A SPOILED SPOILS SYSTEM: PUERTO RICO'S EPIDEMIC OF POLITICAL DISCRIMINATION AND THE FEDERAL COURTS

ARTICLE

ALEXANDRA SABATER BAERGA* & JEAN R. SANTIAGO CRUZ**

> We have had a long and lamentable history of political discrimination at the local level in Puerto Rico. Every party that has held power at that level has sinned in that respect. It is an evil rooted in our collective behavior that is contrary to the fundamental values of our legal system, namely, that human dignity is inviolable, and that all persons are equal under the law. . . . [This] vice not only undermines and discredits our vocation as a democratic people; but it also ruthlessly imposes a grave burden on many

* Third-year student at University of Puerto Rico School of Law and Staff Writer of the University of Puerto Rico Law Review.

** Third-year student at University of Puerto Rico School of Law and Member of the University of Puerto Rico Law Review.

> breadwinners, who find themselves devoid of what is frequently their only means of providing for their families.[1]

INTRODUCTION

POLITICAL DISCRIMINATION HAS A PERVASIVE HISTORY IN PUERTO RICO. IN June of 1987, an ex-agent of the Puerto Rico Police Department -and participant in the Cerro Maravilla Murders-[2] publicly declared that the Intelligence Division of the Police Department kept files (*carpetas*) on many citizens on the basis of their political affiliation.[3] This statement resulted in a flurry of legislative investigations that uncovered a decades-old,[4] ongoing, systematic effort to investigate and keep track of citizens affiliated to nationalist and socialist political parties.[5] The practice was thereafter declared unconstitutional by the Supreme Court of Puerto Rico in *Noriega v. Gobernador*, where Justice Antonio Negrón García, in a separate opinion, stated that "for decades the State . . . has silently acted at the margins of the Constitution"[6] and that the practice of keeping files on citizens because of the political affiliations "preserve[s] an abusive and humiliating stigma that threaten[s] the dignity, privacy, free expression, and free association of thousands of citizens."[7]

The public employees of Puerto Rico's central government, state-owned corporations, and municipalities, are no strangers to what Justice Negrón García described in his opinion. Decades before these revelations, and still decades after to the present time, the maintenance of a position in public employment has often been determined by way of political affiliation. During the uninterrupted twenty-eight years of one-party rule under the Popular Democratic Party (PDP), employees were expected to materially demonstrate their loyalty to the party. And after

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1 Aponte Burgos v. Aponte Silva, 154 DPR 117, 134 (2001) (translation provided by authors).

2 Mireya Navarro, *Puerto Rico Gripped by its Watergate*, N.Y. TIMES (Jan. 30, 1992),

http://www.nytimes.com/1992/01/30/us/puerto-rico-gripped-by-its-watergate.html?pagewanted=all (last visited May 1, 2016).

3 COMISIÓN DE DERECHOS CIVILES DE PUERTO RICO, DISCRIMEN Y PERSECUCIÓN POR RAZONES POLÍTICAS: LA PRÁCTICA GUBERNAMENTAL DE MANTENER LISTAS, FICHEROS Y EXPEDIENTES DE CIUDADANOS POR RAZÓN DE SU IDEOLOGÍA POLÍTICA i (1989).

4 While the investigation shone a public light on these practices, the Puerto Rico Civil Rights Commission had denounced the practice as far back as 1970. *See* COMISIÓN DE DERECHOS CIVILES DE PUERTO RICO, LA VIGILANCIA E INVESTIGACIÓN POLICÍACA Y LOS DERECHOS CIVILES 46-47 (1970).

5 Representative David Noriega of the Puerto Rican Independence Party presented Information Request No. 167 before the House of Representatives to require the Puerto Rico Police Department to turn over all files of persecuted persons considered subversives by the Intelligence Division. COMISIÓN DE DERECHOS CIVILES DE PUERTO RICO, *supra* note 3.

6 Noriega v. Gobernador, 122 DPR 650, 695 (1988) (Negrón García, J., concurring) (translation provided by authors).

7 *Id.* at 695-96 (translation provided by authors).

the end of the PDP's dominance in the 1968 elections,[8] every election cycle has brought with it a string of politically motivated dismissals both at the state and local level. Public servants in Puerto Rico are thus subject to the ever-changing winds of electoral politics, undermining the principle of merit, and destabilizing the public administration of the Commonwealth.

The economic effect wrought by this nefarious tradition is staggering. Both the Court of Appeals for the First Circuit and Supreme Court of Puerto Rico have felt the need to remark on the costs brought on by politically discriminatory dismissals.[9] In a 1993 study, the Puerto Rico Civil Rights Commission estimated the total cost of political discrimination lawsuits over a five year period to be over 100 million dollars.[10] Another study identified four municipalities that had to take out loans with the Government Development Bank for Puerto Rico and the Treasury Department to be able to pay outstanding claims.[11] Municipalities alone paid more than thirty-nine million dollars in settlements and jury awards between 2000 and 2008,[12] and this does not take into account litigation costs like legal fees, or employer contributions to the state retirement system that must be paid if the employee is reinstated. As the introductory quotation to this article suggests, however, the most severely hit may be the dismissed employees. As of April, 2016, public sector employment as a share of total employment equaled 25.76%,[13] and, as such, the government is the largest single employer in the island. In an economy where less than 40% of the working age population is employed and which suffers from an 11.9% unemployment rate,[14] losing a government job can be a devastating blow for which there is no readily available replacement.

The scale of this problem is made evident in the federal court system where, in comparative terms, the number of political discrimination cases hailing from

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8 *See* JOSÉ TRÍAS MONGE, LAS PENAS DE LA COLONIA MÁS ANTIGUA DEL MUNDO 166 (1999).

9 The First Circuit sustained that "[t]he practice is so pervasive that jury awards in cases of political discrimination threaten to bankrupt local governments in Puerto Rico." Sánchez-López v. Fuentes-Pujols, 375 F.3d 121, 126 (1st Cir. 2004) (citing Acevedo-García v. Vera-Monroig, 368 F.3d 49, 55 n.7 (1st Cir. 2004) ("According to the Town, the judgment in this case exceeds its entire annual budget.")). On the other hand, Puerto Rican Supreme Court stated that "[u]ltimately, the real victim of illegal, politically discriminatory actions is the citizenry in general, regardless of their political creed, because compliance with these sentences produces a substantial erosion and diversion of public funds in the detriment of essential services." Olivieri Morales v. Pierluisi, 113 DPR 790, 792 (1983) (translation provided by authors).

10 COMISIÓN DE DERECHOS CIVILES DE PUERTO RICO, INFORME SOBRE DISCRIMEN POLÍTICO EN EL EMPLEO PÚBLICO EN PUERTO RICO 34 (1993).

11 The four municipalities in question were Florida, Humacao, Luquillo, and Adjuntas. Yolanda Cordero Nieves, *El discrimen político en el empleo público*, *in* PUERTO RICO Y LOS DERECHOS HUMANOS: UNA INTERSECCIÓN PLURAL 363 (José J. Colón Morera & Idsa E. Alegría Ortega eds., 2012).

12 *Id.* at 362-63.

13 Press Release, Bureau of Labor Statistics Regional and State Employment and Unemployment - April 2016 (May 20, 2016), http://www.bls.gov/news.release/pdf/laus.pdf.

14 ANNE O. KRUEGER *ET AL.*, PUERTO RICO: A WAY FORWARD 6 (2015), http://www.bgfpr.com/documents/puertoricoawayforward.pdf.; U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, ECONOMY AT A GLANCE: PUERTO RICO, http://www.bls.gov/eag/eag.pr.htm#eag_pr.f.5.

the District Court for the District of Puerto Rico far outnumbers political discrimination cases from other federal districts. A tangential effect of the disproportionate representation of Puerto Rico in these cases has been the influence the First Circuit has exerted over other circuits in the development of public employment political discrimination jurisprudence.[15] Although Puerto Rico's Constitution and its laws establish specific protections against political discrimination,[16] Puerto Rican plaintiffs flood federal courts year after year in hope of finding a perceptive, and impartial, forum for their claims. The purpose of this article, then, is to explore the phenomenon of political discrimination in Puerto Rico in its relationship to federal law and the federal courts, and to use that relationship as a prism through which we can assess the gravity of the phenomenon and its ramifications on Puerto Rico and the broader federal system.

