WILL THE VICTOR BE DENIED THE SPOILS? CONSTITUTIONAL CHALLENGES TO PATRONAGE DISMISSALS

*By Marita K. Marshall**

"Patronage is the root evil of politics. It keeps people in bondage."
—Arthur Telcser, Republican member of the Illinois House of Representatives.[1]

"To the victor belong the spoils"[2] is the familiar party chant when a new political party comes into power. Government employees who are unprotected by the civil service system[3] are dismissed from their jobs and are replaced by faithful and politically active members of the incoming party. The term "patronage" refers to this practice of hiring and firing government employees on the basis of their political affiliation.[4]

The issue of patronage dismissals is worthy of careful consideration because of its importance to millions of Americans. Public employment has

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1. M. TOLCHIN & S. TOLCHIN, TO THE VICTOR . . . 3 (1971) [hereinafter cited as TOLCHIN & TOLCHIN].

2. From a remark attributed to William Learned Marcy, former governor of New York: "To the victor belong the spoils of the enemy." *Id.* at 323.

3. Civil service refers to the system of government employment, on federal, state, or local levels, in which the criteria for employment (qualifications, selection procedures, classifications, pay schedules, retention, and promotion factors) are set forth in statutory form. The modern federal civil service system was founded by the Pendleton Act, ch. 27, 22 Stat. 403 (1883), and is governed by parts two and three of title five of the United States Code. Civil service systems also exist at the state and local levels. In setting up a civil service system the legislature decides which government positions will be included in the system and further designates some positions as competitive, based on examinations, and others as excepted, based on other statutory provisions. For the purposes of this note, the key feature of the civil service system is that employment is based on merit: hiring depends on merit, not political affiliation (*see* 5 U.S.C. § 3301 (1970)) and firing must be for cause with proper procedural safeguards (*see* 5 U.S.C. § 7501 (1970)).

4. Patronage practices can be traced to the beginning of the American republic. When Thomas Jefferson assumed the presidency in 1801 he replaced the Federalists with enough Republicans to assure, as he said, a more even distribution between the parties. It is generally agreed that patronage practices reached their corrupt apex during the administration of Andrew Jackson, though Abraham Lincoln used the spoils system far more extensively. After his first victory in 1860 Lincoln removed 1195 out of 1520 presidential appointees to make room for his own supporters.

grown steadily in the twentieth century and constitutes a significant component of the total national work force.[5] Yet public employees in patronage jobs have enjoyed little, if any, job security and have been expected to accept the prospect of dismissal as an inevitable result of the shifting political tides. Dismissed public employees who sought legal redress on the basis of a patronage termination found little comfort in the courthouse. The courts' traditional response was that unless protected by civil service, public employees had no right to employment and could be dismissed at will.[6]

Constitutional challenges to patronage dismissals first appeared in *Alomar v. Dwyer*,[7] but the court denied relief to the dismissed public employee, finding no violation of her constitutional rights. In *Illinois State Employees Union v. Lewis*,[8] however, the dismissal of non-policy-making employees for refusing to change their political party affiliation was held to violate the employees' First Amendment rights.[9]

The conflict in the lower courts was at least partially resolved when the United States Supreme Court addressed the question of the constitutionality of patronage dismissals for the first time in *Elrod v. Burns*.[10] In *Elrod*, the newly elected Democratic Sheriff of Cook County, Illinois, following traditional practice, fired three Republican employees of his office. The discharged employees[11] brought suit in federal district court alleging that the sole reason for their discharge was their lack of affiliation with or sponsorship by the Democratic Party, and seeking, *inter alia*, declaratory and injunctive relief. The district court dismissed their complaint for failure to state a claim upon which relief could be granted, but the appellate court,

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The creation of the civil service system in 1883 cut into the influence of the patronage system. By 1939, all states were compelled to initiate merit systems for employees engaged in programs aided by federal funds. By 1950, 75% of all American cities had some formal type of merit system, but only 25% of the cities covered all employees. Almost half of the reporting cities with populations of less than 25,000 had no formal civil service system. TOLCHIN & TOLCHIN, *supra* note 1, at 323-28.

5. Today almost 15 million persons are employed by federal, state, and local governments, with the state and local work force of nearly 12 million persons comprising the bulk of public employment. Of these, only about half are covered by civil service. The figures suggest that the issue of patronage dismissals as directly affecting job and economic security is an urgent one for at least 10% of the total American work force. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 242, 272 (96th ed. 1975).

6. *E.g.*, Norton v. Blaylock, 285 F. Supp. 659, 662-63 (W.D. Ark. 1968), *aff'd*, 409 F.2d 772 (8th Cir. 1969); American Fed'n of State, County and Municipal Employees v. Shapp, 443 Pa. 527, 280 A.2d 375 (1971).

7. 447 F.2d 482 (2d Cir. 1971), *cert. denied*, 404 U.S. 1020 (1972).

8. 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 943 (1973).

9. *Id.* at 576.

10. 96 S. Ct. 2673 (1976).

11. A fourth Republican employee, who claimed imminent danger of discharge, joined in the suit. *Id.* at 2679.

relying on its earlier decision in *Lewis*, reversed and remanded.[12] Certiorari was granted and the Supreme Court affirmed the result in a 5-3 decision, holding that the discharged employees stated a valid claim for deprivation of their First and Fourteenth Amendment rights.[13] In a broad plurality opinion, Justice Brennan, joined by Justices Marshall and White, suggested that hiring as well as firing non-policy-making public employees because of political affiliation was constitutionally impermissible. A narrower concurrence by Justice Stewart, in which Justice Blackmun joined, limited its decision to the firing situation presented by the facts of the case.[14] The question of the constitutionality of patronage hirings, therefore, remains open.

