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DEALING WITH THE ELEPHANT IN THE ROBE: HOW TO LIMIT THE RISING ROLE OF POLITICAL AFFILIATION IN THE JUDICIARY USING THE FIRST AMENDMENT

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ABSTRACT

With record-breaking numbers of federal judicial appointments, a newly-implemented selection process for Administrative Law Judges, and a state judicial selection process requiring a balance of the two major political parties on its courts, is it too late to rescue the judiciary from a highly polarized political climate? Allowing judicial selection based solely upon political affiliation can endanger the very nature of judicial independence. Under a narrow First Amendment exception, appointments based upon political loyalties are allowed only for "policymaking" positions. This Note will argue that three forms of the judiciary: State, Article III, and Administrative Law Judges, should be excluded from the policymaking exception and, subsequently, that judicial selection should not be based solely upon political affiliation, as judges are not "policymakers." This Note will also analyze varying methods of judicial selection for State, Article III, and Administrative Law Judges, and argue for the adoption of particular methods to prevent the judiciary from transforming into an inherently "policymaking" and political entity. Specifically, this Note will contend that independent non-party based nominating commissions for State and Article III members of the judiciary, as well as the reinstatement of "competitive service" Administrative Law Judge selection, support the exclusion of the judiciary from the First Amendment policymaking exception.

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INTRODUCTION

"We don't work as Democrats or Republicans," stated Chief Justice John G. Roberts, Jr. in 2016.[1] Judges, from the state trial level to the Supreme Court of the United States, have historically enjoyed some level of insulation from political winds due to their "judicial independence."[2] Nevertheless, many scholars and members of the public have developed pessimistic views of the Supreme Court ("Court") and believe that it may be in the midst of a "legitimacy crisis"[3] and "is almost entirely a political institution, deciding most cases on the basis of ideology with little or no regard for 'law.'"[4] This interpretation, in addition to heightened levels of

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1. Adam Liptak, *Supreme Court Says Judges Are Above Politics. It May Hear a Case Testing That View*, N.Y. TIMES (Sept. 16, 2019), https://www.nytimes.com/2019/09/16/us/politics/supreme-court-judges-partisanship.html [hereinafter Liptak, *Judges Are Above Politics*]. Chief Justice Roberts went a step further and stated two years later in 2018, "We do not have Obama judges or Trump judges, Bush judges, or Clinton judges. . . . What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them." Robert Barnes, *Rebuking Trump's Criticism of 'Obama Judge,' Chief Justice Roberts Defends Judiciary as 'Independent,'* WASH. POST (Nov. 21, 2018, 6:21 PM), https://www.washingtonpost.com/politics/rebuking-trumps-criticism-of-obama-judge-chief-justice-roberts-defends-judiciary-as-independent/2018/11/21/6383c7b2-edb7-11e8-96d4-0d23f2aaad09_story.html. *See also* Adam Liptak, *Politics Has No Place at the Supreme Court, Chief Justice Roberts Says*, N.Y. TIMES (June 30, 2020), https://www.nytimes.com/2019/09/25/us/politics/chief-justice-john-roberts-interview.html ("We don't go about our work in a *political* manner.") (quoting Chief Justice Roberts) (emphasis added).

2. *See* Douglas Keith, *Impeachment and Removal of Judges: An Explainer*, BRENNAN CTR. FOR JUST. (Mar. 23, 2018), https://www.brennancenter.org/our-work/analysis-opinion/impeachment-and-removal-judges-explainer; *Judicial Independence*, JUD. LEARNING CTR., https://judiciallearningcenter.org/judicial-independence (last visited Feb. 20, 2020); *see also Judicial Independence: Talking Points*, FED. JUD. CTR., https://www.fjc.gov/history/talking/judicial-independence-talking-points (last visited Feb. 25, 2021) (discussing how despite the Framers' attempt to preserve judicial independence by creating separate branches of government, there remains some potential for political influence due to the appointment of judges by the President, with advice and consent of the Senate, and Congress's ability to establish inferior courts).

3. *See* Tara Leigh Grove, *Book Review: The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2253 (2019) (reviewing RICHARD H. FALLON, LAW AND LEGITIMACY IN THE SUPREME COURT (2018)) (noting that "if the Supreme Court repeatedly issues 'conservative' (or 'progressive') decisions in high-profile cases, its institutional reputation will eventually decline with the 'loser' group"); Michael Tomasky, *The Supreme Court's Legitimacy Crisis*, N.Y. TIMES (Oct. 5, 2018), https://www.nytimes.com/2018/10/05/opinion/supreme-courts-legitimacy-crisis.html; *see also* Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 181–202 (2019) (discussing two proposals for tackling the legitimacy problem of the Supreme Court: the lottery and balanced bench).

4. Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, VAND. LEGAL STUD. RSCH. PAPER SERIES, NO. 19-30, at 3 (July 2019). Justices appointed by presidents from both sides of the aisle have suffered from participating in arguably unseemly events and

polarization in the political climate, has tested the traditional view of "judicial independence" and resulted in various academic, state, and federal proposals designed to ensure political balances on courts for the two major political parties, Democratic and Republican.[5] These plans are designed to limit the possibility of the courts being dominated by a single party and prevent their transformation into political entities.[6]

At the same time, politics have dominated the federal judicial appointment process, and recently, President Donald J. Trump's Administration ("Trump Administration") had appointed record-breaking numbers of federal judges, traditionally based upon party affiliation among other factors.[7] Additionally, politics may begin to

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commentary that call into question their impartiality while on the bench. On October 29, 2019, Justices Alito and Kavanaugh were photographed with the president of conservative advocacy group, National Organization for Marriage, resulting in the photograph being shared on social media via Twitter. Aila Slisco, *Supreme Court Justices Brett Kavanaugh and Samuel Alito Urged to Recuse Themselves from LGBT Cases*, NEWSWEEK (Nov. 7, 2019, 12:07 AM), https://www.newsweek.com/supreme-court-justices-brett-kavanaugh-samuel-alito-urged-recuse-themselves-lgbt-cases-1470290. In 2016, Justice Ginsburg regretted commenting on then-presidential nominee Donald Trump. Michael D. Shear, *Ruth Bader Ginsburg Expresses Regret for Criticizing Donald Trump*, N.Y. TIMES (July 14, 2016), https://www.nytimes.com/2016/07/15/us/politics/ruth-bader-ginsburg-donald-trump.html.

5. *See* DEL. CONST. art. IV, § 3 (amending Delaware's constitution to require no more than a bare majority of judges from one of the major political parties on its courts); Epps & Sitaraman, *supra* note 3, at 193–200. Various groups, such as the progressive "Take Back the Court" organization, have prioritized expanding the size of federal courts in an attempt to tackle hyper partisanship. AARON BELKIN, THE CASE FOR COURT EXPANSION, TAKE BACK THE CT. (2019), https://static1.squarespace.com/static/5ce33e8da6bbec0001ea9543/t/5d14e7ae04c5970001fa4cb1/1561651120510/The+Case+for+Court+Expansion.pdf. Former presidential candidate, Pete Buttigieg, recommends that the Supreme Court be increased to fifteen justices, comprised of five Democrats, five Republicans, and five selected by the other ten (five Democratic and five Republican justices) if they meet a criteria based upon "fairness, independence[,] and centrism." Liptak, *Judges Are Above Politics*, *supra* note 1 (noting that Mayor Buttigieg's plan is based on a paper by Epps and Sitaraman). *See also* Epps & Sitaraman, *supra* note 3, at 181 (suggesting two proposals, the "Supreme Court Lottery" and "Balanced Bench," as alternatives to the current makeup of the Court in an attempt to save it from partisanship). This plan, due to its incorporation of five independent members unaffiliated with either political party, likely has a greater chance of surviving a First Amendment freedom of association claim than Delaware's constitutional provision discussed in this piece. For a detailed discussion of the "Balanced Bench" proposal, see *id.* at 200–05.

6. *See* Epps & Sitaraman, *supra* note 3, at 193–94.

7. *See* Colby Itkowitz*, 1 in Every 4 Circuit Court Judges is Now a Trump Appointee*, WASH. POST (Dec. 21, 2019, 7:32 PM), https://www.washingtonpost.com/politics/one-in-every-four-circuit-court-judges-is-now-a-trump-appointee/2019/12/21/d6fa1e98-2336-11ea-bed5-880264cc91a9_story.html (noting that, as of December 2019, President Trump appointed fifty judges to the various circuit courts and 187 judges altogether to the federal bench). *See also* Richard A. Arenberg, *The Trumpification of the Federal Courts*, HILL (Jan. 6, 2020, 10:00 AM), https://thehill.com/opinion/judiciary/476796-the-trumpification-of-the-

infiltrate the domain of Administrative Law Judges ("ALJs") after the alteration of their selection process.[8] However, the question remains: where do these practices leave political independents and "judicial independence?"[9]

Under a narrow First Amendment exception, patronage appointments based on political affiliation are allowed only for policymaking positions.[10] This Note will make a case for excluding various forms of the judiciary from the policymaking exception by using the Third Circuit's analysis in *Adams v. Governor of Delaware*,[11] which subsequently created a circuit split, as a guidepost.

Delaware's provision challenged in *Adams*, the only one of its kind in the nation, requires "Political Balancing" of both Democrats and Republicans in the state judiciary.[12] Adams, an attorney vying for a position in the state judiciary, challenged this provision as an independent claiming the provision violated his First Amendment freedom of association.[13] After granting certiorari, the Court issued its decision in December 2020 and reversed the Third Circuit's holding, remanding the matter for its eventual dismissal.[14] In its analysis, the Court avoided the First Amendment issues and, rather, held that Adams

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federal-courts. President Obama during his tenure had twenty-four appointments to the circuit courts, whereas Presidents Bush, Clinton, H.W. Bush, and Reagan, had thirty, twenty-seven, thirty-one, and twenty-three, respectively. Cori Petersen & CJ Szafir, *Trump is Remaking the Federal Judiciary at a Historic Rate*, REALCLEAR POL. (Jan. 4, 2020), https://www.realclearpolitics.com/articles/2020/01/04/trump_is_remaking_the_federal_judiciary_at_a_historic_rate__142073.html.

8. *See* Administrative Conference Recommendation 2019-2, Agency Recruitment and Selection of Administrative Law Judges, 84 Fed. Reg. 38,927-1, 38,930 (Aug. 8, 2019) [hereinafter Recommendation 2019-2] (describing the shift in ALJ hiring process which leaves much more discretion to each agency to determine selection criteria).

9. In 2017, 42 percent of Americans considered themselves to be political independents, opposed to 39 percent in 2016 (whereas 29 percent identified as Democrats and 27 percent as Republicans). Jeffrey M. Jones, *Americans' Identification as Independents Back Up in 2017*, GALLUP (Jan. 8, 2018), https://news.gallup.com/poll/225056/americans-identification-independents-back-2017.aspx.

10. *See* Angela Galloway, *A "Narrow Exception" Run Amok: How Courts Have Misconstrued Employee-Rights Laws' Exclusion of "Policymaking" Appointees, and a Proposed Framework for Getting Back on Track*, 86 WASH. L. REV. 875, 875–76 (2011); Michael T. Jilka, *Political Spoils and the First Amendment*, 77 J. KAN. BAR ASS'N 20, 20–21 (2008).

11. 922 F.3d 166 (3d Cir. 2019), *rev'd on other grounds sub nom.*, Carney v. Adams, 141 S. Ct. 493 (2020).

12. *See id.* at 169; DEL. CONST. art. IV, § 3.

13. *Adams*, 922 F.3d at 172–73.

14. Carney v. Adams, 141 S. Ct. 493, 503 (2020).

lacked Article III standing.[15] However, Justice Sotomayor acknowledged the lingering First Amendment concerns in her concurrence and stated that these constitutional questions would very likely come before the Court again.[16] Moreover, in describing Delaware's unique major party requirements, she believed that "they [were] far rarer than their bare majority cousins, and . . . arguably impose[d] a greater burden on First Amendment associational rights."[17] Consequently, the Court may need to determine the scope of the policymaking exception and perhaps the role of the judiciary in the future.

While state and federal party-balancing judicial selection proposals may be well-intentioned, by examining the policymaking exception of the First Amendment, which in the Third Circuit's view should exclude members of the judiciary,[18] these plans may result in increased levels of polarization for roles meant to be protected from political winds, however idealistic. In light of the Court's holding in *Adams*, the question remains as to whether there are ways to limit party affiliation from judicial selection and provide equal access to nonpartisan or independent judicial candidates. This Note's analysis will tackle these very issues and, in light of the policymaking exception, will consider which alternative methods of judicial selection may best limit the appearance of policymaking by the judiciary and avoid First Amendment concerns. These proposals can be used to restore "judicial independence" by insulating the judiciary from political winds blowing from both directions, the left and the right. Without these efforts, it may be difficult to prevent the judiciary from becoming a purely political entity deciding on the basis of party loyalty.