I. THE HISTORICAL BACKGROUND

A. The United States

From the inception of the United States in 1789, Congress fervently debated the discretion held by the Executive in dismissing federal employees.[17] The result of that debate was termed the Decision of 1789, which gave virtually unfettered authority to the President's removal powers.[18] John Adams, the first president to be affiliated to a political party, dismissed some officials for purely political reasons.[19] Thomas Jefferson was the first to flex the muscle of this discretionary power; the President removed 109 of past 433 presidential appointees.[20] However, it was President Andrew Jackson, elected in 1828, who turned this discretion into a philosophy.[21] This occurred partly due to the distrust and dislike of the patrician

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15 The First Circuit "decided many of the early patronage employment cases" precisely because of Puerto Rico's pervasive political discrimination practices, since "[m]any of the cases arose out of the change in administrations after the 1984 gubernatorial election in Puerto Rico." Susan Lorde Martin, *Patronage Employment: Limiting Litigation*, 49 SAN DIEGO L. REV. 669, 681 n.87 (2012); *see also* Vázquez Ríos v. Hernández Colón, 819 F.2d 319, 320 (1st Cir. 1987) ("There has been a steady drumbeat of civil actions involving claimed politically motivated discharges arising out of the change in administration following Puerto Rico's 1984 gubernatorial election. . . . Personnel realignments followed fast and furious on the winds of electoral fortune.").

16 *See, e.g.*, P.R. CONST. art. II, § 1; Human Resources Administration System Act, P.R. LAWS ANN. tit. 3, §§ 1461-1462 (2011).

17 Gerald E. Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PA. L. REV. 942, 947-48 (1976).

18 *Id.* at 949.

19 Note, *Developments in the Law: Public Employment*, 97 HARV. L. REV. 1611, 1623 (1984).

20 Martin H. Brinkley, *Despoiling the Spoils: Rutan v. Republican Party of Illinois*, 60 N.C. L. REV. 719, 728 n.72 (1991). Forty of these dismissals were part of John Adams' "midnight" appointments, which represented "a notorious early example of the use of patronage as a tool to strengthen political parties." *Id.* at 727 (footnote omitted).

21 Frug, *supra* note 17, at 951.

class that occupied the select federal offices then in existence,[22] and partly due to the need to reward his supporters with government jobs.[23] Jackson articulated a vision for the government where the will of the people, through elections, would be brought to bear on the cadre of federal employees holding office.[24] This came to be known as the 'Spoils System', and although Jackson's own efforts to take advantage of the spoils have been exaggerated,[25] it was implemented liberally thereafter, as "[t]he alternation of Whig and Democratic administrations between 1841 and 1861 led to increasingly extreme quadrennial political purges of the civil service."[26] President Abraham Lincoln spearheaded perhaps the most egregious purge after winning the 1860 elections. He dismissed 1,457 of the 1,639 federal officers appointed by previous presidents, a figure approximating nine tenths of all federal officers.[27]

Such excesses created concerns about government inefficiency and drove calls for civil service reform in subsequent decades.[28] The result was the enactment of the Pendleton Act of 1883.[29] The Pendleton Act was the first attempt to professionalize the civil service through the requirement of competitive examinations to obtain government positions.[30] The reform was modest in its approach and scope. It established a bipartisan Civil Service Commission which would establish the rules of the civil service and prepare examinations, and created a specific class of federal employees who would be chosen through this merit system.[31] Most notable for its absence was substantial regulation of the President's power to dismiss federal employees; the Act mainly regulated entry into federal service, not removal from it.[32]

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22 *See* Note, *supra* note 19, at 1624 ("Jackson's fervent appeals to the popular will . . . struck at the heart of the patrician vision of public service.") (footnote omitted).

23 Louis Lawrence Boyle, *Reforming Civil Service Reform: Should the Federal Government Continue to Regulate State and Local Government Employees?*, 7 J. L. & POL. 243, 247 (1991).

24 At his First Inaugural Address of March 4, 1829, Jackson stated:

> [T]he task of reform . . . will require particularly the correction of those abuses that have brought the patronage of the Federal Government into conflict with the freedom of elections, and the counteraction of those causes which have disturbed the rightful course of appointment and have placed or continued power in unfaithful or incompetent hands.

First Inaugural Address of Andrew Jackson, THE AVALON PROJECT - YALE LAW SCHOOL, LILLIAN GOLDMAN LAW LIBRARY, http://avalon.law.yale.edu/19th_century/jackson1.asp (last visited May 1, 2016).

25 Frug, *supra* note 17, at 951; Brinkley, *supra* note 22, at 728.

26 Note, *supra* note 19, at 1625-26 (footnote omitted).

27 PAUL P. VAN RIPER, HISTORY OF THE UNITED STATES CIVIL SERVICE 43 (1958).

28 Note, *supra* note 19, at 1626-27.

29 Civil Service (Pendleton) Act of 1883, ch. 27, 22 Stat. 403, 404 (1883).

30 Brinkley, *supra* note 20, at 729.

31 Note, *supra* note 19, at 1628.

32 The logic was that if there was an impartial way to recruit federal employees there would be no need to later remove them for partisan reasons. *See* DAVID H. ROSENBLOOM, FEDERAL SERVICE AND THE CONSTITUTION: THE DEVELOPMENT OF THE PUBLIC EMPLOYMENT RELATIONSHIP 87-88 (1971).

But even then, the lax legislation on this area betrayed a concern for political discrimination in the federal service; the only regulation made with respect to this power was a prohibition on the dismissal of employees classified within the merit system for failing to contribute to a political fund or to perform political service.[33] Only about ten percent of federal employees were covered under the merit system and given tenure at first,[34] but since the Act gave the President discretion to expand this category of "protected employees", it had grown to forty percent by the end of the nineteenth century,[35] and to ninety percent by 1970.[36]

B. Puerto Rico

Originally, Puerto Rico's relationship with the practice of political discrimination was intrinsically tied to its status as a colonial outpost. Government officers were recruited almost exclusively from the population of *peninsulares* living in the island, Spanish-born residents of Puerto Rico who bore allegiance to the Crown.[37] This arrangement was to the detriment of the *criollos*, the Puerto Rican-born residents who were most represented in the autonomist political parties that sought greater freedoms and representation from Spain.[38] This preference for loyalists to the imperial power did not change with the transition to American rule after the Spanish-American War of 1898; rather, the resulting political alignment that pitted Puerto Ricans between the *Republicanos*, who favored assimilation into the United States, and the *Federales*, who yet favored autonomism and independence, dictated the hiring practices of the era. The American military leaders that ruled the island until civilian government was restored in 1900,[39] immediately recognized the *Republicanos* as loyalists they could trust and rewarded them with positions in the civil service and the judiciary.[40] With the advent of civilian rule under the Foraker Act, the latency of political discrimination took a turn for the worse; the powers of municipalities, the traditional bastions of political power for the *Federales*, were greatly reduced under the Act. As a result, many employees who were affiliated with the *Federales* were dismissed once the insular government assumed traditionally municipal functions.[41]

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33 *See* Arnett v. Kennedy, 416 U.S. 134, 149 (1974); Civil Service (Pendleton) Act of 1883. Subsequently, the Lloyd-LaFollette Act of 1912 prohibited removal of persons in the classified civil service without just cause. Postal Service Appropriation (Lloyd-LaFollette) Act of 1912, ch. 389, 37 Stat. 555 (1912).

