

Summer 2001

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Recommended Citation

Bryan R. Berry, *Donkeys, Elephants, and Barney Fife: Are Deputy Sheriffs Policymakers Subject to Patronage Termination*, 66 Mo. L. REV. (2001)

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Donkeys, Elephants, and Barney Fife: Are Deputy Sheriffs Policymakers Subject to Patronage Termination?

*DiRuzza v. County of Tehama*¹

I. INTRODUCTION

The practice of patronage² is virtually as old as the Republic itself.³ Beginning with President Washington and continuing until the early 1970s, elected officials were safe in their reliance upon a perceived right to surround themselves, through appointments and dismissals, with politically like-minded subordinates. This privilege was considered a part of the spoils of political victory.⁴

Beginning in the 1970s, however, the Supreme Court started chipping away at the practice of patronage through a series of decisions that barred the dismissal of public employees based solely on their political affiliation.⁵ Nevertheless, the Court recognized limited exceptions for discharging employees whom the Court

1. 206 F.3d 1304 (9th Cir.), *cert. denied*, 121 S. Ct. 624 (2000).

2. Webster's Dictionary defines "patronage" as "the power to make appointments to government jobs especially for political advantage." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 863 (9th ed. 1986).

3. See Susan Lorde Martin, *A Decade of Branti Decisions: A Government Official's Guide to Patronage Dismissals*, 39 AM. U. L. REV. 11 (1989). "The first time in American history that a government employee was dismissed because of a political affiliation probably occurred in 1797, when the Secretary of the Treasury, a Federalist, fired the United States Commissioner of Revenue, an avid Republican." *Id.* at 14.

4. See Louis Cammarosano, Note, *Application of the First Amendment to Political Patronage Employment Decisions*, 58 FORDHAM L. REV. 101, 103 (1989).

5. While the Supreme Court first addressed the constitutional issues arising from patronage in the 1970s, patronage already had begun to decline in popularity in many jurisdictions. Jamie Johnson, Note & Comment, *O'Hare Truck Serv. Inc. v. City of Northlake: Further Limiting the Spoils of the Victor*, 14 GA. ST. U. L. REV. 489, 492 (1998). Public concern about patronage abuses led to the enactment of the Pendleton Act of 1883, which established the civil service system, and enactment of the Hatch Political Activities Act of 1939, which limited the political activities of federal employers. See Kathleen M. Dugan, Note, *An Objective and Practical Test for Adjudicating Political Patronage Dismissals*, 35 CLEV. ST. L. REV. 277, 280 n.22 (1990). However, this legislation failed to protect non-civil service government employees. *Id.*

labeled “policymakers”⁶ or “confidential employees.”⁷ These exceptions resulted in the eruption of more than twenty years of inconsistent rulings by lower courts regarding which government positions entail policymaking and, more fundamentally, how best to approach that question.

This Note examines *DiRuzza v. County of Tehama*,⁸ a recent Ninth Circuit decision that takes a case-specific approach to defining the position of deputy sheriff for the purpose of deciding whether that position involves policymaking and is, therefore, subject to patronage. Furthermore, this Note reviews the landscape of other circuit court decisions on the susceptibility of deputy sheriffs to patronage termination, including the Eighth Circuit’s relative silence on the issue. Finally, this Note argues that the Supreme Court should sanction the approach espoused by *DiRuzza* in an effort to harmonize what has become a cacophonous mix of lower court voices on the issue of patronage.

II. FACTS AND HOLDING

From 1992 to 1995, Sherol DiRuzza was a deputy sheriff in Tehama County, California.⁹ During the election campaign of 1994, DiRuzza publicly supported the campaign of incumbent Sheriff Mike Blanus, who lost his bid for re-election to Robert Heard.¹¹

After the election, but during Blanus’s tenure, DiRuzza was suspended for thirty days.¹² The suspension followed a domestic dispute in which DiRuzza discharged her service revolver out of her bedroom window.¹³ The district attorney charged DiRuzza with a felony and a misdemeanor as a result of this

6. The introduction of the term “policymaker” in the context of patronage in *Elrod v. Burns*, 427 U.S. 347, 367 (1976), was unaccompanied by a clear definition of the term. See *infra* note 45.

7. The term “confidential employee” is first introduced in the context of patronage dismissals in *Branti v. Finkel*, 445 U.S. 507, 510-11 (1980). This use of the term, as a synonym for “policymaker,” appears again only in *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 71 n.5 (1990).

8. 206 F.3d 1304 (9th Cir.), *cert. denied*, 121 S. Ct. 624 (2000).

9. *Id.* at 1306.

