Testing Whether the Government has Violated the First Amendment Rights of Employees

1. Is the employee on the government payroll? (If not, the First Amendment generally will not apply and the employee will be left to contractual or statutory remedies (e.g., "whistleblower" law), if any.)

2. Has the employee been punished for his or her speech in a non-trivial way, such as being discharged, demoted, or transferred? (If not, the courts are unlikely to consider the First Amendment claim.)

3. Did the expression for which the employee was punished relate to a matter of "public concern?" (If not, "absent the most unusual circumstances" (Connick), the courts will not consider the claim. Courts should look at the "whole record" to determine whether the expression concerns a matter of interest to the general public. Whether expression relates to a matter of public concern does not depend upon how it is communicated--whether privately or publicly.)

4. If the government says that it had additional reasons for punishing the employee that do not relate to the employee's expression on matters of public concern, would those additional reasons have resulted in the same punishment that the employee suffered? (Unless the expression on a matter of public concern was a "but for" cause of the punishment--but for that expression the employee would not have been punished as he or she was--the employee loses on the First Amendment claim. The government, however, has the burden of proof of showing that the other reasons would have produced the same punishment. Doyle)

5. If the employee's speech did relate to a matter of public concern, is the government's ability to "efficiently provide services" nonetheless adversely affected in a substantial way, or does the speech negatively reflect on the employee's job performance? (If so, the employee is out of luck.)

6. Was the employee punished for speech that was pursuant to his or her duties as an employee? If so, the First Amendment will generally afford no protection to the employee. (Garcetti)

7. With respect to political affiliation of public employees, the Court asks whether party affiliation is an "appropriate requirement" for the position, taking into account such factors as whether the employee makes important policy decisions or is in a position to thwart the policy directives of superiors. If not, the First Amendment prohibits consideration of political affiliation in either hiring, promotion, or discharge decisions (Branti, Rutan).