termination for solely political reasons. If there were other substantial, nonpolitical reasons for the action, there may be no constitutional infringement.[65] Second, if it is established that the discharge was substantially politically motivated, then it must be determined whether the employee falls within the *Elrod* protection. That is, is he the type of non-

58. *Id.* at 372.
59. *Id.* at 367.
60. *Id.* at 367-68.
61. *Id.*
62. *Id.* at 375.
63. There is little case law on the concept of "confidentiality," but the district court in *Branti* surmised that it is ancillary to "policymaking." 457 F. Supp. at 1291. *See also* note 76 *infra*.
64. Most courts relying on *Elrod* read the concurrence as constituting the rule of the case because, when the Court is so divided, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)). *See also* Ramey v. Harber, 431 F. Supp. 657, 662 (W.D. Va. 1977) (*Elrod* read in accordance with "least common denominator" test of *Marks* and *Gregg*). *Cf.* Finkel v. Branti, 457 F. Supp. 1284, 1289 n.9 (S.D.N.Y. 1978) (supporting broader reading of *Elrod* than that dictated by "least common denominator" test), *aff'd*, 598 F.2d 609 (2d Cir. 1979), *aff'd*, 445 U.S. 507 (1980). For a discussion of the application of the *Elrod* test in *Branti*, *see* note 76 *infra*.
65. *See* Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (plaintiff cannot use a constitutional privilege to prevent termination for nonconstitutionally protected activity). In this *Mt. Healthy* "same decision anyway" defense, the government must show by a preponderance that discharge is justified on other grounds.

policymaking, nonconfidential employee who may not be discharged or threatened with discharge for solely political reasons?[66]

C. *The Branti Decision*

1. *How Much Coercion Is Too Much?*

Elrod had identified two reasons supporting the conclusion that patronage dismissals are prohibited by the first and fourteenth amendments. First, the inevitable tendency of such a system is to coerce employees into compromising their true beliefs.[67] Second, absent a showing of some overriding state interest, patronage practices impose an unconstitutional condition on the receipt of a public benefit.[68]

In *Branti v. Finkel*, petitioner Branti argued that *Elrod* does not apply to requirements of in-party sponsorship, but is limited to situations in which government employees are actually coerced into pledging allegiance to a political party that they would not support voluntarily. Therefore, he contended, *Elrod* prohibits only those dismissals resulting from an employee's failure to capitulate to political coercion. Attempting to distinguish the instant case, he claimed that respondents were never asked to change their political affiliation or contribute to or work for the party's candidates. Since, however, party sponsorship was a requirement for the position of assistant public defender, and since neither Finkel nor Tabakman met that requirement, they were being replaced by persons who did.[69]

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66. Lower federal courts have applied this test with varying results. *See, e.g.*, Loughney v. Hickey, 480 F. Supp. 1352 (M.D. Pa. 1979) (Superintendents of Highways and Refuse who take active part in policymaking and who are privy to discussion and information involved in policymaking process are policymaking, confidential municipal employees who may be discharged for solely political reasons); Newcomb v. Brennan, 558 F.2d 825 (7th Cir.), *cert. denied*, 434 U.S. 968 (1977) (Deputy City Attorney's dismissal on announcing intent to run for Congress upheld since plaintiff's duties were of broad scope which the *Elrod* Court equated with a policymaking function); Ramey v. Harber, 431 F. Supp. 657, 666 n.15 (W.D. Va. 1977) (policymaker defined as one who controls or exercises a role in the decision making process as to the goals and general operating procedures of the office; e.g., decision to make a specific arrest is nonpolicymaking, while decision to concentrate on certain types of crimes is policymaking).

67. Branti v. Finkel, 445 U.S. at 513-14 (citing Elrod v. Burns, 427 U.S. at 355-56).

68. Branti v. Finkel, 445 U.S. at 514-17 (citing Elrod v. Burns, 427 U.S. at 357-58, 362, & 368). *See also* Perry v. Sindermann, 408 U.S. 593, 597 (1972).

69. 445 U.S. at 512. Respondents, Finkel and Tabakman, noted in Brief that more overt forms of coercion would have been less of a constitutional burden and, therefore, preferable. That is, where changing one's political allegiance or contributing to or working on behalf of a particular candidate makes a difference, at least the government employee has the option of submitting to such coercion to keep his job or exercising his freedom of expression and being discharged.

