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The First Amendment: Political Speech and Activities of Public Employees

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The First Amendment:
Political Speech and Activities of Public Employees

Introduction

The government as employer has far broader powers than the government as sovereign with regard to restrictions placed on First Amendment rights. For instance, a private person may freely and publicly criticize a government agency's legislative program; however, the Constitution generally does not prevent the government agency as employer from firing a high-ranking employee for doing the same thing. Even government employees' participation in political campaigns may be restricted by government employers in certain instances. This paper will explore the history and current status of the government's ability to restrict government employees' First Amendment rights and to retaliate against employees for exercising those rights.

History

Prior to 1968, the U.S. Supreme Court applied a right-privilege approach to determine whether government employees' protected speech had been impermissibly infringed upon by the government employer. This commonly quoted statement by Justice Oliver Wendell Holmes succinctly sums up the doctrine: "[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (1892). Research of early twentieth century case law shows that the right-privilege standard was regularly applied by the courts in cases that would now be addressed through a balancing test. Until the late 1960's, cases considering employee discharge involving freedom of speech and association were typically decided on due process grounds even when the aggrieved employee also challenged an employer's actions on First Amendment grounds. In *Bailey v. Richardson*, 182 F.2d 46, 59 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951), the Court affirmed without written opinion a lower court decision upholding the dismissal of a government employee against due process and First Amendment claims: "[T]he plain hard fact is that so far as the Constitution is concerned there is no prohibition against the dismissal of government employees because of their political beliefs, activities or affiliations...The First Amendment guarantees free speech and assembly, but it does not guarantee government employ." Soon after affirming the dismissal in the *Bailey* case, the Supreme Court itself applied the right-privilege distinction in upholding a prohibition on employing persons as teachers if the persons advocated the desirability of overthrowing the government:

> It is clear that such persons have the right under our law to assemble, speak, think and believe as they will...It is equally clear that they have no right to work for the state in the school system on their own terms. They may work for the school system under reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to

> retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not.

Adler v. Bd. of Educ., 342 U.S. 458, 492-93 (1952).

Current Free Speech Protection for Government Employees

The *Pickering* balancing test - The court first offered generalized free speech protection for government employees in *Pickering* and imposed on the government employer a balancing test that measured the employee's right of free speech as a citizen against the government's right as an employer to manage its delivery of services to the public. Writing for the Court, Justice Marshall rejected the notion that citizens abandon First Amendment rights to political expression when they accept employment with the government agency; however, he recognized that the government, as employer, has a right to regulate employee conduct that impairs the efficiency of government services, and that the government must somehow balance these potentially competing interests. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). Justice Marshall cited *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), in which the Court pronounced: "[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."

Public [perhaps inaccurate] communication of public concern - The *Pickering* case involved the dismissal of a teacher who had written a letter to a local newspaper critical of the school system administration. The Court indicated that dismissal of a public employee for criticism of his superiors was improper where the relationship of employee to superior did not involve closeness such as day-to-day personal contact that creates problems of discipline or of harmony among coworkers, or problems of personal loyalty and confidence would arise. The critical letter written by the teacher contained primarily differences of opinion [the school board said the letter was inaccurate] regarding allocation of funds. The Court noted the school board had not shown any harm resulted from the allegedly false statements in the letter, and, additionally, the allocation of funds is a matter of important public concern: "In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Pickering*, 391 U.S. at 570-73.

Private communication of public concern - *Pickering* was extended to protect private communications of an employee's views to the employer in *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410 (1979). The Court explained that the context of speech is important and will impact decisions. For instance, regarding public speech content may be the determinative factor in weighing government interest impairment. On the other hand, regarding private speech, the time, manner and place may be determinative. *Id.* at 415 n.4. *Givhan* has been characterized by the Court as involving an employee speaking out as a citizen on a matter of general concern, not tied to a personal employment dispute, but speaking privately; and the Court explained that a

stronger showing of interference with governmental interests may be necessary if an employee's speech more substantially involves matters of public concern. *Connick v. Myers*, 461 U.S. 138, 152 (1983).

Public employee speech as part of official duties – *Garcetti v. Ceballos*, 547 U.S. 410 (2006), involves an Assistant District Attorney who wrote a memorandum expressing concerns about what he perceived as inaccuracies in an affidavit used to obtain a search warrant in a pending criminal case as part of his job duties. After being reassigned, transferred and denied a promotion, the Assistant District Attorney brought a § 1983 action in U.S. District Court alleging his employer violated the First and Fourteenth Amendments by retaliating against him because of the memorandum. The U.S. Supreme Court found that, "…when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 547 U.S. 410, 126 S.Ct. 1951, 1960. The court clarified that failure to recognize First Amendment claims of government employees arising from their work product does not prevent them from participating in public debate and the employees retain their constitutional protection for contributions to civic discourse in non work product matters.