10. *Id.* at 1307. DiRuzza’s support of her employer included an appearance in a political television advertisement on his behalf. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* During the dispute, DiRuzza’s fiancé “allegedly damaged her car, tore her phone off the wall, and threatened her with physical violence.” *Id.* DiRuzza claimed she was being threatened with a rifle and fired eight shots from her service revolver in an attempt “to get the neighbors to call the authorities.” *Id.* at 1314.

incident.¹⁴ Upon taking office, Heard allowed DiRuzza to plead guilty to a single, lesser charge of disturbing the peace in exchange for DiRuzza's resignation from her position as deputy sheriff.¹⁵

On March 26, 1996, DiRuzza filed suit in federal district court against Tehama County, Sheriff Heard, and Undersheriff Jerry Floyd,¹⁶ claiming she had been fired in retaliation for her political support of Blanusa during the election campaign.¹⁷ The defendants initially denied that any political motivation led to DiRuzza's firing,¹⁸ contending instead that DiRuzza lost her job solely as a result of the incident that led to her suspension by then-Sheriff Blanusa.¹⁹ DiRuzza disputed this assertion,²⁰ and the defendants subsequently filed a supplemental brief wherein they argued that any knowledge on their part of DiRuzza's political activities relative to the election was immaterial because "no constitutional prohibition against an elected sheriff's termination of a deputy for partisan reasons" existed.²¹ The district court agreed and granted summary judgment for all of the defendants, concluding that the First Amendment did not protect DiRuzza from partisan dismissals because deputy sheriffs in California are

14. *Id.* DiRuzza was charged with the felony of "gross negligent discharge of a firearm" and the misdemeanor of "exhibiting a firearm in a rude and threatening manner" in violation of California Penal Code Sections 246.3 and 417(a)(2). *Id.*

15. *Id.* DiRuzza claimed that Heard influenced the district attorney's decision to charge DiRuzza with a felony and in his offer of a plea agreement, which included DiRuzza's resignation. *Id.* DiRuzza charged that "this influence was motivated by a desire to retaliate against DiRuzza for her political support of the incumbent Sheriff." *Id.* at 1314-15.

16. *Id.* at 1307. Initially, DiRuzza's suit alleged twelve federal and state causes of action, but by the time the district court ruled, DiRuzza had limited her suit to claims under 42 U.S.C. §§ 1983 and 1985, seeking damages as a remedy. *Id.*

17. *Id.* DiRuzza "alleged that due to her political support of Blanusa and opposition to Heard, she was not re-sworn as a deputy after the election, was given undesirable shifts, and was forced to accept resignation under threat of a felony charge." *Id.*

18. *Id.* At summary judgment, the defendants offered as an undisputed, material fact that neither Floyd nor Heard had any knowledge of DiRuzza's political support for Blanusa. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

policymakers²² and that it is appropriate for a sheriff to demand political loyalty from his or her deputies.²³

On appeal, the Ninth Circuit reversed the district court's grant of summary judgment, finding that the defendants had "failed to show as a matter of law that DiRuzza was a policymaker and that political loyalty was therefore an appropriate requirement for her job."²⁴ The circuit court remanded the case to the district court for a determination of "whether [DiRuzza's] actual duties were those of a policymaker."²⁵ The court held that, when the job description of a public employee delineates no consistent and universal responsibilities, whether that employee is a policymaker subject to patronage termination cannot be determined based solely on that employee's job description, free speech activities, or unperformed, potential duties; rather, the question must be decided based upon an analysis of that employee's actual, day-to-day activities.²⁶

III. LEGAL BACKGROUND

Prior to the 1970s, the constitutionality of patronage was not questioned.²⁷ Government employment was considered a privilege rather than a right, and courts allowed employers to require that a potential employee self-limit his or her free speech rights in exchange for that privilege.²⁸ However, by the beginning of that decade, it was clear the Supreme Court had rejected this "right-privilege"

22. The court based this determination, in part, upon California Government Code Section 24100, which describes a deputy sheriff as exercising "the same general authority as the sheriff." *Id.* The court also relied upon the findings of three other circuits that have held that deputy sheriffs are policymakers. *See Jenkins v. Medford*, 119 F.3d 1156, 1164 (4th Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1090 (1998); *Upton v. Thompson*, 930 F.2d 1209, 1210 (7th Cir. 1991), *cert. denied*, 503 U.S. 906 (1992); *Terry v. Cook*, 866 F.2d 373, 377 (11th Cir. 1989).

23. *DiRuzza*, 206 F.3d at 1306. The district court further held, in the alternative, that Heard and Floyd, as individual defendants, were entitled to qualified immunity because the rights DiRuzza claimed were violated were not clearly established at the time the alleged violation occurred. *Id.* at 1307. The court also declined to exercise supplemental jurisdiction over DiRuzza's remaining state claims. *Id.*

24. *Id.* at 1306.

25. *Id.* The court also held, in response to the defendants' alternative assertion of qualified immunity, that the law protecting non-policymakers from partisan firing was clearly established at the time of DiRuzza's firing. *Id.* The court remanded the case for consideration of the defendants' reasonableness relative to DiRuzza's firing "in light of the then-clearly established law." *Id.*

26. *Id.* at 1309-10.

27. *See Johnson*, *supra* note 5, at 493.