Part I of this Note provides a brief historical overview of the rise of political patronage and the creation of the First Amendment policymaking exception. Part II discusses a circuit split between the Third, Sixth, and Seventh Circuits to illustrate how the Court has applied the policymaking exception in the judicial context. Part III expands on the Third Circuit's holding that judges are not policymakers by recommending several solutions to prevent members of the judiciary from appearing as policymakers, including different proposals for limiting judicial selection based solely upon political affiliation for state, federal, and administrative law members of the judiciary in light of the

15. *Id.* In the Court's majority opinion, Justice Breyer noted, "Adams has not shown that he was 'able and ready' to apply [for a judgeship] in the imminent future. Consequently, he has failed to show that 'personal,' 'concrete,' and 'imminent' injury upon which our standing precedents insist." *Id.*

16. *Id.* (Sotomayor, J., concurring).

17. *Id.*

18. *See Adams*, 922 F.3d at 169.

Court's holding in *Lucia v. Securities and Exchange Commission*.[19] Part IV discusses the future of this issue and how reforms will be needed to limit the effects of the polarized climate on the judiciary.

I. THE HISTORY AND PURPOSE OF THE "POLICYMAKING" EXCEPTION TO THE FIRST AMENDMENT FREEDOM OF ASSOCIATION

"[T]o the Victor Belong the Spoils!"[20]

Political patronage has an established place in American history and is defined as "the allocation of the discretionary favors of government in exchange for political support."[21] To counter the rise of powerful political machines, the Court, beginning in the 1970s, attempted to limit the usage of political patronage.[22] Specifically, the Court used freedom of association protections afforded to individuals through the First Amendment to curtail the rapid growth of political machines.[23]

The Court first developed the policymaking exception of the First Amendment in *Elrod v. Burns*[24] in 1976.[25] It held that county sheriff's office Republican employees, fired by a recently appointed Democratic sheriff, had viable constitutional claims since their freedom of association rights had been violated.[26] However, the Court acknowledged political patronage was justified under limited circumstances.[27]

Selecting employees based on political affiliation was justified when used "as a means of furthering government effectiveness and efficiency,"

19. 138 S. Ct. 2044, 2051–56 (2018).

20. This phrase was famously coined by Senator William L. Marcy in 1832. WILLIAM LEARNED MARCY, RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS 1314 (Library of Congress 1989). *See* Jilka, *supra* note 10, at 20; Susan Lorde Martin, *A Decade of Branti Decisions: A Government Official's Guide to Patronage Dismissals*, 39 AM. U. L. REV. 11 (1989).

21. Louis Cammarosano, *Application of the First Amendment to Political Patronage Employment Decisions*, 58 FORDHAM L. REV. 101, 101 (1989) (quoting M. TOLCHIN & S. TOLCHIN, TO THE VICTOR 5 (1971)). Political patronage has been embedded in American government since Thomas Jefferson's presidency and continues to be prevalent today. *See* Elrod v. Burns, 427 U.S. 347, 353 (1976). *See also* Martin, *supra* note 20, at 14–16 (discussing the historical significance of the usage of political patronage during the presidencies of Jefferson, Jackson, and Lincoln).

22. Jilka, *supra* note 10, at 20.

23. *Id*. at 20–21; *see also* U.S. CONST. amend. I.

24. 27 U.S. 347 (1976).

25. Galloway, *supra* note 10, at 886 (citing *Elrod*, 427 U.S. at 359).

26. *Elrod*, 427 U.S. at 350–51, 372.

27. *Id.* at 366.

yet this justification was missing in *Elrod*.[28] The sheriff's office employees did not hold policymaking positions, as the Court considered whether an employee "acts as an adviser or formulates plans for the implementation of broad goals."[29] This newly-established standard failed to provide a bright-line rule to determine whether an individual is a policymaker and forced the Court to refine its application.[30]

This was the first time the Court limited political patronage and stated "political loyalty 'justification is a matter of proof, or at least argument, directed at particular kinds of jobs.'"[31] Emphasizing the necessity of limiting appointments based on political affiliation, the Court asserted that "patronage is a very effective impediment to the associational and speech freedoms which are essential to a meaningful system of democratic government."[32]

A mere four years later, the Court expanded on this newly-established policymaking exception in *Branti v. Finkel*.[33] In *Branti*, a recently-appointed public defender planned to discharge two assistant public defenders due to their Republican Party affiliations.[34] Recalling that Justice Brennan noted in *Elrod* how it can be difficult to determine whether party affiliation can be a reasonable consideration for employment, the Court wanted to tweak the line of reasoning established in *Elrod*.[35]

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28. *Id.*; *see* Joel Edan Friedlander, *Is Delaware's "Other Major Political Party" Really Entitled to Half of Delaware's Judiciary?* 58 ARIZ. L. REV. 1139, 1155 (2016) (stating that in *Elrod,* "five Justices found common ground in the proposition that subjecting a non-confidential, non-policymaking public employee to penalty for exercising rights of political association was tantamount to an unconstitutional condition." (quoting O'Hare Truck Serv. v. City of Northlake, 518 U.S. 712, 718 (1996)).

29. *Elrod*, 427 U.S. at 368; Galloway, *supra* note 10, at 895–96.

30. *See* William V. Luneberg, *Civic Republicanism, the First Amendment, and Executive Branch Policymaking*, 43 ADMIN. L. REV. 367, 390 (1991) ("Justice Brennan found that [the] concern for political loyalty could support patronage for 'policymaking' but not all positions. He eschewed any attempt to explore the rationale for this distinction, . . . and offered only the haziest suggestions regarding what he might consider to be a policymaker for First Amendment purposes." (internal citations omitted)); Kenneth G. Yalowitz, *Patronage Dismissals and Compelling State Interests: Can the Policy-Making/ Nonpolicymaking Distinction Withstand Strict Scrutiny?*, 3 S. ILL. UNIV. L.J. 278, 286–87 (1978) (critiquing the *Elrod* standard by expressing concerns over its vagueness and difficulty in its application).

31. *Elrod*, 427 U.S. at 368 (quoting Ill. State Emp. Union v. Lewis, 473 F.2d 561, 574 (7th Cir. 1972)).

32. *Id.* at 369–70.

33. 445 U.S. 507 (1980).

34. *Id.* at 508; s*ee* Jilka, *supra* note 10, at 21; Martin, *supra* note 20, at 21.

35. *See Branti*, 445 U.S. at 518.

Modifying the *Elrod* standard, the Court stated that under the First Amendment, "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective *performance* of the public office involved."[36] Upon applying this refined standard, the Court held that it would be unreasonable to believe that the work of an assistant public defender should be conditioned on the basis of whether the individual is a member of the controlling political party.[37] The role of a public defender is to represent the citizens of the State, who are entitled to such representation.[38] Nevertheless, this standard was not absolute and the Court conceded that "if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency."[39]

The *Elrod* and *Branti* decisions established First Amendment principles and curtailed political patronage appointments for policymaking positions.[40] Ten years after *Branti*, the Court tackled the same First Amendment concerns and expanded the policymaking doctrine in *Rutan v. Republican Party of Illinois*[41] in 1990.[42] Public officials sued the Illinois Republican Party due to a hiring freeze of all state agencies and the Governor implemented a new procedure requiring his permission for any hiring requests during the freeze.[43] The Governor used this process to ensure that only Republicans would be afforded the available employment opportunities.[44] Expanding the policymaking doctrine, the Court felt that low-level public employees should also be protected from political patronage appointment practices.[45] Despite the

36. *Id.* (emphasis added); *see* Luneberg, *supra* note 30, at 390.
37. *Branti*, 445 U.S. at 519–20.
38. *See id.* at 519.
39. *Id.* at 517; Martin, *supra* note 20, at 21 (asserting that *Branti* went further than *Elrod* by allowing two additional governmental interests of effectiveness and efficiency for patronage appointments to be constitutional).
40. *See Branti*, 445 U.S. at 519; Elrod v. Burns, 427 U.S. 347, 372 (1976).
41. 497 U.S. 62 (1990).
42. *See* Martin H. Brinkley, *Despoiling the Spoils*: Rutan v. Republican Party of Illinois, 69 N.C. L. REV. 719 (1991).
43. *Rutan*, 497 U.S. at 65–66; *see* David Herman, Rutan v. Republican Party of Illinois *and Patronage Employment Practices: Clarification or Confusion*, 11 N. ILL. U. L. REV. 375, 385–97 (1991).
44. *Rutan*, 497 U.S. at 66; Herman, *supra* note 39, at 387.
45. *Rutan*, 497 U.S. at 74; Brinkley, *supra* note 38, at 720; Herman, *supra* note 43, at 392. *But see Rutan*, 497 U.S. at 104 (Scalia, J., dissenting) ("Patronage is 'a necessary evil if you want a strong organization, because the patronage system permits of discipline, and

strengthening of the rejection of patronage for non-policymaking positions, patronage was still rampantly used.[46] In addition, a lingering question remained: are members of the judiciary policymakers?

The Court first applied policymaking standards to members of the judiciary in 1991 in *Gregory v. Ashcroft*.[47] Appointed state judges challenged a state constitutional provision requiring them to retire at the age of 70.[48] The judges contended that this provision violated the Age Discrimination in Employment Act of 1967 ("ADEA").[49] The ADEA contained language excluding certain types of employees from its definition of "employee" which included "appointee[s] on the policymaking level."[50] Ashcroft reasoned that, based upon the statutory language, state judges were policymakers since they (a) interpret and apply the common law, (b) establish procedural rules for the courts in the State Supreme Court, and (c) supervise inferior courts and the state bar.[51] The Court found that the ADEA did not include protections for state judges within its definition of "employee" on the theory that Congress failed to make it clear in the statutory language that it intended to include judges.[52] While this decision relied on the Court's reluctance to allow a more liberal statutory interpretation of the ADEA, the Court still failed to decide whether judges are policymakers outside of the statutory definition of the ADEA which, consequently, led the to the current circuit split.[53]

without discipline, there's no party organization.'" (quoting M. TOLCHIN & S. TOLCHIN, TO THE VICTOR, 36 (1971)).

46. Brinkley, *supra* note 42 at 720–21 ("Despite the consistency of the *Elrod*, *Branti*, and *Rutan* holdings, however, a stubborn residue of patronage activity still clings to national, state, and local governments today.").

47. 501 U.S. 452 (1991).

48. *Id.* at 455–56.

49. *Id.* at 456.

50. 29 U.S.C. § 630(f) (2020); *Gregory*, 501 U.S. at 465.

51. *Gregory*, 501 U.S. at 465–66.

52. *Id.* at 467.

53. *See id.*; Adams v. Governor of Del., 922 F.3d 166 (3d Cir. 2019), *rev'd on other grounds sub nom.*, Carney v. Adams, 141 S. Ct. 493 (2020); Newman v. Voinovich, 986 F.2d 159 (6th Cir. 1993); Kurowski v. Krajewski, 848 F.2d 767 (7th Cir. 1988); Emily Alexander, *The Americans with Disabilities Act and State Prisons: A Question of Statutory Interpretation*, 66 FORDHAM L. REV. 2233, 2251–52 (1998) (stating that the *Gregory* Court applied a strict plain statement rule when interpreting the ADEA's definition of "employee").

II. OVERVIEW OF CIRCUIT SPLIT

The current circuit split considers whether members of the judiciary should be excluded from the policymaking exception and, therefore, not be selected solely on the basis of political affiliation.[54] Courts have held that judges should be considered policymakers, that is, until the Third Circuit found that the judiciary should be independent of inherently political positions warranting patronage appointment systems.[55]

A. Adams v. Governor of Delaware, Third Circuit

1. Facts and Procedural Posture

In 2017, Plaintiff James R. Adams ("Adams") had aspirations of becoming a member of the state judiciary.[56] Adams had been an active and registered member of the Democratic Party throughout his career but changed his party affiliation in early 2017 and opted to become an Independent.[57] Due to a unique state constitutional provision, Adams did not apply for state judiciary membership because of his Independent Party affiliation.[58]

Under Article IV, Section 3 of the Delaware State Constitution, state judicial appointments have various limitations for the Supreme Court, Superior Court, Chancery Court, Family Court, and the Court of Common Pleas based upon party affiliation.[59] This section is often referred to as the "Political Balance Requirement."[60] Each of these constitutional limitations essentially contains two requirements: "the bare majority . . . and the major political party component."[61] For the first requirement—bare majority—the party occupying the majority of positions is limited in the sense that it cannot occupy every position at any level of the judiciary.[62] This leads to the purpose of the second component: the other positions, unoccupied by the majority party, must

54. *See Adams*, 922 F.3d at 178.
55. *See id.* at 178–79.
56. *Id.* at 172.
57. *Id.* Having become disenchanted with the direction of the centrist bloc of the Democratic Party, Adams considered himself to be "more of a [Vermont Senator] Bernie [Sanders] independent." *Id.*
58. *Id.*
59. DEL. CONST. art. IV, § 3; *Adams*, 922 F.3d at 170–72.
60. *See* Friedlander, *supra* note 25, at 1141.
61. *Adams*, 922 F.3d at 171.
62. *Id.*

be occupied by the other major political party.[63] However, where does this leave registered Independents or members of a minor political party?