It is yet to be seen what ultimate effect this case will have on the *Pickering* balancing test. In the year and a half since this case was decided, numerous lower courts have followed *Garcetti* and rejected claims of public employees because their statements were made in connection with their official job duties rather than as a citizen. In *Sigsworth v City of Aurora*, 487 F.3d 506 (7th Cir. 2007), the Seventh U.S. Circuit Court of Appeals affirmed the lower court's rejection of an Aurora police investigator's retaliation lawsuit ruling that he had no First Amendment claim because his speech was job-related. Sigsworth, a career officer, reported to the chief of police his suspicions that a key target in a botched raid had been tipped off by somebody associated with the task force. A short time later he was removed from the task force and denied promotions. He sued, claiming retaliation for speaking out against possible government corruption. The Seventh Circuit noted that "*Garcetti* requires that before analyzing whether an employee's speech is of public concern, a court must determine whether the employee was speaking 'as a citizen' or, by contrast, pursuant to his duties as a public employee." *Id.* at 509-10. The Seventh Circuit has framed the test as "*Garcetti* holds that before asking whether the subject-matter of particular speech is a topic of public concern, the court must decide whether the plaintiff was speaking 'as a citizen' or as part of her public job. Only when government penalizes speech that a plaintiff utters 'as a citizen' must the court consider the balance of public and private interests, along with the other questions posed by *Pickering* and its successors…" *Mills v. City of Evansville*, 452 F.3d 646, 647-48 (7th Cir. 2006).

Employee grievance of no public concern – *Pickering* was distinguished in *Connick v. Myers*, a case that involved an employee grievance rather than an employee's effort to inform the public on a matter of public concern. The employee who was fired for insubordination was an assistant district attorney involved in a dispute with her supervisor over transfer to another section. The employee was fired after she circulated a

questionnaire among her peers asking for their views on employee morale. The Court found the firing permissible: "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* at 146. The Court in *Connick* also applied the *Pickering* balancing test, stating, "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." *Connick,* 461 U.S. at 151-52. The issue of public concern is a threshold inquiry and also plays a role in the balancing of interests: "...the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression" and its importance to the public. *Id.* at 150.

No intention to inform the public - The Court has indicated that employee speech may be protected when matters of public concern are involved even though the employee has no intent to inform the public. In *Rankin v. McPherson*, 483 U.S. 378 (1987) [a 5-4 decision], the Court held that the employee's comment was protected when the employee, upon hearing of an unsuccessful attempt to assassinate the President, said to the coworker, "If they go for him again I hope they get him." The comment was made in a context critical of the President's policies. The Court emphasized that the statement was made by a clerical employee who had lack of contact with the public and concluded that the employer's interest in maintaining the efficient operation of the office was insufficient to outweigh the employee's First Amendment rights.

Protection extended to independent contractors - Protections applicable to government employees have been extended to independent government contractors. In a 1996 case involving termination of an independent contractor's contract after he publicly criticized the county governing board's general mismanagement of county affairs, the Court explained:

> The similarities between government employees and government contractors ...are obvious. The government needs to be free to terminate both employees and contractors for poor performance, to improve the efficiency, efficacy, and responsiveness of service to the public, and to prevent the appearance of corruption. And, absent contractual, statutory, or constitutional restriction, the government is entitled to terminate them for no reason at all. But either type of relationship provides a valuable financial benefit, the threat of the loss of which in retaliation for speech may chill speech on matters of public concern by those who, because of their dealings with the government, are often in the best position to know what ails the agencies for which they work.

Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996) (*citing Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion)).

Freedom of Association

Although freedom of speech is specifically articulated in the First Amendment, freedom of association is not: *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.* U.S. CONST. amend. I.

In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), Justice Harlan articulated a First Amendment right to freedom of association and the Court revealed its perspective that certain associational freedoms derive from the First Amendment while others derive from notions of substantive due process. *See* Laurence A. Shapero, Note, A Logical Extension: The Supreme Court Extends Rights of Free Speech and Association to Government Contractors, 47 DePaul L.Rev. 155, notes 20-22 (1997). In the latter half of the twentieth century, U.S. Supreme Court cases continued to recognize two types of freedom of association protected by the United States Constitution:

> Our decisions have referred to constitutionally protected 'freedom of association' in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment — speech, assembly, petition for the redress of grievances, and the exercise of religion.