28. *See Johnson*, *supra* note 5, at 493.

distinction in determining the relationship between governmental benefits and constitutional rights.²⁹ In 1972, the Court announced, more specifically, that government employment could not be withheld in lieu of a job applicant's partial forfeiture of his or her First Amendment speech rights.³⁰ Having addressed the constitutional propriety of withholding government employment for political reasons, the stage was set for the Court to speak specifically to the practice of patronage termination by governmental employers.³¹

A. *The Supreme Court's Elrod-Branti Test*³²

In *Elrod v. Burns*,³³ the Supreme Court addressed the practice of patronage termination for the first time³⁴ and, in a plurality opinion delivered by Justice Brennan, held that patronage dismissals are unconstitutional because they violate the right to free speech and association under the First Amendment.³⁵ In *Elrod*, a newly-elected Democratic sheriff fired four Republican employees of the previous administration³⁶ upon their refusal to become Democrats, pledge support

29. See *Graham v. Richardson*, 403 U.S. 365, 374 (1971) (citing *Sherbert v. Verner*, 374 U.S. 398, 404 (1963), for the proposition that the Court had "rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege'"); see also *Bell v. Burson*, 402 U.S. 535, 539 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970).

30. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (Government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.").

31. See *Johnson*, *supra* note 5, at 494.

32. The line of analysis reviewed in this Part represents only one of two streams of the Supreme Court's treatment of First Amendment issues related to patronage. This line of cases applies when a public employee complains of being fired for his or her political affiliation. When the issue is an employee's right to speak on an issue of public concern, courts are guided by *Pickering v. Board of Education*, 391 U.S. 563 (1968), and its progeny, which apply a balancing approach between a public employee's right to free expression and the government's interest in discharging the employee for exercising that right. See Craig D. Singer, Comment, *Conduct and Belief: Public Employees' First Amendment Rights to Free Expression and Political Affiliation*, 59 U. CHI. L. REV. 897, 897-98 (1992).

33. 427 U.S. 347 (1976).

34. See Brent C. Eckersley, Note, *Constitutional Law: Bd. of County Comm'rs v. Umbehr and O'Hare Truck Serv. v. City of Northlake—The Extension of First Amendment Protection to Independent Contractors—The Garbage Man Can Now Talk Trash!*, 50 OKLA. L. REV. 557, 559 (1997).

35. *Elrod*, 427 U.S. at 363.

36. *Id.* at 349-50. The discharged employees included: the chief deputy of the

to Democratic candidates, or contribute to the Democratic party.³⁷ The fired employees sued, claiming the First Amendment prohibited their termination based solely upon their political affiliation.³⁸ The defendants argued the firings were constitutional, based upon three governmental interests: (1) effective and efficient government; (2) the preservation of a healthy political process; and (3) the need for loyal employees to implement the policies of elected officials.³⁹ The Court employed an “exacting scrutiny” standard in considering the constitutionality of the firings,⁴⁰ and held that a partisan firing “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 the constitutionally protected rights.”⁴¹ Under this test, the Court rejected the defendants’ arguments regarding efficiency and the protection of political processes,⁴² but it found limited merit in the argument that political loyalty is essential “to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate.”⁴³ Notwithstanding the strength of this argument, the Court found it “inadequate to validate patronage wholesale” and held that “[l]imiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end.”⁴⁴ Furthermore, the Court held that government employers wishing to justify partisan dismissals based on this policymaking exception would bear the burden of proof in showing how the nature of the fired employee’s duties made the employee a policymaker and, therefore, subject to patronage dismissal.⁴⁵ Following *Elrod*, the constitutionality of the partisan

process division, a process server, a bailiff, and a fourth employee whose position was not described. *Id.* at 350-51.

37. *Id.* at 355.

38. *Id.* at 350.

39. *Id.* at 364-68. The defendants included: the newly elected Democratic Sheriff Richard J. Elrod, Chicago Mayor Richard J. Daley, the Democratic Organization of Cook County, Illinois, and the Democratic County Central Committee of Cook County, Illinois. *Id.* at 349-50.

40. *Id.* at 362.

41. *Id.* at 363.

42. *Id.* at 364, 369.

43. *Id.* at 367.

44. *Id.*

45. *Id.* at 368. Justice Brennan stated that in “determining whether an employee occupies a policymaking position, consideration should . . . be given to whether the employee acts as an advisor or formulates plans for the implementation of broad goals.” *Id.* However, Brennan acknowledged that “[n]o clear line can be drawn between policymaking and nonpolicymaking positions.” *Id.* at 367.

dismissal of a public employee turned on whether the employee was a policymaker. If so, the firing was constitutionally justified.⁴⁶

Four years after *Elrod* was decided, the Court refined its "policymaking test" in *Branti v. Finkel*.⁴⁷ In *Branti*, two Republican public defenders sued the Democratic public defender who allegedly was about to fire them based solely on their party membership.⁴⁸ The defendant argued that *Elrod* only forbade patronage dismissals in cases where the fired employee actually had been coerced into changing party affiliation or supporting the political party of the employer.⁴⁹ Concerning situations where an employee suffers partisan firing *sans* any effort by the employer to coerce the employee into renouncing his or her political affiliation, the defendant contended *Elrod* was silent.⁵⁰ In a five-to-three opinion delivered by Justice Stevens, the Court rejected the defendant's arguments and tightened the *Elrod* rule, holding that "the ultimate inquiry is not whether the label 'policymaker' . . . 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."⁵¹

B. Circuits' Application of *Elrod-Branti*

While the lower federal courts that have addressed patronage since *Elrod* and *Branti* have acknowledged the standards announced therein, their application of the standards has created a less-than-uniform legal landscape.⁵² The apparent clarity of the policymaking exception in *Elrod* and the "appropriate requirement"

46. See Eckersley, *supra* note 34, at 560.

47. 445 U.S. 507 (1980).