Justice Stevens found that this perspective would "emasculate the principles set forth in *Elrod*."[70] While such a view may eliminate the more blatant forms of coercion, "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."[71] Although there was no "overt political pressure" exerted on the respondents in this case, Justice Stevens pointed to Mr. Finkel's change of party registration, in an effort to retain his position, as an example of the potentially coercive effect of requiring party sponsorship.[72] He concluded that, to prevail in this type of action, it is not necessary to prove that employees have been actually or ostensibly coerced into changing their political allegiance.[73] It is sufficient to show that they were about to be discharged "solely for the reason that they were not affiliated with or sponsored by the . . . [dominant] party."[74]

2. *The Branti Modification*

The district court framed the issue in the instant case as whether Finkel and Tabakman are nonpolicymaking, nonconfidential government employees who, solely for political reasons, were threatened with removal from jobs they were competent to perform and had been satisfactorily performing.[75] Judge Broderick meticulously applied the principles of *Elrod* and its progeny to *Branti* and concluded that assistant public defenders are nonpolicymaking, nonconfidential employees.[76] He also concluded that Finkel and Tabakman had been

70. 445 U.S. at 516.
71. *Id.*
72. *Id.* at 516 n.11. See note 19 *supra*.
73. 445 U.S. at 517.
74. *Id.* (quoting 427 U.S. at 350).
75. 457 F. Supp. at 1285.
76. See note 66 *supra* for cases discussing the policymaking requirement. Applied to the facts in *Branti v. Finkel*, the district court found that the responsibilities of assistant public defenders with respect to their specific cases are not well-defined. With respect to the operation of the public defender's office, however, they have limited, if any, responsibility. Furthermore, they do not act as advisors or formulate plans for the implementation of broad office goals. Although they do make decisions in the context of specific cases, they do not make decisions about the orientation and operation of the office in which they work. 457 F. Supp. at 1291. The district court found little case law on the concept of confidentiality, but determined that it is ancillary to the concept of policymaking. "An employee is a confidential employee if he or she stands in a confidential relation to the policymaking process, e.g., as an advisor to a policymaker, or if he or she has access to confidential documents or other materials that embody policymaking deliberations and determinations. . . ." 457 F. Supp. at 1291. Judge Broderick noted that assistant public defenders stand in a confidential relationship to the public defender as an attorney, but not as a policymaker. *Id.*

satisfactorily performing their jobs and that the attempt to remove them was based solely on their political beliefs.[77] Having ruled that plaintiffs were entitled to the injunctive relief they sought, Judge Broderick then raised an issue that formed the basis of the Supreme Court's *Branti* modification of the *Elrod* test. In footnote, Judge Broderick questioned the "propriety of political considerations entering into the selection of attorneys to serve in the sensitive positions of Assistant Public Defenders."[78] He asked:

> By what rationale can it even be suggested that it is legitimate to consider in the selection process, the politics of one who is to represent indigent defendants accused of crime? No "compelling state interest" can be served by insisting that those who represent such defendants publicly profess to be Democrats (or Republicans).[79]

Judge Broderick aptly reminds us that first amendment guarantees will be surrendered only on the showing of a "compelling state interest." Indeed, the original strict scrutiny test outlined by the *Elrod* plurality called for the "least restrictive" means of furthering a "vital government end."[80] Justice Brennan proceeded to apply this test to the facts of *Elrod* and determined that none of the suggested governmental interests were sufficiently "vital" to justify the discharge of non-policymaking employees for solely political reasons. This conclusion was repeated by Justice Stewart in his concurring opinion. Courts that have read the concurrence as the law of *Elrod* have cut short their analysis before addressing important issues and have fallen victim to mechanical decisions made possible by their shortcut.[81] What is overlooked in such decisions is that compelling governmental interests change as do the preferred means for realizing those interests.

The Supreme Court in *Branti* reconsidered the nonpolicymaking-nonconfidentiality criteria generally taken as the rule of *Elrod*, and offered numerous examples of how the rule has failed. Justice Stevens pointed to some positions in which party affiliation may be an appropriate consideration even though that position is neither policymaking nor confidential. For example, state election laws may require that precincts be supervised by two election judges of different parties. Although this job is neither confidential nor policymaking, party membership is essential to the performance of this particular position.