Dallas v. Stanglin, 490 U.S. 19, 23-24 (1989) (*citing Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984)).

Protection under the First and Fourteenth Amendments from retaliatory treatment prompted by employees' political associations was strengthened through the Court's decisions in *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980). Although factually distinct, both cases addressed whether the First and Fourteenth Amendments protect employees from being discharged from government jobs solely because of their partisan political affiliation.

In the *Elrod* case, the court considered the type of position involved and determined that a nonpolicy-making, nonconfidential government employee cannot be discharged from a job upon the sole ground of his political beliefs or affiliations. *Elrod* involved non-civil-service Republican employees of a County Sheriff's Office who each had either been discharged or threatened with discharge by the newly elected Democratic Sheriff simply because they were not affiliated with or sponsored by the Democratic

Party. The Court stated that a significant impairment of First Amendment rights must survive exacting scrutiny, and the interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest (*citing Buckley v. Valeo*, 424 U.S. 1, 64-65, 94 (1976)). The Court considered the argument advanced that patronage is needed for political loyalty of employees so that representative government will not be undercut by tactics obstructing the implementation of policies of the new administration — policies presumably sanctioned by the electorate. Although the Court found the argument to have some force, it was inadequate to result in the wholesale validation of patronage and the court stated that, "Limiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end. Nonpolicy making individuals usually have only limited responsibility and are not in a position to thwart the goals of the in-party.... [It] is the government's burden to demonstrate an overriding interest in order to validate an encroachment on protected interests..." *Elrod*, 427 U.S.at 368.

In *Branti*, Republican Assistant Public Defenders brought suit to enjoin the recently appointed Public Defender, a Democrat, from discharging the Assistant Public Defenders solely because they were Republicans. The Court reiterated that according to the *Elrod* decision, to prevail in the action it is sufficient for respondents to prove they were discharged solely for the reason they were not affiliated with or sponsored by the party in charge. Rather than discussing whether the aggrieved parties in *Elrod* were "nonpolicymaking, nonconfidential" employees, the court in *Branti* noted that it is not always easy to determine whether a position is one in which political affiliation is a legitimate factor to be considered. The Court put less emphasis on whether a position was policymaking and confidential. The *Branti* court stated that "the ultimate inquiry is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved. *Branti*, 445 U.S. at 518-19.

Protection extended to promotion, transfer, recall – The facts in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), are as follows: After a hiring freeze had been put in effect, the Republican Governor of Illinois issued an executive order that prohibited state officials from hiring any employee, filling any vacancy, creating any new position, or taking any similar action without the Governor's permission. Five employees complained that a political patronage system had been created by the Governor to benefit those who were supported by the Republican Party. The employees brought suit under § 1983 against the Governor, the Republican Party of Illinois, and various state and Republican Party officials and claimed discrimination in violation of the Federal Constitution's First and Fourteenth Amendments. The District Court dismissed the complaint for failure to state a claim. Both the District Court and the Court of Appeals found that patronage practices violate the First Amendment when they are the substantial equivalent of dismissal from employment, but not in the instances involved in the *Rutan* case, i.e. transfers, denial of promotions, failure to recall after layoffs, and hiring decisions involving low-level public employees. The U.S. Supreme Court extended the findings made in *Elrod* and *Branti* to the facts in *Rutan* and held that restrictions on patronage apply not only to dismissal of government employees, but also apply to

promotion, transfer, recall after layoffs, and hiring of low-level public employees. *Rutan* was a 5-4 decision. The four dissenting Justices indicated in an opinion by Justice Scalia that they would not only rule differently in *Rutan*, but that they would also overrule *Elrod* and *Branti*. Justice Scalia provides a colorful and candid dissenting opinion somewhat critical of the Court, and somewhat comforting to anyone who is sometimes confused in trying to reconcile and apply the various tests applied by the Court in First Amendment cases. The Chief Justice and Justice Kennedy join in the dissent, and Justice O'Connor joins as to Parts II and III (not here included):

> Today the Court establishes the constitutional principle that party membership is not a permissible factor in the dispensation of government jobs, except those jobs for the performance of which party affiliation is an "appropriate requirement." 497 U.S. at 64. It is hard to say precisely (or even generally) what that exception means, but if there is any category of jobs for whose performance party affiliation is not an appropriate requirement, it is the job of being a judge, where partisanship is not only unneeded but positively undesirable. It is, however, rare that a federal administration of one party will appoint a judge from another party. And it has always been rare. See *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). Thus, the new principle that the Court today announces will be enforced by a corps of judges (the Members of this Court included) who overwhelmingly owe their office to its violation. Something must be wrong here, and I suggest it is the Court.

