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## ARE JUDGES POLICYMAKERS?: A CONSTITUTIONAL REBUFF TO JUDICIAL REFORM

*Zach Hullinger*

### I. INTRODUCTION

It is a bedrock principle of our democracy that the ultimate power rests with the people. This is not merely an ideal, it is constitutional practice. The Founders guaranteed this preservation of power through their careful structure of the government into three separate branches, balanced to ensure that this promise rang true. The judicial branch is the least answerable to the people, a desirable trait for a body that is supposed to adhere to fixed rules, and which has an ostensibly limited scope in deciding only those cases and controversies which are brought before it.<sup>1</sup> But as this branch has “updated” the Constitution to reflect its own view of modern society and the people’s will,<sup>2</sup> and as Congress has receded behind administrative delegation<sup>3</sup> and deferred to the other branches on controversial political topics by virtue of partisan impasse<sup>4</sup> and ineptitude,<sup>5</sup> the Supreme Court has shaken free from some of these carefully constructed constraints. Now that the people have come to understand the true nature of the modern Court’s role, it should come as no surprise that at least some of them wish to exert influence over the judiciary, to ensure that the ultimate power does in fact rest with the people, and not robed crusaders.

While the legislative process is an obvious obstacle to judicial reform, the real roadblock is constitutional. Reform that seeks to prevent political control of the courts necessarily involves an inquiry into the political affiliation of the judges. Former 2020 Democratic presidential nominee Pete Buttigieg had proposed expanding the Supreme Court to 15 seats: five Republicans, five Democrats, and five justices appointed by the unanimous consent of the ten politically

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1. U.S. CONST. art. III, § 2, cl. 1.

2. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598, 2603 (2015) (holding that the framers “entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning,” and that this meaning should include “new insights and societal understandings”).

3. See *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) (questioning the scope of current Congressional delegation as a violation of the separation of powers).

4. *The Partisan Divide on Political Values Grows Even Wider*, PEW RES. CENTER (OCT. 5, 2017), <https://www.people-press.org/2017/10/05/the-partisan-divide-on-political-values-grows-even-wider/> [<https://perma.cc/FK7H-KWX3>] (showing an increase in political polarization on a variety of issues).

5. *House Workload, 80th-115th Congresses, 1947-2018*, BROOKINGS INST., <https://www.brookings.edu/wp-content/uploads/2019/03/6-1-Full.pdf> [<https://perma.cc/2CEE-GD4R>] (showing an overall trend of decline in legislation passed, and a decline in committee and subcommittee meetings).

affiliated justices.<sup>6</sup> While this approach seeks to depoliticize the Court, it actually institutionalizes politics by conditioning the nomination of justices on their political affiliation.

The Supreme Court has held that conditioning employment on political patronage is generally a First Amendment violation, but has carved out an exception for “policymaking” positions.<sup>7</sup>

Do judges fall within this exception? Can their appointments be conditioned on a particular political affiliation? The Third Circuit confronted this question in *Adams v. Governor of Delaware*, where it invalidated a 122-year-old framework of the Delaware Constitution while creating a circuit split on the issue.<sup>8</sup> Section II of this Casenote reviews the trio of Supreme Court decisions that have outlined the policymaking exception. Section III examines the current circuit split on whether judges fall within the policymaking exception, contrasting *Adams v. Governor of Delaware* with two previous circuit decisions: *Kurowski v. Krajewski* and *Newman v. Voinovich*.<sup>9</sup> Section IV analyzes the circuit courts’ approaches in applying the policymaking exception to judges, concluding that a proper understanding of the exception does not permit partisan conditions for judicial appointments. Section V assesses the impact of this exception on judicial reform efforts, and discusses the impact this could have on judicial reform and the judicial appointment process. Section VI offers some brief concluding thoughts on the policymaking exception.

## II. BACKGROUND

Recognizing the First Amendment right to freedom of association, the Supreme Court has held political patronage firings to be “at war with” the First Amendment.<sup>10</sup> As a general matter, firings made on the basis of an employee’s political affiliation are unconstitutional.<sup>11</sup> And it would seem entirely natural that firing a typical office worker for nothing more than his or her political affiliation infringes on those well-established protections afforded by the First Amendment. But can the president effectively fulfill his duties, and implement the policies that the people sought when electing him, if he cannot appoint

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6. Josh Lederman, *Inside Pete Buttigieg’s Plan to Overhaul the Supreme Court*, NBC NEWS (June 3, 2019), <https://www.nbcnews.com/politics/2020-election/inside-pete-buttigieg-s-plan-overhaul-supreme-court-n1012491> [<https://perma.cc/FUB5-K5U4>].

7. *Elrod v. Burns*, 427 U.S. 347, 367 (1976).

8. *Adams v. Governor of Del.*, 922 F.3d 166, 169 (3d Cir. 2019).

9. *Id.*; *Kurowski v. Krajewski*, 848 F.2d 767 (7th Cir. 1988); *Newman v. Voinovich*, 986 F.2d 159 (6th Cir. 1993).

10. *Elrod*, 427 U.S. at 357.

