Case preview: Justices to consider Delaware rules on bipartisanship in judiciary

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Amy L. Howe

The justices start their new term on Monday, at a time when the Supreme Court is at the center of a bitter battle over President Donald Trump's nominee to succeed Justice Ruth Bader Ginsburg, who died last month at the age of 87. If Judge Amy Coney Barrett is confirmed, it could cement a decisive conservative majority on the court for decades to come. With the ideological balance on the Supreme Court very much at the forefront of many people's minds, it is perhaps fitting that in their first oral argument of the term the justices will consider whether a provision in the Delaware constitution that seeks to ensure bipartisanship in the state's courts violates the U.S. Constitution.

Under the Delaware constitution, judges are appointed by the governor for 12-year terms and must be confirmed by a majority of the state senate. The state's constitution also imposes additional limitations on the governor's appointments. One section, known as the "bare majority" provision, directs that no more than a bare majority of the judges on the state's five main courts can be affiliated with any one political party. Another section, known as the "major party" provision, applies to the three courts known as the "business" courts: the Delaware Supreme Court, the Court of Chancery and the Superior Court. It divides the seats on those courts between the two major political parties – currently the Democratic Party and the Republican Party.

The case before the U.S. Supreme Court on Monday, *Carney v. Adams*, was filed by John Adams, who became a lawyer in 2000. A registered Democrat, Adams worked as a family-law lawyer in the Delaware Department of Justice from 2003 to 20015. Adams changed his party affiliation in 2017 to Independent and decided that he wanted to serve as a judge, but he believed that he would not be able to apply for any future vacancies on the business courts because he wasn't a Democrat or a Republican. Adams went to federal court in Delaware, where he argued that the "bare majority" and "major party" provisions violate the First Amendment to the U.S. Constitution by limiting a judicial candidate's freedom to associate with the political party of his choice.

The district court ruled for Adams. The court agreed that Adams' case was governed by a 1976 Supreme Court decision holding that the First Amendment prohibits state officials from

considering partisan affiliation when making employment decisions for jobs that do not make policy. Judges do not make policy, the district court ruled, but instead simply apply the law.

The state appealed to the U.S. Court of Appeals for the 3rd Circuit, which struck down the "major party" provision. In the view of the court of appeals, the rationale for allowing state officials to consider partisan affiliation "is to ensure that elected officials may put in place loyal employees who will not undercut or obstruct the new administration." But judges, who are supposed to be independent and impartial, the court of appeals reasoned, "do not fit this description." Having concluded that the "major party" provision is unconstitutional, the court of appeals concluded that the "bare majority" provision must also be invalidated because it is so closely linked to the "major party" provision. The "major party" provision, the court of appeals suggested, was intended to operate as an enforcement mechanism for the "bare majority" provision by preventing, for instance, a Democratic governor from appointing a liberal member of the Green Party to the five-member state supreme court when there were already three Democrats on the court. The two provisions thus "operate in tandem to dictate the bi-partisan makeup of Delaware courts" and both must be struck down, the 3rd Circuit said.

The state asked the justices to weigh in, which they agreed in December 2019 to do. The case was originally scheduled for oral argument in March of this year, but it was pushed back to October after the March oral arguments were canceled because of the COVID-19 pandemic.

Before the justices can reach the main question in the case – whether the two provisions violate the First Amendment – they must first resolve a threshold question: whether Adams has a legal right to sue, known as "standing." The state contended that he does not, and that Adams' lawsuit therefore cannot go forward. Adams is not harmed by the "bare majority" provision because he does not belong to either the Democratic or the Republican Party and because he "passed on applying for at least ten judgeships," the state argued in a brief. It is not enough to say that he might apply for judgeships someday but could be prevented from doing so by the "major party" provision because he is a registered Independent, the state continued. This is a manufactured, "self-inflicted" harm: Adams switched his voter registration from Democratic to Independent shortly before he filed the lawsuit so he could complain about the provisions, the state alleged.

Adams countered that he has standing to bring his lawsuit. He said that he cannot apply for a judgeship because he is an Independent, rather than a Republican or a Democrat; that is enough harm to allow his lawsuit to go forward. Adams emphasized that he "does not have to show that he would have been chosen for a judgeship, or that there was a reasonable possibility that he would have been selected"; all he has to demonstrate is that there is a rule that bars him from being a judge because of his political affiliation.