Rutan, 497 U.S. at 92-93.

Protection extended to government contractor - In *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996), the Court extended the protections of *Elrod* and *Branti* to a government contractor. The lower court had dismissed the action for failure to state an actionable First Amendment claim since the contractor would not be protected as an employee would be. The Supreme Court held that the complaint stated an actionable First Amendment claim and remanded the case. The case involved an allegation that the city removed the towing company from a list of businesses offered towing business on a rotating basis in retaliation against the contractor for his refusal to contribute to the mayor's reelection campaign. In extending protection to the contractor, the Court noted: "Government officials may indeed terminate at-will relationships, unmodified by any legal constraints, without cause; but it does not follow that this discretion can be exercised to impose conditions on expressing, or not expressing, specific political views, *see Perry v. Sindermann*, 408 U.S. at 597." *O'Hare Truck Serv., Inc.*, 518 U.S. at 725-26 . The Court confirmed the finding in *Branti* and *Elrod* that termination of a public employee on account of his political affiliation brings the Court's "unconstitutional conditions" cases into play, for "if the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes," *Branti*, 445 U.S. at 515. In the *O'Hare Truck*

Serv., Inc. case, the Court also reiterated its modified standard for assessing when party affiliation may be an acceptable basis for terminating a public employee: "The ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *O'Hare Truck Serv., Inc.*, 518 U.S. at 714.

Government Attorneys not protected under *Branti* - Federal courts have uniformly held that government attorneys occupy positions inherently demanding political loyalty, and that they thus fall within the *Branti* exemption from First Amendment protection. *See Gordon v. County of Rockland*, 110 F.3d 886, 890 (2d Cir. 1997) ("All circuit court decisions — and almost all other court decisions — involving attorneys in government service, other than public defenders, have held that *Elrod* and *Branti* do not protect these positions.") (citation omitted); *see also Aucoin v. Haney*, 306 F.3d 268, 275 (5th Cir. 2002), *Alberti v. County of Nassau*, 393 F. Supp. 2d 151 (D.N.Y. 2005).

The Patronage (Spoils) System and the Hatch Act

"Ask not what job applicants can do for the State — ask what they can do for our party." *Rutan*, 497 U.S. at 92 (from Justice Steven's concurring opinion discussing the Patronage System).

Background – Until after the Civil War, federal employees came and went based on party service and changing administrations rather than on meritorious performance. This is referred to as the spoils or patronage system and it was the prevalent basis for governmental employment and advancement prior to the Civil War. *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 557-58 (1973). The Report of the Committee on Civil Service and Retrenchment submitted by Senator Pendleton on May 15, 1882 contained a vivid description of the patronage system, reading in part as follows:

> The fact is confessed by all observers and commended by some that 'to the victors belong the spoils;' that with each new administration comes the business of distributing patronage among its friends. . . . [The President] is to do what some predecessor of his has left undone, or to undo what others before him have done; to put this man up and that man down, as the system of political rewards and punishments shall seem to him to demand.

S. Rep. No. 576, 47th Cong., 1st Sess., 2 (1882); *Bush v. Lucas*, 462 U.S. 367, 381 (1983).

The spoils system in federal government did not survive due to the belief that partisan political activities by government employees must be limited if the government is to operate effectively and fairly with employees sufficiently free from improper influences. In 1871, Congress authorized the President to prescribe regulations for the

creation of a civil service of federal employees. Abolition of the spoils system in federal employment brought with it restrictions on political activities of federal employees. In 1876, federal employees were prohibited from requesting from giving to, or receiving from, any other federal employee money for political purposes, and the Civil Service Act of 1883 more broadly forbade civil service employees to use their official authority or influence to coerce political action of any person or to interfere with elections. *See Ex parte Curtis*, 106 U.S. 371 (1882).