77. *Id.* at 1292-93.
78. *Id.* at 1293 n.13.
79. *Id.*
80. 427 U.S. at 373.
81. *See, e.g.*, note 66 *supra* and cases cited therein.

Similarly, there are many policymaking, confidential positions in which party affiliation is irrelevant—for example, a state university football coach. Clearly, these criteria are inadequate, the greatest danger lying in their failure to provide first amendment protection to many of those who may need it most.[82]

With this potential overbreadth and underbreadth in mind, Justice Stevens restated the ultimate question in *Branti* as "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[83] He then analyzed the office of assistant public defender in light of this modified test and pointed out that the primary responsibility of an assistant public defender is to represent indigent citizens in controversies with the state. Any policymaking involved in such a function relates to the individual cases being tried, not to partisan political concerns. There is a certain amount of confidentiality in the various attorney-client relationships an assistant public defender develops, but these are not of political concern. Therefore, the Court concluded, to make the tenure of an assistant public defender "dependent on his allegiance to the dominant political party . . . would undermine, rather than promote, the effective performance of [his] office."[84]

Even Justice Stevens' restatement of the issue in patronage dismissals fails to spell out the "vital government end" to be achieved. Perhaps "effective performance of the public office" could be read as a compelling state interest. If so, it should be noted that this is not the same compelling interest sought in *Elrod*. Recall that Justice Brennan considered the "need to insure effective government and the efficiency of public employees"[85] as a justification for patronage and concluded that this end could be better insured through the merit system and case by case review.[86] Recall, too, that the only government interest Justice Brennan found sufficiently compelling to justify even limited first amendment infringements (through patronage dismissals) is the need to protect the representative form of government, that is, to insure that policies presumably sanctioned by the electorate are effectively implemented.[87]

82. 445 U.S. at 518.
83. *Id.*
84. *Id.* at 519-20.
85. 427 U.S. at 367. Compare this shift in stated interests to the shift from "justice" to "efficiency" noted between the Pendleton Act and the Lloyd-LaFollette Act, *supra* note 35.
86. 427 U.S. at 367-68.
87. *Id.* at 367.

D. *Burdens and Presumptions Under Branti*

An offshoot of the *Branti* rule is that the hiring authority has the burden of demonstrating that party affiliation is an appropriate requirement for the effective performance of the particular public office.[88] Absent such a showing, a person's continued employment cannot be conditioned upon his allegiance to, or sponsorship by, the in-party.[89] This would seem to reinforce a presumption in favor of continued public employment since an employment term no longer expires automatically on the election of a new party. It may be useful to review the burdens imposed under the various tests applied to patronage dismissals to determine whether a similar presumption prevails.

Elrod required a showing that an employee was selected for termination for solely political reasons.[90] This requirement has been overcome in later cases[91] by the *Mt. Healthy* "same decision anyway"[92] defense showing that the same decision to terminate would have been reached based on the employee's nonconstitutionally protected activity. As a defense, the burden is on the government to show by a preponderance of the evidence that a particular discharge is justified on nonpolitical grounds.[93] The *Elrod* concurrence added the requirement of satisfactory performance,[94] but did not elucidate on its application. Presumably, if the employee were not satisfactorily performing his duties, the government could use evidence of his unsatisfactory performance in the *Mt. Healthy* "same decision anyway" defense.

Judge Broderick framed a slightly different test in the district court in *Branti*: Nonpolicymaking, nonconfidential government employees cannot be threatened with removal, for solely political reasons, from jobs they are competent to perform and have been satisfactorily performing.[95] This test makes explicit a requirement for continued employment in patronage positions that had been previously unstated—competent performance. Stated in the affirmative, and in addition to the requirements of satisfactory performance and solely

88. 445 U.S. at 518.
89. *Id.* at 519.
90. 427 U.S. at 375.
91. *See, e.g.*, Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (plaintiff cannot use a constitutional privilege to prevent termination for nonconstitutionally protected activity).
92. 429 U.S. 274.
93. *Id.*
94. 427 U.S. at 375.
95. 457 F. Supp. at 1285.

political reasons (for discharge), it seems to put the burden on the plaintiff employee to establish that he is competent to perform his job and has been satisfactorily performing it.