34 Note, *supra* note 19, at 1628.

35 Boyle, *supra* note 23, at 250, n.37.

36 COMISIÓN DE DERECHOS CIVILES DE PUERTO RICO, *supra* note 10, at 46.

37 *Id.* at 59.

38 *Id.*

39 *See* Foraker Act, Pub. L. No. 56-191, 31 Stat. 77 (1900).

40 COMISIÓN DE DERECHOS CIVILES DE PUERTO RICO, *supra* note 10, at 61.

41 *Id.* at 62.

The humble attempt at the elaboration of a modern civil service in Puerto Rico occurred in the aftermath of the 1904 territorial elections.[42] The *Unionistas*, ideological successors of the *Federales*, won the elections and set out to procure jobs for their followers that had long been occupied exclusively by American administrators and *Republicanos*.[43] The result was the Civil Service Act of 1907, which created a Civil Service Commission and divided the civil service between classified employees and non-classified employees, where the classified employees had to be selected on the basis of merit.[44] The scope of the classification, however, was quite narrow, insofar as it excluded from its purview professions such as teachers and policemen.[45] Furthermore, the classification was often ignored by making very long temporary appointments that circumvented the merit selection process, and it was not until 1924 that the Commission received the budget it urgently needed to carry out its functions effectively.[46]

The second attempt at civil service reform in the island was equally fraught with failure. The Civil Service Act of 1931,[47] implemented during the midst of the Great Depression, coincided with a period where almost all civil service positions were occupied by temporary employees who were recruited without regard to merit examinations.[48] It was not until the Civil Service Personnel Act of 1947 was legislated,[49] that reform was pursued not only in theory but in practice.[50] The Act, furthermore, expressly disallowed discharge of protected employees for their political beliefs.[51] Certain bad habits remained. The Act did not eliminate an obvious way of ascertaining an employee's political affiliation, and a common practice at the time: soliciting political donations from civil servants in the workplace.[52] This was not prohibited until 1964.[53]

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42 *Id.* at 63-64.

43 *Id.* at 64.

44 *Id.* at 65.

45 *Id.*

46 *Id.* at 65, 69. Another change brought about in 1924 was an amendment to the Municipal Act which conferred on mayors the authority to appoint and dismiss employees. It was certainly a victory for the *Unionistas*; nevertheless, rather than increasing transparency and merit selection, it allowed them to establish a parallel political patronage system. *Id.* at 69.

47 Act No. 88 of May 8, 1931.

48 COMISIÓN DE DERECHOS CIVILES DE PUERTO RICO, *supra* note 10, at 71.

49 Act No. 345 of May 12, 1947.

50 One historian found impressive the "growing number of appointments made on the basis of merit through the classification system and the reduced number of temporary and provisional appointments." *Id.* at 77 (citing IRMA GARCÍA DE SERRANO, LA SELECCIÓN DE PERSONAL EN EL SERVICIO PÚBLICO DE PUERTO RICO (1969)) (translation provided by authors).

51 This, however, did not preclude a number of dismissals of pro-independence employees in the aftermath of the 1950 revolts in Puerto Rico or the political persecution of pro-independence Puerto Ricans in subsequent decades. *Id.*

52 Cordero, *supra* note 11, at 355.

53 Act No. 91 of June 26, 1964.

II. Political Discrimination Cases and the Federal Courts

A. Emergence of First Amendment Protection for Public Employees

In the seminal case *Elrod v. Burns*, the Supreme Court determined for the first time that a politically motivated discharge of a public employee is unconstitutional in light of the First Amendment.[54] *Elrod* built upon the vision of *Buckley v. Valeo*, which established earlier on that same year that "[t]he First Amendment protects political association as well as political expression."[55] Although a decade had passed since *Keyishian v. Board of Regents* held that it was unconstitutional to statutorily deny employment to individuals for pertaining to particular political associations (i.e. the Communist Party), said ruling had not been extended to the practice of patronage dismissals or other subsequent employment decisions.[56]

In *Elrod*, the non-civil-service employees of the County Cook Sherriff's Office filed a class action suit against Richard Elrod, a democrat, and the newly instituted Sherriff of Cook County, as well as against county Democratic organizations.[57] It was a common practice that a new Sherriff of a different political party would proceed to replace the non-civil-service employees with members of their own party, unless the current employees affiliated with or obtained support from said party.[58] Three of the four members of the class action were discharged solely because they were not members of the Democratic Party nor had they obtained the sponsorship of one of the party's leaders, while the fourth employee was in imminent danger of being discharged for the same reason.[59]

Although the Court concluded that "the practice of patronage dismissals clearly infringes First Amendment interests," given that First Amendment protections are not absolute, it proceeded to apply the exacting scrutiny called for by *Buckley*.[60] The Court proceeded to analyze the effect that political dismissals have upon beliefs, the nature of government employment, and additional interests that patronage has been argued to uphold to ultimately determine that politically charged dismissals are unconstitutional.

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54 Elrod v. Burns, 427 U.S. 347 (1976).

55 Buckley v. Valeo, 424 U.S. 1, 15 (1976).

56 Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589 (1967).

57 *Elrod*, 427 U.S. at 349-50.

58 *Id.* at 351.

59 *Id.*

60 *Id.* at 360.

i. Coerced Belief is Unconstitutional

Justice Brennan found that systems of political patronage, where employees must either financially support or pledge their allegiance to a party they do not belong to -out of the fear of losing their jobs- violate the First Amendment because they coerce these employees into adhering to an ideology other than their own, thereby compromising their true beliefs. Brennan assures that the condemnation of coerced belief is not limited to patronage systems by referencing the 1943 case *Board of Education v. Barnette*.[61] In *Barnette*, the Supreme Court ruled that the West Virginia State Board of Education's resolution declaring that a student's failure to pledge allegiance to the flag was insubordination punishable by expulsion violated the constitution.[62] As Justice Jackson so eloquently stated when writing the majority opinion of *Barnette*:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[63]

As a corollary of the First Amendment protection of the freedom of belief and expression, the "First Amendment protects political association as well as political expression."[64] In past decisions the Supreme Court has conceded that it is indisputable that group association facilitates and improves the effective advocacy of any belief, be it public or private.[65] Thus it follows that when pursuing political beliefs, "[t]he right to associate with the political party of one's choice is an integral part" of the constitutional freedom of association.[66]

Beyond the inherent unconstitutionality of the state coercing belief, this practice generates grave political consequences. One of these is the detriment of the electoral process, given that "employment on partisan support prevents support of competing political interests."[67] Brennan foresaw that as the government expanded and increased its employment, if political dismissals were permissible, they would be used to stifle political opposition and obligate partisan support.[68]

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61 *Id.* at 355-356.

62 W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

63 *Id.* at 642.

64 Buckley v. Valeo, 424 U.S. 1, 14 (1976).

65 AACP v. State of Ala. *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

66 Kusper v. Pontikes, 414 U.S. 51, 57 (1973).

67 Elrod v. Burns, 427 U.S. 347, 357 (1976).

68 *Id.*

ii. Public Employment: A Protected Benefit

The plurality in *Elrod* rejected the notion that, since a government job is a benefit and not a right, a public employee may be dismissed for any given reason. Constitutional rights do not "turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'"[69] While government employment is a benefit that no one has a right to, and can thus be denied for myriad reasons, it cannot be denied as a subterfuge for the government to coerce behavior that it cannot demand directly.[70] In other words, even benefits cannot be subjected to unconstitutional requirements. For example, freedoms of religion and expression cannot be "infringed by the denial of or placing of conditions upon a benefit or privilege."[71] It is worth noting, as the Court later did in *Rutan v. Republican Party of Illinois*, that government jobs are particularly valuable beyond the general benefits of employment (i.e. salary, health insurance, among others).[72] The denial of a government job "is a serious privation" not only because the public sector may have openings when the private sector does not but also because, for many occupations, the government is the principal or exclusive source of employment.[73] The Seventh Circuit affirmed the District Court's dismissal of the complaint arguing that patronage practices beyond discharges only constitute a violation to the First Amendment when they are the "substantial equivalent of a dismissal."[74]

iii. Additional Arguments: Discrimination in the Name of Efficiency and Democracy is still Unconstitutional

In *Elrod* it was alleged that political patronage was necessary because employees whose political beliefs differed from those of the incumbent administration would have no incentive to be efficient and could even attempt to undue policies placed into effect by the party in office.[75] The Supreme Court rejected this argument because it found that replacing large numbers of public employees is inherently inefficient.[76] Furthermore, if maintaining employment is at the mercy of who wins an election, current employees have no incentive to be effective even while the party they pertain to is in office.[77] Equally relevant, political patronage does

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69 Graham v. Richardson, 403 U.S. 365, 374 (1971) (citations omitted).