Ironically, Delaware's "Political Balance Requirement" was implemented in 1897 in an attempt to encourage bipartisanship of the judiciary and eliminate polarization of the judges.[64] This system is unique in the nation and has been revered by various judges, politicians, and lawyers in Delaware.[65]

Adams brought this claim asserting that the "Political Balance Requirement" violated his First Amendment freedom of association rights and requested injunctive relief.[66] Acknowledging the narrow exception to First Amendment protections for patronage appointments in policymaking positions, the District Court found that the judiciary fell outside of this exception.[67] The Court asserted that "a judge's role is 'to apply, not amend, the work of the People's representatives.'"[68] The District Court granted summary judgment in favor of Adams and struck down the constitutional provision in its entirety, concluding that "[s]ince political affiliation in Delaware cannot 'cause an official to be ineffective in carrying out the duties and responsibilities of the office,' it does not meet the standard for a 'policymaking position.'"[69]

The Governor of Delaware appealed the lower court's decision.[70] In February 2019, the Third Circuit affirmed and reversed in part the District Court's decision, holding that judges did not fall within the policymaking exception.[71] However, since the major political party component was lacking in both the Family Court and Court of Common Pleas, the Third Circuit believed that Adams' First Amendment right to associate as an Independent had not been violated under the constitutional provisions for these courts.[72] The Governor requested a

63. *Id.*

64. *See* Friedlander, *supra* note 28, at 1142.

65. *See id.*; Colleen O'Dea, *Explainer: How Do Our Judges Make It to the Bench in New Jersey?*, NJ SPOTLIGHT NEWS (June 3, 2014), https://www.njspotlight.com/2014/06/14-06-02-explainer-how-judges-make-it-to-the-bench-in-new-jersey/ (discussing how New Jersey's unspoken practice of promoting a balanced bench on the State Supreme Court by party affiliation has been a tradition of countless governors).

66. Adams v. Carney, No. CV 17-181-MPT, 2017 WL 6033650, at *1 (D. Del. Dec. 6, 2017).

67. *Id.* at *3–4.

68. *Id.* at *5 (quoting Hayes v. Harvey, 874 F.3d 98, 111 (3d Cir. 2017)).

69. *Id.* at *6 (quoting Waskovich v. Morgano, 2 F.3d 1292, 1297 (3d Cir. 1993)).

70. Adams v. Governor of Del., 914 F.3d 827 (3d Cir.), *aff'd in part, rev'd in part*, 922 F.3d 166 (3d Cir. 2019).

71. *Id.* at 838–40.

72. *See id.* at 843.

rehearing which was granted in April 2019.[73] Nevertheless, the Third Circuit's ruling was almost identical to its February 2019 opinion, but additionally stated that the major party constitutional component is not severable from Article IV, Section 3 for the Supreme, Superior, and Chancery Courts.[74]

2. Third Circuit's Analysis

The Governor argued that judges are policymakers and fall within the exception, and if they are not policymakers, the State has a significant interest in maintaining the political balance on its courts.[75] In beginning its policymaking analysis, the Court referenced the exception's development through *Elrod*, *Branti*, and *Rutan*, explaining that the idea driving the policymaking exception is that officials directly elected by the public should have the ability to "put in place loyal employees who will not undercut or obstruct the new administration."[76] Judge Fuentes, writing for the majority, stated that judges do not fall within this exception and cited both the American Bar Association's Model Code of Judicial Conduct and the Delaware Code of Judicial Conduct.[77] Both of these Codes of Conduct outline various guidelines for members of the judiciary and reiterate that members must be independent and promote "impartiality," not loyalty.[78] Additionally, the Third Circuit referenced the "Political Balance Requirement" to counter the Governor's policymaking argument since the provision restricts the Governor's ability to nominate individuals to the judiciary.[79] The Governor simply cannot nominate judges solely on the basis of allegiance to his party since

73. *See* Adams v. Governor of Del., 922 F.3d 166 (3d Cir. 2019),), *rev'd on other grounds sub nom.*, Carney v. Adams, 141 S. Ct. 493 (2020); *see also* Richard Winger, *Third Circuit Again Strikes Down Delaware Law Requiring State Judges to be Members of the Two Largest Parties*, BALLOT ACCESS NEWS (Apr. 10, 2019), https://ballot-access.org/2019/04/10/third-circuit-again-strikes-down-delaware-law-requiring-state-judges-to-be-members-of-the-two-largest-parties.

74. *Adams*, 922 F.3d at 183.

75. *Id.* at 178.

76. *Id.* at 176–78; Elrod v. Burns, 427 U.S. 347 (1976); Branti v. Finkel, 445 U.S. 507 (1980); Rutan v. Republican Party of Ill., 497 U.S. 62 (1990); *see Recent Case:* Adams v. Governor of Delaware, HARV. L. REV. BLOG (Mar. 12, 2019), https://blog.harvardlawreview.org/recent-case-adams.

77. *Adams*, 922 F.3d at 179.

78. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 1 (AM. BAR ASS'N 2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/; DEL. JUDGES' CODE OF JUDICIAL CONDUCT r. 2.4(A), 4.1, 1.2(A) (2008), https://courts.delaware.gov/forms/download.aspx?id=39408.

79. *Adams*, 922 F.3d at 178–79.

the purpose of this constitutional provision is to have both Democratic and Republican judges as members of the judiciary.[80] Next, the majority dismissed the Governor's contention that judges create policy, similar to the argument in *Gregory*.[81]

Regarding the Sixth and Seventh Circuit decisions holding that judges are policymakers, the Third Circuit confirmed that it would proceed in a different direction, resulting in a circuit split.[82] The *Adams* majority believed that the Sixth and Seventh Circuits applied the *Elrod* and *Branti* standards too broadly.[83] Additionally, the Third Circuit suggested that while the established policymaking exception "protect[s] affiliation—and decisions not to affiliate—with a political party. . . . [it does not] prohibit an appointing official from considering a job candidate's views on questions and issues related to the job itself."[84] Furthermore, the Third Circuit expanded on the policymaking exception by considering "whether the employee has duties that are *non-discretionary or non-technical*, participates in discussions or other meetings, prepares budgets, possesses the authority to hire or fire other employees, has a high salary, retains power over others, and can speak in the name of policymakers."[85]

After asserting that judges fall outside the scope of the policymaking exception, the Third Circuit considered whether the State has a state interest, pursuant to *Rutan*, that is "narrowly tailored to further vital government interests."[86] Judge Fuentes dismissed the popularity of the "Political Balance Requirement" among the judicial community in Delaware and informed the Governor that this was an insufficient justification for the provision.[87] Moreover, in a concurring opinion, Judge McKee, joined by Judges Restrepo and Fuentes, found that while the judiciary in Delaware warranted significant national admiration, this still did not excuse "*the constitutional transgression that is baked into the selection process*."[88]

80. *See id.*
81. *Id.* at 180; Gregory v. Ashcroft, 501 U.S. 452, 453 (1991).
82. *See Adams*, 922 F.3d at 180; *see also* Newman v. Voinovich, 986 F.2d 159, 163 (6th Cir. 1993); Kurowski v. Krajewski, 848 F.2d 767, 770 (7th Cir. 1988).
83. *Adams*, 922 F.3d at 181.
84. *Id.*
85. *Id.* at 178 (emphasis added) (quoting Galli v. N.J. Meadowlands Comm'n, 490 F.3d 265, 271 (3d Cir. 2007) (citing Brown v. Trench, 787 F.2d 167, 169 (3d Cir. 1986)).
86. *Id. See* Rutan v. Republican Party of Ill., 497 U.S. 62, 74 (1990) ("Unless these patronage practices are narrowly tailored to further vital government interests, we must conclude that they impermissibly encroach on First Amendment freedoms.").
87. *Adams*, 922 F.3d at 181.
88. *Id.* at 186–87 (emphasis added).

B. Kurowski v. Krajewski, Seventh Circuit

1. Facts and Procedural Posture

Prior to the Third Circuit's decision, the Seventh Circuit applied the policymaking exception to the judiciary in *Kurowski v. Krajewski*[89] in 1988. Judge Krajewski, a Republican, was formally appointed after a judicial scandal ousted another judge.[90] As a result, Krajewski gained the ability to appoint state public defenders.[91] Assistant Public Defender Kurowski received excellent feedback on his work from Judge Krajewski.[92] A mere six months later, Judge Krajewski terminated Kurowski and another assistant public defender.[93] Both Kurowski and the other individual were Democrats, as was the judge who had hired them.[94] Judge Krajewski was an active Republican and proceeded to replace those positions with fellow Republicans.[95] Kurowski brought this claim pursuant to the Civil Rights Act and the First Amendment.[96] At trial, the magistrate judge found that Judge Krajewski fired Assistant Public Defender Kurowski solely based upon his political affiliation and an appeal followed.[97]

2. Seventh Circuit's Analysis

Interpreting *Branti*, the Seventh Circuit found that the decision turned on "the characteristics of the assistant public defender's job, not on the office of the person doing the firing."[98] Nonetheless, the Seventh Circuit refined the policymaking exception and believed that the focus should be "how best to carry out the duties of the office in question" and whether the employer would need like-minded employees committed to the office to be successful.[99] It held that while the governor had the ability to consider Judge Krajewski's political affiliation when appointing him as a judge, believing that judges were within the policymaking exception,

89. Kurowski v. Krajewski, 848 F.2d 767 (7th Cir. 1988).
90. *Id.* at 768.
91. *See id.*
92. *See id.*
93. *Id.* at 769.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 769.
98. *See id.* at 769; Branti v. Finkel, 445 U.S. 507, 519 (1980) ("[W]hatever policymaking occurs in the public defender's office must relate to the needs of individual clients and not to any partisan political interests.").
99. *Kurowski*, 848 F.2d at 770.

he could not utilize the same approach for public defenders.[100] In dicta, regarding the judiciary falling within the policymaking exception, the Seventh Circuit stated, "A judge both makes and implements governmental policy. A judge may be suspicious of the police or sympathetic to them, stern or lenient in sentencing, and political debates rage about such questions."[101] Distinguishing public defenders from the judiciary, the Seventh Circuit continued, "[p]ublic defenders are advocates, not judicial officers; they are farther removed from core judicial functions."[102]

C. *Newman v. Voinovich, Sixth Circuit*

1. Facts and Procedural Posture

Five years later, the Sixth Circuit agreed with the Seventh Circuit and that members of the judiciary should be policymakers under the First Amendment exception.[103] In *Newman v. Voinovich*,[104] Republican Governor Voinovich had been making interim judicial appointments using a procedure through the Republican Party.[105] Specifically, the Republican Chairpersons submitted individuals for consideration for these judicial appointments.[106] After a judge was leaving his position as a county common pleas judge, Newman, a registered Democrat, became a proposed judicial candidate after his law firm partner submitted his information to the governor for consideration.[107] The Governor's Special Assistant for Boards, Commissions, and Judges conceded that Newman's information may have been reviewed half-heartedly since his name was not endorsed by the Republican Party.[108] Newman claimed that the process violated his First Amendment freedom of association.[109] The District Court dismissed Newman's claim and an appeal followed.[110]

100. *Id.* at 770–71.
101. *Id.* at 770.
102. *Id.* at 775.
103. Newman v. Voinovich, 986 F.2d 159, 163 (6th Cir. 1993).
104. 986 F.2d 159.
105. *Id.* at 160.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*; U.S. CONST. amend. I.
110. *Newman*, 986 F.2d at 160.

2. Sixth Circuit's Analysis

The Sixth Circuit analyzed Article IV, Section 13 of the Ohio Constitution, which explicitly gives the governor the ability to fill any temporary vacancies until judicial elections are held.[111] Notably, the Sixth Circuit's analysis aligned with the Seventh Circuit's holding that judges are policymakers under the First Amendment exception.[112] The Sixth Circuit consistently cited *Kurowski* with the belief that it was acceptable for the governor to consider a judge's party affiliation when deciding whom to appoint.[113] Aligned with *Gregory*, the Sixth Circuit also stated "judges are policymakers because their political beliefs influence and dictate their decisions on important jurisprudential matters."[114] It held that the Governor was within his right to determine judicial appointments on the basis of political affiliation.[115]

However, the Sixth Circuit expressed concerns about the gubernatorial political appointment process and asserted "while this practice may be constitutional, we believe it is unwise."[116] In Judge Jones' concurring opinion, he expressed many of the concerns reflected in the Third Circuit's eventual holding in *Adams*, but still believed that judges constitute "unique types of 'policymakers.'"[117]

III. PROPOSALS TO LIMIT THE ROLE OF POLITICAL AFFILIATION IN THE JUDICIARY

While the Third Circuit excluded judges from the policymaking exception in *Adams*, questions remain regarding its application.[118] This standard leaves significant uncertainty as to whether other members of the judiciary would be considered policymakers thus allowing selection

111. *See id.* at 161; OHIO CONST. art. IV, § 13.
112. *Newman*, 986 F.2d at 163 ("We agree with the holding in *Kurowski* that judges are policymakers because their political beliefs influence and dictate their decisions on important jurisprudential matters."); *see* Kurowski v. Krajewski, 848 F.2d 767, 770 (7th Cir. 1988).
113. *See Newman*, 986 F.2d at 162–63; *Kurowski*, 848 F.2d at 770.
114. *Newman*, 986 F.2d at 163; *See* Gregory v. Ashcroft, 501 U.S. 452, 466–67 (1991).
115. *Newman*, 986 F.2d at 163.
116. *Id.*
117. *Id.* at 165 (Jones, J., concurring) ("Nonetheless, I am gravely troubled by the Ohio Governor's practice . . . [u]sing political affiliation as a *factor* in filling appointments is drastically different from using political affiliation as *an exclusive means* of appointing judges"); *see also* Adams v. Governor of Del., 922 F.3d 166, 181 (3d Cir. 2019), *rev'd on other grounds sub nom.*, Carney v. Adams, 141 S. Ct. 493 (2020).
118. *See Adams*, 922 F.3d at 181.

based upon political affiliation.[119] In addition to eliminating Delaware's "Political Balance Requirement," further reforms should be made in other forms of the judiciary to prevent selection based upon political affiliation to conform to the First Amendment policymaking exception. Although many of these proposals have been debated, consideration of the First Amendment policymaking exception lends credence to some of these proposals, as they are a step in the right direction in combating the ongoing "legitimacy" crisis of the bench in a heavily polarized environment. The application of the underutilized First Amendment policymaking exception could be a useful tool towards achieving this goal.