If the justices agree with Adams that he has a legal right to sue, they will then move on to the main question in his case: whether the "major party" provision violates the U.S. Constitution. Adams conceded that governors can consider political-party affiliation when deciding whom to appoint as a judge. But in the case of judges, political affiliation should not factor into their work in a way that would justify allowing state officials to make it a requirement for the position: "Judges are required to put aside their political views and decide cases based on neutral

principles," Adams emphasized. Judges don't work closely with the people who appoint them and are not accountable to them.

Adams pushed back against the idea that the "major party" and "bare majority" provisions are necessary to ensure bipartisanship and excellence in the state's judiciary. Other states have high-quality judicial systems without limiting their courts to specific numbers of Democrats and Republicans, Adams observed. And the Delaware Supreme Court is in any event not balanced, Adams continued, because "one party always has a majority on the bench, and that majority could assert their political ideology if they so desired." There are also other ways to ensure that the system is politically balanced and nonpartisan, Adams noted, including the code of conduct for state judges, which "instructs judges to be unswayed by partisan interests."

Defending the "major party" and "bare majority" provisions, the state emphasized both the long history of considering party affiliation in appointing judges and the extent to which the provisions have created "stability, consistency, and nonpartisanship" in the state's judiciary. It is true that, as a result of those provisions, some people – including Adams – who would like to apply for judgeships may not be able to do so, but that doesn't violate the First Amendment, the state contended.

The state suggested that the best way to think of the Supreme Court's line of cases banning patronage is as creating an exception for "low-level public employees" who do not make policy and have little discretion in their roles. None of those decisions, the state noted, have involved a position like a judge. And judges in Delaware do have the kind of policy-making power that the Supreme Court envisions for positions that can be conditioned on party affiliation – particularly when it comes to business law, where the judges' decisions shape corporate law around the world. It may not matter "whether road crews, prison guards, or process servers are politically balanced," the state acknowledged, but Delaware has decided that political balance is desirable in its court system, and the best way to achieve that balance is for governors to consider "party affiliation as a proxy for how applicants might carry out such roles."

The Supreme Court has indicated that states should have some leeway to decide the qualifications of their judges, Delaware argued. But even if a more rigorous form of scrutiny is applied to the "major party" provision, the state continued, it is still constitutional. The state has a compelling interest in having politically balanced courts to ensure "public confidence in judicial integrity," the state contended, and no one has identified some other way to do that.

If the justices agree with Adams that the "major party" provision is unconstitutional, they must then decide whether only the "major party" provision must fall, or whether the "bare majority" provision must also be invalidated. To do so, they must apply a doctrine known as severability. The state told the justices that even if the "major party" provision is unconstitutional, so that the state cannot limit the courts to Democrats and Republicans, they should leave the "bare majority" provision in place. As an initial matter, the state claimed, because Adams does not have standing to challenge the "bare majority" provision, he shouldn't be able to invalidate the whole law.

And in any event, the state added, the “bare majority” provision can survive without the “major party” provision: It was the only provision in the state’s constitution for 54 years, and two of the state’s courts continue to be covered by only a “bare majority” provision without a “major party” provision. There is no reason to believe, the state assured the justices, that if given the choice, the drafters of the state’s constitution would choose to eliminate both provisions from the constitution, rather than keep the “bare majority” provision.

Adams argued that because the state did not raise the question of whether the “major party” provision can be separated from the “bare majority” provision in the lower courts, the justices should not consider it at all. But if the Supreme Court does reach that question, Adams told the justices, it should strike both provisions down because the two are “textually intertwined”: The “major party” provision “is recognized as necessary” for the “bare majority” provision “to achieve its goals.”

Adams’ case has drawn a wide range of “friend of the court” briefs on both sides of the issue. A bipartisan group of former chief justices of the Delaware Supreme Court noted that party affiliation has long played a role in the selection of judges for federal and state courts. If the 3rd Circuit’s ruling is upheld, they contended, it could endanger those practices. A brief from the libertarian Cato Institute responded that the court’s ruling does not need to be so sweeping, particularly when other requirements that states sometimes use to ensure balance and nonpartisanship are generally less restrictive and typically do not exclude Independents and members of third parties.

A decision in the case is expected by summer.