70 *Elrod*, 427 U.S. at 360-61 (citing Perry v. Sindermann, 408 U.S. 593, 597 (1972)).

71 Sherbert v. Verner, 374 U.S. 398, 404 (1963) (citations omitted).

72 Rutan v. Republican Party of Illinois, 497 U.S. 62, 77 (1990).

73 *Id.*

74 *Id.* at 68 (citing Rutan v. Republican Party of Illinois, 868 F.2d 943, 955 (7th Cir. 1989)).

75 *Elrod*, 427 U.S. at 364.

76 *Id.*

77 *Id.*

not guarantee that the replacement employee will be a more qualified person.[78] While the Court found merit in the notion that the loyalty of public employees can be an important factor in government effectiveness and efficiency, this can be achieved by limiting patronage dismissals to policymaking positions.[79] Lastly, it was argued that political dismissals help preserve the democratic process because, since political parties make our democracy work and said parties rely heavily on patronage, the latter is simply a price we have to pay. The Supreme Court correctly found that this logic was roundabout and serviced partisan politics exclusively. Moreover, the Court concluded that preserving any fixed-number of parties was not essential to safeguarding the United States' democratic system.

B. The Expansion of Elrod

In *Rutan v. Republican Party of Illinois* the Court extended *Elrod* to prohibit promotions, transfers, recalls and all hiring decisions based on party affiliation and support.[80] In *Rutan*, the Republican Governor of Illinois issued an executive order prohibiting the state officials in every agency, bureau, board or commission subject to his control from hiring employees, filing vacancy or creating new positions as well as promoting, transferring or recalling employees after layoffs, without submitting a request to the Governor and receiving his "express permission."[81] When evaluating said requests, the Governor would verify if the applicant had voted in Republican primaries, provided any support to the Republican Party, if they had the support of the state Republican Party officials, or whether they promised to join the Republican Party in the future.[82] The petitioners alleged that they were denied promotions, transfers, employment or recalls after layoffs because they lacked the support of the Republican Party.[83] In *Rutan*, the Supreme Court found that dismissals, or their substantial equivalent, are not the only employment decisions protected by the First Amendment because "there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy."[84]

In *Branti v. Finkel* the Court extended *Elrod* to protect public employees who face discrimination merely for their political affiliations without having been forced to change their political allegiance to maintain their jobs.[85] In *Branti*, two Republican assistant public defenders, with satisfactory job performance, were awarded injunctions to prevent the newly appointed Democratic public defender

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78 *Id*. at 364-65.

79 *Id.* at 367.

80 Rutan v. Republican Party of Illinois, 497 U.S. 62, 79 (1990).

81 *Id.* at 65-66.

82 *Id.* at 66

83 *Id.* at 67.

84 *Id.* at 75.

85 Branti v. Finkel, 445 U.S. 507, 517 (1980).

from terminating them for not belonging to the same political party.[86] The Court found that to succeed in a political discrimination case such as this one, the employees only had to prove that they were dismissed for the sole reason of not being affiliated or sponsored by a given political party.[87] Although *Branti* significantly expands which dismissals are considered discriminatory, the most important contribution of this case consists of clarifying what positions are exempt from the protection of *Elrod*. *Branti* contends that "party affiliation is not necessarily relevant to every policymaking . . . position."[88] Justice Stevens, in the court's opinion, mentions assistants who write speeches or otherwise speak on the government's behalf as examples of positions where, despite not being policymaking or confidential, sharing similar political beliefs is crucial.[89] Consequently, *Branti* determines that the test should not be whether a position is considered to be policymaking or confidential, but 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."[90] Thus, the only instance where the government can constitutionally consider political beliefs when making employment decisions is when said beliefs are necessary for adequate job performance.[91]

Branti also has implications for the "trust employee" classification established in the Puerto Rico civil service, and for employees in policymaking positions in general. Trust employees in Puerto Rico are, according to the civil service, "selected and removed at will," and they "substantially intervene or collaborate in the formulation of public policy."[92] Notwithstanding the provisions of local law regarding the free removal of trust employees, that does not imply that these employees are devoid of their constitutional protections. The mere label of "trust employee" in a policy making capacity does not subject every position categorized under it to the possibility of patronage dismissal.[93] As the Court recognized in a line of cases[94] and reaffirmed in *Elrod*,[95] the Court rejected any distinction that hinged upon whether a government benefit was classified as a right or a privilege. This is known as the *theory of unconstitutional conditions*. As the *Branti* case affirmed, not all freely removable employees in policymaking positions are subject

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86 *Id.* at 508-09.

87 *Id.* at 517 (citing Elrod v. Burns, 427 U.S. 347, 350 (1976)).

88 *Id.* at 518.

89 *Id.*

90 *Id.*

91 Harvard Law Review Association, *Political Patronage in Promoting, Hiring, Transfer and Recall Decisions*, 104 HARV. L. REV. 227, 230-31 (1990).

92 P.R. LAWS ANN. Tit. 3, § 1465(2) (2011).

93 Montfort-Rodríguez v. Rey-Hernández, 504 F.3d 221, 225 n.10 (1st Cir. 2007).

94 *See* Sugarman v. Dougall, 413 U.S. 634, 644 (1973); Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 571 n.9 (1972); Graham v. Richardson, 403 U.S. 365, 374 (1971).

95 Elrod v. Burns, 427 U.S. 347, 361 (1976).

to dismissal. The hiring authority must state an overriding interest of vital importance that would outweigh the employee's First Amendment right.[96] Certain policymaking employees formulate policy that is divorced from the necessity of party affiliation.[97] In that sense, save positions where such an affiliation is *necessary*, the hiring authority will not be able to assert its discretion in patronage hiring and dismissal.[98] The stringent requirements established in *Branti* were harshly criticized in a dissent by Justice Powell, who stressed that patronage in itself may serve a governmental interest, and that the constitutionality of the hiring decision rests precisely on the interest advanced.[99]

When facing a political discrimination claim by a trust or policymaking employee, the hiring authority may comply with the requirements of *Branti* in one of two ways. Firstly, by establishing that the position is one in which party affiliation is a necessity, which would entitle the public employer to carry out patronage employment and dismissals.[100] Secondly, by adducing another non-discriminatory reason for reaching the hiring decision.[101] The non-discriminatory reason may also come into conflict with the employee's First Amendment rights. Nevertheless, insofar as the trust employee's exercise of speech on substantive policy and administrative issues comes into conflict with her superiors, a superior may dismiss her without offending the First Amendment's free speech guarantees.[102]

In Puerto Rico, one of the biggest bounties of the political patronage system is the awarding of government contracts to loyal supporters and big party donors.[103] And yet, for the first twenty years after the *Elrod* decision, federal courts were split as to whether the protection against political discrimination applied to private government contractors as well. As one author stated, this insulated "one of the most highly valued elements of patronage systems, the distribution of government contracts as a means of rewarding loyal political supporters, from constitutional invalidity."[104] The earliest decisions on this issue reached the Seventh and Eighth Circuits. These decisions, which rejected the application of *Elrod* to public contractors, based their interpretation on upholding the narrow holding of

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96 Branti v. Finkel, 445 U.S. 507, 515-16 (1980) (citing *Elrod*, 427 U.S. at 362, 368).