48. *Id.* at 508.

49. *Id.* at 516.

50. *Id.*

51. *Id.* at 523.

52. See *Upton v. Thompson*, 930 F.2d 1209, 1212 (7th Cir. 1991), *cert. denied*, 503 U.S. 906 (1992) (Following *Elrod* and *Branti*, circuit court opinions regarding patronage have been "conflicting and confusing."). Such uncertainty in the circuits' application of the *Elrod-Branti* scheme was predicted by Justice Powell in *Branti*: "The standard articulated by the Court is framed in vague and sweeping language certain to create vast uncertainty. Elected and appointed officials at all levels . . . no longer will know when political affiliation is an appropriate consideration in filling a position." *Branti v. Finkel*, 445 U.S. 507, 524 (1980) (Powell, J., dissenting). Similar misgivings concerning how employers would determine which government positions enjoy *Elrod-Branti* protection were expressed in a later case by Justice Scalia, who predicted that the test is "so general that for most positions it is impossible to know whether party affiliation is a permissible requirement until a court renders its decision." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 111 (1990) (Scalia, J., dissenting).

test of *Branti*⁵³ notwithstanding, the circuits have been left to fend for themselves in deciding *which* government positions are protected under *Elrod-Branti* and, more basically, in developing a uniform standard for making that determination.

The Ninth Circuit first applied the *Elrod-Branti* rule to a suit brought by a deputy sheriff in *Thomas v. Carpenter*.⁵⁴ Although the plaintiff-lieutenant sheriff in *Thomas* was not fired, he alleged that he was excluded from departmental decision-making processes because of his unsuccessful bid for election to his employer's job.⁵⁵ The circuit court reversed a dismissal of the deputy sheriff's claim by the district court because "[the defendant employer could] not show, based solely on the allegations of [the] complaint, that [the plaintiff's] political loyalty [was] essential to the effective performance of the tasks removed from his list of responsibilities."⁵⁶ In so ruling, the circuit court intimated that no *per se* rule existed in the Ninth Circuit for determining the policymaking status of deputy sheriffs; instead, the "critical inquiry is the job actually performed."⁵⁷

In *Fazio v. City and County of San Francisco*,⁵⁸ the Ninth Circuit outlined several factors to consider in determining whether political affiliation constitutionally can be considered in connection with governmental employment decisions.⁵⁹ The court looked to these factors and the actual duties performed by the plaintiff-employee in determining that an assistant district attorney legitimately could be subject to partisan dismissal.⁶⁰ Taken together, *Thomas* and *Fazio* indicate that the Ninth Circuit does not adhere to a "one size fits all" definition of "deputy sheriff" for the purpose of determining the deputy's policymaking status, but, instead, applies a multi-factor test to a specific employee's actual duties in light of statutory or judicial definitions of the employee's position.

53. *Branti*, 445 U.S. at 518.

54. 881 F.2d 828 (9th Cir. 1989), *cert. denied*, 494 U.S. 1028 (1990).

55. *Id.* at 829.

56. *Id.* at 832.

57. *DiRuzza v. County of Tehama*, 206 F.3d 1304, 1310 (9th Cir.), *cert. denied*, 121 S. Ct. 624 (2000). The holding in *Thomas* suggested the impropriety of ruling, as the district court did in *DiRuzza*, that the policymaking status of deputy sheriffs in California can be gleaned solely from a statutory provision that allows a sheriff to appoint his or her "deputies" when that job is defined to include positions ranging from undersheriff to jail custodian. See CAL. GOV'T CODE § 24101 (West 1988 & Supp. 2001).

58. 125 F.3d 1328 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998).

59. *Id.* at 1334. The list of factors included: "vague or broad responsibilities, relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders." *Id.* at 1334 n.5 (quoting *Hall v. Ford*, 856 F.2d 255, 262 (D.C. Cir. 1988)).

60. *Id.* at 1334.

Several circuits have employed an approach similar to the Ninth Circuit's "position-specific" analysis in determining the policymaking status of deputy sheriffs, even if their conclusions have not been uniform. The Fourth, Seventh, and Eleventh Circuits have applied a position-specific analysis in reaching the conclusion that deputy sheriffs *are* subject to patronage dismissal under *Elrod* and *Branti*.⁶¹ In *Jenkins v. Medford*,⁶² the Fourth Circuit upheld the firings of several North Carolina deputy sheriffs who had campaigned for the defendant-sheriff's predecessor.⁶³ In doing so, the court characterized its approach as a move away from "wholesale pronouncements,"⁶⁴ such as those it previously had enunciated in *Jones v. Dodson*—the court's first effort at applying *Elrod-Branti* to deputy sheriffs⁶⁵—in favor of "position-specific analyses."⁶⁶

In *Upton v. Thompson*,⁶⁷ the Seventh Circuit reversed a district court's denial of summary judgment for two Illinois sheriffs who claimed qualified immunity as a defense in a suit by their deputies for patronage termination.⁶⁸ In a manner favorable to the defendant-employers, the court interpreted two prior Seventh Circuit cases⁶⁹ that held that "nonpolicymaking officials were . . . subject to politically-based firing because they were vested with substantial discretionary authority in the implementation of the policy goals of elected officials."⁷⁰ The

61. See *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997), *cert. denied*, 522 U.S. 1090 (1998); *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), *cert. denied*, 503 U.S. 906 (1992); *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989).