11. *Id.*

a Secretary of State who shares his policy views?<sup>12</sup> Recognizing this justification for political patronage, the Supreme Court carved out an exception to the general prohibition by permitting patronage practices for “policymaking” positions.<sup>13</sup> This exception was outlined by a trio of Supreme Court decisions spanning from 1976 to 1990: *Elrod v. Burns*, *Branti v. Finkel*, and *Rutan v. Republican Party of Illinois*.<sup>14</sup>

The first case, *Elrod*, enunciated both the general prohibition against patronage firings, and the policymaking exception to the default rule.<sup>15</sup> The Court recognized a valid justification for certain patronage firings, which it framed as “the need for political loyalty of employees . . . to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration.”<sup>16</sup> The Court held that this governmental interest could be satisfied by limiting these firings to “policymaking” positions.<sup>17</sup> While the Court’s struggle to define what constituted a “policymaking” position was certainly ominous, the Court emphasized several considerations, such as the responsibilities and scope of the position, and whether the employee “acts as an adviser or formulates plans for the implementation of broad goals.”<sup>18</sup> *Elrod* mustered a mere three-member plurality in a thoroughly fractured opinion. While its successor, *Branti*, was no less divided in its 5-4 holding, the Court did manage a majority in its second application of the exception.<sup>19</sup>

*Branti* held that assistant public defenders were not policymakers and could not be fired by the newly appointed Democrat on the basis of their political beliefs, but offered a slightly different articulation of the policymaking exception.<sup>20</sup> The Court held that the ultimate inquiry was not whether the “policymaker” label fit the position, but “whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.”<sup>21</sup> The Court explained that political affiliation is not an appropriate requirement for all positions that involve making

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12. *Elrod* rejected application of the political question doctrine since the case merely involved a state government, and not any relationship between the federal government and the judiciary. *Id.* at 351-52. Whether federal appointments would present a political question under this exception remains an open question.

13. *Id.* at 367.

14. *Id.* at 347; *Branti v. Finkel*, 445 U.S. 507 (1980); *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990).

15. *Elrod*, 427 U.S. at 367.

16. *Id.*

17. *Id.*

18. *Id.* at 367-68.

19. *Branti*, 445 U.S. 507.

20. *Id.* at 519.

21. *Id.* at 518.

policy, because even though football coaches, for example, may formulate policy, their political affiliation is not relevant.<sup>22</sup>

*Branti* serves as the current test that lower courts apply to determine whether political patronage violates an employee's First Amendment rights. The final case in the trio, *Rutan*, did not offer any additional gloss on what constitutes a policymaking position, but extended *Branti* and *Elrod*, which concerned only patronage firings, to include "promotion, transfer, recall, and hiring decisions based on party affiliation and support."<sup>23</sup> While *Rutan* extended the reach of *Branti* and *Elrod* to include hiring decisions, it did not elaborate on or displace the existing framework for determining whether a position can properly be conditioned on partisan affiliation. The Court did state in a footnote that *Branti*'s formulation "refined the exception created by *Elrod*."<sup>24</sup>

These three cases comprise the entirety of the Supreme Court's direction on the policymaking exception. All the lower courts have to do is apply an exception that, in the Court's own words, has no clear line.<sup>25</sup> When courts struggle to find that line, judicial appointments present one of those cases that could fall on either side. Judges are not Secretaries of State, nor are they mere office secretaries. So can the chamber doors be affixed with a partisan padlock? Until 2019, the answer had been a unanimous yes.

### III. DOES THE POLICYMAKING EXCEPTION APPLY TO JUDGES?

This section discusses *Gregory v. Ashcroft*<sup>26</sup> to assess whether the Supreme Court has ever decided that judges are policymakers, and then progresses chronologically through the federal circuit cases that have ruled on this issue.

#### A. *Gregory v. Ashcroft* (1991)

Although the Supreme Court has never applied the policymaking exception to judges, the Court in *Ashcroft* confronted the issue of whether judges are appointees "on the policymaking level" within the meaning of the Age Discrimination in Employment Act ("ADEA").<sup>27</sup>

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22. *Id.*

23. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 65 (1990).

24. *Id.* at 71 n.5.

25. *Elrod v. Burns*, 427 U.S. 347, 367 (1976) ("No clear line can be drawn between policymaking and nonpolicymaking positions").

26. *Gregory v. Ashcroft*, 501 U.S. 452, 453 (1991).

27. *Id.* at 453.

The Court offered a highly qualified holding on this issue, since the ADEA excludes all employees unless it is “unmistakably clear” that they should be included.<sup>28</sup> The Court noted that the language of “on the policymaking level” does not necessarily inquire as to whether judges make policy, but only requires that they exercise “discretion concerning issues of public importance.”<sup>29</sup> In holding that “[i]t is at least ambiguous whether a state judge is an ‘appointee on the policymaking level,’” the Court avoided fully resolving the issue, and expressly declined to decide whether judges make policy or are “policymakers in the same sense as the executive or the legislature.”<sup>30</sup> Even if the Court had held that judges were policymakers, this would not have resolved the question under the *Elrod-Branti* exception, for reasons that will be more fully discussed in Part IV.

*B. Kurowski v. Krajewski (1988)*

The Seventh Circuit was the first of three federal circuits to decide whether judges are policymakers within the meaning of the *Elrod-Branti* exception, though *Kurowski* did not squarely present the issue. Rather, the case concerned a judge who fired public defenders for their political affiliation.<sup>31</sup> In attempting to distinguish these public defenders from those in *Branti*, Judge Krajewski argued that since he had a practice of appointing public defenders to serve as judges *pro tempore* in his absence, this position fell within the policymaking exception.<sup>32</sup> The court ultimately held that judges *pro tempore* are policymakers, and that the “first amendment is no obstacle” to patronage firings for the position.<sup>33</sup>

In applying the policymaking exception, the court first rejected the notion that the inquiry turns on whether the employee implements the appointing authority’s policies, reasoning that this construction would prevent a governor from considering a judge’s politics when making

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28. *Id.* (citing *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 65 (1989)).

