

ARE DELAWARE'S JUDICIAL POLITICAL BALANCE REQUIREMENTS CONSTITUTIONAL? STAY TUNED FOR THE THIRD CIRCUIT DECISION IN *ADAMS V. CARNEY*

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Recent headlines have amplified the concern that judicial nominations have become politicized to partisan extremes. In Delaware, the process for judicial appointments has avoided becoming a partisan battleground, in part, because of the political balance requirements applicable to the judiciary by Article IV, Section 3 of the Delaware Constitution. However, in *Adams v. Carney*, the United States District Court for the District of Delaware declared those political balance requirements to violate the First Amendment.¹ Young Conaway was retained as counsel to the Governor of Delaware to pursue an appeal of that decision, and the matter was argued before the Third Circuit on September 25, 2018. As of this writing, the Third Circuit has not ruled.

There are two components to the Political Balance Requirements in the Delaware Constitution. One provision—known as the “bare majority” provision—precludes any political party from having more than a bare majority of the seats on the Supreme Court, Superior Court, Court of Chancery, Family Court or Court of Common Pleas. The second provision—known as the “major party” provision—requires that every member of Supreme Court, Court of Chancery and Superior Court be a member of one of the two major political parties in Delaware, which at present are the Republican and Democratic parties. These provisions largely eliminate partisan fights concerning judicial appointments because both major parties are limited to a bare majority and each major party is guaranteed positions on three of the major courts. In addition, these provisions encourage a judiciary that is bipartisan in outlook and representative of the political mainstream. Most members of the judiciary and outside observers believe the system has worked well.

In early 2017, James R. Adams—a Democrat who days earlier changed his voter registration to Independent—challenged both provisions of the Delaware Constitution as violating his First Amendment rights. In his Complaint, Adams alleged that “at various times [he] has desired to apply for a judgeship but has been unable to do so in certain circumstances because he [as an Independent] was not of the required political party.”

¹ *Adams v. Carney*, No. CV 17-181-MPT, 2018 WL 2411219 (D. Del. May 23, 2018)

The Magistrate Judge (acting as the District Court), held that Adams lacked Article III standing to challenge the “bare majority” provisions applicable to the Family Court and Common Pleas, which were the same as the “bare majority” provisions applicable to the other courts. Article III, §2 of the United States Constitution requires that a plaintiff have an injury traceable to the challenged law in order to have standing to contest the constitutionality of that law. The nomination of Adams to a judicial position would never be impacted by the “bare majority” requirements because—as an Independent—he was not a member of any party precluded from obtaining greater than a bare majority. The Court concluded that Adams did have Article III standing to challenge the “major party” provisions because he was not a member of either of Delaware’s major political parties and, consequently, was barred from being nominated by the “major party” provision. Despite Adams’ lack of Article III standing to challenge the “bare majority” provision, the Court nonetheless ruled that provision unconstitutional, stating that “Article IV, §3 of the Constitution of the State of Delaware [including both the “bare majority” and “major party” provisions] violates the First Amendment by placing political affiliation restrictions on government employment by the Delaware judiciary.” (Opinion at 17)

The District Court’s opinion was unprecedented in several respects. First, under First Amendment precedent, political affiliation may be a requirement for governmental positions that involve “policymakers” without violating the First Amendment rights of those who are not members of the required party. Although every one of the several decisions that previously addressed the issue held that judges are “policymakers”—and, consequently, that political affiliation requirements do not violate the First Amendment—the Delaware District Court concluded that judges are not policymakers because they merely apply the law, as opposed to making law. Under this rationale, any president or governor who appoints judges based on political affiliation would be violating the First Amendment.

The District Court also concluded that political balance requirements were not “appropriate,” notwithstanding that numerous statutes mandate that many independent federal agencies must be politically balanced. Under existing First Amendment precedent—as applied in the Third Circuit—the determination of whether a person is a policymaker may not always be dispositive of the First Amendment issue. The Court also may examine whether a political affiliation requirement is “appropriate” for the position at issue. The District Court reasoned that applying any political affiliation requirement to judges was not “appropriate” because judges should be independent of political party. In reaching this result, the Court did not consider the policy reasons supporting the political balance requirements in the Delaware Constitution (and federal statutes).

On appeal, both the standing issue and the substantive First Amendment issues were briefed and argued. However, the Plaintiff did not challenge the District Court’s determination that he lacked Article III

standing to contest the “bare majority” provisions applicable to the Family Court and Court of Common Pleas. In addition, the Plaintiff did not argue in support the District Court’s conclusion that he could challenge the bare majority provisions, despite this lack of Article III standing, because he had prudential standing to do so. At argument, the appellate panel queried how a plaintiff could challenge the “bare majority” provisions without Article III standing. Thus, unless the Third Circuit finds some basis for Article III standing not asserted by the District Court or the Plaintiff, there is a significant prospect that Plaintiff will be held not to have standing to challenge the “bare majority” provisions.

With respect to the substantive First Amendment claim, the argument on appeal centered on two disputes: whether judges are “policymakers” and whether it is “appropriate” to consider the political affiliation of a candidate for judicial office. Despite the unanimity of the decisions holding judges are policymakers, Plaintiff argued they are not because (1) judges only apply the law, they do not make the law, and (2) policymakers are limited to persons serving in the executive branch of government. The Governor argued for reversal of the decision below on this issue because judges have all of the attributes of policymakers cited in prior decisions resolving this issue for a myriad of positions. In particular, the Governor argued that judges actually make the common law and equitable doctrines that define fiduciary duties for directors and managers of Delaware legal entities and set the boundaries of tort law liability.

Plaintiff expended most of his argument on the proposition that it is not “appropriate” to consider a candidate’s political affiliation when making judicial appointments because judges should decide cases without regard to political affiliation. The Governor countered that the purpose of the Delaware political balance requirements is not to nominate judges who will decide cases on the basis of political affiliation, but rather to limit partisanship in the appointment of judges. Governors are required to appoint persons of the opposing party to the judiciary in order to maintain the mandated political balance. In essence, the consideration of political affiliation in connection with judicial appointments is “appropriate” because the purposes of the political balance requirements are appropriate public policy ends.

While the appeal involves substantial issues of concern to the State of Delaware, the affirmation of the decision below could work a major change in other states and at the national level. If the Third Circuit affirms the District Court’s determination that judges are not policymakers, it could render the typical judicial appointment—where a governor or president appoints a person of the same political party to the judiciary—a violation of the First Amendment rights of all potential applicants who are not of that party. And if the Third Circuit affirms the District Court’s conclusion that the “political balance” requirement is not “appropriate” under the First Amendment, such a holding will raise significant issues as to the constitutionality of the many federal agencies for which political balance is required by federal statute.