A. *State Judiciary*

1. The Role of the State Judiciary and Status of State Judicial Selection

The Third Circuit in *Adams* found that despite the pivotal role of state judges, this "does not make the judicial position a political role tied to the will of the Governor and his political preferences."[120] Members of the state judiciary are "the final arbiters of state laws and constitutions" nationwide.[121] Additionally, the state judiciary has more sizeable caseloads as compared to their federal counterparts.[122] Unsurprisingly, the status of state judicial selection varies by state; methods of selection include judicial elections, as well as commission-based and gubernatorial appointments.[123] The independent commission method is most aligned with the Third Circuit's belief that judges should be excluded from the policymaking exception and is the least threatening method to an

119. *See id.*

120. *Id.* at 180.

121. *See Comparing Federal & State Courts*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts (last visited Feb. 26, 2021).

122. *See* QUALITY JUDGES INITIATIVE, FAQS: JUDGES IN THE UNITED STATES, https://online.iaals.du.edu/sites/default/files/documents/publications/qji_media_kit.pdf (last visited Feb. 26, 2021) (finding that more than 100 million cases are filed in state trial courts compared to around 400,000 cases filed in federal courts each year).

123. *See* QUALITY JUDGES INITIATIVE, SELECTION AND RETENTION OF STATE JUDGES: METHODS FROM ACROSS THE COUNTRY, https://iaals.du.edu/sites/default/files/documents/publications/selection_and_retention_of_state_judges_charts.pdf (last visited Feb. 24, 2021) [hereinafter *Selection and Retention of State Judges*]. To view an interactive map-based resource showing the judicial selection methods by state, courtesy of the Brennan Center for Justice, visit http://judicialselectionmap.brennancenter.org. *See Judicial Selection: An Interactive Map*, BRENNAN CTR. FOR JUST., http://judicialselectionmap.brennancenter.org (last visited Feb. 26, 2021).

individual's First Amendment freedom of association due to its emphasis on merit-based criteria.[124]

As of 2017, twenty-four states held some form of judicial elections for state supreme court justices, whereas twenty-one held elections for intermediate appellate courts, and thirty-six for trial courts.[125] There are three forms of judicial elections: legislative, partisan, and nonpartisan.[126] In legislative elections, the judiciary is selected solely by the members of the state legislature.[127] For the remaining methods, the general public is able to vote for members of the judiciary in both partisan and nonpartisan judicial elections.[128]

Nonpartisan judicial elections remain the slightly more popular option for states[129] in an effort to curtail the politicization of judicial appointments.[130] However, despite the exclusion of party affiliation in nonpartisan judicial elections, these elections can still transform into highly political affairs due to external influences and spending by political groups.[131] Alternatively, partisan judicial elections list the party affiliations of the candidates on the ballot.[132] Many states use partisan judicial elections for at least one level of their judiciary.[133] Proponents of

124. *Compare Selection and Retention of State Judges*, *supra* note 123, *with* Adams v. Governor of Del., 922 F.3d 166, 181 (3d Cir. 2019), *rev'd on other grounds sub nom.*, Carney v. Adams, 141 S. Ct. 493 (2020). *See also* U.S. CONST. amend. I.

125. *See Selection and Retention of State Judges*, *supra* note 123.

126. *See id.*

127. *See Legislative Election of Judges*, BALLOTPEDIA, https://ballotpedia.org/Legislative_election_of_judges (last visited Feb. 26, 2021). South Carolina and Virginia are the only two states that select judges by legislative elections of the state assemblies. *Id.*

128. *See Selection and Retention of State Judges*, *supra* note 123. Judges are listed on the ballot and identified by their political party affiliations in partisan elections, whereas in nonpartisan elections, judicial candidates do not run as candidates identified by political affiliation. *State Judicial Elections, 2019*, BALLOTPEDIA, https://ballotpedia.org/State_judicial_elections,_2019 (last visited Feb. 26, 2021).

129. *Selection and Retention of State Judges*, *supra* note 123, at 3–5.

130. *See Nonpartisan Election of Judges*, BALLOTPEDIA, https://ballotpedia.org/Nonpartisan_election_of_judges (last visited Feb. 26, 2021) ("Varying codes of conduct govern the campaign process of judicial candidates, mandating how much or how little they can or must reveal about party affiliation and their stances on controversial issues.").

131. *See* Selection of State Judges Symposium, *The Case for Partisan Judicial Elections*, 33 U. TOL. L. REV. 393, 403–04 (2002); *see also* Staff Writer, *Clearly, Nonpartisan Judicial Elections Remain Partisan*, AP NEWS (Nov. 11, 2018), https://apnews.com/4a0735020c594aef8487562428c03c0a (discussing the partisan behavior in nonpartisan judicial elections witnessed in West Virginia's first nonpartisan cycle in 2016).

132. *Partisan Election of Judges*, BALLOTPEDIA, https://ballotpedia.org/Partisan_election_of_judges (last visited Feb. 26, 2021).

133. *See id.* Nine states have partisan elections for the Supreme Court, eight for intermediate appellate courts, and fourteen for trial courts. *Selection and Retention of State Judges*, *supra* note 123, at 3–5.

this selection method assert that it encourages transparency and strengthens the public's voice in the process.[134]

Despite the popularity of partisan judicial elections, it still has its critics.[135] Criticisms of this method are similar to those of elections for other forms of public office including, but not limited to: the role money plays in elections, power of special interests, and deceptive campaign advertisements.[136] For example, there is a growing movement in Texas to alter this method of judicial selection in hopes of limiting partisanship.[137] This can ultimately play a role in transforming members of the judiciary into policymakers and, therefore, result in First Amendment concerns.

Opting for a less politicized process, some states select the judiciary through commission-based appointments.[138] As of 2017, twenty-one states had commission-based gubernatorial appointments, which include

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134. *See The Case for Partisan Judicial Elections*, *supra* note 131, at 408 ("[T]he most important reason for supporting partisan judicial elections may well be that this mechanism reinforces the ideal of self-government."); Kelly Shackelford & Justin Butterfield, *The Light of Accountability: Why Partisan Elections are the Best Method of Judicial Selection*, 53 ADVOC. (TEX.) 73, 75 (2010) ("[P]artisan elections . . . do expose the judicial candidates' ideology to the public. Again, exposing the politics to the public produces better results than hiding the politics in the political shadows in back room appointments and where decisions are made by an elite few with special access.").

135. The Editorial Board, *Judges Shouldn't Be Partisan Punching Bags*, N.Y. TIMES (Apr. 8, 2018), https://www.nytimes.com/2018/04/08/opinion/judicial-independence.html ("[E]lected judges . . . may be more wary of issuing what they perceive to be controversial or unpopular rulings, for fear of blowback.").

136. *See* Adam Liptak, *Judges Who Are Elected Like Politicians Tend to Act Like Them*, N.Y. TIMES (Oct. 3, 2016), https://www.nytimes.com/2016/10/04/us/politics/judges-election-john-roberts.html [hereinafter Liptak, *Judges Who Are Elected Like Politicians Tend to Act Like Them*]; Mitch Ryals, *Should Judges Be Elected by The Public? Let's Break It Down*, INLANDER: BLOGLANDER (Oct. 6, 2016, 4:29 PM), https://www.inlander.com/Bloglander/archives/2016/10/06/should-judges-be-elected-by-the-public-lets-break-it-down ("When you elect judges in the same way you elect politicians, they tend to act like politicians.").

137. Ross Ramsey, *Analysis: Voters Elect Texas' Judges. The State Might Take That Power – But it's Risky.,* TEX. TRIB. (Jan. 20, 2020, 12:00 AM), https://www.texastribune.org/2020/01/20/voters-elect-texas-judges-state-might-take-that-power-but-its-risky/ (discussing how a state panel continues to consider viable alternatives to judicial selection by elections). *See* Rudy Apodaca, *Texas Would Do Well to Do Away With Picking Judges in Partisan Elections for this Simple Reason*, HOUS. CHRONICLE (Oct. 20, 2018, 6:09 PM), https://www.houstonchronicle.com/opinion/outlook/article/Texas-would-do-well-to-do-away-with-picking-13323669.php ("All but six states, . . . includ[ing] Texas, have taken steps to limit the role of politics in the selection of judges. The oft-cited reason for this shift, according to the National Center for State Courts, is a 'recognition that an independent judiciary is *essential* to the maintenance of public trust and confidence in the court system.'" (emphasis added)); *Judicial Selection in the States*, NAT'L CTR. FOR STATE CTS., http://www.judicialselection.us/ (last visited Feb. 26, 2021).

138. *See* Liptak, *Selection and Retention of State Judges*, *supra* note 123, at 3–8.

processes for both intermediate appellate and trial courts.[139] This method includes a commission comprised of various individuals tasked with screening and selecting the best nominees for the judiciary[140] and is often referred to as merit-based selection.[141]

Some states use hybrid commission-appointment systems where the commission compiles a list of who it believes is qualified and the governor retains the ability to select a candidate from the list.[142] The first state to adopt this type of merit-based system, Missouri, (known as the "Missouri Plan") has a seven-person commission that submits nominees to the executive for selection.[143]

Judicial selection commissions were created out of fear that the judiciary was becoming heavily politicized due to the inherently political nature of judicial elections.[144] However, this can be dependent upon the types of individuals selected to serve on the nominating commission.[145] The commission may be bipartisan, with members of both major political parties, or nonpartisan, with individuals from a wide array of technical experience, including, members of the American Bar Association ("ABA"), legal scholars, or various public officials.[146] Like any other selection method, commissions have their critics as well, with some

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139. *Id.* at 3.

140. Joseph A. Colquitt, *Rethinking Judicial Nominating Commissions: Independence, Accountability, and Public Support*, 34 FORDHAM URB. L.J. 73, 74, 81 (2007); Matthew Schneider, *Why Merit Selection of State Court Judges Lacks Merit*, 56 WAYNE L. REV. 609, 623 (2010).

141. *See* Schneider, *supra* note 140, at 623.

142. *See* Liptak, *Selection and Retention of State Judges*, *supra* note 123, at 3–8.

143. Rachel Paine Caulfield, *What Makes Merit Selection Different?*, 15 ROGER WILLIAMS U. L. REV. 765, 767–68 (2010); Cort A. Vanostran, Note, *Justice Not for Sale: A Constitutional Defense of the Missouri Plan for Judicial Selection*, 44 WASH. U. J.L. & POL'Y 159, 166 (2014).

144. *See* Schneider, *supra* note 140, at 623 (stating that even former President and Chief Justice William Howard Taft described judicial elections as "'disgraceful' and . . . 'so shocking . . . that we ought to condemn them.'" (quoting William Howard Taft, *The Selection and Tenure of Judges*, 38 ANN. REP. A.B.A. 418, 422-23 (1913))). Taft continued, "[T]he logical development of the view that a popular election is the only basis for determining right and justice . . . [is] so out of keeping with the fixedness of moral principles which we learned at our mother's knee, and which find recognition in the conscience of every man who has grown up under proper influence, that we ought to condemn . . . a system which can encourage or permit such *demagogic* methods of securing judicial position." Taft, *supra* note 144, at 423 (emphasis added).

145. *See Methods of Judicial Selection*, FUND FOR MODERN CTS. https://moderncourts.org/programs-advocacy/judicial-selection/methods-of-judicial-selection/ (last visited Feb. 26, 2021).

146. *Id.*

arguing that they simply move the process to "smoke-filled rooms" behind closed doors where decisions are made by a small number of elites.[147]

2. Commission-Based Selection Supports the Exclusion of the Judiciary from the Policymaking Exception

Considering the various state judicial selection methods, the commission-based selection method contains the most appropriate criteria to combat the policymaking concerns acknowledged by the Third Circuit in *Adams*.[148] As discussed by the Third Circuit, it becomes a significant issue when the judiciary becomes beholden to the political party in power and, consequently, transforms the judiciary into policymakers.[149] This issue is glaringly present in the state judicial election process.[150] In both partisan and nonpartisan judicial elections, members of the judiciary, feeling the effects of being candidates in political elections, are pressured to align with a political party, even, notably, when they are on the bench.[151] Therefore, based on the Third Circuit's view that the judiciary should be excluded from patronage appointments as they should not be considered policymakers for purposes of the First Amendment, the election method only encourages judicial selection to be conditioned on the basis of political affiliation alone. Despite some criticisms of commission-based selection, including

147. *See* Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675, 676 (2009) (arguing that merit selection "simply *move*[*s*] the politics of judicial selection into closer alignment with the ideological preferences of the bar"); Schneider, *supra* note 140, at 651 n.218 (referencing Senate testimony by Professor Marina Angel of Temple Law School stating that instituting a merit selection gives away her right to vote and puts it in the hand of elites behind closed doors); Shackelford & Butterfield, *supra* note 134, at 74 (discussing how the Missouri Plan, one commission-based method, "merely pushes political considerations out of the public spotlight and into the 'smoke-filled rooms' of special interest groups and political power players").