29. *Id.* at 466-67. Justice White framed the issue clearly in his partial concurrence: “it should be remembered that the statutory exception refers to appointees ‘on the policymaking level,’ not ‘policymaking employees.’ Thus, whether or not judges actually make policy, they certainly are on the same level as policymaking officials in other branches of government and therefore are covered by the exception.” *Id.* at 483 (White, J., concurring).

30. *Id.* at 467. While *Newman v. Voinovich*, 986 F.2d 159, 167 (6th Cir. 1993), cited *Ashcroft* as holding that judges indeed are employees at the policymaking level, the Court expressly refrained from deciding the issue. This failure to resolve the issue drew disagreement from Justice White in his partial concurrence. *Id.* at 474 (White, J., concurring).

31. *Kurowski v. Krajewski*, 848 F.2d 767, 768-69 (7th Cir. 1988).

32. *Id.* Under Indiana law, trial judges could appoint judges *pro tempore* who would serve in their stead and exercise “the full powers of the office.” *Id.*

33. *Id.* at 770.

appointments.<sup>34</sup> Instead, the court framed the question as “whether there may be genuine debate about how best to carry out the duties of the office in question, and a corresponding need for an employee committed to the objectives of the reigning faction.”<sup>35</sup> The court reasoned that since judges both make and implement governmental policy, and wade into issues of political debate, such as whether to be suspicious of the police or to be lenient in sentencing, that their political beliefs may be a basis for their appointment.<sup>36</sup> The court also noted that judges were elected in Indiana, reasoning that the Governor may consider political affiliation, just as voters do.<sup>37</sup> But it should be noted that the question of the Governor’s appointments was not properly before the court, as this case involved only the dismissal of public defenders and their function as judges *pro tempore*.<sup>38</sup>

### C. *Newman v. Voinovich* (1993)

The first proper challenge to a judicial appointment process came in *Newman*, where the Sixth Circuit scrutinized former Ohio Governor George Voinovich’s appointment practices.<sup>39</sup> The Governor made his interim judicial appointments after considering two candidates put forth by Republican County Chairpersons, effectively precluding nominees from other parties.<sup>40</sup> While the Sixth Circuit did quote the *Branti* rule as being an elaboration on the policymaking exception,<sup>41</sup>

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34. *Id.* This decision was rendered before *Rutan* extended *Branti* and *Elrod* to hiring decisions. Perhaps the court presumed the validity of partisan judicial appointments due to the longstanding practice that Justice Scalia noted in his *Rutan* dissent. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 93 (1990) (Scalia, J., dissenting).

In addition to *Adams v. Governor of Delaware*, 922 F.3d 166, 169 (3d Cir. 2019), two other recent circuit court decisions have applied the policymaking exception in a manner that contradicts this holding. *McCaffrey v. Chapman*, 921 F.3d 159, 167 (4th Cir. 2019) (holding that a sheriff’s deputy fell within the exception since “[r]equiring a sheriff to employ deputies who have displayed the level of hostility portrayed in this complaint could reasonably impede a sheriff’s obligation to his electorate to implement the platform on which he campaigned”); *Eves v. LePage*, 927 F.3d 575, 584 (1st Cir. 2019) (holding that the employee was a policymaker since he was “in a position to thwart’ the policy objectives of ‘the in-party.’”) The Ninth Circuit, in contrast, has developed a nine-factor policymaker test that does not explicitly ask whether the position can obstruct the implementation of policy. *Carroll v. City of Phx.*, No. CV 07-00148 PHXNVW, 2007 WL 1140400, at \*9 (D. Ariz. Apr. 17, 2007) (citing *Walker v. City of Lakewood*, 272 F.3d 1114, 1132 (9th Cir.2001)).

35. *Id.* The court never cited the language of the “appropriate requirement” test from *Branti*.

36. *Id.*

37. *Id.*

38. The Seventh Circuit later applied its *Kurowski* holding to an administrative hearing officer. *Walsh v. Heilmann*, 472 F.3d 504, 505 (7th Cir. 2006). The opinion was again authored by Judge Easterbrook, 18 years after he wrote *Kurowski*.

39. *Newman v. Voinovich*, 986 F.2d 159 (6th Cir. 1993).

40. *Id.* at 160.

41. *Id.* at 161.

its analysis largely relied on *Kurowski*, offering several block quotations from the opinion.<sup>42</sup> The only original thought provided in *Newman* is the court's holding that "judges are policymakers because their political beliefs influence and dictate their decisions on important jurisprudential matters."<sup>43</sup> The three-judge panel in *Newman* produced three opinions, with Judge Kennedy concurring, but refusing to join the portion of the court's opinion that called the Governor's appointment practices "unwise."<sup>44</sup> Judge Jones also concurred, not to retreat from questioning the wisdom of the Governor, but to question it more forcefully.<sup>45</sup> His interpretation of the policymaking exception makes his analysis far more thought-provoking than anything offered by the opinion of the court.

Judge Jones started by recognizing the independence of the judiciary, and its need to remain separate from "partisan theories of government," a view that surely animated his decision to question the wisdom of the Governor's procedure in his concurrence.<sup>46</sup> He followed this discussion with an assertion that one would expect to find in a dissent, stating that "it cannot be seriously contended that being a member of a certain party . . . should be a requirement for the *effective performance* of being a judge."<sup>47</sup> This pronouncement would seem to require the conclusion that judges do not fall within the policymaking exception, but Judge Jones changed course. After explaining that life experiences shape every decision a judge makes,<sup>48</sup> he ultimately concluded that "political affiliation may be *an appropriate factor* to consider," never discussing how he substituted "factor" for *Branti*'s use of the word "requirement."<sup>49</sup>

#### D. *Adams v. Governor of Delaware* (2019)

Until 2019, every court to decide whether judges fall under the policymaking exception had held that judges are indeed policymakers within the meaning of *Elrod* and *Branti*.<sup>50</sup> If any case were to split the

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42. *Id.* at 162-63.