97 *Id.* at 518.

98 *Id.*

99 *Id.* at 527 (Powell, J., dissenting).

100 *Id.* at 527-28.

101 Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

102 Flynn v. City of Boston, 140 F.3d 42, 47 (1st Cir. 1998).

103 *See, e.g.*, Ely Acevedo Denis, *Activados en donativos políticos Anaudi Hernández, Eder Ortiz y Eric Reyes*, NOTICEL (Dec. 6, 2015), http://www.noticel.com/noticia/183261/activados-en-donativos-politicos-anaudi-eder-ortiz-y-eric-reyes.html (last visited May 1, 2016); *Serie completa de El Nuevo Día sobre el gasoducto*, CENTRO DE PERIODISMO INVESTIGATIVO (May 12, 2011), http://periodismoinvestigativo.com/2011/05/serie-completa-de-el-nuevo-dia-sobre-el-gasoducto/ (last visited May 1, 2016); *Donativos a cambio de contratos*, PRIMERA HORA (Apr. 16, 2009), http://www.primerahora.com/noticias/puerto-rico/nota/donativosacambiodecontratos-290823/ (last visited May 1, 2016).

104 Thomas G. Dagger, *Political Patronage in Public Contracting*, 51 U. CHI. L. REV. 518, 519 (1984).

Elrod and *Branti*, however in doing so, they ignored the rationale employed by the Court in these cases. For example, in the case of *Sweeney v. Bond*, the Eighth Circuit agreed with the Missouri Department of Revenue and related defendants in upholding the constitutionality of the dismissal of free agents that were considered independent contractors.[105] The Court stated that "*Elrod* and *Branti* were limited to dismissals of public employees for partisan reasons. We are not willing to extend the patronage decisions to cases which do not involve public employees."[106] In this respect, the Court cited both cases for the proposition that the protection did not apply to contractors, notwithstanding the fact that the Court had stipulated no such limitation; the holding was simply limited to the specific facts of the case at hand.[107] Another decision by the Seventh Circuit, *LaFalce v. Houston*,[108] offered a more nuanced rationale, "in an effort to draw a principled line between public employees and independent contractors."[109] The Court, led by Judge Richard Posner, advanced a policy argument, by adducing that private contractors would be able to find work more easily than a dismissed public employee, since government contractors usually also have private clients.[110]

These decisions ran against the grain of the unconstitutional conditions theory advanced by the Supreme Court to extend the protection against politically motivated dismissals in the first place.[111] In fact, in *Bd. of County Com'rs v. Umbehr*, the Court held that contractors were protected from termination or non-renewal as retaliation for exercising their free speech rights.[112] It reasoned that establishing the boundary for constitutional protection on the distinction between public employee and independent contractor would give too much discretion to state law to decide who is constitutionally protected, since state law establishes who is an employee and who is a contractor.[113] Furthermore, there was no "difference of constitutional magnitude" between an employee and a contractor that would justify protection for one and not the other.[114] The Court specifically addressed protection

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105 Sweeney v. Bond, 669 F.2d 542, 546 (8th Cir. 1982).

106 *Id.* at 545.

107 In *Elrod*, Justice Brennan stated in his plurality opinion for the Court that the "practice of dismissing employees on a partisan basis is but one form of the general practice of political patronage. . . . Although political patronage comprises a broad range of activities, we are here concerned only with the constitutionality of dismissing public employees for partisan reasons." Elrod v. Burns, 427 U.S. 347, 353 (1976) (footnote omitted). While Justice Brennan clearly established that the Court was concerned with dismissal of employees in the specific case, he did mention the concession of "lucrative government contracts" as part of the general practice of political patronage. *Id*.

108 LaFalce v. Houston, 712 F.2d 292 (7th Cir. 1983).

109 Dagger, *supra* note 104, at 530.

110 *LaFalce*, 712 F.2d at 294.

111 *See Elrod*, 427 U.S. at 354.

112 Bd. of Cty. Com'rs v. Umbehr, 518 U.S. 668, 685 (1996).

113 The Court called such a delegation "at best a very poor proxy for the interests at stake." *Id.* at 679.

114 *Id.* at 684 (citing Lefkowitz v. Turley, 414 U.S. 70, 83 (1973)).

from a politically motivated retaliation against an independent contractor in *O'Hare Truck Service v. Northlake*, a case decided on the same day as *Umbehr*.[115] There, the city of Northlake terminated its relationship with a towing service because the owner of the towing service had supported the new mayor's opponent; the Court found such an act unconstitutional and thus extended the protection to contractors specifically in cases of political retaliation.[116]

Strangely, although before these two 1996 cases there had been several cases in other circuits regarding the protection from politically motivated terminations against contractors,[117] there is no First Circuit case concerning this issue that predates the two Supreme Court cases of *Umbehr* and *O'Hare*. Subsequent First Circuit cases from Puerto Rico have dealt with the issue and have also mentioned the question of whether first-time contract bidders are protected from retaliation for an exercise of free speech,[118] even though they have declined to answer this question, mainly because the facts presented on the cases have not necessitated it. While neither the Supreme Court nor the First Circuit have expressed themselves, the Puerto Rico District has ruled on the extension of the protection to first-time contract bidders at least three times, with the most recent opinion, in contrast with the previous two,[119] deciding to extend the protection.[120] It stands to reason that since there is no "difference of constitutional magnitude" between independent contractors and public employees, the protection should be extended to first-time contract bidders, as it was extended to all hiring decisions for public employment in *Rutan*.[121]

The First Amendment protection against patronage dismissals has even been extended to intra-party conflicts. Various circuits have considered the issue and reached the same conclusion.[122] The First Circuit has stated that the underlying

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115 O'Hare Truck Serv. v. City of Northlake, 518 U.S. 712 (1996).

116 The Court found, as in *Umbehr*, that a distinction on this point between contractors and employees would mean that "[governments] could avoid constitutional liability simply by attaching different labels to particular jobs." *Id.* at 722.

117 Umbehr v. McClure, 44 F.3d 876 (10th Cir. 1995); Blackburn v. City of Marshall, 42 F.3d 925 (5th Cir. 1995); Havekost v. U.S. Dep't of the Navy, 925 F.2d 316 (9th Cir. 1991); Smith v. Cleborne Cty. Hosp., 870 F.2d 1375 (8th Cir. 1989); Horn v. Kean, 796 F.2d 668 (3rd Cir. 1986); LaFalce v. Houston, 712 F.2d 292, 293-94 (7th Cir. 1983).

118 García-González v. Puig-Morales, 761 F.3d 81, 92-93 (1st Cir. 2014); Centro Médico del Turabo v. Feliciano de Melecio, 406 F.3d 1, 9 (1st Cir. 2005); Prisma Zona Exploratoria de Puerto Rico, Inc. v. Calderón, 310 F.3d 1, 7 (1st Cir. 2002).

119 San Juan Towing and Marine Serv., Inc. v. Puerto Rico Ports Auth., No. 08–1284, 2009 WL 564163 (D.P.R. Mar. 5, 2009); Prisma Zona Exploratoria de Puerto Rico, Inc. v. Calderón, 162 F.Supp.2d 1 (D.P.R. 2001).

120 Del Valle Group v. Puerto Rico Ports Auth., 756 F. Supp. 2d 169 (D.P.R. 2010); *see* Ryan Lozar, *Del Valle Group v. Puerto Rico Ports Authority: First-Time Contract Bidders and First Amendment Protections Against Speech and Political Affiliation Retaliation*, 45 REV. JUR. UIPR 351 (2011).