148. *See* Adams v. Governor of Del., 922 F.3d 166, 178–80 (3d Cir. 2019), *rev'd on other grounds sub nom.*, Carney v. Adams, 141 S. Ct. 493 (2020).

149. *Id.* at 179–80.

150. *See Judges Shouldn't Be Partisan Punching Bags*, *supra* note 135.

151. *See* KATE BERRY, HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES, BRENNAN CTR. FOR JUST. 7 (2015) (referencing studies confirming "that re-election and retention pressures cause judges to (1) sentence more punitively and (2) vote less frequently in favor of criminal defendants on appeal"); *see also* Liptak, *Judges Who Are Elected Like Politicians Tend to Act Like Them*, *supra* note 136 (noting that "[a]ppointed judges who must face retention elections also have reason to be sensitive to public opinion" and, consequently, may "take positions that are more attractive to a party's base than to the general electorate").

transferring power from the many to the few,[152] there are particular qualities a commission can possess to limit these concerns.

Over thirty states currently have some form of judicial nominating commissions.[153] While some state judicial selection commissions are comprised of individuals appointed by the governor, resulting in the individuals nominating applicants and the governor appointing the judges, this is not the ideal method to insulate judicial selection from the political process.[154] Instead, commissioners should have longer term limits to limit reappointment worries and prevent the feeling of being beholden to the governor.[155] Additionally, dividing the power between the governor and legislature is beneficial.[156] For example, if the governor has the power to appoint the judiciary, the legislature can retain the power to appoint commissioners to the independent nominating commission.[157] Members of the legislature appoint some commissioners in at least seven states and four states require formal legislative confirmation for some commissioners.[158]

Regarding the commission's makeup, commissioners should come from diverse legal and nonlegal backgrounds.[159] This can ease concerns and limit criticisms of commissions which give only elite members of the legal community the power to nominate members of the judiciary.[160]

For example, Hawaii's judicial nomination commission has garnered attention and, as the Brennan Center for Justice has noted, could

152. *See* Shackelford & Butterfield, *supra* note 134, at 74 (discussing how commissions developed through the Missouri Plan remained politicized and "were for the benefit of a very few, elite persons on the nominating committee instead of for the public as a whole . . . with so much of the process hidden in the back rooms [and] the full extent of the politicization . . . hidden from the public").

153. Douglas Keith, *Judicial Nominating Commissions*, BRENNAN CTR. FOR JUST. 15–22 app. II, https://www.brennancenter.org/sites/default/files/2019-10/2019_10_JudicialNominationCommissions_Final.pdf (last visited Feb. 26, 2021).

154. Colquitt, *supra* note 140, at 87–88 (describing this selection process as an example of "external capture" since the governor maintains control over the commission).

155. *See id.* at 89.

156. *See id.* at 94–95.

157. *Id.*

158. MALIA REDDICK & REBECCA LOVE KOURLIS, CHOOSING JUDGES: JUDICIAL NOMINATING COMMISSIONS AND THE SELECTION OF SUPREME COURT JUSTICES 7 (2014), https://iaals.du.edu/sites/default/files/documents/publications/choosing_judges_jnc_report.pdf.

159. CODY CUTTING, JUDICIAL RETENTION IN HAWAII: A CASE STUDY 7 (2016), https://www.brennancenter.org/sites/default/files/blog/Judicial_Retention_in_Hawaii-A_Case_Study.pdf [hereinafter CUTTING, JUDICIAL RETENTION IN HAWAII] ("A substantial body of research shows that judicial decision-making is enhanced by the inclusion of diverse backgrounds, perspectives, and life experiences.").

160. *See id.*

potentially serve as a "model" for the nation in its attempt to insulate the judiciary from political pressures.[161] Consequently, this method, due to its unique makeup and retention method, can prevent members of the judiciary from appearing as policymakers thus allowing patronage appointments.[162]

First, the Hawaiian judicial selection commission, comprised of nine members, reviews candidates, and prepares a list of qualified candidates.[163] Various members of the government are responsible for making appointments to the commission, including "the governor, House Speaker, president of the Hawaii Senate, Hawaii Bar Association, and chief justice of the Supreme Court."[164] Next, the assigned appointive body makes its final determination and the Senate provides consent.[165] The appointive body depends on the level of the court.[166] After an applicant is appointed and serves his or her first term and seeks reappointment, he or she must reapply to the commission for the next term.[167]

Resembling agency notice-and-comment procedures, the commission then solicits comments about the particular judge from the public.[168] In addition to reviewing the public's comments, the committee assesses the judge's record, including "the judge's decision-making record, performance evaluations administered by the judiciary and the Bar, [and] an in-person interview. . . ."[169] This holistic approach is aligned with the Court's policymaking analysis in *Branti* and demonstrates that the commission does not believe "party affiliation is an appropriate requirement for the effective performance of the [judiciary]."[170] Therefore, the setup of this commission is aligned with the position that

161. Cody Cutting, *The Aloha State: A Model for Selecting Judges?* BRENNAN CTR. FOR JUST., https://www.brennancenter.org/our-work/analysis-opinion/aloha-state-model-selecting-judges (Sept. 6, 2016) [hereinafter Cutting, *The Aloha State*].

162. *See id.* ("The design of Hawaii's commission also helps enhance its role as a nonpartisan evaluator."); *see also* CUTTING, JUDICIAL RETENTION IN HAWAII, *supra* note 159, at 7 (providing more details about Hawaii's Judicial Selection Commission).

163. Lawrence S. Okinaga, *Judicial Selection in Hawaii*, 10 HAW. BAR J. 100, 100 (2006).

164. *Hawaii Judicial Selection Commission*, BALLOTPEDIA, https://ballotpedia.org/Hawaii_Judicial_Selection_Commission (last visited Feb.26, 2020). *See also* Okinaga, *supra* note 163, at 101 (explaining in greater detail the composition of the selection commission).

165. Okinaga, *supra* note 163, at 100.

166. *See id.* The Chief Justice appoints for the district court, whereas the governor appoints for the "circuit, intermediate appellate, and supreme courts." *Id.*

167. *Id.*

168. *See* Cutting, *The Aloha State*, *supra* note 161; *see also* CUTTING, JUDICIAL RETENTION IN HAWAII, *supra* note 159.

169. CUTTING, JUDICIAL RETENTION IN HAWAII, *supra* note 159, at 4. *See* Cutting, *The Aloha State*, *supra* note 161.

170. *See* Branti v. Finkel, 445 U.S. 507, 518 (1980).

the judiciary should not be selected on political affiliation alone and should be exempt from the policymaking exception of the First Amendment.

Hawaii has the only state judicial selection process which uses the commission for retention in the nation.[171] Some scholars believe that this system has the potential to not only limit the politicization of the judiciary, but also create greater public confidence in the judiciary and provide a more transparent selection process.[172] While it is unlikely to completely eliminate politics from the state judicial selection process, changes can be made nationwide to prevent the transformation of the judiciary into policymakers.

Today, state judicial selection movements for merit-based reform continue, and one such effort is led by the O'Connor Judicial Selection Initiative by the Institute for the Advancement of the American Legal System at the University of Denver.[173] Justice O'Connor began these efforts to combat the effort of judges becoming policymakers, as she stated judges should be "more than 'politicians in robes.'"[174] This idea can prevail by asserting that judges should be excluded from the policymaking exception. However, it is important to note that there is no perfect selection-based plan, and as Justice O'Connor stated, "even states that use a merit selection system to select judges should scrutinize their plans to preserve what is essential to judicial independence."[175] Nonetheless, "to the extent that merit-selection plans are imperfect, they remain on the side of virtue."[176]

3. Delaware Should Eliminate Political Affiliation from Its

171. CUTTING, JUDICIAL RETENTION IN HAWAII, *supra* note 159; Cutting, *The Aloha State*, *supra* note 161.

172. *See* CUTTING, JUDICIAL RETENTION IN HAWAII, *supra* note 156, at 5.

173. *See* John Schwartz, *Effort Begun to End Voting for Judges*, N.Y. TIMES (Dec. 23, 2009), https://www.nytimes.com/2009/12/24/us/24judges.html; *see also* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., THE O'CONNOR JUDICIAL SELECTION PLAN (2014), https://iaals.du.edu/sites/default/files/documents/publications/oconnor_plan.pdf. Justice O'Connor was firmly against the politicization of the bench and stated, "I have been distressed to see persistent efforts in some states to politicize the bench and the role of our judges. This Plan is a step toward developing systems that prioritize the qualifications and impartiality of judges." *Id.* at 5.

174. Schwartz, *supra* note 173 (quoting Justice O'Connor). The O'Connor Judicial Selection Plan consists of four-parts: a judicial nominating commission, gubernatorial appointment, judicial performance evaluation, and retention elections. THE O'CONNOR JUDICIAL SELECTION PLAN, *supra* note 173, at 5–8.

175. THE O'CONNOR JUDICIAL SELECTION PLAN, *supra* note 173, at 11.

176. Sandra Day O'Connor, *The Essentials and Expendables of the Missouri Plan*, 74 MO. L. REV. 479, 486 (2009).

Judicial Candidate Forms

While the Third Circuit found Delaware's unique "Political Balance Requirement" unconstitutional, this does not mean that the state must start from scratch in implementing a new judicial selection process.[177] Aside from its party-balance provision, Delaware maintains a Judicial Nominating Commission which requires candidates to submit application forms.[178]

The Judicial Nominating Commission of Delaware has eleven members, which includes "at least four lawyers and at least four nonlawyers[,] and [t]he president of the Delaware State Bar Association nominates with the governor's consent the eleventh member."[179] After the commission submits candidates' names to the governor, the governor must abide by the "Political Balance Requirement."[180] Not only can this commission become merit-based by adopting some of the practices of commissions previously discussed, but it can also remove political affiliation from its candidate application forms.[181] The commission currently issues a Questionnaire for Candidates for Judicial Office.[182] This form's second question requests the political affiliation of the judicial applicant.[183] The subsection asks whether the applicant's political affiliation "changed within the last two years" and requires an explanation if it has changed.[184] The elimination of question two can curtail potential perceived biases against candidates based on their political affiliation alone, which includes a rejection of a candidate who may be registered as an Independent, such as Adams, or remains unaffiliated with a political party.[185]

177. *See* Adams v. Governor of Del., 922 F.3d 166 (3d Cir. 2019), *rev'd on other grounds sub nom.*, Carney v. Adams, 141 S. Ct. 493 (2020).

178. *See Methods of Judicial Selection: Delaware*, NAT'L CTR. FOR STATE CTS., http://www.judicialselection.com/judicial_selection/methods/judicial_nominating_commissions.cfm?state=DE (last visited Feb. 26, 2021); DEL. JUD. NOMINATING COMM'N, QUESTIONNAIRE FOR CANDIDATES FOR JUDICIAL OFFICE, https://www.courts.delaware.gov/forms/download.aspx?id=85888 (last updated Jan. 2021) [hereinafter *Questionnaire for Political Office*].

179. *Methods of Judicial Selection: Delaware*, *supra* note 178.

180. *See* DEL. CONST. art. IV, § 3.

181. *See Questionnaire for Political Office*, *supra* note 178.

182. *See id.*

183. *Id.*

184. *Id.*

185. *See* Adams v. Governor of Del., 922 F.3d 166, 172 (3d Cir.), *rev'd on other grounds sub nom.*, Carney v. Adams, 141 S. Ct. 493 (2020).

There are numerous states that do not include political affiliation on their judicial applicant forms.[186] For example, Maryland's applicant form for qualifications provides a good model for excluding questions pertaining to political affiliation.[187] This updated application will eliminate any effect political affiliation may have on the judicial application process and, rather, encourage the most qualified candidate to be selected based on merit. Subsequently, eliminating this question can help avoid First Amendment freedom of association concerns and is aligned with the exclusion of the judiciary from the policymaking exception.

B. Article III Judiciary

1. The Role of Article III Judges and Status of Article III Judicial Selection

Article III federal judges serve on the United States Supreme Court,[188] 94 district courts, and 13 courts of appeals, which review the decisions of the lower district courts.[189] Federal courts have general federal jurisdiction and the judges only hear cases arising out of disputes concerning the United States Constitution, federal statutes, or treaties.[190] Additionally, state law cases may be brought in district courts if there is diversity jurisdiction and the amount in controversy is greater than $75,000.[191]

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186. For example, while Hawaii has a detailed Application for Judicial Office, there is not a single question referring to the political affiliation of the candidate. *See, e.g.*, JUD. SELECTION COMM'N OF THE STATE OF HAW., APPLICATION FOR JUDICIAL OFFICE, https://www.courts.state.hi.us/docs/form/jsc/JSP084.pdf (last updated July 2014).