43. *Id.* at 163 (citing *Gregory v. Ashcroft*, 501 U.S. 452 (1991)).

44. *Id.* at 164 (Kennedy, J., concurring).

45. *Id.* at 165-66 (Jones, J., concurring) (stating that he is "gravely troubled by the Ohio Governor's practice" and questioning the state of the law post-*Rutan*).

46. *Id.* at 164 (Jones, J., concurring) (quoting *State ex rel. Weinberger v. Miller*, 99 N.E. 1078, 1085 (1912)).

47. *Id.* at 165-66 (Jones, J., concurring) (citing *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 91 (1990) (Scalia, J., dissenting) (emphasis in original)).

48. *Id.* at 165 (Jones, J., concurring).

49. *Id.* (Jones, J., concurring) (emphasis in original).

50. *See, e.g.*, *Kurowski v. Krajewski*, 848 F.2d 767 (7th Cir. 1988); *Newman*, 986 F.2d 159; *Adams*



circuit courts, a state constitutional framework that had gone unchallenged since 1897 would seem an unlikely candidate. But the Third Circuit was undeterred.

In 1897, Delaware adopted a method of judicial selection that limited control of the bench by a single party, in a novel attempt to prevent judges from “being under political obligations.”<sup>51</sup> The provision was amended in 1951 to exclude third parties and balance the judiciary between Democrats and Republicans.<sup>52</sup> When it came before the Third Circuit, Article IV Section 3 of the Delaware Constitution read, in pertinent part, as follows:

Appointments to the office of the State Judiciary shall at all times be subject to all of the following limitations:

First, three of the five Justices of the Supreme Court in office at the same time, shall be of one major political party, and two of said Justices shall be of the other major political party.

Second, at any time when the total number of Judges of the Superior Court shall be an even number not more than one-half of the members of all such offices shall be of the same political party; and at any time when the number of such offices shall be an odd number, then not more than a bare majority of the members of all such offices shall be of the same major political party, the remaining members of such offices shall be of the other major political party.<sup>53</sup>

And the chorus continued for six stanzas to encompass other state courts, with all seats requiring consent of a Senate majority.<sup>54</sup> This political balancing requirement escaped scrutiny for well over a century, but it was not the balancing that motivated the eventual court challenge; rather, it was the two-party monopoly on the judiciary.

Plaintiff James Adams registered as a political independent, but found that his unwillingness to fall in line with the two-party fiat left him unable to apply for a vacant seat on the bench.<sup>55</sup> He challenged the constitutionality of the political balancing requirement, leading the Third Circuit to strike down this staple of the Delaware governmental system.<sup>56</sup> The court framed the purpose of the policymaking exception as ensuring that new administrations could implement their policies

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v. Governor of Del., 922 F.3d 166 (3d Cir. 2019).

51. *Adams*, 922 F.3d at 169 (citing J.A. 117-18).

52. *Id.* at 170.

53. DEL. CONST. art. IV, § 3.

54. *Id.*

55. *Adams*, 922 F.3d at 172.

56. *Id.* at 172-73.

without obstruction from politically disloyal employees.<sup>57</sup> Having framed the issue this way, the court applied the policymaking exception a bit differently than the other circuits, holding that “the question before us is not whether judges make policy, it is whether they make policies that necessarily reflect the political will and partisan goals of the party in power.”<sup>58</sup> After citing various rules governing judicial conduct, the court concluded that judges should be independent, not politically loyal, and held that judges are not policymakers who should be “tied to the will of the Governor and his political preferences.”<sup>59</sup> The court recognized the important role that a judge plays, but did not consider political affiliation to be an appropriate requirement for the judiciary, referring to the language of *Branti*.<sup>60</sup>

The court also considered a second justification for the political balancing requirement, rejecting the government’s argument that this provision was narrowly tailored to further a different government interest—political balance.<sup>61</sup> The court held that the provision was not narrowly tailored since it excluded third parties and independents.<sup>62</sup> While it did not decide whether political balance in the judiciary was a vital government interest, leaving that issue open for a future case, it did express concern about “conflating party balance with judicial impartiality.”<sup>63</sup>

#### IV. DISCUSSION

This section outlines the proper understanding of the *Elrod-Branti* exception, and then discusses how some courts have erred in applying this exception by losing the meaning and purpose of “policymaker” as developed by the Supreme Court. While the policymaking exception does permit patronage practices for some positions, this exception, properly understood, does not merely ask whether one makes policy, but instead requires that the position implement the political objectives and policies of the controlling party.

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57. *Id.* at 178.

58. *Id.* at 179.

59. *Id.* at 179-80.

60. *Id.* at 181.

61. *Adams*, 922 F.3d at 181-82. The court tested this alternative government interest in political balance under the narrowly tailored requirement, which it extracted from *Rutan*. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74 (patronage practices must be “narrowly tailored to further vital government interests”).

62. *Id.* at 182.

63. *Id.* at 183 (citing *Common Cause Ind. v. Individual Members of the Ind. Election Comm’n*, 800 F.3d 913, 922-23 (7th Cir. 2015)).

*A. Understanding and Applying the Policymaking Exception*

The present circuit split did not arise due to differing views of the judicial role. None of the circuits have validated patronage practices because they believed judges should be political, or that they should decide cases according to the executive's will. In fact, the Sixth Circuit expressly admonished this practice as unwise.<sup>64</sup> Whatever differences may exist in the courts' views of the judicial function, they are not responsible for the conflicting outcomes. This split is directly, if not solely, attributable to the courts' understanding and framing of the *Elrod-Branti* policymaking exception.