121 Rutan v. Republican Party of Illinois, 497 U.S. 62, 79 (1990).

122 Tomczak v. City of Chicago, 765 F.2d 633, 640-41 (7th Cir. 1985); Barnes v. Bosley, 745 F.2d 501, 506 n.2 (8th Cir. 1984); McBee v. Jim Hogg Cty., Tex., 703 F.2d 834, 838 n.1 (5th Cir. 1983).

principle of the protection is the guarantee of the freedom to express political beliefs, and that events such as primary elections produced the same risk for backlash and retaliation as a general election between opposing parties.[123] The question in that case was whether support for the mayor's opposing candidate in the primary election was to be considered a personal affiliation or a constitutionally protected political association. The Court found no problem in adjudicating that support for another primary candidate "has on its face everything to do with politics."[124] Although in this case the political content of the affiliation was obvious, the logic of such a decision may mean that moving forward, the Circuit may choose to consider other associations that transcend party lines, or the concept of party affiliation in itself. If the underlying principle is the freedom to express political beliefs, a concrete distinction between the personal and the political may be necessary to establish the reach of the protection.

C. Political Discrimination in the First Circuit: An Evolving Standard

The First Circuit began receiving a steady influx of political discrimination cases ensuing Puerto Rico's 1984 gubernatorial elections.[125] In said elections, Rafael Hernández Colón of the PDP defeated the incumbent NPP candidate Carlos Romero Barceló, after holding office for eight years.[126] As a result of the increasing amount of political discrimination cases in its docket, the First Circuit, emitted an *en banc* decision in the case *Jimenez Fuentes v. Torres Gaztambide* and established a two-prong standard to make *Elrod* and *Branti* easier to apply.[127] The first step required determining the extent to which the position is linked with partisan interests, specifically if the position consists of government decision-making where political disagreement could affect the implementation of policy and quality of governance.[128] This is met if the position in question has the power to make decisions regarding key issues, such as providing services like water or housing, granted that the political parties have opposing ideology concerning said matters.[129] The second step consisted of analyzing the specific responsibilities of intrinsic to the position -not the individual holding it- to "determine whether it resembles a policymaker, a privy to confidential information, a communicator, or some other office holder whose function is such that party affiliation is an equally appropriate requirement."[130] Characteristics inherent to a position that need to be

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123 Padilla-García v. Rodríguez, 212 F.3d 69, 76 (1st Cir. 2000) (footnote omitted).

124 *Id.* at 77.

125 Vázquez-Ríos v. Hernández-Colón, 819 F.2d 319, 320 (1st Cir. 1987).

126 *Id.*

127 Susan Lorde Martin, *A Decade of Branti Decisions: A Government Official's Guide to Patronage Dismissals*, 39 AM. U. L. REV. 11, 24-25 (1989).

128 Jimenez-Fuentes v. Torres-Gaztambide, 807 F.2d 236, 241-42 (1st Cir. 1986).

129 *Id.* at 243.

130 *Id.* at 242.

analyzed when applying the second prong of this analysis consist of: (1) the salary; (2) technical skill required; (3) influence over others individuals and policy; (4) public perception; (5) the capacity to represent policymakers; (6) the nature of the relationship with elective officials, and (7) "responsiveness to partisan politics and political leaders."[131]

It is worth noting that the Supreme Court's shift in the standard of pleadings for dismissals in *Bell Atlantic Corp. v. Twombly* has been incorporated to the First Circuit's standard. This is particularly relevant given that forty-six of the First Circuit's cases since 2008 *Twombly* have precisely been regarding motions to dismiss. In synthesis, *Twombly* establishes that when analyzing a Rule 12(b)(6) motion to dismiss, meaning failure to state a claim upon which relief can be granted, courts do not have to accept legal conclusions as if they are true factual allegations.[132] Furthermore, for a complaint to demonstrate the entitlement to a relief, its factual allegations must "possess enough heft" that, if assumed to be true, would "raise a right to relief above the speculative level."[133] Two years later in *Ashcroft v. Iqbal*, the Supreme Court established a two-pronged approach to apply its holding in *Twombly*.[134] First, when reviewing a motion to dismiss, a court must consider to be true the factual allegations of the complaint separate from the legal conclusions stated therein, given that a cause of action cannot be supported by conclusory statements alone.[135] Second, after a context-specific review, a complaint must provide a plausible, not merely possible, claim for relief to withstand a motion to dismiss.[136]

In *Ocasio-Hernández v. Fortuño Burset*, the First Circuit applied the principles of *Twombly* and *Iqbal* to find that domestic workers of the Governor's Mansion of Puerto Rico pleaded adequate factual allegations to support that their employers plausibly had knowledge of their political belief.[137] These allegations consisted of various instances where their employers inquired how and when they began their jobs in the Governor's Mansion, as well as attempted to interrogate them regarding their political beliefs.[138] Additionally, in this particular case, the well-pleaded factual allegations were sufficient to establish that the same individuals who ques-

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131 *Id.* (quoting Ecker v. Cohalan, 542 F.Supp. 896, 901 (E.D.N.Y. 1982)) (internal quotation marks omitted).

132 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)).

133 *Id.* at 555, 557.

134 Ashcroft v. Iqbal, 556 U.S. 662 (2009).

135 *Id.* at 678.

136 *Id.* at 679.

137 Ocasio-Hernández v. Fortuño-Burset, 640 F.3d 1 (1st Cir. 2011).

138 *Id.*

tioned employees regarding their past voting records were also personally involved in their termination, and used this information to make decisions regarding their employment.[139]

To establish a *prima facie* case of political discrimination, a plaintiff must prove the following: first, that they and the defendant have opposing political affiliations; second, that the defendant is aware of the plaintiff's opposing political affiliation; third, the existence of a challenged employment action, and finally, that the plaintiff's political affiliation was a "substantial or motivating factor" in the challenged employment action.[140] To prove that the adverse employment action was politically motivated, the plaintiff must make a fact-specific showing, using direct or circumstantial evidence, which would allow a rational fact-finder to determine that the challenged employment action was caused by the plaintiff's political affiliation.[141] The First Circuit has adopted the Supreme Court determination in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*. This case states that after a plaintiff establishes a *prima facie* case, the burden of proof then shifts to the defendant to prove by the preponderance of evidence a non-discriminatory reason for the challenged employment action and that it would have led to the same adverse outcome despite the plaintiff's political beliefs.[142] The plaintiff may counter the defendant's non-discriminatory motivation by providing evidence to show that "discrimination was more likely than not a motivating factor."[143]

The First Circuit is the circuit that has seen the most political discrimination cases by far. The data analysis in section III of this article shows that it has seen a total of 289 cases since 1970, the runner up being the Seventh Circuit, seeing only 67 cases. In light of this, there is no doubt that First Circuit's jurisprudence, and the tests established therein, has influenced other circuits and is often adopted by them. The Ninth Circuit has incorporated the first prong of the test established by the First Circuit in *Jimenez Fuentes* regarding the link between the position and partisan interests.[144] Meanwhile, the Second Circuit integrated the second prong which establishes what specific elements of a position should be analyzed to determine if it is a policymaking position.[145] Lastly the Third, Fourth, Eleventh and DC Circuit Courts of Appeals have adopted the *Jimenez Fuentes* two-step test in

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139 *Id.* at 16-18.

140 Peguero-Moronta v. Santiago, 464 F.3d 29, 48 (1st Cir. 2006) (quoting González-de Blasini v. Family Dept., 377 F.3d 81, 85 (1st Cir. 2004)) (internal quotation marks omitted).

141 González-de Blasini v. Maldonado, 377 F.3d 81, 85 (1st Cir. 2004); LaRou v. Ridlon, 98 F.3d 659, 661 (1st Cir. 1996); Avilés-Martínez v. Jiménez-Monroig, 963 F.2d 2, 5 (1st Cir. 1992).

142 Medina-Velázquez v. Hernández-Gregorat, No. 09-169, 2015 WL 6829150, at *3 (D.P.R. Nov. 6, 2015) (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)).

143 *Id.* (citing Padilla-García v. Rodríguez, 212 F.3d 69, 77 (1st Cir. 2000)).

144 *See* Bardzik v. Cty. of Orange, 635 F.3d 1138, 1144 (9th Cir. 2011).