187. *See* CTS. OF THE STATE OF MD., QUALIFICATIONS OF A MARYLAND JUDGE, (Jan. 21, 2021), https://www.courts.state.md.us/sites/default/files/import/judgeselect/pdfs/judapplication.pdf.

188. The United States Supreme Court is often referred to as the "Court of Last Resort" and serves as the final arbiter. *See* Joan Biskupic, *The Court of Last Resort*, WASH. POST (Oct. 9, 1996), https://www.washingtonpost.com/archive/1996/10/09/the-court-of-last-resort/6cc450bc-4e24-4bfb-a631-e9fd9b6fbb03/. It generally accepts 100–150 cases per year out of thousands of petitions for certification. *Supreme Court Procedures*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (last visited Feb. 26, 2021).

189. *Introduction to the Federal Court System*, U.S. DEP'T OF JUST.: OFFS. OF THE U.S. ATT'YS, https://www.justice.gov/usao/justice-101/federal-courts (last visited Feb. 26, 2021); *see The Judicial Branch*, WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/the-judicial-branch/ (last visited Feb. 26, 2021).

190. *Introduction to the Federal Court System, supra* note 189.

191. *Id.*

The appointment of Article III judges, including Supreme Court Justices, circuit, and district judges is governed by the Constitution.[192] Article III confirms that these judges have lifetime appointments and that "[j]udges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour."[193] There have been few instances of federal judicial misconduct on the bench and only fifteen judges have been impeached by the United States House of Representatives.[194] The Appointments Clause dictates the nomination process for Article III judges and states that they must be nominated by the President and confirmed by the United States Senate.[195] In the Senate, the Judiciary Committee handles and vets the executive nominations of all Article III judges, yet, the ever-present practice of senatorial courtesy remains prevalent today.[196]

In the nation's early history, the federal judicial appointment process was swift, and presidents rarely had difficulty in getting their nominees confirmed by the Senate.[197] Yet, over time, judicial appointments were increasingly being used as "spoils" at the peak of the patronage system for federal positions.[198]

Today, the typical appointment process of an Article III judicial nominee is as follows.[199] First, when there is a vacancy, the home state's

192. *Federal Judge*, BALLOTPEDIA, https://ballotpedia.org/Federal_judge (last visited Feb. 26, 2021). *See* U.S. CONST. art. II, § 2, cl. 2; *id.* art. III, § 1.

193. *See* U.S. CONST. art. III, § 1.

194. *See* Lauren C. Bell, *Federal Judicial Selection in History and Scholarship*, 96 JUDICATURE 296, 296 (2013); *Impeachments of Federal Judges*, FED. JUD. CTR., https://www.fjc.gov/history/judges/impeachments-federal-judges (last visited Feb. 26, 2021) (listing the fifteen federal judges impeached by the House of Representatives).

195. U.S. CONST. art. II, § 2, cl. 2.

196. *Jurisdiction*, COMM. ON THE JUDICIARY https://www.judiciary.senate.gov/about/jurisdiction (last visited Feb. 26, 2021). Senatorial courtesy is an embedded tradition which allows the senators in the state where the judicial vacancy is to submit recommendations to the President as to who should fill the vacancy. Bell, *supra* note 194, at 298; Sarah A. Binder & Forrest Maltzman, *The Limits of Senatorial Courtesy*, 29 LEGIS. STUD. Q. 5, 5–6 (2004). If the senator and president are members of the same political party, the president often follows the senator's recommendation. *See* Bell, *supra* note 194, at 298; Binder & Maltzman, *supra* note 196, at 6.

197. *See* Bell, *supra* note 194, at 298. For example, President Washington "nominated six Supreme Court justices, 13 district court judges, and more than two dozen U.S. marshals and U.S. attorneys[,] [and] the Senate confirmed all of these nominees within a day." *Id.* (citing Richard. S. Arnold*, Judicial Politics Under President Washington*, 38 ARIZ. L. REV. 473 (1996)).

198. *See* Bell, *supra* note 194, at 298.

199. *See* DENIS STEVEN RUTKUS, CONG. RSCH. SERV., THE APPOINTMENT PROCESS FOR U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS: AN OVERVIEW 17 (2016).

senators send recommendations to the White House Counsel's Office.[200] Next, the Counsel's Office conducts its own internal review of the candidates and select one to be assessed by the Department of Justice's Office of Legal Policy.[201] The candidate is then interviewed by both the Office of Legal Policy and Counsel's Office.[202] After an additional review, the candidate's information may be forwarded to both the ABA and FBI.[203] However, the Trump Administration instituted a policy, last used in 2001, which eliminated the ABA's early participation in the nomination process.[204] This policy allowed the ABA to vet the candidate and issue its rating at the same time as any other organization, after the president has already nominated the candidate.[205] Finally, once the Office of Legal Policy and Counsel's Office complete their reviews and give recommendations, the president submits the nomination.[206]

After the president submits the nomination, usually by way of letter, the matter is handled by the Senate Judiciary Committee.[207] Candidates are required to answer a questionnaire issued by the committee which includes financial information, as well as the nominee's experience in academia and/or politics.[208]

Once the Committee issues its report and the president and Committee are on the same page, the Committee Chair will schedule the confirmation hearing.[209] This hearing not only allows the Committee to directly ask questions to the nominee, but also serves an important "public education function" due to the media coverage of the hearings

200. *See id.*
201. *Id.* See *Judicial Nominations: General Information*, DEP'T OF JUST.: OFF. OF LEGAL POL'Y, https://www.justice.gov/olp/judicial-nominations (last updated Dec. 16, 2020)), for an updated list of judicial nominations for the current administration.
202. *See* RUTKUS, *supra* note 199, at 17.
203. *Id.*
204. *See ABA Ratings During the Trump Administration*, BALLOTPEDIA, https://ballotpedia.org/ABA_ratings_during_the_Trump_administration (last visited Feb. 26, 2021); *Bush Dumps Bar Ratings of Judges*, ABC NEWS (Jan. 7, 2006, 10:10 AM), https://abcnews.go.com/US/story?id=93753&page=1.
205. *See ABA Ratings During the Trump Administration*, *supra* note 204. Without this process of early vetting by the ABA, there were various instances of nominees withdrawing their names from contention after members of the Senate raised questions regarding their levels of legal experience. *See* Nina Totenberg, *3 Trump Judicial Nominees Withdraw, Raising Some Questions About Vetting*, NPR (Dec. 19, 2017 7:38 PM), https://www.npr.org/2017/12/19/572046189/three-trump-judicial-nominees-withdraw-raising-some-questions-about-vetting.
206. *See* RUTKUS, *supra* note 199, at 17.
207. *Id.*
208. *Id.* at 18.
209. *Id.* at 22.

allowing the general public to evaluate the nominee.[210] Lastly, the Committee may bring forward a vote on the nominee, subsequently resulting in the confirmation of the potential nominee.[211]

There are no explicit constitutional provisions requiring either party affiliation to be taken into account or a required balance of both major political parties for federal judicial selection. Although the selection and confirmation processes have become highly politicized and contentious, since the judiciary should be excluded from the policymaking exception, political affiliation should not be the sole determinative factor for a seat on the federal bench.[212] This exclusion is necessary to prevent the denial of otherwise qualified candidates who may either be registered Independents or members of the opposing political party.

2. Independent Non-Party Based Judicial Nominating Commissions Should Become the Norm

The politicization of the selection of Article III federal judges, as one may view through some of the contentious nomination hearings, has worsened over time, and subsequently endangers the role of judges by transforming them into policymakers.[213] The belief that party loyalty is a cornerstone of federal judicial selection resulted in the Trump Administration appointing federal judges at a record pace.[214] Moreover, by the end of 2020, a quarter of all federal judges will likely have been appointed by the Trump Administration.[215] Various traditions and norms of federal judicial selection have been eliminated, such as the blue slip policy, which gave home senators a say in their home state judicial

210. *Id.* at 23.

211. *Id.* at 25.

212. Significantly, the Biden Administration is creating a bipartisan commission to explore potential reforms to the federal judiciary in the future. Tyler Pager, *Biden Starts Staffing a Commission on Supreme Court Reform*, POLITICO (Jan. 27, 2021 12:14 PM), https://www.politico.com/news/2021/01/27/biden-supreme-court-reform-463126.

213. Hugh Scott, *The Selection of Federal Judges: The Independent Commission Approach*, 8 WM. & MARY L. REV. 173, 178 (1967) ("While most judges completely divorce themselves from political activity, there appears to remain in some instances a sense of loyalty to the political party responsible for their appointment, which has been responsible for situations which not only cast serious reflection upon the judiciary, but constitute an impediment to the work of the courts." (quoting former Senior Judge J. Earl Major of the 7th Circuit Court of Appeals)).

214. *See Donald Trump is Appointing Federal Judges at a Blistering Pace*, *Daily Chart*, ECONOMIST (Feb. 14, 2020), https://www.economist.com/graphic-detail/2020/02/14/donald-trump-is-appointing-federal-judges-at-a-blistering-pace.

215. *See id.*

nominations, as well as ABA early review access of a nominee's file.[216] While suggestions have been made to combat the transformation of the federal judiciary into policymakers, including support for the implementation of a Code of Ethics for the United States Supreme Court,[217] a focus on judicial selection and the adoption of independent vetting commissions could maintain the exclusion of the judiciary from the policymaking exception of the First Amendment.

Although it is unrealistic to envision a world where federal judicial selection is completely free from political influences, independent judicial nominating commissions can limit judges from transforming into policymakers and selection based solely upon party affiliation.[218] Independent judicial nominating commissions on the federal level are different from their state counterparts since these commissions will not participate in the formal appointment process.[219] These commissions must make their recommendations to the home state senators who may forward the names of the candidates to the president.[220]

Like state judicial selection, there have been movements to adopt independent nominating commissions for the selection of Article III judges.[221] For example, in 2003, Senator Charles Schumer of New York proposed in a letter to President George W. Bush that "the

216. *See* Jordain Carney, *Senate Reignites Blue Slip Trump Court Picks*, HILL (Feb. 24, 2019, 6:29PM), https://thehill.com/homenews/senate/431232-senate-reignites-blue-slip-war-over-trump-court-picks; Tony Mauro, *Ignored or Attacked*, *ABA Committee Persists in Ranking Judicial Nominees*, N.Y. L.J. (2019).

217. In *Adams*, the Third Circuit noted how judges in Delaware must follow various handbooks and judicial codes of conduct, including both the ABA and Delaware Codes of Conduct. Adams v. Governor of Del., 922 F.3d 166, 179 (3d Cir. 2019), *rev'd on other grounds sub nom.*, Carney v. Adams, 141 S. Ct. 493 (2020). It would be beneficial for the Court to adopt a Code of Ethics to curtail the image of justices becoming politicized and turning into policymakers for purposes of the First Amendment policymaking exception and Chief Justice Roberts continues to consider the adoption of such Codes. *See* Debra Cassens Weiss, *Chief Justice Considering Possibility of Ethics Code for Supreme Court*, *Kagan Reveals*, ABA J. (Mar. 8, 2019, 11:37 AM), https://www.abajournal.com/news/article/chief-justice-is-considering-idea-of-ethics-code-for-supreme-court-kagan-reveals; *see also* JOHANNA KALB & ALICIA BANNON, BRENNAN CTR. FOR JUST. SUPREME COURT ETHICS REFORM (2019), https://www.brennancenter.org/sites/default/files/2019-09/Report_2019_09_SCOTUS_Ethics_FINAL.pdf.

218. *See* Scott, *supra* note 213, at 181–82.

219. RUSSELL WHEELER & REBECCA LOVE KOURLIS, GOVERNANCE INST. AT BROOKINGS, OPTIONS FOR FEDERAL JUDICIAL SCREENING COMMITTEES 3–4 (2d ed. 2011).

220. *Federal Judicial Selection: Federal Judicial Nominating Commissions*, NAT'L CTR. FOR STATE CTS., http://www.judicialselection.us/federal_judicial_selection/federal_judicial_nominating_commissions.cfm?state=FD (last visited Feb. 26, 2021).

221. *See* Samuel Morse, *Memo on Judicial Nominating Commissions,* FIX THE CT. (Nov. 6, 2018), https://fixthecourt.com/2018/11/ftcmemojncs/.

Administration and the Senate 'agree to the creation of nominating commissions' (comprised of 'an equal number of Republicans and Democrats') to be convened in each state and circuit to propose individual candidates to fill vacancies."[222] As of August 2017, over twenty states had senators set-up federal judicial nominating panels to recommend nominees.[223] However, many of these states have implemented committees which incorporate party affiliation into the makeup of the commission.[224] The ideal commission to combat patronage appointments should be formed without a party-balance requirement and comprised of former judges, attorneys, legal scholars, and other well-respected members of the legal community.[225]

Once the commissions are formed, selection should be merit-based, both to respect the significant judicial responsibilities that come with Article III judgeships and to limit judicial appointments based on patronage pursuant to the First Amendment policymaking exception.[226] Since the Eisenhower Administration, the ABA has played a vital role in assisting administrations through its Standing Committee on the Federal Judiciary ("FJC").[227] The FJC "provides the Senate Judiciary Committee, the administration, and the public with its independent, nonpartisan peer evaluation of the professional qualifications of every judicial nominee to the Article III . . . federal courts."[228] Additionally, the FJC is comprised of fifteen members, with each federal district having at

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222. Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 585 n.4 (2005) (quoting Charles E. Schumer, *Text of Senator Charles Schumer's Letter to The Honorable George W. Bush,* VOTE SMART (Apr. 30, 2003), https://votesmart.org/public-statement/7310/text-of-senator-charles-schumers-letter-to-the-honorable-george-w-bush).

