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Office Politics: Hiring and Firing Government Lawyers

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In September of 2009, the U.S. Department of Justice (DOJ) announced that it would not prosecute former DOJ Civil Rights Division official Bradley Schlozman for alleged false statements made during his congressional testimony about personnel actions at DOJ.¹ As many government lawyers will remember, a July 2, 2008, report of the DOJ Office of Professional Responsibility and Office of the Inspector General (hereinafter, the IG's report) found that Schlozman had violated the Civil Service Reform Act when he "considered political and ideological affiliations in hiring career attorneys and other personnel actions affecting career attorneys in the Civil Rights Division."²

Division, I witnessed firsthand beleaguered career lawyers struggling to enforce the nation's civil rights laws while at the same time enduring offensive, morale-damaging labels. Career attorneys were deemed "disloyal," "not to be trusted" and not "on the team" while others were deemed "real Americans" or "right-thinking Americans" based on real or assumed partisan leanings.⁶

Such barefaced statements are probably rare, but unfortunately a more subtle use of political considerations is not unheard of among lawyers at all levels of government. Often after the transition to a new administration, government lawyers wonder if their new boss will be overtly political or if they will be

federal government employees have strictly prescribed limits on partisan political activity.⁸ The Office of Attorney Recruitment and Management, responsible for career attorney hiring for DOJ, specifically states on its website that discrimination in hiring based on politics is prohibited.⁹ Beyond DOJ policies, the Civil Service Reform Act (CSRA) states that career attorneys should be hired based on ability, skill and knowledge, not political affiliation.¹⁰ Career attorneys often possess years, and sometimes decades of institutional memory. They are arguably vital to smooth transitions from one administration to the next.

By contrast, political appointees generally promote the adminis-

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The IG's report found that Schlozman declined a lunch invitation with the assistant attorney general for civil rights, explaining in an email, "Unfortunately I have an interview at 1 with some lefty who we'll never hire but I'm extending a courtesy interview as a favor."³ In another email, Schlozman wrote that a Criminal Section deputy chief "has recommended several other commies for permanent positions in [the section]. [The Criminal Section chief] probably would concur with his recommendations. But as long as I'm here, adherents of Mao's little red book need not apply."⁴ And Schlozman wrote in a July 15, 2003, email, "I too get to work with mold spores, but here in Civil Rights, we call them Voting Section attorneys." Continuing the exchange the next day, he wrote, "My tentative plans are to gerrymander all of these crazy libs right out of the section."⁵

As a former Deputy Chief of the Department of Justice Civil Rights

transferred or fired. Most government lawyers inherently understand that while consideration of partisanship is appropriate when hiring for political positions, it is entirely inappropriate for career positions.

The experiences of lawyers in the Civil Rights Division should serve as a powerful lesson to governmental agencies across the country about when it is permissible to consider political patronage for employment purposes.

Distinguishing Career and Political Appointees in the Federal Government

The Code of Federal Regulations defines *career positions* as those "which are not of a confidential or policy-determining character."⁷ Career attorneys serve regardless of political affiliation and are generally perceived as nonpartisan. Their obligation is to the public; they have no duty to espouse loyalty to a political group or ideology. Indeed,

tration's policies and develop an enforcement agenda. They hold "positions which are policy-determining or which involve a close and confidential working relationship with the head of an agency or other key appointed officials."¹¹ Courts have defined *political affiliation* as "commonality of political purpose, partisan activity, and political support."¹² When hiring for a political position, it is acceptable for an employer to inquire about a potential employee's political affiliation. However, the Code of Federal Regulations and federal law specifically prohibit this type of inquiry for career positions.¹³

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Balanced Hiring

Schlozman participated in the hiring of 99 of the 112 lawyers hired during his tenure in the Civil Rights Division. Only 13 lawyers were hired in the division without Schlozman's involvement during his tenure. Virtually all of the lawyers (97 percent) hired by Schlozman whose political and ideological affiliations were evident in the hiring process were Republican or conservative (63 of 65). Schlozman hired only two lawyers who had Democratic or liberal affiliations. By contrast, when Schlozman was not involved in the hiring process, the results were more balanced: four Republican or conservative lawyers and three Democratic or liberal lawyers were hired.*

*U.S. Dep't of Justice, Office of Prof'l Responsibility & Office of the Inspector Gen., An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division 33 (2008), available at www.usdoj.gov/oig/special/s0901/final.pdf.