*Adams* framed the test as being whether judges "make policies that necessarily reflect the political will and partisan goals of the party in power."<sup>65</sup> In stark contrast, *Kurowski* held that the exception does not "turn on the relation between the job in question and the implementation of the appointing officer's policies."<sup>66</sup> To determine whether the exception does in fact turn on the position's implementation of policy, one must revisit the language of *Elrod* and *Branti*.

*Elrod* created the policymaking exception to narrowly permit political patronage practices for only certain positions, what the Court deemed "policymaking" positions, recognizing a government interest in politically loyal employees so that "representative government not be undercut by tactics obstructing the implementation of policies of the new administration."<sup>67</sup> This language quite clearly rebukes *Kurowski*'s test, where the court did not believe *Elrod* made anything turn on the implementation of the appointing officer's policies.<sup>68</sup> *Branti*'s critical reformulation of the exception makes clear that the inquiry is not whether the "policymaker" label fit the position, but "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."<sup>69</sup> While this brings the inquiry into focus by shifting attention away from the "policymaking" label, it does not alter the underlying government interest that the exception was created to serve. After all, if courts are not focused on whether the position implements a party's policies, then what does "effective performance" mean? Republicans and Democrats are not automatically more effective at

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64. *Newman v. Voinovich*, 986 F.2d 159, 163 (6th Cir. 1993).

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

66. *Kurowski v. Krajewski*, 848 F.2d 767, 770 (7th Cir. 1988).

67. *Elrod v. Burns*, 427 U.S. 347, 367 (1976).

68. *Kurowski*, 848 F.2d at 770.

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

certain jobs. Political affiliation makes them more effective only insofar as they aid in the implementation of the controlling party's policies.

The proper inquiry under the *Elrod-Branti* exception is whether party affiliation is an appropriate requirement for the effective performance of the public office involved. And it will be an appropriate requirement when the office involves implementing the partisan policies of the controlling party, and when political loyalty is necessary to ensure those policies are properly implemented. Formulated this way, the test applies *Branti*'s language through the lens of *Elrod* and the underlying government interest it recognized. This test is essentially the same as what the Third Circuit applied in *Adams*,<sup>70</sup> and the First and Fourth Circuits have placed the underlying government interest at the forefront of their policymaking exception analysis in recent decisions.<sup>71</sup>

Applying the above inquiry to judges, political affiliation is a manifestly inappropriate requirement for the office. Proper application of the law requires independence, not political loyalty. The policymaking exception was created so that an administration could prevent obstruction of its policies, but courts are often asked to be obstructionists. Judges must be willing to invalidate policies that run afoul of the Constitution, and cannot be required to step aside and merely function as a tool of the executive. Judicial appointments are a check on the judiciary, but are emphatically not a method of implementing the executive's policy. If this is not so, then there are only two branches of government. The importance of an independent judiciary is self-evident, but is also enshrined in state and national rules of judicial conduct.<sup>72</sup> *Kurowski* and *Newman* did not err because they disagreed about the need for an independent judiciary; rather, they misunderstood the fundamental inquiry commanded by *Branti* and *Elrod*. These defects are worth exploring further.

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70. The Third Circuit's test was whether judges "make policies that necessarily reflect the political will and partisan goals of the party in power." *Adams*, 922 F.3d at 179.

71. *McCaffrey v. Chapman*, 921 F.3d 159, 167 (4th Cir. 2019) (holding that a sheriff's deputy fell within the exception since "[r]equiring a sheriff to employ deputies who have displayed the level of hostility portrayed in this complaint could reasonably impede a sheriff's obligation to his electorate to implement the platform on which he campaigned"); *Eves v. LePage*, 927 F.3d 575, 584 (1st Cir. 2019) (the court's analysis mixed in some general policymaking considerations but ultimately cited *Elrod v. Burns*, 427 U.S. 347, 367 (1976), in holding that the employee was "in a position to thwart' the policy objectives of 'the in-party'").

72. *Adams*, 922 F.3d at 179 (noting that the American Bar Association's Model Code of Judicial Conduct and the Delaware Code of Judicial Conduct both require judges to be independent and "unswayed by partisan interests").

*B. Elrod's Evanescence*

The essential shortcoming of *Kurowski* and *Newman* is that they failed to recognize and apply the government interest underlying the policymaking exception, which is preventing obstruction. When this interest is not furthered by a political patronage requirement, these hiring (and firing) practices violate the First Amendment. Rather than looking to this government interest, courts have often considered factors that primarily answer whether the position can be considered a “policymaking” position. The policymaking label should have died after the *Branti* reformulation, when the Court expressly abandoned it.<sup>73</sup> However, since the exception has become known as the “policymaking exception,” it should not be surprising that courts have had trouble disentangling this consideration from their analysis.

*Kurowski* considered factors such as whether the office involves making “the sort of decisions about which there are political debates,” while *Newman* held that “judges are policymakers because their political beliefs influence and dictate their decisions on important jurisprudential matters.”<sup>74</sup> These political considerations indicate that the courts were influenced by the policymaking label, attempting to ascertain the degree to which judges may make policy that is influenced by their political beliefs. But even if judges make policy, and even if their views are influenced by their “ideals, life experiences, and political philosophies,”<sup>75</sup> this is not the type of policymaking that requires political alignment with the governor. This sort of analysis is why the *Branti* court provided the football coach example; even if football coaches make a certain form of policy, political affiliation is clearly not an appropriate requirement and would not lend itself to more effective performance “no matter which party is in control.”<sup>76</sup>

The Ninth Circuit has developed a nine-factor test that seeks to aid courts in determining whether an employee is a policymaker, which is of course the wrong inquiry. The test considers:

[1] whether [the employee had] vague or broad responsibilities, in addition to [the employee's][2] relative pay, [3] technical competence, [4] power to control others, [5] authority to speak in the name of policymakers, [6] public perception, [7] influence on programs, [8] contact with elected

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73. *Branti*, 445 U.S. at 518.