145 *See* Gordon v. Cty. of Rockland, 110 F.3d 886, 889 (2d Cir. 1997).

its totality.[146] While it has not properly integrated *Jimenez* into its jurisprudence, the Sixth Circuit has reiterated the determination in said case that the legislature's determination regarding the nature of a job as being policymaking should be given deference.[147]

D. Political Discrimination in the Puerto Rico Courts

Unlike the Federal Constitution, where the prohibition on political discrimination in public employment has been interpreted through the provisions of the First Amendment,[148] Puerto Rico's Constitution explicitly prohibits the practice.[149] The Constitution did not go so far as to include the proposal from the Graduate School of Public Administration of the University of Puerto Rico, which had the purpose of explicitly incorporating a provision that mandated the use of the merit principle for the civil service.[150] But, in the first section of the Bill of Rights, the Puerto Rican Constitution unequivocally states that no one can be discriminated against for their political beliefs.[151] The Constitutional Assembly, in the Bill of Rights Commission's Report, explained that the Bill of Rights did not only protect political expression, but also the consequences of said expression.[152] Furthermore, the Bill of Rights Commission explained that the right should be interpreted as broadly as possible.[153] In this sense, the merit principle in civil service was implicit in the broad restriction against government discrimination for political beliefs.

Going forward, the Puerto Rico Supreme Court would closely follow the Bill of Rights Commission's interpretation of the constitutional prohibition on political discrimination. The first case to reach the Supreme Court of Puerto Rico that dealt with this issue was *Báez Cancel v. Municipio de Guaynabo*, a case decided in 1972 before the seminal *Elrod* decision by the United States Supreme Court.[154] The Court had to ascertain whether temporary employees who were dismissed after the administration shifted from the PDP to the New Progresive Party (NPP) were protected from politically motivated dismissals under the prohibition on political discrimination established in the Constitution of Puerto Rico. The Court found, in *Báez*, that the text prohibiting political discrimination was clear, and as such,

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146 *See* Fields v. Prater, 566 F.3d 381, 386 (4th Cir. 2009); Burns v. Cty. of Cambria, Pa., 971 F.2d 1015, 1022 (3rd Cir. 1992); Hall v. Ford, 856 F.2d 255, 262-64 (D.C. Cir. 1988); Ray v. City of Leeds, 837 F.2d 1542, 1544 (11th Cir. 1988).

147 Rice v. Ohio Dep't of Transp., 14 F.3d 1133, 1143 (6th Cir. 1994).

148 U.S. CONST. amend. I.

149 P.R. CONST. art. II, § 1.

150 Cordero, *supra* note 11, at 355.

151 P.R. CONST. art. II, § 1.

152 4 DIARIO DE SESIONES DE LA CONVENCIÓN CONSTITUYENTE 2562 (1951).

153 *Id*.

154 Báez Cancel v. Rivera Pérez, 100 DPR 982 (1972); Elrod v. Burns, 427 U.S. 347 (1976).

the State may not discriminate for political reasons in any of its services or functions, including in its employment relations.[155] The Court recognized for the first time in a 1982 case, *Ramos Villanueva v. Srio. de Comercio*, the federal precedent of *Elrod* and *Branti*.[156] There, it confirmed a trial court in finding that a dismissal of a trust employee was null and void in accordance with *Branti* and *Elrod*, because political party affiliation was not a necessary attribute for the position in question.[157] The Court had indicated in *Báez* that "every employee, even a trust employee, is protected against political discrimination."[158] Further cases have discussed the prohibition on political discrimination in the Puerto Rico Constitution and the protections derived from *Elrod* and *Branti* in tandem. In *Aponte Burgos v. Aponte Silva*, the Court dealt with the non-renewal of the contracts of transitory employees and, following federal jurisprudence, held that a non-renewal constituted a hiring decision and, as such, a politically motivated non-renewal was prohibited.[159] While the court dealt in the instant case with the dismissal of transitory employees, it had an opportunity to address and discuss new developments in the federal jurisprudence regarding politically motivated dismissals, such as the extension of the protection to independent contractors.[160]

The Puerto Rico Supreme Court has not had a chance to address in any public employment political discrimination case if the scope of Puerto Rico law regarding political discrimination is distinguishable from federal law and if it confers a wider range of protections.[161] In fact, in *López v. Municipio de Mayagüez*, the Court seemed to draw a line on the protections conferred.[162] This case was very fact-specific, insofar as it concerned a purported right by the plaintiff, who was Deputy Director of Human Resources in the municipality of Mayagüez, to occupy the position of Director in an acting capacity until a replacement was named.[163] There, the Court cited both federal and Puerto Rican jurisprudence for the proposition that "recruiting, transferring, reactivating, or dismissing an employee solely because of their affiliation or political ideology is unconstitutional, unless doing so advances a vital state interest in promoting better public administration."[164] But

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155 *Báez*, 100 DPR at 987.

156 Ramos Villanueva v. Secretario de Comercio, 112 DPR 514 (1982); Branti v. Finkel, 445 U.S. 507 (1980).

157 *Ramos Villanueva*, 112 DPR at 516-17.

158 *Id.* at 518, n.3 (translation provided by authors) (citation omitted).

159 Aponte Burgos v. Aponte Silva, 154 DPR 117, 128-29 (2001).

160 *Id.* at 127.

161 The Puerto Rico Supreme Court has established that the Bill of Rights in the Puerto Rico Constitution confers a wider range of rights (*factura más ancha*) than the United States Constitution. *See* Pueblo v. Díaz Medina, 176 DPR 601, 621 (2009).

162 López Hernández v. Mun. de Mayagüez, 158 DPR 620 (2003).

163 *Id.* at 627-28.

164 *Id.* at 633 (translation provided by authors).

the Court found that, in this specific case, the position of Director of Human Resources was a position where the Mayor was warranted in discriminating politically because ideological affinity was an "inherently necessary element" for the position.[165] In doing so, the Court missed an opportunity to adopt a liberal interpretation of federal and Puerto Rican law. A Human Resources office is precisely the place where appointing an officer due to party affiliation would be against the promotion of better public administration. Hiring decisions are processed through that office and as such, it is an office that should be kept insulated from political leanings. Such pronouncements limit the practical effectiveness of the unique non-discrimination provision in the Puerto Rican Constitution, and ignore the wider range of rights that it is intended to confer.

The importance of federal jurisprudence on Puerto Rico law in political discrimination cases cannot be understated because the Puerto Rico Supreme Court has chosen, in recent decades, to follow in this issue and not to lead. It has failed to articulate vital differences between the doctrine as developed by the United States Supreme Court and the nuances of Puerto Rican law that should adapt its application to the island, such as the fact that the prohibition of political discrimination within Puerto Rico law does not stem derivatively from a First Amendment right to free speech or association, but from an explicit prohibition on such practices. No thought has been given to whether this should subject the practice of political discrimination in public employment to a more stringent test, and no such analysis seems forthcoming from the Puerto Rico Supreme Court in recent cases.

III. Political Discrimination by the Numbers

The following table shows how many political discrimination cases each Federal Circuit has seen since 1970 to present day, and from which Federal District Court said cases originated from. Although these cases attend various issues, such as summary judgments and interlocutory orders, the fundamental controversy in all of them involves political discrimination in public employment. From a simple glance it is evident that, in general terms, political discrimination cases are rare. This methodology is the easiest way to show the disparate amount of political discriminations appealed to a circuit court by Puerto Rico in comparison to the rest of the United States.

Table 1. Political Discrimination Cases Seen by Federal Circuit Courts from each District Court

165 *Id.* at 638 (translation provided by authors).