62. 119 F.3d 1156 (4th Cir. 1997), *cert. denied*, 522 U.S. 1090 (1998).

63. *Id.* at 1164. The court based its determination that the plaintiffs-deputies were policymakers on its reading of a North Carolina statute that describes the deputy sheriff as holding "an office of special trust and confidence, acting in the name of and with powers coterminous with his principal, the elected sheriff." *Id.* at 1163; see also N.C. GEN. STAT. § 17E-1 (1996).

64. *Jenkins*, 119 F.3d at 1162.

65. The *Dodson* court held that "the duties of deputy sheriffs, no matter what the size of the office, or the specific position of power involved, . . . could [not] be found to involve policymaking." *Jones v. Dodson*, 726 F.2d 1329, 1338 (4th Cir. 1984).

66. *Jenkins*, 119 F.3d at 1162.

67. 930 F.2d 1209 (7th Cir. 1991), *cert. denied*, 503 U.S. 906 (1992).

68. *Id.* at 1218. In this consolidated appeal, the defendants-employers claimed qualified immunity from liability based on their contention that the law concerning patronage dismissals of deputy sheriffs was unsettled at the time of the deputies' termination. *Id.* at 1211.

69. See *Tomczak v. City of Chicago*, 765 F.2d 633 (7th Cir.), *cert. denied*, 474 U.S. 946 (1985); *Livas v. Petka*, 711 F.2d 798 (7th Cir. 1983).

70. *Upton*, 930 F.2d at 1215. Notably, the *Tomczak* court held that "*Elrod* and *Branti* require examination of the powers inherent in a given office, as opposed to the functions performed by a particular occupant of that office." *Tomczak*, 765 F.2d at 640 (emphasis added).

court held that deputy sheriffs “operate with a sufficient level of autonomy and discretionary authority to justify a sheriff’s use of political considerations when determining who will serve as deputies.”⁷¹

In *Terry v. Cook*,⁷² the Eleventh Circuit upheld the politically motivated firing of Alabama deputy sheriffs.⁷³ Citing case law that describes the relationship between sheriff and deputy as that of principal and agent,⁷⁴ the *Terry* court held that “[t]o mandate that a sheriff must accept the deputies that he finds in office simply because they belong to another political party even though he is totally responsible for all their acts is incredible, and beyond the bounds of common sense.”⁷⁵

The Third, Sixth, and Tenth Circuits have employed similar position-specific analyses while coming to the contrary conclusion that deputy sheriffs *are not* subject to patronage dismissal under the *Elrod-Branti* scheme.⁷⁶ In *Burns v. County of Cambria*,⁷⁷ the Third Circuit held that deputy sheriffs whose primary tasks included service of process, courtroom security, and transport of prisoners were not subject to partisan dismissal because political affiliation was not an appropriate prerequisite to employment for these positions.⁷⁸ The court was unpersuaded by the argument that “the need for loyalty and confidentiality alone

71. *Upton*, 930 F.2d at 1218. While the court cited no legislative or case authority for its description of the nature of deputy sheriffs’ duties, it analogized the actual duties of the plaintiffs to the level of autonomy and discretionary powers of municipal water department employees, as in *Tomczak*, and public prosecutors, as in *Livas*. *Id.* at 1215, 1218.

72. 866 F.2d 373 (11th Cir. 1989).

73. *Id.* at 377.

74. See *Taylor v. Gibson*, 529 F.2d 709, 716 (5th Cir. 1976); *Salter v. Tillman*, 420 F. Supp. 5, 8 (S.D. Ala. 1975); *Moseley v. Kennedy*, 17 So. 2d 536, 537 (Ala. 1944) (stating that a deputy sheriff is the “alter ego” of the sheriff); *Ramsey v. Strobach*, 52 Ala. 513, 515 (1875); *Perkins v. Hopkins*, 14 Ala. 536, 537 (1848) (noting a sheriff is civilly liable for actions performed by his or her deputy).

75. *Terry*, 866 F.2d at 377 (quoting *Whited v. Fields*, 581 F. Supp. 1444, 1456 (W.D. Va. 1984)). The court reversed the Rule 12(b)(6) dismissal of claims brought by a clerk, an investigator, a process server, a dispatcher, and a jailer, holding that “it has not been established that loyalty to an individual sheriff is an appropriate requirement for effective job performance for [these positions].” *Id.* at 377-78.

76. See *Hall v. Tollett*, 128 F.3d 418 (6th Cir. 1997); *Burns v. County of Cambria*, 971 F.2d 1015 (3d Cir. 1992), *cert. denied sub nom. Roberts v. Mutsko*, 506 U.S. 1081 (1993); *Dickeson v. Quarberg*, 844 F.2d 1435 (10th Cir. 1988).