This note examines the question of patronage practices in light of the *Elrod* decision. It begins with a consideration of the constitutional issue involved: the First Amendment right of freedom of political association, and the limitations that may legitimately be placed on this right. The note then briefly examines a line of Supreme Court decisions in which the Court developed constitutional guidelines directly applicable to the patronage situation. The prior patronage dismissal cases are reviewed, followed by a discussion of the holding and separate opinions in *Elrod*. Finally, the author comments on the future of patronage practices after *Elrod* and suggests that some problems remain in applying the decision and extending its holding to hiring practices.

I. Constitutional Issues Raised by Patronage Practices

A. First Amendment Freedom of Association

The major constitutional objection to patronage dismissals is the infringement of the freedom of political belief and association protected by the First Amendment. This aspect of the First Amendment insures that an individual may choose his own political beliefs and associate with those sharing similar beliefs without undue interference or the imposition of penalties by the government.[15]

The Supreme Court has afforded special protection to First Amendment rights:

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12. 509 F.2d 1133 (7th Cir. 1975).

13. 96 S. Ct. at 2689.

14. Justice Powell wrote a dissenting opinion in which Chief Justice Burger and Justice Rehnquist concurred, and the Chief Justice also filed a separate dissent. Justice Stevens did not participate in the decision of the case.

15. *See generally* R. HORN, GROUPS AND THE CONSTITUTION (1971); Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1 (1964); Fellman, *Constitutional Rights of Association*, 1961 SUP. CT. REV. 74; Rice, *The Constitutional Right of Association*, 16 HASTINGS L.J. 491 (1965).

> These [First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.[16]

While political activity is not specifically guaranteed by the Bill of Rights, freedom of association, especially political association, has been recognized as within the scope of the First Amendment:

> Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations.[17]

While stressing the primary importance of First Amendment rights, the Court has also recognized that these rights are not absolute. Some restrictions on political association have been sustained in the face of important government interests. In *United Public Workers v. Mitchell*,[18] and later in *Civil Service Commission v. National Association of Letter Carriers*,[19] the Court sustained provisions of the Hatch Act[20] that restricted the partisan political activities of federal civil service employees.[21] The public employees' interests in political action were protected by the First Amendment, but the strong government interest in keeping the federal civil service free of partisan politics was held to justify the rather severe restrictions on First Amendment rights.[22] The Court stressed that the congressional intent was to

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16. NAACP v. Button, 371 U.S. 415, 433 (1963) (citations omitted).

17. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); *see* United States v. Robel, 389 U.S. 258, 263 (1967); Griswold v. Connecticut, 381 U.S. 479, 483 (1965); NAACP v. Button, 371 U.S. 415, 430 (1963); Bates v. Little Rock, 361 U.S. 516, 522-23 (1960); NAACP v. Alabama, 357 U.S. 449, 460-61 (1958).

The freedom of association is protected not only against federal encroachment, but also against state infringement by reason of the Fourteenth Amendment. Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973); Williams v. Rhodes, 393 U.S. 23, 30-31 (1968). In NAACP v. Alabama, 357 U.S. 449 (1958), the Court stated that "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Id.* at 460.

18. 330 U.S. 75 (1947).

19. 414 U.S. 548 (1973).

20. 5 U.S.C. §§ 7321-27 (1970 & Supp. V 1975).

21. The first Hatch Act (ch. 410, 53 Stat. 1147 (1939)) applied restrictions on public employees other than those in top policy posts, prohibiting certain political activities that were clearly defined in the statute. Violations could result in fines, imprisonment, or both for the offender. The second Hatch Act (ch. 640, 54 Stat. 767 (1940)) clarified the original act and extended its prohibitions to state and local employees paid in full or in part with public funds.

22. Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973); United Pub. Workers v. Mitchell, 330 U.S. 75, 96-97 (1947). Restrictions on

insure impartial execution of the laws. To achieve that end, it was permissible to forbid public employees to play substantial roles in partisan political campaigns, take formal positions in a political party, or run for office on a partisan ticket.

When the government attempts to curtail the exercise of a fundamental right such as the freedom of association, its action will be subject to strict judicial scrutiny.[23] Under a strict scrutiny test, the government must demonstrate a compelling state interest that justifies the infringement of First Amendment rights[24] and must show that its goals cannot be achieved by means less restrictive of First Amendment rights.[25] The burden of proof is on the state to justify its restrictions on First Amendment freedoms: "Even a ' "significant interference" with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms."[26]

In those cases involving public employment, the Court appears to use a somewhat less exacting standard of review. The Court has recognized that the state has special interests as an employer that may justify the use of a balancing test rather than a strict scrutiny test. In *Pickering v. Board of Education*,[27] the Court held that the dismissal of a public school teacher due to his public criticism of school board policies was an impermissible violation of free speech, but, at the same time, the Court stated:

> [T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[28]

The Court has also stated that the terms of public employment must be

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partisan political activities of state employees were upheld despite constitutional objection in Broadrick v. Oklahoma, 413 U.S. 601 (1973).

23. Buckley v. Valeo, 424 U.S. 1, 25 (1976) (citing NAACP v. Alabama, 357 U.S. 449, 460-61 (1958)).

24. Williams v. Rhodes, 393 U.S. 23, 30 (1968); NAACP v. Button, 371 U.S. 415, 438 (1963); Bates v. Little Rock, 361 U.S. 516, 524 (1960); NAACP v. Alabama, 357 U.S. 449, 464-66 (1958).

25. Kusper v. Pontikes, 414 U.S. 51, 59 (1973); United States v. Robel, 389 U.S. 258, 268 (1967); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

26. Buckley v. Valeo, 424 U.S. 1, 25 (1976).

27. 391 U.S. 563 (1968).

28. *Id.* at 568. *See* Slochower v. Board of Educ., 350 U.S. 551 (1956), in which the Court noted that the state has broad powers in the selection and discharge of its employees, and discharge may be proper if, upon inquiry, it appears that an employee's continued employment is inconsistent with a real interest in the state. *Id.* at 559.

"reasonable, lawful and non-discriminatory,"[29] suggesting a less than compelling government interest is required.