Restrictions on the political activity of classified service employees grew in scope during the next sixty years. Experience during the 1936 and 1938 political campaigns convinced a majority in Congress that the prohibition against taking an active part in political management and political campaigns should be extended to the entire federal service and the Hatch Act resulted. The Hatch Act forbids federal employees, and many state employees as well, to take active part in political management or in political campaigns. *Ch. 410, 53 Stat. 1148 Sec. 9(a), (1939), as amended, 5 U.S.C. Sec. 7324(a)(2).*

The Hatch Act and State and Local Agencies - In 1940 the Hatch Act was extended by Congress to officers and employees of state and local agencies whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United State. *Letter Carriers*, 413 U.S. at 562, *citing* Ch.640, 54 Stat. 767 (1940), as amended, 5 U.S.C. § 1501-08. This provision was sustained against federalism challenges in *Oklahoma v. Civil Serv. Comm'n*, 330 U.S. 127 (1947). The prohibition against political activity was not to be construed to prohibit political activity in non-partisan elections or in connection with questions not specifically identified with any national or state political party, such as "questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character…" *Letter Carriers*, 413 U.S. at 562. As applied through the regulations and rulings of the Office of Personnel Management, formerly the Civil Service Commission, the Hatch Act prevents employees from running for public office, distributing campaign literature, playing an active role at political meetings, circulating nomination petitions, attending a political convention except as a spectator, publishing a letter soliciting votes for a candidate, and all similar activity. The Commission on Political Activity of Government Personnel, Findings and Recommendations 11, 19-24 (Washington: 1968).

In the *Letter Carriers* case, the Court pointed out: "This account of the efforts by the Federal Government to limit partisan political activities by those covered by the Hatch Act should not obscure the equally relevant fact that all 50 States have restricted the political activities of their own employees." *Letter Carriers*, 413 U.S. at 563, referencing generally *Broadrick v. Oklahoma*, 413 U.S. 601, 604 (1973). Laws patterned on the Hatch Act have been broadly adopted by states. *See Broadrick*, 413 U.S. at 604.

Tests and Doctrines

Following are a few of the tests and doctrines utilized by the Court in the cases cited in this paper involving the First Amendment and government employee political association, speech and activities.

Right-Privilege Doctrine - "A policeman may have a constitutional right to talk politics but he has no constitutional right to be a policeman." Not relied upon in First Amendment cases since the late 1960s.

Pickering Balancing Test - requires a court evaluating restraints on a public employee's speech to balance the interests of the employee, 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.

Connick/Pickering Balancing Test - imposes a threshold inquiry (implicit in *Pickering* itself, says the Court) that in order to merit *Pickering* balancing, a public employee's speech must touch on a matter of public concern.

Garcetti Test- before a court applies the *Pickering* balancing test they must first look at whether the public employee was speaking "as a citizen" or pursuant to his duties as a public employee. If speaking "as a citizen," then the *Pickering* balancing is considered. If speaking pursuant to his duties as a public employee, then, for First Amendment purposes, the Constitution does not insulate their communications from employer discipline.

Public Concern Test - subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of the speech. The Court has also recognized that certain private remarks, such as negative comments about the President of the United States, touch on matters of public concern and should thus be subject to *Pickering* balancing.

Summary

This is a summary of guidance gleaned from the various cases included in this paper. Just as in reading First Amendment cases, it is best not to search too hard for smooth, logical transitions from one rule to the next.

In cases involving employee political speech and activities, the court has moved away from the right-privilege doctrine to a balancing test under the First Amendment. When compared to the government's ability to regulate non-employee political speech and activities, the government's ability as employer to regulate employee political speech and activities is substantially greater. In regulating non-employee political speech and activity, the government regulation is usually held to strict scrutiny; in regulating employee political speech and activity, regulations are held to a less stringent standard. In situations where the legislature has imposed restrictions on government employee

political speech and activity (such as the Hatch Act and similar state legislation), the Supreme Court has stated that Congress, through legislative power, has struck what Congress has determined is the balance between the interests of the employee as a citizen in commenting on matters of public concern and the interest of the government as an employer in promoting the efficiency of the government work. Protections applicable to government employees have been extended to independent government contractors. Public employees are protected from retaliatory employment decisions based on political association, unless the employer is able to show that party affiliation is an appropriate requirement for the effective performance of the public office involved. In determining whether an employer may constitutionally take detrimental employment actions based on political association, appropriate considerations may include whether the employee is a policy maker and whether the employee is privy to confidential information of the employer, however, those considerations are no longer the primary focus. Employees in government positions are not protected under the First Amendment for their communications made as part of their job duties. Government attorneys have consistently been found to be within the category of employees who may suffer discharge and other detrimental employment actions based on political association.