77. 971 F.2d 1015 (3d Cir. 1992), *cert. denied sub nom. Roberts v. Mutsko*, 560 U.S. 1081 (1993).

78. *Id.* at 1022.

supports politically motivated dismissals independent of the tasks which the employee must perform."⁷⁹

Similarly, the Sixth Circuit, in *Hall v. Tollett*,⁸⁰ held that the defendant-sheriff "failed to show that political affiliation is 'an appropriate requirement for the effective performance'" of the position of deputy sheriff.⁸¹ The court made this finding based upon a painstaking description of the specific duties performed by the six plaintiff-deputy sheriffs,⁸² but it left open the possibility that "in future cases, defendants will show that the duties and responsibilities of a [particular] sheriff's deputy make political affiliation an appropriate requirement for employment in that position."⁸³

Finally, the Tenth Circuit, in *Dickeson v. Quarberg*,⁸⁴ refused to sanction the patronage dismissal of a head jailer and a sheriff's administrative assistant based upon their political relationship with a former sheriff.⁸⁵ In so ruling, the court stated that "the precise parameters of [the] competing interests" between an employee's free speech rights and an employer's interest in efficiency "depend on all the circumstances of a particular case."⁸⁶ The court went on to note that "any analysis must necessarily begin with the inherent powers of the office at issue. However, titles alone do not provide the answer. The critical question whether a position is one where [patronage is justified] can be answered best by analyzing the nature of the employee's duties and responsibilities."⁸⁷

The Eighth Circuit has not addressed the issue of deputy sheriffs' policymaking status relative to a claim of illegal patronage under the *Elrod-Branti* rule. Were the circuit court to face such a question, it would have circuit precedent in *Bauer v. Bosley*,⁸⁸ wherein the patronage firing of a staff legal assistant to a county circuit court in Missouri was upheld and a district court's ruling that the employee's First Amendment rights were violated was reversed.⁸⁹ The court rejected the argument of the plaintiff-employee that no policymaking duties were part of his job as actually performed, holding that the argument "fails to comprehend that the proper focus is on the 'powers inherent in a given office,

79. *Id.* at 1023.

80. 128 F.3d 418 (6th Cir. 1997).

81. *Id.* at 429 (quoting *Branti v. Finkel*, 445 U.S. 507, 518 (1980)).

82. *Id.* at 424-27.

83. *Id.* at 429.

84. 844 F.2d 1435 (10th Cir. 1988).

85. *Id.* at 1443-44.

86. *Id.* at 1440.

87. *Id.* at 1442.

88. 802 F.2d 1058 (8th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987).

89. *Id.* at 1064.

as opposed to the functions performed by a particular occupant of that office.”⁹⁰ It appears that the Eighth Circuit would be disinclined to adopt the approach of those circuits that utilize an employee-specific analysis of the policymaking status of deputy sheriffs under *Elrod-Branti*.⁹¹ More likely, the Eighth Circuit instead would look no further than the definition of the deputy’s position as provided by statute, ordinance, policy manual, or other official document.⁹²

IV. INSTANT DECISION

In *DiRuzza v. County of Tehama*, the Ninth Circuit addressed the claim by Sherol DiRuzza, a discharged California deputy sheriff, that her termination was an unconstitutional violation of her rights under *Elrod* and *Branti*.⁹³ The court first dealt with the threshold question “whether DiRuzza could be fired for her

90. *Id.* (quoting *Tomczak v. City of Chicago*, 765 F.2d 633, 640 (7th Cir.), *cert. denied*, 474 U.S. 946 (1985)).

91. The *Dickeson* court included the Eighth Circuit in a list of circuits that already have adopted an employee-specific approach to applying *Elrod-Branti*. See *Dickeson*, 844 F.2d at 1443. The *Dickeson* court based this characterization upon language in *Horton v. Taylor*, 767 F.2d 471, 477 (8th Cir. 1985) (“The *Branti* test is a functional one, focusing on the actual duties an employee performs.”). However, the *Horton* court made this statement in the context of discussing the differences between road graders and deputy sheriffs, not between an individual plaintiff-employee’s job description and the same employee’s actual duties. See *Horton*, 767 F.2d at 477.

92. Were the court to apply this approach to the claim of a Missouri deputy sheriff, the applicable definition of the position would be found in Missouri Revised Statutes Section 57.270. This Section states that “[e]very deputy sheriff shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff.” MO. REV. STAT. § 57.270 (2000). The only distinction made by Missouri statutes between one full-time deputy sheriff and another is found in Missouri Revised Statutes Section 57.015, a 2000 “definitions” provision that states that “[a]s used in this chapter [describing the duties and responsibilities of sheriffs and their departments] . . . [the] term [deputy sheriff] shall not include any deputy sheriff with the rank of lieutenant and above, or any chief deputies, under sheriffs and the command staff as defined by the sheriff’s department policy and procedure manual” MO. REV. STAT. § 57.015 (2000).