223. *Federal Judicial Screening Committees*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., https://iaals.du.edu/sites/default/files/documents/publications/federal_judicial_screening_committees_8-17.pdf (last visited Feb. 26, 2021). These states include Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Ohio, Oregon, Pennsylvania, Texas, Vermont, Washington, Wisconsin, Alabama, California, Michigan, Montana, and New York, as well as the District of Columbia. *Id.*

224. *See id.* For example, California, Colorado, Delaware, Texas, and Washington are just some of the states where senators have implemented bipartisan commissions in the past. *Id.*

225. Some states already include both lawyers and nonlawyers on their commissions, including Hawaii, Louisiana, Maine, and Ohio. *Id.*

226. *Cf.* Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 BYU L. REV. 1257, 1274–75 (1993) (recommending that selection for those on the commissions be merit-based).

227. *See* Mauro, *supra* note 216, at 7; Scott, *supra* note 213, at 176; WHEELER & KOURLIS, *supra* note 219, at 6; *Standing Committee on the Federal Judiciary*, ABA https://www.americanbar.org/groups/committees/federal_judiciary/ (last visited Mar. 5, 2020).

228. *Standing Committee on the Federal Judiciary*, *supra* note 227.

least one representative, serving for staggered three-year terms.[229] Despite some criticisms of the ABA's role in judicial nominations, its established rating system can serve as a basis in evaluating the candidate's legal qualifications.[230]

Notably, the FJC evaluates "strictly on professional qualifications: integrity, professional competence and judicial temperament [and] does not consider a prospective nominee's philosophy, *political affiliation*[,] or ideology."[231] This evaluation can be critical in order to limit selection based solely upon political affiliation and, therefore, this review should be reinstated and begin prior to the candidate's nomination by the president.

In addition to allowing the ABA to again have early access to the nominee's information for its evaluation,[232] the ABA's evaluation criteria can serve as a model for the independent nominating commission. This model would force the commission to strictly focus on the candidate's merit and dissuade members of the commission from considering the nominee's party loyalties, as it is explicitly embedded in the criteria.[233] By establishing this metric throughout the entire judicial selection process, the likelihood of selecting a candidate solely on the basis of his or her political affiliation can be limited. Consequently, if judges are selected based on merit by independent commissions, they will, ideally, feel less beholden to any political loyalties.[234]

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229. Lee Rawles, *Its Ratings System Under Fire, ABA Stresses Importance of Federal Judicial Candidate Evaluations*, ABA J. (Jan. 1, 2018, 1:15 AM), https://www.abajournal.com/magazine/article/federal_judicial_candidate_evaluations.

230. *See id.*; Maya Sen, *How Judicial Qualification Ratings May Disadvantage Minority and Female Candidates*, 2 J.L. & COURTS, 33, 34 (2014). Tobias, *supra* note 226, at 1285.

231. AM. BAR ASS'N, STANDING COMMITTEE ON THE FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 1 (2020), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/backgrounder-9-21-2020.pdf (emphasis added). *See* Sen, *supra* note 230, at 35.

232. *See* Tobias, *supra* note 226, at 1284 (calling for the ABA to continue its participation in the selection process in 1993).

233. *See* AM. BAR ASS'N, *supra* note 231, at 1 ("The Committee does not consider a prospective nominee's philosophy, political affiliation or ideology.").

234. This method may also limit the number of nominees appointed deemed "not qualified" by the ABA. The Standing Committee has three ratings: "Well Qualified," "Qualified," or "Not Qualified." *See Ratings of Article III and Article IV Judicial Nominees*, AM. BAR ASS'N, https://www.americanbar.org/groups/committees/federal_judiciary/ratings/ (last visited Feb. 27, 2021).

C. Administrative Law Judges ("ALJs")

1. The Role of ALJs and Status of ALJ Selection

Applying the policymaking exception to ALJs is unique due to their specialized roles in administrative agencies and the executive branch.[235] Additionally, there is a vastly greater amount of ALJs compared to their Article III counterparts.[236] Despite their unique roles, ALJs should not be considered policymakers for purposes of the First Amendment and become appointed or rejected solely on the basis of party affiliation. Recent developments, including the holding in *Lucia* and issuance of an executive order, have resulted in fears of the politicization of ALJs due to their roles as adjudicators and abilities to issue binding orders if the agency agrees with the ALJ's decision.[237]

Enacted in 1946, the Administrative Procedures Act ("APA") provides standards for administrative agencies to abide by for adjudicatory proceedings.[238] The APA's language confirms that the day-to-day duties of ALJs resemble those of their state and federal counterparts.[239] Despite these similarities, ALJs serve as both members of the agency and as

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235. *See* Robin J. Arzt, *Adjudications by Administrative Law Judges Pursuant to the Social Security Act are Adjudications Pursuant to the Administrative Procedure Act*, 22 J. NAT'L ASS'N ADMIN. L. JUDGES 279, 281–82 (2002); Karen Y. Kauper, *Protecting the Independence of Administrative Law Judges: A Model Administrative Law Judge Corps Statute*, 18 U. MICH. J.L. REFORM 537, 537 (1985).

236. *See* Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 799 (2019); Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1097–99 (2018). The majority of ALJs are part of the Social Security Administration. *See id.* at 1098 ("[T]he Social Security Administration (SSA) [is] 'probably the largest adjudication agency in the western world.'" (quoting Barnhart v. Thomas, 540 U.S. 20, 28–29 (2003))).

237. *See* Joe Davidson, *Trump Order Risks 'Politicization' of Administrative, Mostly Social Security, Judiciary*, WASH. POST (July 13, 2018, 6:00 AM), https://www.washingtonpost.com/news/powerpost/wp/2018/07/13/trump-order-risks-politicization-of-administrative-judiciary/.

238. Administrative Procedure Act, 5 U.S.C. §§ 551–59 (2018); Arzt, *supra* note 235, at 281.

239. ALJs have the ability to "(1) administer oaths and affirmations; (2) issue subpenas [sic] authorized by law; (3) rule on offers of proof and receive relevant evidence; (4) take depositions . . . (5) regulate the course of the hearing; (6) hold conferences . . . (7) inform the parties as to the availability of . . . alternative means of dispute resolution . . . (8) require the attendance at any conference . . . (9) dispose of procedural requests or similar matters; (10) make or recommend decisions . . . and (11) take other action authorized by agency rule." 5 U.S.C. § 556(c).

adjudicators and, occasionally, these two roles may conflict.[240] Judicial independence is key for ALJs, as it is for members of the state and federal judiciary, but can be more difficult to achieve since the ALJ "must strive to be free of overreaching [from] the agency she is serving."[241] Agencies have attempted to encourage levels of judicial independence by employing detailed procedures for ALJ selection.[242] Section 3105 of the U.S. Code governs the ALJ appointment procedures and states, "Each agency shall appoint as many [ALJs] as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 . . . [ALJs] shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as [ALJs]."[243]

Although Section 3105 gives agencies the ability to appoint ALJs, there are no APA provisions that provide set criteria for formal ALJ selection.[244] Prior to *Lucia*, ALJ selection was conducted through the U.S. Office of Personnel Management ("OPM").[245] To apply for an ALJ position through the OPM Portal, an applicant was required to pass an examination evaluating the knowledge, skills, and abilities ("KSAs") of an ALJ and possess at least seven years of qualifying legal experience.[246] After applying, the OPM would determine the three top applicants ("list of three"), which were usually "the three highest-scoring applicants based upon, among other things, an OPM-administered and -developed examination and panel interview process, as well as veterans' status."[247] This process was referred to as "competitive service" as opposed to

240. *See* Jeffrey Scott Wolfe, *Are You Willing to Make the Commitment in Writing? The APA, ALJS, and SSA*, 55 OKLA. L. REV. 203, 205 (2002) (discussing how the dual roles of an ALJ create "this tension that is at the core of the adjudicative role of the ALJ").

241. *Id.* (quoting Christopher B. McNeil, *Similarities and Differences Between Judges in the Judicial Branch and the Executive Branch: The Further Evolution of Executive Adjudications Under the Administrative Central Panel*, 18 J. NAT'L ASS'N ADMIN. L. JUDGES 1, 3 (1998)).

242. *See* Recommendation 2019-2, *supra* note 8.

243. 5 U.S.C. § 3105 (2018).

244. JACK M. BEERMANN & JENNIFER L. MASCOTT, RESEARCH REPORT ON FEDERAL AGENCY ALJ HIRING AFTER *LUCIA* AND EXECUTIVE ORDER 13843, at 1 (2019), https://www.acus.gov/sites/default/files/documents/Submitted%20final%20draft%20JB.pdf.

245. *See* Barnett, *supra* note 236, at 804; Recommendation 2019-2, *supra* note 8.

246. *Qualification Standard for Administrative Law Judge Positions*, OPM.GOV, https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/specialty-areas/administrative-law-judge-positions/ (last visited Jan. 27, 2021).

247. Recommendation 2019-2, *supra* note 8.

"excepted service."[248] After *Lucia*, the ALJ selection process completely changed.[249] Consequently, this left the door open for ALJs to be perceived as policymakers susceptible to political winds.

In 2018, the Court held in *Lucia* that the Securities and Exchange Commission ("SEC") ALJs should be considered "Officers" of the United States under the Appointments Clause of the Constitution and, subsequently, that the appointment of SEC ALJs from within the agency was unconstitutional.[250] Under the Appointments Clause, Congress' ability to appoint inferior "Officers" can be vested "in the President alone, in the Courts of Law, or in the Heads of Departments."[251] This radically changed the ALJ selection process and gave the heads of agencies the ability to create and implement their own internal selection processes and, consequently, created a fear of the politicization of ALJs, damaging their needs for judicial independence and impartiality.[252] This is in direct tension with the exclusion of the judiciary from the First Amendment policymaking exception.

Following *Lucia*, an Executive Order was issued which revamped the entire ALJ appointment process.[253] The remaining requirement from the prior "competitive service" selection process after this order is that the applicant must possess a license to practice law, resulting in an "excepted service" process, a significant shift from the traditional "competitive

248. *See* Jason Kay, *Federal Job Classifications: Competitive vs. Excepted Service*, FEDSMITH (Nov. 28, 2010, 9:37 AM), https://www.fedsmith.com/2010/11/28/federal-job-classifications-competitive-vs-excepted/ (explaining the different implications of having "competitive service" rather than "excepted service" for federal employment).

249. *See* Recommendation 2019-2, *supra* at note 8.

250. *See* Lucia v. SEC 138 S. Ct. 2044, 2055–56 (2018); Erik A. Christiansen, *Supreme Court Holds ALJ Appointment Procedure at SEC Unconstitutional*, AM. BAR ASS'N (Sept. 6, 2018), https://www.americanbar.org/groups/litigation/publications/litigation-news/top-stories/2018/sc-holds-alj-sec-appointment-procedure-unconstitutional/; Alexandria Tindall Webb, *Selection of Administrative Law Judges*, ADMIN. CONF. OF THE U.S. (June 6, 2019 at 6:57 PM), https://www.acus.gov/newsroom/administrative-fix-blog/selection-administrative-law-judges; Lucia v. SEC, 132 HARV. L. REV. 287 (2018), https://harvardlawreview.org/2018/11/lucia-v-sec/.

251. U.S. CONST. art. II, § 2, cl. 2; *Lucia*, 138 S. Ct. at 288.

252. *See Lucia*, 138 S. Ct. at 292; Davidson, *supra* note 237; Amelia Brust, *Judges Warn Public Shouldn't Be 'Concerned' About Executive Order to Politicize ALJ Appointments*, FED. NEWS NETWORK (July 13, 2018, 3:02 PM), https://federalnewsnetwork.com/tom-temin-federal-drive/2018/07/judges-warn-public-should-be-concerned-about-executive-order-to-politicize-alj-appointments/. Marilyn Zahm, President of the Association of Administrative Law Judges, voicing her concerns over the Executive Order, stated "ALJs were created and protected by the [A]dministrative [P]rocedure [A]ct . . . to ensure that the American public would have impartial, independent adjudicators when they had to deal with federal agencies in some sort of claim situation." *Id.*

253. *See* Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 13, 2018).

service" criteria.[254] Specifically, "Schedule E" allows agencies to sidestep the traditional OPM process and create their own procedures to hire ALJs directly through the agency heads.[255] Some have voiced concerns over this process and that it may result in the politicization of ALJs, something that the exclusion of the judiciary from the First Amendment policymaking exception can limit.[256]

2. "Competitive Service" Selection Should be Reinstated

To protect the impartiality of ALJs and prevent their transformations into policymakers, significant action must be taken. Congress, having recognized this problem in 2018, inserted language into a Conference Report for a 2019 appropriations bill which stated that ALJs must be "independent, impartial, and selected based on their qualifications."[257] Though this is a step in the right direction to protect the ALJs from politicization, it remains insufficient.