74. *Kurowski v. Krajewski*, 848 F.2d 767, 770 (7th Cir. 1988); *Newman v. Voinovich*, 986 F.2d 159, 163 (6th Cir. 1993).

75. *Newman*, 986 F.2d at 165 (Jones, J., concurring).

76. *Branti*, 445 U.S. at 518.

officials, and [9] responsiveness to partisan politics and political leaders.<sup>77</sup>

These factors attempt to determine whether a position is policymaking in nature. But that label, once again, is meaningless when divorced from the government interest of implementing the administration's policies. While powerful employees with more broad responsibilities may often be in a position to undercut an administration's policies, these factors are relevant only when considered in light of that government interest—preventing obstruction. This nine-factor inquiry would bury the most important considerations, like placing “responsiveness to partisan politics and political leaders,” below “technical competence” and “relative pay.”<sup>78</sup> And certainly relative pay bears not even a tenuous connection to the ability to undercut an administration's policies.

This factored approach, less explicit yet still lurking in *Kurowski* and *Newman*, demonstrates how courts have lost the meaning of *Elrod* in applying its exception. In preserving analyses that attempt to decide whether a position is policymaking in nature, the courts have kept *Elrod*'s body, but its soul has evanesced. The Court used the “policymaking” label only in a well-intentioned effort to narrowly define those positions that could obstruct an administration's policies. But even after *Branti* abandoned this empty label, courts have lost sight of the government interest that first created the exception, chasing *Elrod*'s form, but not its meaning.

### C. Compounding the Confusion

While losing sight of the government interest is the primary defect in *Kurowski* and *Newman*, they have several other flaws that help explain their incorrect holdings. In *Kurowski*, the Seventh Circuit recognized that if the exception turned on the position's implementation of the controlling party's policy, then “the governor could not consider a would-be judge's politics when deciding who to appoint,” and believed this to be an unthinkable result.<sup>79</sup> The court apparently presumed the validity of partisan judicial appointments due to the longstanding practice that Justice Scalia noted in his *Rutan* dissent.<sup>80</sup> *Kurowski* was decided pre-*Rutan*. But now that these

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77. Carroll v. City of Phx., No. CV 07-00148 PHXNVW, 2007 WL 1140400, at \*9 (D. Ariz. Apr. 17, 2007) (citing Walker v. City of Lakewood, 272 F.3d 1114, 1132 (9th Cir.2001)).

78. *Id.*

79. *Kurowski*, 848 F.2d at 770.

80. Justice Scalia appeared to believe that the policymaking exception would prevent partisan appointment of judges, but recognized that this had always been the practice and would not have been willing to invalidate it. “[I]f there is any category of jobs for whose performance party affiliation is not an

appointment practices are within the scope of this exception, perhaps the Seventh Circuit would not have presumed their validity.

The Seventh Circuit also erred in its belief that state judicial elections imply a political component to the office. But these structures establish a democratic component, not a political component. In confronting the interest of a state in regulating judicial elections, the Court has insisted that judges remain independent from outside interests, “with nothing to influence or controul him but God and his conscience.”<sup>81</sup> And the Seventh Circuit’s reasoning that the governor may consider political affiliation “when making an appointment, just as the voters may consider these factors,” highlights one of the flaws that the *Adams* court singled out—conflating the ability to *consider* political affiliation with ability to *condition* employment on a particular affiliation.<sup>82</sup>

While there can be no doubt, as the Seventh Circuit believed, that a governor may consider the political views of a judge, this is not the same as conditioning employment on party affiliation, which violates a candidate’s First Amendment rights. As the *Adams* court held, “[t]here is a wide gulf between a governor asking a judicial candidate about his philosophy on sentencing, for example, and a governor posting a sign that says ‘Communists need not apply.’”<sup>83</sup> This distinction is sensible given that *Branti* asks whether political affiliation is an appropriate *requirement* for the office.<sup>84</sup> And it was this distinction that ultimately led Judge Jones astray in his *Newman* concurrence, where he agreed to uphold the patronage practice despite stating that “it cannot be seriously contended that being a member of a certain party . . . should be a *requirement* for the effective performance of being a judge.”<sup>85</sup> These additional errors further

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appropriate requirement, it is the job of being a judge, where partisanship is not only unneeded but positively undesirable. It is, however, rare that a federal administration of one party will appoint a judge from another party. And it has always been rare.” *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 92–93, (1990) (Scalia, J., dissenting) (citing *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803)).

Justice Scalia eloquently offered the same critique in a later decision that extended the scope of this exception to government contracts. “What secret knowledge, one must wonder, is breathed into lawyers when they become Justices of this Court, that enables them to discern that a practice which the text of the Constitution does not clearly proscribe, and which our people have *regarded* as constitutional for 200 years, is in fact unconstitutional?” *Bd. of Cty. Comm’rs, Wabaunsee Cty., Kan. v. Umbehr*, 518 U.S. 668, 688–89 (1996) (emphasis in original).

81. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1667 (2015) (citing *Address of John Marshall*, in *Proceedings and Debates of the Virginia State Convention of 1829–1830*, p. 616 (1830)) (internal quotations omitted).