Number of Political Discrimination Cases Seen by Federal Circuit Courts from each District Court (1970-2015)[166]		
Circuit		Number of Cases From each District Court
First Circuit		
	District of Maine	2
	District of Massachusetts	8
	District of New Hampshire	-
	District of Puerto Rico	276
	District of Rhode Island	3
		Total: 289
Second Circuit		
	District of Connecticut	-
	Eastern District of New York	4
	Northern District of New York	4
	Southern District of new York	3
	Western District of New York	4
	District of Vermont	-
		Total: 15
Third Circuit		
	District of Delaware	1
	District of New Jersey	14
	Eastern District of Pennsylvania	10
	Middle District of Pennsylvania	5
	Western District of Pennsylvania	5
	District of the Virgin Islands	1
		Total: 36
Fourth Circuit		
	District of Maryland	1
	Eastern District of North Carolina	2
	Middle District of North Carolina	-
	Western District of North Carolina	7
	District of South Carolina	-
	Eastern District of Virginia	1
	Western District of Virginia	7
	Northern District of West Virginia	1

166 The methodology used for this table consisted in a Westlaw search of the key phrases "political discrimination" and "political patronage" for all dates and in unison with each state, followed by a review of each case with these elements for the First Circuit. This will not account for cases that do not include these key words.

	Southern District of West Virginia	2
		Total:21
Fifth Circuit		
	Eastern District of Louisiana	-
	Middle District of Louisiana	1
	Western District of Louisiana	2
	Northern District of Mississippi	3
	Southern District of Mississippi	-
	Eastern District of Texas	-
	Northern District of Texas	3
	Southern District of Texas	5
	Western District of Texas	1
		Total: 15
Sixth Circuit		
	Eastern District of Kentucky	17
	Western District of Kentucky	2
	Eastern District of Michigan	4
	Western District of Michigan	-
	Northern District of Ohio	10
	Southern District of Ohio	12
	Eastern District of Tennessee	6
	Middle District of Tennessee	5
	Western District of Tennessee	1
		Total: 57
Seventh Circuit		
	Central District of Illinois	10
	Northern District of Illinois	34
	Southern District of Illinois	5
	Northern District of Indiana	7
	Southern District of Indiana	6
	Eastern District of Wisconsin	3
	Western district of Wisconsin	2
		Total: 67
Eighth Circuit		
	Eastern District of Arkansas	-
	Western District of Arkansas	2
	Northern District of Iowa	-
	Southern District of Iowa	3
	District of Minnesota	1
	Eastern District of Missouri	2
	Western District of Missouri	1
	District of Nebraska	1

	District of North Dakota	1
	District of South Dakota	-
		Total: 11
Ninth Circuit		
	District of Alaska	-
	District of Arizona	-
	Central District of California	3
	Eastern District of California	-
	Northern District of California	-
	Southern District of California	-
	District of Guam	2
	District of Hawaii	-
	District of Idaho	-
	District of Montana	-
	District of Nevada	1
	District of the Northern Mariana Islands	-
	District of Oregon	2
	Eastern District of Washington	-
	Western District of Washington	-
		Total: 8
Tenth Circuit		
	District of Colorado	2
	District of Kansas	4
	District of New Mexico	4
	Eastern District of Oklahoma	-
	Northern District of Oklahoma	1
	Western District of Oklahoma	8
	District of Utah	-
	District of Wyoming	-
		Total: 19
Eleventh Circuit		
	Middle District of Alabama	1
	Northern District of Alabama	1
	Southern District of Alabama	-
	Middle District of Florida	3
	Northern District of Florida	-
	Southern District of Florida	4
	Middle District of Georgia	3
	Northern District of Georgia	5
	Southern District of Georgia	1
		Total: 18
District of Colombia Circuit		

	District of Columbia	5
		Total: 5

The data confirms the pervasive nature political discrimination cases in the district of Puerto Rico and adds merit to the claim that the First Circuit has become an expert of sorts in these cases. Although only appeals are taken into account in the table above, these are enough to demonstrate that political discrimination is not a national problem. Indeed, twenty-eight districts, of the ninety-four that exist, have never appealed a case regarding political discrimination to their corresponding Circuit of Appeals in the past thirty-five years. The average amount of cases appealed per district is approximately six.[167] Puerto Rico on the other hand, has appealed 276 times in this same time frame. In fact, 50.8% of all cases regarding political discrimination reviewed by the circuit courts have come from the District Court of Puerto Rico. The District with the next highest amount of appeals under this methodology is the Northern District of Illinois with a mere thirty-four.

TABLE 2. DATA REGARDING POLITICAL DISCRIMINATION CASES FROM PUERTO RICO FROM 2005-2015

Data Regarding Political Discrimination Cases from Puerto Rico From 2005-2015	
Total amount of reported opinions from the District of Puerto Rico	236
Amount of Summary Judgments Granted	68
Amount of Motions to Dismiss Granted	53
Amount of cases where a plausible or prima facie case of discrimination was established	76
Other orders or findings	39
Amount of cases resolved in favor of the employee after trial	14
Amount of cases resolved in favor of the government after trial	17
Total Amount of cases where an award was given	6
Lowest total award given	$5,000
Highest total award given	$1,026,497 (back pay and restitution in employment for several employees)
Municipality	53
Central government	107
State owned corporation	73
Legislative Branch	3

167 The true average amount is 5.968.

Judicial Branch	1
Claim of discrimination against the Popular Democratic Party	101
Claim of discrimination against the New Progressive Party	126

When analyzing the details of Puerto Rico appeals several things stand out. First of all, very few of the cases appealed had given an award to employee-plaintiffs, even when a prima facie case was proved. Confirmations of motions to dismiss or summary judgments were much more frequent. The amounts awarded have varied significantly. It should be noted that the highest total award given, which was upward of a million dollars, was to be divided amongst thirty-six employees.[168] Even with this caveat, each employee is entitled to thousands of dollars. This goes to show that while few cases lead to awards for the plaintiffs, when they do they are significant. Despite this, the true cost of political discrimination cases is the price of litigation per se. The data also shows that political discrimination is not particularly more prevalent in municipalities or state corporations. Although the central government had more cases, this is easily explainable by its size. Especially interesting, is the fact that the main political parties, the PDP and the NPP, are accused of discriminating fairly equally. The NPP has only twenty-five more claims against it than the PDP.

CONCLUSION

The numbers speak for themselves. It is evident that political discrimination is a pervasive problem at all levels of government in Puerto Rico and drains government resources both directly through awards and indirectly through litigation. The standard is not to blame. These cases are fact intensive and require sufficient pleadings to establish causation between knowledge and action. Analogous standards are utilized for other types of discrimination without affecting the amount of cases presented. Furthermore, other jurisdictions simply do not face the same magnitude of these cases.

Proposals to combat patronage focus primarily on two elements: education and transparency. First, educating public employees, specifically those in supervising positions, on political discrimination as a part of the mandated twenty hours of ethics education.[169] Second, data should be collected and reports should be published notifying the public of all of the political discrimination cases against the government at all levels, as well as against any public servant in their personal capacity, and the amount of public funds being used to carry out these cases and pay awards to employees. These are important steps that will help to change the

168 Borges Colón v. Román-Abreu, 438 F.3d 1 (1st Cir. 2006).

169 Puerto Rico Government Ehtics Act of 2011, Act No. 1 of January 3, 2012, P.R. LAWS ANN., tit. 3, § 1856b (2011 & Supl. 2015). The law of governmental ethics establishes that every public service of the executive branch assist twenty hours of ethics training every two years.

underlying culture of patronage that is accepted as an occupational hazard of public employment in Puerto Rico. However, this is not enough to deter officials in a more immediate fashion. For that to be achieved, the simplest, if not only solution, is personal responsibility. Public officials sued in their personal capacity can apply for the Secretary of Justice to represent them or the central government to pay the awards granted if they lose the case against them. While this is important for both adequate representation and for those discriminated against to receive equally adequate compensation, in the case of bad faith or gross negligence on part of the public official, the law could be amended to require them to cost legal fees or a portion of the award. An even more radical approach would call for the criminalizing of political discrimination dismissals, although the shift in the standard of proof may make this claim even harder to establish.