Even though a lesser state interest is necessary in the public employment cases, the Court still requires that the end be achieved by the least drastic means. In *Shelton v. Tucker*,[30] a state statute compelling every teacher to file an annual affidavit listing all organizational ties as a condition of employment was held to violate the individual's freedom of association. The Court stated that

> even though the government purpose be legitimate and substantial, that purpose cannot be pursued by means that *broadly* stifle personal liberties when the end can be more *narrowly* achieved. The breadth of legislative abridgement must be reviewed in light of *less drastic means* for achieving the same basic purpose.[31]

In a number of Supreme Court decisions involving the conditioning of public employment on the abridgment of constitutional rights, the Court resolved the issue of competing state interests and individual constitutional rights in favor of the employee. These cases provide a background for understanding the conflicting opinions in *Elrod v. Burns*.[32]

B. Conditioning Government Benefits on Waiver of Constitutional Rights

1. The "Right-Privilege" Distinction

Traditionally, government employment has been considered a privilege to which public employees, in the absence of statutory protection, have no constitutional right. If there is no right to a job, the courts reasoned, a government employer may dismiss any of its employees at will. This "no right to public employment" rationale for justifying public employee dismissals grew out of a comment made by Justice Holmes in *McAuliffe v. Mayor of New Bedford*.[33] In dismissing the petition of a policeman fired for violating a regulation that restricted his political activities, Justice Holmes stated:

> The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech . . . . [H]e takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control.[34]

The court in *Bailey v. Richardson*[35] reiterated this concept by holding that the Constitution does not prohibit the dismissal of government employees

29. Slochower v. Board of Educ., 350 U.S. 551, 555 (1956).
30. 364 U.S. 479 (1960).
31. *Id.* at 488 (emphasis added).
32. 96 S. Ct. 2673 (1976).
33. 155 Mass. 216, 29 N.E. 517 (1892).
34. *Id.* at 220, 29 N.E. at 517-18.
35. 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam by an equally divided Court*, 341 U.S. 918 (1951).

because of political beliefs, activities, or affiliations, as the "First Amendment guarantees free speech and assembly, but it does not guarantee Government employ."[36] Courts have frequently relied on the *Bailey* case when dismissing patronage claims.[37]

2. The Doctrine of Unconstitutional Conditions

This so-called right-privilege distinction has been largely replaced by the doctrine of unconstitutional conditions, which states that the government may not condition the receipt of its benefits or largess on the surrender of constitutional rights.[38] The argument as applied to public employment is that the government need not create public jobs, but once it voluntarily elects to do so it may not deny, terminate, or condition public employment in a manner inconsistent with the Constitution. Therefore, even though there is no right to public employment, such employment, once granted, may not be unconstitutionally conditioned.[39] The doctrine of unconstitutional conditions has been articulated in a series of cases in which the Court rejected government attempts to condition the receipt of benefits on the relinquishment or conditioning of a constitutional right, particularly a First Amendment right.[40]

Two decisions cited as direct authority for the *Elrod v. Burns* plurality opinion[41] illustrate this doctrine in the field of public employment. In *Keyishian v. Board of Regents*,[42] a state statute required faculty members of a New York state university to sign certificates stating that they were not, and whether they had ever been, members of the Communist Party. Justice

36. *Id.* at 59.

37. *E.g.*, Alomar v. Dwyer, 447 F.2d 482 (2d Cir. 1971), *cert. denied*, 404 U.S. 1020 (1972) (*Bailey* cited as primary authority for dismissal).

38. *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

39. This theory of unconstitutional conditions can be traced to Justice Sutherland's remarks in Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583 (1926), in which the Court held that the government cannot condition the receipt of its benefits on the surrender of an individual's express constitutional rights: "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 . . . . 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." *Id.* at 593-94.

40. *E.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (denial of unemployment compensation to Seventh Day Adventist for refusing Saturday employment violated freedom of religion); Torcaso v. Watkins, 367 U.S. 488 (1961) (declaration of belief in God as prerequisite for notary public commission held to violate freedom of belief); Wieman v. Updegraff, 344 U.S. 183 (1952) (exclusion from employment for failure to take a loyalty oath violated due process).

41. 96 S. Ct. 2673, 2682-83 (1976).

42. 385 U.S. 589 (1967).

Brennan, writing for the Court, invalidated the state law as vague and overbroad, tending to stifle free expression.[43] The Court noted approvingly the language used by then Court of Appeals Judge Thurgood Marshall in an earlier stage of the case: "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."[44] The importance of the *Keyishian* decision as applied to the patronage situation was stressed by Justice Brennan in his *Elrod* opinion: "*Keyishian* squarely held that political association alone could not, consistently with the First Amendment, constitute an adequate ground for denying public employment."[45]

In *Perry v. Sindermann*,[46] the state board of regents voted not to renew the contract of a state college teacher with ten years' service allegedly because of the teacher's criticism of the college's policies. The Court, in an opinion by Justice Stewart, held that such state action would violate the teacher's First Amendment right of free speech. The lack of a contractual or tenured right to re-employment alone did not defeat the claim:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.[47]

The preceding discussion of the right of political association and the Supreme Court decisions relating to dismissals of public employees provide some constitutional guidelines for assessing the patronage situation:

(1) The First and Fourteenth Amendments protect the freedom of political association of public employees from infringement by state action. Public employment cannot be conditioned on the surrender of these rights.[48]

(2) Freedom of political association of public employees is not absolute; a significant impairment of this right can be justified if the government interest is at least substantial and legitimate.[49]

(3) If the government interest is to prevail over a First Amendment right, the means used by the state must be the least restrictive of individual rights.[50]

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43. *Id.* at 604, 608.

44. *Id.* at 605-06 (quoting Keyishian v. Board of Regents, 345 F.2d 236, 239 (2d Cir. 1965)).

45. 96 S. Ct. at 2682.

46. 408 U.S. 593 (1972).

47. *Id.* at 597.