Politics and Employment at the State and Local Levels

The Supreme Court has clarified the law regarding politically motivated employment decisions at the state and local government level. *Elrod v. Burns* and *Branti v. Finkel* are the two most notable cases on politically motivated dismissals. In *Elrod v. Burns*,¹⁴ non-civil service employees of the Cook County, Illinois, sheriff's office brought an action alleging that they were fired solely because they were not affiliated with the new sheriff's political party. The Court held that public employees are protected against politically motivated dismissals under the First and Fourteenth Amendments unless they are policymakers. The Court characterized policymakers as employees with significant responsibility or those who act as advisors. The sheriff's office employees were not policymakers and were thereby protected by the First Amendment.

In *Branti v. Finkel*,¹⁵ two Rockland County, New York, assistant public defenders brought suit to enjoin the

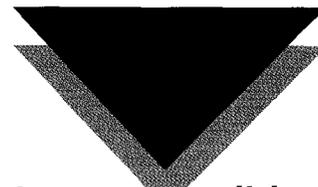
newly appointed public defender from terminating them solely because of their political affiliation. De-emphasizing the *Elrod* policymaker exception, the Court stated, "The issue is not whether the label 'policymaker' or 'confidential' fits the particular public office in question, but rather whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the office."¹⁶ Finding that the responsibility of assistant public defenders is to their clients and that political affiliation does not affect office performance, the Court held that their employment was protected under the First and Fourteenth Amendments and granted injunctive relief.

In *Rutan v. Republican Party of Illinois*,¹⁷ the Court extended the rule of *Elrod* and *Branti* to politically motivated promotions, transfers, and hiring and rehiring decisions. In *Rutan*, Illinois public employees challenged the governor's use of political considerations in employment decisions.¹⁸ The Court stated that "conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so."¹⁹ Finding no such government interest in this case, the Court held that hiring, promotions, rehiring and transfers based on political affiliation or support are an impermissible infringement on public employees' First Amendment rights.

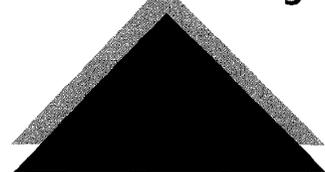
A recent Second Circuit case provides additional illumination. In *Almonte v. City of Long Beach*,²⁰ former city employees affiliated with the Democratic Party brought an action under 42 U.S.C. § 1983 against the city, city manager, and Republican Party-affiliated members of the city council, alleging that the decision to eliminate their positions violated free speech and due process and constituted a politically motivated conspiracy in violation of Sections 1985 and 1986. The court of appeals developed a list of factors to consider when determining whether an employee may constitutionally be

discharged on the basis of political affiliation. These include whether the employee

(1) is exempt from civil service protection, (2) has some technical competence or expertise, (3) controls others, (4) is authorized to speak in the name of policymakers, (5) is perceived as a policymaker by the public, (6) influences government programs, (7) has contact with elected officials, and



Improper political hiring and firing not only affects the individual employee but also greatly impacts the public's confidence in nonpartisan enforcement of key laws that affect its safety and well-being.



(8) is responsive to partisan politics and political leaders.²¹

While the list is not exhaustive and no single factor is determinative, these indicators are helpful in assessing whether a politically motivated employment decision is appropriate or permissible.

Impact of Political Hiring and Firing

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Sampling of Statutes that Protect Career Attorneys

The *Civil Service Reform Act* (CSRA) prohibits federal agencies from discriminating in hiring for career positions based on political affiliation. For example, the CSRA states that federal agencies must adopt hiring practices for career employees in which "selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity." 5 U.S.C. § 2301(b)(1).

5 U.S.C. § 2301(b)(2). All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

5 C.F.R. § 213.3301(a). Upon specific authorization by OPM, agencies may make appointments under this section to positions which are policy-determining or which involve a close and confidential working relationship with the head of an agency or other key appointed officials. Positions filled under this authority are excepted from the competitive service and constitute Schedule C. Each position will be assigned a number from § 213.3302 to § 213.3999, or other appropriate number, to be used by the agency in recording appointments made under that authorization.