82. *Kurowski*, 848 F.2d at 770; *Adams v. Governor of Del.*, 922 F.3d 166, 181 (3d Cir. 2019).

83. *Adams*, 922 F.3d at 181.

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

85. *Newman v. Voinovich*, 986 F.2d 159, 165–66 (6th Cir. 1993) (Jones, J., concurring) (citing *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 91 (1990) (Scalia, J., dissenting) (emphasis added and

explain how the earlier circuit court decisions went astray in holding that judges fell within the policymaking exception.

## V. JUDICIAL REFORM AND FEDERAL APPOINTMENTS

Since the proper interpretation of the *Elrod-Branti* exception excludes judges, their appointments cannot be conditioned on political affiliation. The First Amendment right preserved by this line of cases could invalidate potential judicial reform efforts and existing appointment practices. This section discusses these complications by considering an alternate justification for political requirements, and the potential applicability of the political question doctrine to bar challenges to federal appointment practices.

### A. Political Balancing

The threat of judicial reform is particularly acute as the country responds to a presidency that has questioned the norms and institutions of its government.<sup>86</sup> The very manner of Donald Trump's victory in the 2016 Presidential Election, a result of electoral configuration and not the electorate's will, has itself invited questions about our institutions, and perhaps provided a willingness to question the present wisdom of decisions made two centuries ago.<sup>87</sup> Combine these evolving attitudes with the recent political battles over Supreme Court vacancies, including the bare 50-vote confirmation of Justice Brett Kavanaugh in 2018,<sup>88</sup> and the result could very well be, to loosely paraphrase Justice Scalia, a court-reforming cocktail.<sup>89</sup>

An essential ingredient of this cocktail, the *sine qua non* of any reform movement, is political impetus.<sup>90</sup> The Court has always

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omitted).

86. President Trump's attacks on government institutions are numerous and wide-ranging, often targeting his own appointees and the departments they head. See Peter Nicholas, *Trump Blasts Sessions's Leadership of Justice Department*, WALL ST. J. (Aug. 25, 2018), <https://www.wsj.com/articles/trump-resumes-attacks-on-sessions-1535209768> [<https://perma.cc/39DK-BJLU>]; In *His Own Words: The President's Attacks on the Courts*, BRENNAN CENTER (June 5, 2017), <https://www.brennancenter.org/our-work/analysis-opinion/his-own-words-presidents-attacks-courts> [<https://perma.cc/DL54-2AH4>].

87. Erin Corbett, *Why Democrats Want to Abolish the Electoral College—and Republicans Want to Keep It*, FORTUNE (April 2, 2019), <https://fortune.com/2019/04/02/abolish-the-electoral-college-votes/> [<https://perma.cc/688X-4P8P>] (discussing growing support to abolish the Electoral College).

88. Dan Berman, *How Senators Voted on Brett Kavanaugh*, CNN (Oct. 6, 2019), <https://www.cnn.com/2018/10/06/politics/how-senators-voted-on-brett-kavanaugh/index.html> [<https://perma.cc/FSP2-8V8V>].

89. *Navarette v. California*, 572 U.S. 393, 413 (2014) (Scalia, J., dissenting) (skewering the majority opinion's analysis as "a freedom-destroying cocktail").

90. "An indispensable condition or thing; something on which something else necessarily depends." *Sine Qua Non*, BLACK'S LAW DICTIONARY (11th ed. 2019).



decided immensely important issues, but the country has now looked to this branch to recognize and protect new individual rights under its substantive due process doctrine, and to remove those issues from the typical legislative process.<sup>91</sup> If this evolving concept of the modern Court's role has in fact provided the political motivation for judicial reform, it would certainly explain why some wish to go beyond term limits—a reform that would seem to address institutional concerns without imposing partisan requirements. Yet despite being, by some measures, a more “moderate” approach to judicial reform, term limits would require a constitutional amendment.<sup>92</sup> A political balancing requirement had been suggested by former Presidential candidate Pete Buttigieg as a bold reform that could be accomplished legislatively.<sup>93</sup> But *Elrod* commands that partisan requirements cannot be imposed on judicial seats without changing the Constitution.

The government could attempt to assert a different government interest to uphold the political balancing requirement and restrict First Amendment rights, as the Delaware government did in *Adams*. The argument would be that the requirement is narrowly tailored to serve a vital government interest in a politically balanced judiciary. The Third Circuit rejected this argument on the narrowly tailored prong, since the provision excluded third parties, but also expressed skepticism about the government interest, believing that party balance should not be conflated with judicial impartiality.<sup>94</sup> Regardless of this interest's precise framing, it seems unlikely that courts would accept political requirements for the bench since it actually entrenches political considerations in the judiciary, even if its intention is to make the branch less political, or to make it appear less political. The Seventh Circuit has already rejected this political balancing argument in the

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91. Abortion rights, for example, have become a litmus test for any Supreme Court nominee. Justice Kavanaugh's views on *Roe v. Wade*, while perhaps a secondary issue during his confirmation, were probed by the Ranking Democratic Member of the Judiciary Committee, Senator Dianne Feinstein, and moderate Republicans such as Senators Lisa Murkowski and Susan Collins. Jordain Carney, *Kavanaugh: Roe v. Wade Has Been 'Reaffirmed Many Times'*, THE HILL (Sept. 5, 2018), <https://thehill.com/homenews/senate/405135-kavanaugh-roe-v-wade-has-been-reaffirmed-many-times> [<https://perma.cc/6CVH-3F6N>].

92. Term limits would conflict with U.S. Const. art. III, § 1, which provides that federal judges hold their offices “during good Behaviour.”