48. See text accompanying notes 15, 17, 42-47 *supra*.

49. See text accompanying notes 18-29 *supra*.

50. See text accompanying notes 30-31 *supra*.

II. Patronage Dismissals

A. Case Law Prior to Elrod v. Burns

Despite the development of case law regarding the dismissals of public employees, the courts refused to apply those principles in the patronage situation. Relying on the "no right to public employment" theory, the courts consistently dismissed plaintiffs' complaints.

The case of *Alomar v. Dwyer*[51] illustrates the early treatment of patronage dismissals. Democrat Daisy Alomar worked for the city of Rochester, New York for three years as a social worker, an administrative job with no policy-making functions. Though her job performance had been satisfactory, a newly elected Republican city manager fired Alomar for refusing to change her party affiliation. Alomar claimed a violation of her First Amendment right of political association, but the court, relying on *Bailey v. Richardson*,[52] upheld her dismissal. Because Alomar was not protected by civil service, the court held that her employment was terminable at will.[53]

A different treatment of patronage dismissals appeared in *American Federation of State, County and Municipal Employees v. Shapp*,[54] in which the court held that public employees who had accepted patronage positions knowing of the possibility of dismissals had waived their right to object to subsequent discharge for political reasons.[55] In *Shapp*, the newly elected Democratic governor of Pennsylvania fired 2,000 public employees, all Republicans, who were not protected by civil service. The employees, without specifically citing First Amendment infringement, claimed that political affiliation was an improper ground for discharge and alleged a denial of due process.[56] The court held that the employees had failed to establish a constitutional right to continued employment, but did not discuss First Amendment rights.[57] Language in *Shapp* indicated regret at finding it necessary to sustain the patronage system and suggested there was a need to limit and greatly reduce the effect of patronage practices.[58] But the Pennsylvania Supreme Court could find no statutory or constitutional basis to indict the

51. 447 F.2d 482 (2d Cir. 1971), *cert. denied*, 404 U.S. 1020 (1972).

52. 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam by an equally divided Court*, 341 U.S. 918 (1951).

53. 447 F.2d at 483.

54. 443 Pa. 527, 280 A.2d 375 (1971).

55. *Id.* at 535, 280 A.2d at 378.

56. *Id.* at 531, 280 A.2d at 376.

57. *Id.* at 535, 280 A.2d at 378.

58. "Regretfully for many of us, who believe that politics and political influence or patronage should be greatly limited and greatly reduced, and that able State employees, whose livelihood will be jeopardized, should not be discharged for political reasons, we are compelled to hold that the Governor of Pennsylvania has the power to hire and fire *at will* any and all employees who are not Constitutionally or Statutorily protected—irrespective of their ability, their politics or their political connections." *Id.* at 536, 280 A.2d at 378.

system: "Those who, figuratively speaking, live by the political sword must be prepared to die by the political sword."[59]

The dissenting opinion in *Shapp*, however, did recognize the First Amendment challenge to patronage dismissals. Justice Barbieri wrote that the majority holding "may be consonant with familiar concepts of patronage and the 'spoils system' " but it is "in disregard of the plaintiff-employees' First Amendment right of freedom of association."[60] Further, "[i]t is true that no case has ever decided that the 'spoils system' is unconstitutional, but the clear implication of many United States Supreme Court decisions may require just that result."[61] Justice Barbieri went on to review those Supreme Court decisions in which the Court struck down governmental attempts to condition continuing public employment on denial of the exercise of First Amendment rights. He concluded that a government employee may not be dismissed solely because of his political viewpoint or association.[62]

The first decision to hold that patronage dismissals infringe First Amendment rights was *Illinois State Employees Union v. Lewis*.[63] In *Lewis*, the newly appointed Republican secretary of state, filling the unexpired term of a Democrat, dismissed a large number of non-civil service employees of his office. The dismissed employees filed an action claiming their dismissals were based on political affiliation due to their refusal to join or support the Republican Party and that such dismissals violated their rights under the First and Fourteenth Amendments. The district court entered summary judgment for the defendant, but the Court of Appeals for the Seventh Circuit reversed and remanded.

In rejecting the teaching of *Bailey* and the holdings of *Alomar* and *Shapp*, then Court of Appeals Judge John Paul Stevens decided that non-policy-making state employees not protected by civil service may not be discharged solely for refusing to transfer political allegiance from one party to another. By requiring the employees to choose between professing allegiance to the Republican Party or losing their jobs, the state government had abridged the employees' First Amendment rights.[64] For Judge Stevens, constitutional considerations were not foreclosed by the fact that the "spoils system has been entrenched in American history for almost two hundred years"[65] because complete surrender of a citizen's First Amendment rights could never be justified in the name of tradition.[66]

59. *Id.*
60. *Id.* at 538, 280 A.2d at 379 (Barbieri, J., dissenting).
61. *Id.* at 539, 280 A.2d at 380.
62. *Id.* at 544, 280 A.2d at 382.
63. 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 943 (1973).
64. *Id.*
65. *Id.* at 568 (citing Alomar v. Dwyer, 447 F.2d 482, 483 (2d Cir. 1971), *cert. denied*, 404 U.S. 1020 (1972)).
66. *Id.* at 569, 572.

The court in *Lewis* noted that although complete surrender of First Amendment rights could never be justified, state interests, if strong enough, might justify some curtailment of such freedom.[67] The state interest in conditioning employment on political affiliation might be justified, the court reasoned, in the case of policy-making employees. Without specifically defining the scope of policy-making employees,[68] the court held that it would be very difficult to account for dismissals of non-policy-making employees, and cited janitors, elevator operators, driver's license examiners, and school teachers as examples of employees with no responsibility for determining policy.[69]

The reasoning in *Lewis* was slow to achieve acceptance. When public employees in Indiana were dismissed for patronage reasons, the employees brought suit in *Indiana State Employees Association v. Negley*[70] for violation of First Amendment rights, relying on the Seventh Circuit's decision in *Lewis*. The district court viewed the *Lewis* decision as a narrow holding, limited to non-policy-making employees, and indicated that the dismissed employees failed clearly to establish their status or prove the reasons for their discharge.[71] The court also viewed the action as a test case to impose an absolute tenure system of public employment in Indiana and, relying on *Bailey* and *Alomar*, denied plaintiffs' motion for a preliminary injunction.[72]

B. The Opinions in Elrod v. Burns

The plurality opinion in *Elrod*, written by Justice Brennan, held that the practice of patronage dismissals violates the First and Fourteenth Amendments because such dismissals severely restrict political belief and association, which constitute the core of activities protected by the First Amendment.[73] In order for the Republican respondents in *Elrod* to maintain their jobs, they were required to pledge their political allegiance to the Democratic Party, contribute a portion of their wages to the Democratic Party, or obtain the sponsorship of a member of the Democratic Party. The individual's true political beliefs were compromised and he faced a dilemma. He maintained membership in his own party at the risk of losing his job. Any support he gave to the new party in terms of money or allegiance diminished

67. *Id.* at 572.