The facts in *Branti* did not put the questions of satisfactory or competent performance in issue.[96] Had the circumstances been otherwise, how would the government's burden of justifying discharge on nonpolitical grounds offset plaintiff's burden of showing competent, satisfactory performance? Emphasis on this issue could go far toward alleviating much of the inefficiency and corruption associated with patronage practices[97] by making appointees accountable for job performance beyond their immediate supervisors and by making department heads and elected officials authorizing the appointments more cautious as to the competence of their appointees.

Branti did address the question of a presumption of continued employment. Petitioner Branti claimed that the term of an assistant public defender automatically expires with the term of the public defender. Therefore, he argued, the action taken in this case should be treated as a failure to reappoint, rather than a dismissal or threat of dismissal and should be subject to a less strict standard of review.[98] Respondents disagreed with this view of the term of assistant public defenders. They claimed that their offices do not become vacant on the appointment of a new public defender. Rather, they are "removable" by the new public defender, presumably on the showing of some cause.[99]

Branti also argued that since Finkel and Tabakman knew these were patronage positions when they were hired, they did not have a reasonable expectation of reappointment once control of the party shifted to the opposing party.[100] This perspective is reminiscent of two lines of reasoning: the waiver theory and the objective/subjective expectancy of continued employment.

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96. *Id.* at 1292 n.11. At the original hearing on the injunction sought by Finkel and Tabakman, Branti rated them both as "competent attorneys." Judge Broderick chose to ignore Branti's later testimony contradicting this rating, finding it "apparently structured to meet the perceived needs of the litigation as it developed." *Id.* The Second Circuit Court of Appeals agreed with the district court's findings of fact regarding the plaintiff's competence.

97. *See* 445 U.S. at 522 n.1 and 427 U.S. at 379.

98. 445 U.S. at 512 n.6.

99. Brief for Respondent at 8-9, 445 U.S. 507 (1980). The district court determined that "removability" by the public defender is irrelevant to the constitutional issues presented in this case 457 F. Supp. 1292 n.10 (citing Perry v. Sindermann, 408 U.S. 593, 597; Rivera Morales v. Benitz de Rexach, 541 F.2d 882, 885 (1st Cir. 1976)).

100. 445 U.S. at 512 n.6.

According to the waiver theory, an employee waives any right to object to a dismissal (or nonreappointment) by taking a patronage position in the first place. Justice Brennan disposes of the waiver claim in footnote, pointing out that the Court rejected a similar argument in *Elrod*.[101] After *Elrod*, it was clear that lack of a reasonable expectancy of continued employment is not sufficient to justify a dismissal based solely on an employee's private political belief or affiliation.[102]

Justice Powell is more sympathetic to the waiver view. In his dissenting opinion in *Branti* he reminds the Court of a suggestion he made in *Elrod*, also in dissent. Public employees who lose positions that they obtained through their participation in the patronage system have not lost first amendment rights. "Such employees have assumed the risks of the system and were benefited, not penalized, by its practical operation."[103]

Respondents claim that they had a reasonable expectancy of reappointment under the new public defender. Finkel pointed out that he had been appointed under a Democratic public defender and had been retained for the full six-year term of the Republican successor.[104] In making this argument, respondents rely heavily on gloss from *Perry v. Sindermann*,[105] where the Supreme Court said that subjective expectancy of continued employment is not protected by due process.[106] From this it may follow that objective expectancy of reemployment does have constitutional protection.[107] If, indeed, this can be taken as

101. *Id.*
102. *Id.*
103. 427 U.S. at 380-81 (Powell, J., dissenting) *cited in* 445 U.S. at 526 n.6.
104. 457 F. Supp. at 1286.
105. 408 U.S. 593, 597 (1972).
106. *Id.*
107. Recall *Perry's* admonition that government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests. . . . This would allow the government to 'produce a result which [it] could not command directly' [citation omitted]." 408 U.S. at 597. Dismissal or threat of dismissal for patronage reasons is "the ultimate means of achieving by indirection the impermissible result of a direct command to a government to cease exercising protected rights of free political association and speech." Delong v. United States, 621 F.2d 618, 623 (1980). The *Delong* court suggested that this principle could also be applied to patronage practices found to be the substantial equivalent of dismissal, such as certain reassignments and transfers. *Delong* then provides guidelines for determining whether a specific reassignment or transfer is tantamount to outright dismissal. A number of subjective and objective factors pertaining to the employee's expectations and reliance upon continued employment emerged as critical to this factual determination. *Delong* concluded that the employee's reasonable expectations and reliance should be weighed, along with the likelihood of reassignment and transfer in comparable employment in the private sector, and only those subjective expectations and reliance on the employee's part that were actually or constructively known to the official making or threatening the transfer or reassignment. Note that the ultimate issue being addressed by these factors is

a corollary to the rule of *Perry v. Sindermann*, the factual issues remain of whether, under the circumstances, any expectation of continued employment exists, and, if so, whether that expectation is reasonable.[108]