Realizing that the polarization of ALJs could threaten their judicial independence, Congress then introduced a bipartisan bill for ALJ selection to revert back to its traditional "competitive service" process in August 2018.[258] The proposal stalled but was reintroduced in May 2019.[259] H.R. 2429, known as "The ALJ Competitive Service Restoration Act," was introduced because, as the congressional sponsors stated jointly, "[l]ives would be disrupted if independent adjudicators were replaced by partisan judges whose appointments were based on politics."[260] The Association of Administrative Law Judges ("AALJ") has

254. *See id.*; Webb, *supra* note 250; *Congress Approves Language Supporting ALJ Independence*, AM. BAR ASS'N (ABA Washington Letter), Oct. 31, 2018 https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/october2018/adminlawjudges/.

255. *See* Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 13, 2018); *Congress Approves Language Supporting ALJ Independence*, *supra* note 254.

256. *See* Davidson, *supra* note 237.

257. H.R. REP. NO. 115-952, at 547 (2018). The Report, discussing SSA ALJs, states, "The conferees expect SSA to maintain a high standard for the appointment of ALJs, including the requirement that ALJs have demonstrated experience as a licensed attorney and pass an ALJ examination administered by the [OPM]." *Id. See Congress Approves Language Supporting ALJ Independence*, *supra* note 254 (discussing how the language inserted into the Report stemmed from suggestions made by the ABA).

258. Ian Smith, *Legislation Reintroduced to Restore ALJs to Competitive Service*, FEDSMITH (May 9, 2019, 5:56 PM), https://www.fedsmith.com/2019/05/02/legislation-reintroduced-to-restore-aljs-to-competitive-service/.

259. *See id.*

260. *See id.*; H.R. 2429, 116th Cong. (2019). The members of Congress also stated, "Congress would not be fulfilling its constitutional duty of oversight if it allowed the politization of the corps of independent adjudicators who are responsible for protecting the

endorsed the Act and stated in a survey of its members, "90 percent either strongly disagree or disagree with the [E]xecutive [O]rder . . . [and] one out of two members say[s] judicial independence is the top issue they face."[261]

The Act still leaves the power in agency heads to conform to *Lucia*, however, the agency head can only appoint ALJs "from a list of eligible candidates provided by the [OPM] based upon successful examination and approval of the qualifications of the individual by the Office."[262] Allowing the OPM to work in conjunction with agency heads ensures that the ALJ hiring process does not result in appointments being made based solely on political affiliation and can safeguard ALJ independence.

Moreover, the "competitive service" selection may be reinstated based upon a narrow interpretation of the Court's holding in *Lucia*.[263] For example, the AALJ believes that *Lucia* did not mandate the Executive Order's elimination of "competitive service" selection, and, rather, that the sole purpose of the Order was to "make it easier to hire ideologues who are less likely to act fairly and independently."[264] Since *Lucia* strictly dealt with SEC ALJs and granted Lucia a new trial before a properly-appointed ALJ due to a timely objection, one interpretation is that it is simply unfeasible to consider Appointments Clause objections

due rights of the American people." Smith, *supra* note 258. The members of Congress who introduced this bill include the late Elijah E. Cummings, D-Md., and Reps. Brian Fitzpatrick, R-Pa., Richard Neal, D-Mass., Rodney Davis, R-Ill., Gerry Connolly, D-Va., Danny Davis, D-Ill., Bobby Scott, D-Va., John Larson, D-Conn., and Tom Cole, R-Okla. Jessie Bur, *Lawmakers Push Back on the Partisan Selection of Administrative Judges*, FED. TIMES (May 2, 2019), https://www.federaltimes.com/federal-oversight/congress/2019/05/02/lawmakers-move-to-restore-administrative-judges-to-competitive-service/.

261. Press Release, Ass'n Admin. Law Judge, AALJ Endorses Bipartisan Bill that Would Restore Merit-Based Administrative Law Judge Appointments (May 1, 2019) https://d2fwhheo3hasol.cloudfront.net/wp-content/uploads/bsk-pdf-manager/2019/05/Press-Release-05.05.19.pdf.

262. H.R. 2429, 116th Cong. § 3105(a)(2) (2019). However, scholars have noted some lingering constitutional concerns about the language of this bill as it refers to both Heads of Department and Agencies. *See id. See also* Alison Frankel, *Senators Collins, Cantwell Introduce Bill to Undo Trump Order on ALJ Hiring*, REUTERS (Aug. 5, 2019, 1:08 PM), https://www.reuters.com/article/legal-us-otc-alj/senators-collins-cantwell-introduce-bill-to-undo-trump-order-on-alj-hiring-idUSKCN1UR5LB (discussing how Prof. Kent Barnett believes "there could be constitutional complications because the proposed law conflates agency heads and department heads").

263. *See* Erich Wagner, *Judges' Union: Supreme Court Decision an 'Excuse' to Politicize ALJs*, GOV'T EXEC. (July 16, 2018), https://www.govexec.com/oversight/2018/07/judges-union-supreme-court-decision-excuse-politicize-aljs/149773/.

264. *See* Eric Katz, *Bipartisan Bill Would Reverse Trump's Order on Executive Branch Judges*, GOV'T EXEC. (Aug. 28, 2018), https://www.govexec.com/management/2018/08/bipartisan-bill-would-reverse-trumps-order-executive-branch-judges/150873/.

for the majority of the ALJs in the SSA, and how even just a few of these objections could wreak havoc in such an inundated agency by creating significant backlogs.[265] This analysis becomes very agency-specific and must consider "[t]he relation of these judges to their agencies in terms of their decisional authority."[266]

Based on either the Act or a narrow interpretation of the Court's holding in *Lucia*, "competitive service" should be reinstated in order to prevent ALJs from not only being selected based on political affiliation, but from deciding cases based on those very same loyalties. Consequently, it is possible that the Court will one day hear a case to determine how ALJs may be removed, and, in light of the exclusion of the judiciary from the First Amendment policymaking exception, should limit ALJ patronage appointments.

3. Agencies Should Provide Open Access to All Potential Applicants for ALJ Openings to Promote Merit-Based Selection

In the alternative, and if the above-referenced bill is unsuccessful, modifications can still be made to the current "excepted service" selection process to limit selection based upon political affiliation. After *Lucia* and the issuance of the Executive Order, the Administrative Conference of the United States ("ACUS") requested recommendations for the implementation of the "excepted service" selection.[267] In June 2019, ACUS issued the findings of Professors Jack M. Beermann and Jennifer L. Mascott.[268] Their four primary recommendations encouraged agencies to:

> [1] publicize their ALJ openings . . . to reach a diverse range of candidates, [2] formulate and publish ALJ selection criteria, [3] . . . develop procedures to review and assess ALJ applications [4] . . . [and have] guidelines and procedures be designed 'to ensure the hiring of ALJs who will carry out the functions of the office

265. *See id.*; Alan Morrison, *Symposium:* Lucia v. SEC *- More Questions Than Answers*, SCOTUSBLOG (June 22, 2018, 8:57 AM), https://www.scotusblog.com/2018/06/symposium-lucia-v-sec-more-questions-than-answers/.

266. *See* Morrison, *supra* note 265.

267. *See* Jack Beermann, *The Future of Administrative Law Judge Selection*, REGUL. REV. (Oct. 29, 2019), https://www.theregreview.org/2019/10/29/beermann-administrative-law-judge-selection/.

268. *See* Agency Recruitment and Selection of Administrative Law Judges, 84 Fed. Reg. 38,930 (Aug. 8, 2019).

with impartiality and maintain the appearance of impartiality.'[269]

The first recommendation encouraging open access to broad pools of applications is most consistent with preventing patronage appointments and aligns with the exclusion of the judiciary from the First Amendment policymaking exception. Broad access to employment opportunities by the public runs contrary to the very core of patronage by preventing limited opportunities from being given to those possessing political loyalties of the party in power.

After the Executive Order, two agencies, the Departments of Labor ("DOL") and Health and Human Services ("HHS"), have already altered their selection processes to comply, but, importantly, focused on merit-based selection.[270] Both of these agencies, in an attempt to prevent patronage appointments, issued public postings of ALJ openings available to the general public.[271] In fact, the HHS issued an ALJ Appointment handbook for the new "excepted service" which may serve as a model for remaining agencies to dissuade the transformation of ALJs into policymakers and appointments based on their political loyalties.[272] Specifically, the handbook's first section contains a "Public Notice" requirement which mandates that all ALJ postings be "announced via . . . USA Jobs. Agencies may supplement . . . by posting the announcement to their websites, by providing a copy of the USA Jobs announcement and/or a link . . . to external sources (e.g., law schools, list serves, etc.), and by similar mechanisms."[273] Other agencies should adopt this particular method, as the broader the access to ALJ openings, the less likely that ALJ selection may be viewed as patronage.

Although agencies often hire other ALJs, especially from the vast amount of SSA ALJs, maintaining public postings of ALJ openings encourages transparency and can discourage Agency Heads from making appointments based on political loyalties. Therefore, if job openings are widely circulated, regardless of the candidate's political affiliation,

269. Beermann, *supra* note 267, at 76 (quoting, Agency Recruitment and Selection of Administrative Law Judges, 84 Fed. Reg. 38,930 (Aug. 8, 2019)).

270. *See* BEERMANN & MASCOTT, *supra* note 244, at 66.

271. *See id.* The Department of Labor posted the vacancies on the Federal Register and/or the ALJ website and the Department of Health and Human Services posted the openings on USAJOBS.gov. *Id.*

272. DEP'T. OF HEALTH AND HUM. SERVS., DEPARTMENT OF HEALTH AND HUMAN SERVICES ADMINISTRATIVE LAW JUDGE APPOINTMENT PROCESS (2018), https://www.hhs.gov/sites/default/files/alj-appointment-process.pdf.

273. *Id.* at 1.

judicial independence can be protected and ALJs can continue to make impartial rulings on significant matters within their agencies.

CONCLUSION

The Third Circuit's holding in *Adams* is significant in that a court has attempted to draw a line between the judicial and political worlds. Former governors and justices of the Delaware Supreme Court filed briefs supporting the reversal of the Third Circuit's opinion.[274] Nevertheless, some, including the New Jersey Law Journal's Editorial Board, believe that the Third Circuit was correct in its exclusion of the judiciary from the policymaking exception.[275] Specifically, the Editorial Board "believe[s] in the benefits of a balanced court and the perception that there is no domination by one partisan political view or the other. However, . . . partisan politics or membership in a partisan political party should not be a *requirement* for appointment to the bench . . . ."[276]

Since the Court remanded and reversed *Adams* merely based upon the lack of standing, it may still need to determine in the future whether members of the judiciary should be selected and denied on the basis of party affiliation, in a time when contentious confirmation hearings have become the norm.[277] The question remains as to whether there are alternatives to judicial selection based upon party affiliation and whether the implementation of additional independent nominating commissions is warranted. Additionally, the Court may need to provide clarification as to how the policymaking exception should apply to not only members of the state judiciary, but also to Article III judges, and ALJs. This Note provides such proposals.

While the policymaking exception continues to be narrowly applied, it has become more widely used in today's politicized environment, as seen in both the *Adams* decision and in the context of independent

274. *Compare* Delaware News Desk, *Former Governors, Chief Justices Support Supreme Court Petition on Judicial Balance*, SMYRNA-CLAYTON SUN-TIMES (Oct. 9, 2019, 6:45 PM), https://www.scsuntimes.com/news/20191008/former-governors-chief-justices-support-supreme-court-petition-on-judicial-balance, *with* Law Journal Editorial Board, *Third Circuit Correct on Judges' Political Affiliations*, N.J. L.J. (Feb. 15, 2019, 4:38 PM), https://www.law.com/njlawjournal/2019/02/15/third-circuit-correct-on-judges-political-affiliations/ [hereinafter *Third Circuit Correct on Judges' Political Affiliations*] (New Jersey Law Journal voicing its support for the Third Circuit's holding in *Adams*).

275. *See Third Circuit Correct on Judges' Political Affiliations*, *supra* note 274.

276. *Id.* (emphasis added).

277. *See* Clay Oxford, *Red and Blue Robes: Partisanship in the Judiciary*, HARV. POL. REV. (Feb. 6, 2019), https://harvardpolitics.com/united-states/red-and-blue-robes-partisanship-in-the-judiciary/.

redistricting commissions.[278] The crux of the policymaking exception is that one should not be excluded based on political affiliation if the role does not have any semblance of policymaking duties which demands political loyalty to the role's superiors. Members of the judiciary should not fit within this exception and, with the proposals discussed in this Note, should be shielded from the continuously gusty political winds of today's environment.

278. For a general discussion on the First Amendment policymaking exception and independent gerrymandering commissions, view Richard L. Hasen, *Michigan Has a Smart Idea for Fixing Gerrymandering. Conservatives Want to Crush* It, VOX (Sept. 10, 2019, 3:04 PM), https://www.vox.com/2019/9/9/20850936/gerrymandering-michigan-commission-republican-legal-argument.