93. *DiRuzza v. County of Tehama*, 206 F.3d 1304 (9th Cir.), *cert. denied*, 121 S. Ct. 624 (2000). *DiRuzza* was a two-to-one decision, with Justice W. Fletcher delivering the opinion of the court and Justice O’Scannlain writing in dissent. *Id.* at 1306, 1305. While *Thomas v. Carpenter*, 881 F.2d 828, 829 (9th Cir. 1989), addressed the rights of a deputy sheriff in the Ninth Circuit under the *Elrod-Branti* test, the issue in that case is distinguishable from *DiRuzza* in that the plaintiff in *Thomas* was never discharged from his position. Nevertheless, *DiRuzza* is less a case of first impression for the Ninth Circuit than an extended application of a previously-announced approach.

political activity."⁹⁴ Citing *Elrod* and *Branti*, the court acknowledged the overarching prohibition against adverse treatment by a public employer of an employee for exercising his or her First Amendment rights.⁹⁵ The court then described the "narrow exception" carved out by the *Elrod* and *Branti* courts to First Amendment protection "in cases where the employee is a policymaker or confidential employee."⁹⁶

Turning to the district court's grant of summary judgment for the defendants, the circuit court referred to the three out-of-circuit cases relied upon by the district court in its holding that DiRuzza was a policymaker subject to partisan dismissal.⁹⁷ Acknowledging that it was "willing to assume *arguendo* that these [out-of-circuit] holdings are correct, based on the different nature of the job performed by deputy sheriffs in these circuits and these states," the circuit court, nevertheless, stated that it did "not believe that a *per se* rule concerning deputy sheriffs is appropriate in this circuit and, in particular, in California."⁹⁸

Citing a California statute that allows a sheriff to appoint his or her "deputies"⁹⁹ and an 1888 case defining all peace officers in a sheriff's office as sheriff's deputies,¹⁰⁰ the court noted that in California the title of "deputy" applies to positions ranging from "undersheriff" to "jail custodian."¹⁰¹ Given this lack of specificity in defining the position of deputy sheriff, the court stated that "[any] categorization based upon job title alone obscures rather than clarifies the nature of the duties actually performed and the constitutional rights at issue."¹⁰² The court characterized as "instructive"¹⁰³ the holding in *Board of County Commissioners v. Umbehr*,¹⁰⁴ which "rejected a simplified, label-based approach in a case involving First Amendment rights of government contractors."¹⁰⁵

94. *DiRuzza*, 206 F.3d at 1308. The court subsequently addressed the defendant-sheriff's argument for qualified immunity and the plaintiff's claim that she was retaliated against for exercising her First Amendment rights. *Id.* at 1313-15.

95. *Id.* at 1308.

96. *Id.* at 1308-09.

97. *Id.* at 1309.

98. *Id.*

99. CAL. GOV'T CODE § 24101 (West 1988 & Supp. 2001).

100. *See People v. Otto*, 18 P. 869 (Cal. 1888).

101. *DiRuzza*, 206 F.3d at 1309.

102. *Id.*

103. *Id.*

104. 518 U.S. 668 (1996).

105. *DiRuzza*, 206 F.3d at 1309. The Court in *Umbehr* held that a categorical rule denying protection to independent contractors "would leave First Amendment rights unduly dependent on whether state law labels a government service provider's contract as a contract of employment or a contract for services, a distinction which is at best a very poor proxy for the interests at stake." *Umbehr*, 518 U.S. at 679.

Analogizing *Umbehr* to the instant case, the court held that the “range of duties performed by deputy sheriffs in California” mitigated against a decision that deputy sheriffs are necessarily policymakers under an *Elrod-Branti* analysis.¹⁰⁶

The court rejected two arguments of the defendants—namely, that DiRuzza “occupied a policymaking position because she gave open political support to the incumbent sheriff,” and, alternatively, “that a deputy sheriff *may* act as a policymaker” and, therefore, is a policymaker.¹⁰⁷ Regarding the former argument, the court stated that a public employee cannot be a policymaker based on exercise of free speech rights alone.¹⁰⁸ The court acknowledged the truth of the latter argument but labeled it “beside the point” because the “actual, not the possible, duties of an individual employee determine whether political loyalty is appropriate for the effective performance of her job.”¹⁰⁹

Next, the court summarized *Thomas v. Carpenter*¹¹⁰ and *Fazio v. City and County of San Francisco*,¹¹¹ contending that the “clear import”¹¹² of *Thomas* was that the Ninth Circuit did not recognize a *per se* definition of the duties of a California deputy sheriff and that the importance of *Fazio* lay in its restatement¹¹³ of a multi-factor test for courts to apply to a given employee’s duties to determine his or her policymaking status.¹¹⁴ Applying the test from *Fazio* to the duties actually performed by DiRuzza, the court held that material facts were in dispute, rendering inappropriate the district court’s grant of summary judgment for the defendants.¹¹⁵ The court remanded the case to the district court for a determination of DiRuzza’s policymaking status based upon an application of the factors listed in *Fazio*.¹¹⁶

106. *DiRuzza*, 206 F.3d at 1309.

107. *Id.* at 1310 (emphasis in original).

108. *Id.* The court stated that to rule otherwise would be to hold that “the very act of engaging in political debate would result in the forfeiture of an employee’s First Amendment rights.” *Id.*

109. *Id.*

110. 881 F.2d 828 (9th Cir. 1989).

111. 125 F.3d 1328 (9th Cir. 1997).