Recall that the *Branti* rule places the burden of showing that party affiliation is a legitimate consideration for a particular government position on the hiring authority. It would appear that such a determination would be most appropriate at the time the particular position is created and prior to the first appointment. Thus a person could know going into a position that it is a patronage position and that party affiliation is a requirement for the effective performance of the office. This would revive Justice Powell's waiver theory under which persons voluntarily accepting patronage positions waive their right to object to a politically motivated dismissal.

CONCLUSIONS AND IMPLICATIONS

The Supreme Court in *Branti* held that the first and fourteenth amendments protect public employees from discharge solely because of their political beliefs. This decision substantially modifies prior case law regarding patronage dismissals in two ways: 1) It is not necessary to prove that employees have been actually or ostensibly coerced into changing their political allegiance. It is sufficient to show that they were about to be discharged solely for the reason that they were not affiliated with or sponsored by the dominant party. 2) The issue is not whether the particular public office involved is policymaking or confidential; but whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the office.

Justice Powell noted in his *Branti* dissent[109] that "a strength of our system has been the blend of civil service and patronage appointments subject always to oversight and change by the legislative branch of government."[110] The importance of maintaining this precarious balance was noted by Max Weber during a visit to the United States in

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whether, all things considered, the challenged reassignment or transfer can reasonably be thought to have imposed so unfair a choice between continued employment and the exercise of protected beliefs and associations as to be tantamount to the choice imposed by threatened dismissal. When these same factors are weighed against compelling government interests in conventional patronage employment practices it may follow that an employee's objective expectancy of continued employment in the public service is protected by the first and fourteenth amendments. *Id.* at 624.

108. *See* note 107 *supra*.

109. 445 U.S. at 525 n.5 (Powell, J., dissenting).

110. *Id.*

1904.[111] Weber was struck by a viewpoint expressed by an American worker he encountered who found "corrupt politicians who can be removed from office were preferable to a permanent, specialized bureaucracy."[112] Weber restated the dilemma as a "political spoils system with corruption, waste of public revenues, and lack of administrative technology in conflict with democratic tendencies."[113] Paradoxically, he noted, "the reformers found themselves advocating a bureaucratic structure which politically they rejected."[114]

The balance between patronage positions and a merit-based civil service must be maintained to insure an efficient work force that is ideologically compatible with American principles of participatory democracy. If public employees are allowed and required to be apolitical, with the exception of elected officials and a handful of political appointees, how participatory or democratic can the system remain?[115]

This paradox is summarized in the following caveat:

> [I]t is possible that the public service, because of a self-imposed commitment to the interests of the general public, begins to see rational behavior as contradictory to party politics, and finally takes an exaggeratedly neutral stance. This is revealed by its indifference to constitutional principles, disregard for party feuds, insensitivity toward any change in political leadership, and the arrogance with which it relies on its own judgment. Indeed, when the ship founders on the sands, the bureaucracy might even convince itself of the necessity of placing itself at the political wheel as a "nonpartisan" solution. The principle of neutrality among competing interest groups can be exaggerated to the point of self-cancellation, so that seemingly the official is not committed to anything except the ingenious defense of his public status.[116]

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111. M. WEBER, ECONOMY AND SOCIETY (Eng. ed. 1968), *construed in* JACOBY at 147-48.

112. *Id.*

113. *Id.*

114. *Id.*

115. Under the *Branti* rule, only those positions in which the hiring authority can demonstrate that political affiliation is relevant to the efficient performance of the office will be subject to patronage dismissals. It follows, therefore, that the number of positions available for political appointments, and thus the overall number of patronage positions, will be substantially reduced. Presumably, the remaining positions either will be abolished or will fall under the general civil service and subject to the restrictions of the Hatch Political Activity Act. *See* note 36 *supra*.

116. JACOBY at 161 (quoting F. MORSTEIN-MARX, THE ADMINISTRATIVE STATE (Eng. ed. 1957).