68. The court stated that whether an employee could be classified as "policy-making" would be a question for the trier of fact. *Id.* at 574. In the later *Elrod* decision, policy-making employees were generally defined as those employees who have a role in policy formulation and who can exercise discretion in the performance of their duties. 96 S. Ct. at 2687. See text accompanying notes 82-83 *infra*.

69. 473 F.2d at 574.

70. 357 F. Supp. 38 (S.D. Ind. 1973).

71. *Id.* at 42.

72. *Id.* at 44.

73. 96 S. Ct. at 2689.

his support of his own party. As a result, his freedom of political association and belief was restrained.[74]

Because of these restrictions, Justice Brennan concluded that such a practice ran counter to court decisions that had invalidated government action that inhibited belief and association in a like manner. Specifically, patronage practices fell squarely within the prohibitions of *Keyishian* and *Perry*.[75] Applied to the patronage situation, the plurality found that the threat of dismissal for failure to support the favored party inhibited political belief and association, and actual dismissal punished its exercise.[76]

Although patronage practices clearly infringe First Amendment rights, the plurality in *Elrod* recognized that such rights are not absolute and may be restricted to serve a vital government interest.[77] A significant impairment of First Amendment rights must survive exacting scrutiny, however, and the burden is on the government to show that the interest advanced is paramount, the means chosen are the least restrictive of the freedom of association, and the benefit gained outweighs the loss of constitutionally protected rights.[78]

Justice Brennan then examined the interests that the government advanced as justifying the retention of patronage. The first argument was that under the patronage system employees will be of the same political party as their elected supervisors and will have more incentive to work effectively. The government, therefore, will operate more efficiently.[79] Unpersuaded, the plurality found no legitimate connection between job performance and similar political persuasion. The inefficiency in the wholesale replacement of large numbers of employees actually retards effective government. Outgoing employees have little incentive to perform if they know their replacement is imminent. Furthermore, the plurality found no evidence to indicate that new patronage employees are more qualified to perform the job than the ones replaced. In any case, Justice Brennan concluded that a less drastic means was available for insuring government efficiency as incompetent employees may always be dismissed for good cause, such as insubordination or poor job performance.[80]

A second argument advanced to justify patronage was the need for political loyalty of employees in order fully to implement new administrative policies.[81] Loyal subordinates of the same party will not discredit the party nor attempt to sabotage its programs, but rather will work to carry out

74. *Id.* at 2681.
75. *Id.* at 2683; see text accompanying notes 42-47 *supra*.
76. 96 S. Ct. at 2683.
77. *Id.*
78. *Id.* at 2684.
79. *Id.* at 2685.
80. *Id.* at 2686.
81. *Id.* at 2687.

the policies presumably mandated by the electorate. The plurality recognized this interest as a legitimate goal, but held that the end could be achieved by the less drastic means of limiting dismissals to policy-making employees, for whom considerations of personal loyalty and political affiliation are recognized as appropriate criteria for employment. But such criteria are not justified when applied to non-policy-making employees such as janitors, elevator operators, and file clerks. The plurality recognized that it will be difficult to draw a clear line between policy-making and non-policy making employees, but stated that the "nature of the responsibilities is critical."[82] The deciding factor will be whether the public employee acts as an advisor or is engaged in formulating or implementing policies of the particular government office or agency.[83]

The third argument presented by patronage advocates was the preservation of the democratic process.[84] While recognizing this interest as an important public concern, the plurality expressed doubt that the elimination of patronage practices would cause the demise of party politics. Justice Brennan concluded that whatever contribution patronage has made to the elective process was diminished by its "impediment to the associational and speech freedoms which are essential to a meaningful system of democratic government."[85]

For the plurality, the issue in *Elrod* was the resolution of conflicting interests under the First Amendment: the free functioning of political parties and the individual freedom of political belief. Justice Brennan concluded that if political parties and campaigning are to continue, each citizen must be free to believe as he will and continue to act and associate according to his beliefs. Therefore, wholesale patronage dismissals are not the least restrictive means of achieving an efficient and effective government, of insuring the implementation of the electorate's sanctioned policies, or of contributing to the democratic process. The government's interest can be satisfied by limiting patronage dismissals to policy-making employees.[86]

Justices Stewart and Blackmun concurred in the result but limited their opinion to the firing situation,[87] apparently refusing to join the plurality because of its broad implications for hiring as well.

The main thrust of Justice Powell's dissenting opinion was that the decision was neither constitutionally required nor did it best serve the interests of democracy.[88] In disposing of respondent's First Amendment claim, the dissenters relied on the holding of *American Federation of State*,

82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 2688.
86. *Id.* at 2689.
87. *Id.* at 2690 (Stewart, J., concurring in the result).
88. *Id.* at 2691 (Powell, J., dissenting).