112. *DiRuzza*, 206 F.3d at 1310.

113. The test outlined in *Fazio* was first enunciated in *Hall v. Ford*, 856 F.2d 255, 262 (D.C. Cir. 1988). See *supra* note 59 for the *Fazio* test.

114. *DiRuzza*, 206 F.3d at 1310.

115. *Id.* at 1310-11. The court suggested that, on the record before it, “there is little to support a conclusion that DiRuzza is a policymaker.” *Id.* at 1311.

116. *Id.* The court also held that the lack of clarity in the record concerning whether DiRuzza was a policymaker did not support the defendants’ claim of qualified immunity because the law concerning how a public employee’s policymaking status should be determined was “clearly established” at the time of DiRuzza’s discharge. *Id.* at 1313-14. The court declined to address the undecided issue of the defendants’ alleged retaliation

V. COMMENT

Twenty-four years following the decision in *Elrod*, and twenty years after *Branti*, it remains far from clear which public positions are constitutionally protected from patronage dismissals and, more fundamentally, how the Supreme Court intended the circuits to make such determinations. The prescience of Justices Powell and Scalia in predicting the current state of confusion¹¹⁷ seems apparent, given the division among the circuits concerning the proper application of *Elrod-Branti*. While it may be understandable that the disparity between jurisdictions' definition of a governmental position would lead to equally-varied circuit court decisions applying *Elrod-Branti*, it is disconcerting that there appears to be no uniformity in the methodology employed by the lower courts in reaching these decisions. While most circuits purport to adopt a position-specific analysis of policymaker status,¹¹⁸ there is an apparent and critical difference between the Ninth, Sixth, and Tenth Circuits' understanding of "position specific" (looking to the individual employee's actual duties as performed) and the interpretation of that term as adopted by the Fourth, Seventh, and Eleventh Circuits (applying *Elrod-Branti* to the fired employee's pre-termination written job description).

The split among circuits on the proper methodology in applying *Elrod-Branti* makes predicting how the Eighth Circuit would address a claim similar to DiRuzza's problematic. There appears, however, to be a bent in the Eighth Circuit toward the "job description" approach taken in the Fourth, Seventh, and Eleventh Circuits, if it is assumed the court would follow its own lead as announced in *Bauer*.¹¹⁹

Adopting such an approach would be an unfortunate application of *Elrod-Branti*. The holding in *DiRuzza* represents a fair approach to determining the validity of claims brought by individual employees in that it refuses to hang the fortunes of an individual plaintiff on the clarity (or lack thereof) with which a legislative or administrative body defines the employee's duties. While the definition of "deputy sheriff" as codified by a particular statute or ordinance may well be instructive, it is clear from the cases discussed herein that "all deputies are

against DiRuzza for exercising her First Amendment rights because material facts were at issue that made such a determination premature. *Id.* at 1314.

117. See *supra* note 52.

118. See *supra* notes 57, 61, and 76, and accompanying text.

119. See *supra* note 91 and accompanying text. Even if the court adopted this approach, Missouri's statutory definition of "deputy sheriff" may be less than helpful. See MO. REV. STAT. §§ 57.015, 57.270 (2000). The court likely would be forced to perform some level of fact-specific analysis to determine the duties of a particular plaintiff-deputy sheriff. For Missouri definitions, see *supra* note 92.

not created equal.¹²⁰ *Elrod-Branti* is better served by a case-by-case analysis of a plaintiff's actual performance under a *Fazio*-type test than by an artificial and inequitable attempt to pigeonhole actual employment duties into often antiquated and unrealistic job descriptions.

What seems more apparent still is that the disparity between the circuits' treatment and application of *Elrod-Branti* cries out for resolution by the Supreme Court. What appears on the surface to be an artificial circuit-split based on jurisdictions' different definitions of governmental jobs is, in fact, a more serious state of confusion as to how to apply *Elrod-Branti* in the real world. The Court should follow the lead of decisions such as *DiRuzza* in resolving the confusion created by what is otherwise a clear and fair treatment of patronage in *Elrod* and *Branti*.

VI. CONCLUSION

Notwithstanding a centuries-old assumption that patronage is part and parcel of the American political landscape, the Supreme Court, in *Elrod* and *Branti*, announced a well-reasoned and sensible restriction on the practice of patronage termination.¹²¹ However, what is a fair and balanced rule in theory has resulted in inconsistent and, often, unfair results in the lower courts.¹²² In *DiRuzza*, the Ninth Circuit added its voice to a small-but-growing chorus calling for an employee-specific standard for adjudicating the individual claims raised by public employees fired for no other reason than their political affiliation. The Supreme Court and those circuits that apply a more inflexible standard would do well to join that chorus.

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120. In part, the disparity between government employees' roles in different jurisdictions is a function of "realistic differences among segments of American society." Johnson, *supra* note 5, at 511. For example, the urban sheriff's deputy is less likely to be involved in policymaking activities than is a deputy in a rural sheriff's department. *Id.* To treat both employees equally under an *Elrod-Branti* analysis would be inconsistent and unfair.

121. See *supra* notes 35, 51, and accompanying text.

122. See *supra* note 52 and accompanying text.