93. *October Democratic Debate Transcript: 4th Debate in Ohio*, REV (Oct. 16, 2019), <https://www.rev.com/blog/october-democratic-debate-transcript-4th-debate-from-ohio> [<https://perma.cc/GE4H-NJDK>] (where Pete Buttigieg indicated that his political balancing proposal may be possible without a constitutional amendment).

A proposal that involves appointment outside the normal structure of appointment by the president and consent of the Senate, as Buttigieg has suggested, would almost certainly require a constitutional amendment. But even after excising this portion of the proposal, the political balancing requirement is separately unconstitutional under *Elrod*, as held by *Adams*.

94. *Adams v. Governor of Del.*, 922 F.3d 166, 183 (3d Cir. 2019).

judicial context.<sup>95</sup>

These persistent rebuffs may cause some to become frustrated with the seemingly impervious judicial shield, and the Court has indeed been mindful to safeguard its public reputation as a non-partisan institution.<sup>96</sup> It is impossible, or at least impossibly naïve, to believe that judges are completely insulated from political considerations, whether those influences are conscious or not. But it is one thing to acknowledge this reality, and to hopefully minimize its impact, and another thing entirely to embrace partisan politics as legal orthodoxy and enshrine it as a pillar of our judicial system.

### *B. Federal Judicial Appointments*

The prior cases involving judicial appointments have concerned state judges, but similar to our federal system, Delaware's constitutional framework required consent of a Senate majority for most of the governor's judicial appointments.<sup>97</sup> Would the *Elrod* line of cases prevent the president from conditioning federal judicial appointments on political affiliation? Given the similarities between the Delaware and federal structures of advice and consent, there cannot be a principled basis for distinguishing between the two systems. However, since the Constitution empowers the president to nominate judges, a court challenge could well be nonjusticiable.<sup>98</sup> Some have argued that intervention in the federal appointment of a judge would undoubtedly be a political question.<sup>99</sup> But, as with virtually all cases concerning the political question doctrine, some doubt may be wise.

“A controversy is nonjusticiable—*i.e.*, involves a political question—where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department.’”<sup>100</sup> The Constitution commits the power to appoint federal judges to the president, with advice and consent of the Senate.<sup>101</sup> But a hypothetical challenge to a federal judicial appointment would not question the

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95. *Common Cause Ind. v. Individual Members of the Ind. Election Comm'n*, 800 F.3d 913, 928 (7th Cir. 2015).

96. Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge'*, N.Y. TIMES (Nov. 21, 2019), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html> [https://perma.cc/H7JU-P5Z3].

97. DEL. CONST. art. IV, § 3.

98. U. S. CONST. art. II, § 2, cl. 2.

99. Michael E. Solimine, *Constitutional Restrictions on the Partisan Appointment of Federal and State Judges*, 61 U. CIN. L. REV. 955, 968 (1993).

100. *Nixon v. United States*, 506 U.S. 224, 228 (1993) (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

101. U. S. CONST. art. II, § 2, cl. 2.

wisdom or propriety of the president's considerations in exercising this power; rather, it would be a case about the plaintiff's First Amendment right to freedom of association.<sup>102</sup> The plaintiff would not be challenging the scope of the president's power to nominate, she would be asserting that her First Amendment rights were infringed by the nomination process. The political question is incidental to the individual right asserted, possibly providing reason for courts to hear such a challenge.<sup>103</sup>

Even though this is largely an academic discussion, since the president could easily circumvent this restriction by putting a token candidate on some sort of short list, and it is unlikely for any such case to arise absent an explicit partisan condition (like Delaware's constitutional provision), there could be practical implications. If the Court were to enjoin the nomination proceedings, it could delay the nomination of a Supreme Court Justice. If the process were to then bleed into an election year, the minority party could claim the "Merrick Garland concern," perhaps with even more force, potentially allowing the opposing party to delay the filling of a seat until the next presidential election has been decided.<sup>104</sup> This sort of political mud fight may be precisely the circumstance in which the Court would be eager to declare an issue nonjusticiable, but such an outcome should perhaps not be presumed.

## VI. CONCLUSION

If the judiciary's duty is to "say what the law is," then it cannot be a mouthpiece for the executive, and its members cannot be blunt political instruments.<sup>105</sup> The Constitution indeed prohibits partisan

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102. Such a case would be unlike *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), where the court declined to hear one of the challenges made to President Bush's recess appointment of Judge Pryor. The court held the claim that the President "circumvented and showed an improper lack of deference to the Senate's advice-and-consent role" to be a political question that involved subjective consideration of political wisdom. *Id.* at 1227.

103. Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 *Yale L.J.* 517, 584 (1966) (suggesting that courts are hesitant to apply the political question doctrine when individual rights are at stake).

Justice Marshall originally distinguished individual rights as being outside the realm of a political question. *Marbury v. Madison*, 5 U.S. 137, 166 (1803).

104. The Senate declined to consider President Obama's Supreme Court nominee, Merrick Garland, in 2016, arguing that they should not fill the seat during an election year. Ron Elving, *What Happened With Merrick Garland In 2016 And Why It Matters Now*, NPR (June 29, 2018), <https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now> [https://perma.cc/7VA3-38VU].

105. *Marbury*, 5 U.S. at 177, ("It is emphatically the province and duty of the judicial department to say what the law is").

conditions on judicial appointments. However noble the concept of an apolitical Court may be, it cannot be achieved by attaching political conditions to seats on the bench. The Third Circuit's ruling in *Adams* was correct—judges do not fall within a proper understanding of the policymaking exception, and this decision ought to instruct any court that confronts legislative attempts to affix partisan locks on chamber doors. This could frustrate judicial reform efforts. But when seeking to change a branch of government, obstacles should be expected.