County and Municipal Employees v. Shapp[89] that such employees benefitted from their political association in being hired, knew the political practices of the office, and thus could not challenge the system when it was their turn to be replaced. Whatever First Amendment rights respondents could have claimed, their rights were waived on acceptance of the patronage job. Justice Powell, however, was forced to recognize the validity of the plurality's argument:

> It is difficult to disagree with the view, as an abstract proposition, that government employment ordinarily should not be conditioned upon one's political beliefs or activities. But we deal here with a highly practical and rather fundamental element of our political system, not the theoretical abstractions of a political science seminar.[90]

Justice Powell then stated his fundamental objection to the plurality opinion: "In concluding that patronage hiring practices are unconstitutional, the plurality seriously underestimates the strength of the government interest—especially at the local level—in allowing some patronage hiring practices, and it exaggerates the perceived burden on First Amendment rights."[91]

For the dissenters, balancing the state and individual interests resolved the issue in favor of the government. The determining factor was the significant contribution made by the patronage system to the " democratization of American politics."[92] The dissent traced the historical development of patronage in an attempt to justify its continued existence, and stressed the importance of patronage to the political process in broadening the base of participation and increasing the volume of political discourse. Justice Powell concluded that patronage encouraged stable political parties and thereby reduced excessive political fragmentation.[93] The dissenters felt that the thinking of the plurality reflected "a disturbing insensitivity to the political realities,"[94] and was naive in thinking that the ongoing activities of local political organizations could be sustained without the hope of some tangible reward such as a job.

Chief Justice Burger, who concurred in Justice Powell's dissent, added in his separate dissent that the Court was intruding into an area reserved for the legislature and that the choice of patronage practices in state government was an area of state concern guaranteed by the Tenth Amendment.[95]

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89. 443 Pa. 527, 280 A.2d 375 (1971).
90. 96 S. Ct. at 2693 (Powell, J., dissenting).
91. *Id.*
92. *Id.* at 2691.
93. *Id.* at 2694-95.
94. *Id.* at 2694.
95. *Id.* at 2690-91 (Burger, C.J., dissenting). "The Court strains the rational bounds of First Amendment doctrine and runs counter to longstanding practices that are part of the fabric of our democratic system to hold that the Constitution *commands* something it has not been thought to require for 185 years. For all that time our system has wisely left these matters to the States and, on the federal level, to the Congress." *Id.* at 2690 (Burger, C.J., dissenting).

C. Conflict in the Elrod Opinions

Examination of the plurality and dissenting opinions reveals some marked philosophical differences and varying interpretations of existing case law.

Before addressing the merits of the case Justice Powell echoed Chief Justice Burger's dissent by accusing the plurality of interfering with legislative functions and of trivializing constitutional adjudication.[96] Justice Brennan met the objection by stating that the issue involved First Amendment rights and thus required constitutional interpretation, "a function ultimately the responsibility of this Court."[97] Further, the plurality noted that the state has no power to act impermissibly under the Constitution.[98] It is clear that the plurality intended no modification or interference with the states' right to design and implement their own civil service systems. These matters are properly ones for legislative concern. On the other hand, it is unlikely that the legislative branch would censor its own patronage practices and more importantly, the infringement on First Amendment rights is a matter for judicial concern.

There was no actual disagreement among the justices that patronage practices infringe First Amendment rights.[99] The conflict arose from differing assessments as to the strength of the government interest in preserving the patronage system and the magnitude of the First Amendment intrusion. The dissenting opinion of Justice Powell stressed the history and tradition of the patronage system as evidence of its importance to American political life. But the plurality was unpersuaded by the system's 200 year history. Patronage can be conceded to be part of the American tradition and still be unconstitutional.[100] The analogies to racial discrimination and denial of women's suffrage serve as painful reminders that tradition is not sacrosanct: "In any event, if the age of a pernicious practice were a sufficient reason for its continued acceptance, the constitutional attack on racial discrimination would, of course, have been doomed to failure."[101]

Of the three justifications advanced by patronage defenders and re-

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96. "The judgment today unnecessarily constitutionalizes another element of American life . . . ." *Id.* at 2697 (Powell, J., dissenting).

97. *Id.* at 2679.

98. *Id.*

99. Justice Powell's opinion is equivocal in this respect. Beginning with the statement, "It might well be possible to dispose of this case on the ground that it implicates no First Amendment right of the respondents . . ." (*id.* at 2692-93) (Powell, J., dissenting), Justice Powell next suggested that under the holding of *Shapp*, the employees had waived their rights (*id.* at 2693), and finally went on to analyze the burden on First Amendment rights in light of the government interests (*id.* at 2693-96). Chief Justice Burger did not address the constitutional issue in his dissenting opinion.

100. 96 S. Ct. at 2687 n.22.

101. Illinois State Employees Union v. Lewis, 473 F.2d 561, 568 n.14 (7th Cir. 1972), *cert. denied*, 410 U.S. 943 (1973).

jected by the plurality,[102] the dissent challenged only the plurality's treatment of the patronage system's role in preserving the democratic process. Justice Powell stressed that patronage practices have stimulated political activity and strengthened political parties, making government more accountable to the public.[103] The dissent claimed that patronage has helped to remove political affairs from the dominance of the "aristocratic class"[104] and is particularly important for local governments where rewards are needed as incentives to carry out ongoing activities and minor political "chores."[105] The plurality opinion disparaged the contribution of patronage practices, and the perfunctory dismissal of this interest weakened the plurality argument. A more satisfactory approach would have been to admit that patronage has played an important role in American politics with two necessary qualifications. First, patronage may well have assisted in the development and strengthening of American political parties in the past.[106] It is of declining importance today, however, due to changes in the organization and style of American politics.[107] Second, it may well be vital that top-level policy-making executives be able to choose their closest associates from the same political party. The plurality conceded the validity of allowing patronage practices to continue in these circumstances. The dissent clearly ignored this distinction in stating that "no alternative to some continuation of patronage practices is suggested."[108]

The opposite results reached by the plurality and dissent may also be traced to the different standards of judicial review applied to the government's and the dismissed employees' interests. The plurality required that if the state action were "to survive constitutional challenge, it 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."[109] While this standard is less harsh than a strict scrutiny test in that it provides an element of balancing the competing interests, the plurality imposed a heavier burden on the government than did the dissent. The dissent required a sufficiently important state interest to sustain what Justice Powell characterized as a "relatively modest intrusion" on First Amendment rights.[110] The "substantial contribution to the practical functioning of our democratic system"[111]