28 C.F.R. § 42.1(a). It is the policy of the Department of Justice to seek to eliminate discrimination on the basis of race, color, religion, sex, sexual orientation, national origin, marital status, political affiliation, age, or physical or mental handicap in employment within the Department and to assure equal employment opportunity for all employees and applicants for employment.

law review article, *Lessons Learned: Voting Rights and the Bush Administration*, Professor Pam Karlan argues that

[t]he lessons we can learn from what went wrong during the Bush years are both substantive and procedural. On the substantive front, we saw the specter of fraud, rather than the risk of exclusion, come to dominate the debate over democratic integrity. ... On the procedural front, we saw an administration transform the Department of Justice, and particularly the Civil Rights Division's Voting Section, from a nonpartisan protector of voting rights into a political actor.²²

While policy decisions may legitimately dictate where each administration places its enforcement

emphasis, it can be argued that another purpose of nonpartisan career attorneys is to temper large shifts in emphasis so that there is a more even level of enforcement.

The use of political affiliation as a litmus test for employment and the subsequent disintegration of employee morale can also lead to a mass exodus of experienced lawyers. This happened in the Civil Rights Division as a large number of employees were transferred or resigned. Recently, Attorney General Eric Holder said that the division is "getting back to doing what it has traditionally done. But it's really only a start. I think the wounds that were inflicted on this division were deep, and it will take some time for them to fully heal."²³ ■

Endnotes

1. Letter from Ronald Welch, Assistant U.S. Attorney Gen., to Charles E. Schumer, U.S. Senator (Sept. 11, 2009), available at www.talkingpointsmemo.com/images/docpage-doj-schumer1.jpg.

2. U.S. DEP'T OF JUSTICE OFFICE OF PROF'L RESPONSIBILITY & OFFICE OF THE INSPECTOR GEN., AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING AND OTHER IMPROPER PERSONNEL ACTIONS IN THE CIVIL RIGHTS DIVISION 64 (2008), available at www.usdoj.gov/oig/special/s0901/final.pdf.

3. *Id.* at 24.

4. *Id.*

5. *Id.* at 20–21 n.13.

6. *Id.* at 21.

7. 5 C.F.R. § 213.3101 (1997). The Office of Personnel Management (OPM) categorizes career positions under Schedule A. See also 5 C.F.R. § 213.3102(d). OPM classifies lawyers as civil service employees.

8. Hatch Act, 5 U.S.C. §§ 7321–7326 (1993). This act prescribes the level of acceptable partisan political activity for government employees.

9. Department of Justice, Office of Attorney Recruitment and Management, www.usdoj.gov/oarm/attvacancies.html (last visited Oct. 2, 2009). "The U.S. Department of Justice is an Equal Opportunity/Reasonable Accommodation Employer. Except where otherwise provided by law, there will be no discrimination because of color, race, religion, national origin, *politics*, marital status, disability, age, sex, sexual orientation, status as a parent, membership or non-membership in an employee organization, or on the basis of personal favoritism." (emphasis added).

10. 5 U.S.C. § 2301(b) (2009).

11. 5 C.F.R. § 213.3301. See sidebar on p. 9 for full text.

12. See, e.g., *Curinga v. City of Clairton*, 357 F.3d 305, 311 (3d Cir. 2004).

13. 28 C.F.R. § 42.1(a) (1996). See sidebar on p. 9 for full text.

14. 427 U.S. 347 (1976).

15. 445 U.S. 507 (1980).

16. *Id.* at 518.

17. 497 U.S. 62 (1990).

18. *Id.* The governor issued an executive order instituting a hiring freeze. This prohibited state officials from making employment decisions without the governor's "express permission."

19. *Id.* at 78.

20. 478 F.3d 100 (2d Cir. 2007).

21. *Id.* at 109–10.

22. Professor Karlan argues that the political hires and the political agenda harmed the administration of key civil rights statutes and made the otherwise apolitical office into a "political actor." See Pam Karlan, *Lessons Learned: Voting Rights and the Bush Administration*, 4 DUKE J. CONST. L. & PUB. POL'Y 17, 18 (2009).

23. Charlie Savage, *Justice Department to Recharge Civil Rights Enforcement*, N.Y. TIMES, Aug. 31, 2009, available at www.nytimes.com/2009/09/01/us/politics/01rights.html.

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