102. See text accompanying notes 79-86 *supra*.
103. 96 S. Ct. at 2694 (Powell, J., dissenting).
104. *Id.* at 2692.
105. *Id.* at 2695.
106. *See, e.g.*, C. FISH, THE CIVIL SERVICE AND THE PATRONAGE 156-57 (1905).
107. Sorauf, *The Silent Revolution in Patronage*, 20 PUB. ADMIN. REV. 28, 30-32 (1960).
108. 96 S. Ct. at 2696 (Powell, J., dissenting).
109. *Id.* at 2685.
110. *Id.* at 2697 (Powell, J., dissenting).
111. *Id.*

was the important state interest and "the coercion on associational choices that may be created by one's desire initially to obtain employment"[112] was the intrusion on First Amendment rights. Justice Powell resolved the balancing in favor of the state saying: "The pressure to abandon one's beliefs and associations to obtain government employment . . . does not seem to me to assume impermissible proportions in light of the interests to be served."[113]

This intrusion was further justified because "the system leaves significant room for individual political expression";[114] according to the dissent, patronage employees may vote freely and express themselves on some political issues.[115] The dissent, in purporting to rely on the Court's decisions in *Perry v. Sindermann*[116] and *Pickering v. Board of Education*,[117] seems to reveal its inconsistency in applying First Amendment principles. When employees in *Perry* and *Pickering* were dismissed due to their exercise of free speech the Court reversed and recognized the employees' right freely to express themselves.[118] If a patronage employee tried to express himself politically in a manner contrary to his employer's views, he would be fired. Under its reasoning in *Elrod*, the dissent would uphold the dismissal, a result contrary to *Perry* and *Pickering*. By its very operation, the patronage system leaves no "significant room for political expression" and the dissent is clearly uncomfortable with that result.

The dissent also attempted to utilize the case of *Buckley v. Valeo*[119] to support its opinion but appeared to read the decision too broadly. In citing *Buckley*'s approval of the disclosure provisions of the Federal Election Campaign Act Amendments of 1974,[120] Justice Powell stressed the government interest in increasing the overall level of political discourse despite an adverse effect on individual First Amendment rights.[121] But the *Buckley* opinion did not suggest that the overall level of political discourse is a more important interest in all cases than the individual's freedom of political association. On the *Buckley* record the Court found that the impact of the disclosure requirements on freedom of association was "highly speculative,"[122] and made provision for a showing of actual injury that could overcome a presumption of constitutionality in specific cases.[123] Further, the

112. *Id.* at 2696.
113. *Id.* at 2696-97.
114. *Id.* at 2696.
115. *Id.*
116. 408 U.S. 593 (1972).
117. 391 U.S. 563 (1968).
118. 408 U.S. at 596-97; 391 U.S. at 568.
119. 424 U.S. 1 (1976).
120. Pub. L. No. 93-443, 83 Stat. 1263 (codified in scattered sections of 2, 5, 18, 26 & 47 U.S.C.).
121. 96 S. Ct. at 2695 n.9.
122. 424 U.S. at 70.
123. *Id.* at 71.

Court noted that the disclosure requirements appeared to be the least restrictive means of accomplishing the government purpose.[124] By contrast, the effect of patronage dismissals on freedom of association is direct and immediate, and such dismissals are not the least restrictive means available.

The dissent emphasized that the Court has upheld restraints on the First Amendment rights of public employees and cited *Civil Service Commission v. National Association of Letter Carriers*[125] to support its position. But the policy underlying the holding of *Letter Carriers* better supports the plurality position. The Court in *Letter Carriers* upheld the provisions of the Hatch Act[126] so that the government might operate efficiently and fairly and so that employees would be free from improper influences.[127] The provisions of the Hatch Act did not dictate an employee's choice of political party or belief but rather restricted his degree of activity within his chosen party. A major goal of the Hatch Act was to free government service from political obligations by reducing the opportunity for political bosses to build "corrupt political machines" and by relieving government employees of political pressures to conform and curry favor from their superiors.[128] Thus, the policies behind the Hatch Act and the elimination of patronage appear to be in accord.

III. The Future of Patronage Practices

The *Elrod* decision left undecided several issues related to the patronage question. First, there remains a potential problem in applying the distinction between policy-making and non-policy-making employees to certain types of employment where the nature of the duties is not easily defined. The plurality indicated that a court will consider whether the employee acts as an advisor or formulates plans for the implementation of broad goals.[129] The concurring opinion referred to confidential employees.[130] A title alone does not provide the answer in each case. A "supervisor" may have many responsibilities, but those responsibilities may have only limited and well-defined objectives.[131] The degree of discretion that an employee can exercise in his job may be a guide. The final resolution must depend upon the circumstances of the case and the nature of the responsibilities.

Another problem in patronage dismissals is proving that the dismissal was for political reasons. The *Elrod* decision did not change the fact that employers may dismiss non-civil service employees without giving a reason

124. *Id.* at 68.
125. 413 U.S. 548 (1973).
126. 5 U.S.C. §§ 7321-27 (1970 & Supp. V 1975); see note 21 *supra*.
127. See text accompanying notes 19-22 *supra*.
128. 413 U.S. at 565-66.
129. 96 S. Ct. at 2687.
130. *Id.* at 2690 (Stewart, J., concurring in the result).
131. *Id.* at 2687.

and cannot be compelled to do so. A politician could fire incumbent office-holders and specify reasons unrelated to political beliefs. This possibility places a heavy burden of proof on the employee, for it is the former employee who has the burden of showing that the discharge was motivated by a constitutionally impermissible purpose. Unless there is a mass firing such as occurred in *Illinois State Employees Union v. Lewis*[132] or *American Federation of State, County and Municipal Employees v. Shapp*,[133] or the reason is expressly given as in *Alomar v. Dwyer*[134] and *Elrod*, the plaintiff may lack sufficient proof to establish a First Amendment violation. The problem is illustrated by the case of *Indiana State Employees Association v. Negley*.[135] Despite the prior decision in *Lewis*, the court denied preliminary injunctive relief restraining the pending dismissals. The evidence presented a sharp factual dispute between the parties. The employees claimed that their dismissals by the state superintendent were motivated solely by their party affiliation and political campaign activism, while Negley claimed his principal reasons for discharging the employees were lack of experience, political sabotage, low moral character, lack of ability, and conflicting loyalties. The evidence was also inconclusive as to whether the employees could be classified as non-policy-making.[136] The court observed that, at least at that point in the proceedings, the employees had not sustained their burden of proof.[137]

The *Elrod* decision also left open the question of patronage hirings as opposed to patronage firings. The language in both the plurality and dissenting opinions is ambiguous in this regard. The specific holding of the plurality was that "the practice of patronage *dismissals* is unconstitutional under the First and Fourteenth Amendments."[138] Though the plurality stated, "[W]e are here concerned only with the constitutionality of *dismissing* public employees for partisan reasons,"[139] Justice Brennan in his broad indictment of patronage practices condemned, at least by implication, hiring as well as firing for patronage reasons.[140] Justice Stewart clearly limited his

132. 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 943 (1973).

133. 443 Pa. 527, 280 A.2d 375 (1971).

134. 447 F.2d 482 (2d Cir. 1971), *cert. denied*, 404 U.S. 1020 (1972).

135. 357 F. Supp. 38 (S.D. Ind. 1973). According to the affidavit of defendant Harold Negley, 80 employees of the Department of Public Instruction were interviewed with respect to their retention or dismissal under his administration. Negley indicated his intention to retain 63 employees and dismiss 17 employees. Because the Department of Public Instruction had over 300 employees, the court did not consider this as a wholesale replacement along party lines. *Id.* at 41 n.3.

136. *Id.* at 41-42.

137. At the trial, the court reviewed the duties and responsibilities of the individual plaintiffs in detail and held that they had occupied policy-making positions. Indiana State Employees Ass'n v. Negley, 365 F. Supp. 225, 227-31 (S.D. Ind. 1973), *aff'd*, 501 F.2d 1239 (7th Cir. 1974).

138. 96 S. Ct. at 2689 (emphasis added).

139. *Id.* at 2680 (emphasis added).

140. *Id.* at 2681-82.

concurring opinion to the dismissal situation.[141] The dissenting opinion of Justice Powell, on the other hand, consistently framed the issue as one concerning patronage *hiring* practices.[142] If the broad plurality opinion can be read as going beyond the facts of the case to condemn all patronage practices, the dissenting opinion is equally broad in defending those practices.

IV. Conclusion

The Court's holding in *Elrod v. Burns*[143] overturned 200 years of American political tradition. Yet Justice Brennan's plurality opinion is a logical extension of the constitutional principles previously enunciated by the Supreme Court in the numerous decisions regarding the conditioning of public employment on infringement of First Amendment rights. The Court's decisions have prohibited conditions on public benefits, such as jobs that generally dampen the exercise of First Amendment rights. Having established that freedom of political association and belief is a fundamental right guaranteed by the First Amendment and that the state may not infringe such a right in the absence of a legitimate interest, the issue is resolved by balancing the government interests and the individual rights. Is the benefit to the government in maintaining control of public employment through patronage practices more important than the loss of the employees' First Amendment rights? The Court's struggle with the competing interests indicates that the answer is neither easy nor necessarily obvious, and that a decision will be colored not only by tradition and precedent but also by one's philosophy of the government's role in society and the relative importance of individual rights.

The arguments advanced by the dissenters in *Elrod* to justify the continuation of patronage practices seem to be an unpersuasive call to maintain the status quo. Patronage practices may well have played an important and necessary role in the evolution of the democratic process in America, but tradition must be a guide, not a dictator. The necessities of the political parties in the past are not determinative of their current needs. Stable political parties are undoubtedly desirable in a democratic form of government, but there is no real evidence that patronage is essential to their existence. The plurality opinion in *Elrod* provides the means whereby the government can accommodate its interests in a manner less restrictive of associational freedoms. By allowing patronage dismissals of policy-making employees the government's interests are served without unnecessarily restricting the rights of all public employees. And finally, even non-policy-making employees are subject to discharge for poor job performance or insubordination.

141. *Id.* at 2690 (Stewart, J., concurring in the result).
142. *Id.* at 2693-97 (Powell, J., dissenting).
143. 96 S. Ct. 2673 (1976).

Is the party really over? The *Elrod* decision provides a constitutional basis for invalidating the practice of patronage dismissals. Despite the lack of a majority opinion in *Elrod*, a majority of the justices agreed that non-policy-making employees could not be discharged because of their political affiliation. Justice Stevens did not participate in the decision, but his opinion in *Lewis* indicates his ideological concurrence with the other five justices. Only the three dissenting justices in *Elrod* appear to be adamant defenders of patronage.

It is uncertain that a majority of the Court would hold patronage hiring practices unconstitutional. Job holders who stand to lose not only their jobs but also their seniority and other benefits could be held to have more at stake than mere job applicants. Yet the constitutional infringement is essentially the same where a potential employee is denied a position due to his political affiliation or is required to surrender that association to obtain public employment. The government interests advanced by patronage defenders—efficient and effective government, full implementation of policies by loyal employees, and preservation of the democratic process—are no more justified in the hiring situation. It would seem that those very interests would be best served by qualified, capable, and experienced personnel, regardless of political affiliation. The patronage hiring situation would impose a heavier burden of proof on the rejected applicant to show that his rejection was solely for reasons of political affiliation and was unaffected by the myriad of other employment criteria. Nevertheless, when the hiring situation does come before the Court, the *Elrod* principles must be extended to invalidate patronage hiring practices if the mandate of the First Amendment is to be faithfully executed.