

The Quirky Pennsylvania Constitution

According to Article 9, Section 4 of the Pennsylvania Constitution, dealing with county government, three County Commissioners shall be elected in each county. In the election of these officers, each qualified elector shall vote for no more than two persons, and the three persons receiving the highest number of votes shall be elected! What the heck does that mean?

The Pennsylvania Supreme Court is the oldest in the nation which, according to Ken Gormley, Professor at Duquesne University School of Law, was established in colonial Pennsylvania in 1681 with a Provincial Court consisting of five judges sitting in Philadelphia in the year 1684. The Pennsylvania Constitution was drafted in the midst of the Revolution in 1776 and is twelve years older than the Federal Constitution.

The obvious purpose of voting for two commissioners to elect three is to assure the minority party gets at least one seat on the Board of County Commissioners. Typically, that minority seat is going to be Republican or Democrat. The system is a virtual guarantee that no one party will elect all three county commissioners.

The question is, however, is a guarantee of party representation constitutional? James R. Adams was a resident member of the State Bar of Delaware. Adams was neither a Republican nor a Democrat. Adams sued the Governor of the State of Delaware to challenge the provision of the Delaware Constitution that effectively limited service on state courts to members of the Democratic and Republican parties. The candidate objected to the announcement for the judicial position which required that the candidate be a Republican.

Adams relied upon Supreme Court precedent in *Elrod vs. Burns*, 427 US 347 (1976) and *Branti vs. Finkel*, 445 US 507 (1980). Those cases found that laws which eliminated judicial candidate's freedom to associate (or not to associate) with the political party of their choice is unconstitutional.

The United States Court of Appeals for the Third Circuit, which includes Pennsylvania, concluded that portions of the Delaware Constitution that limited Adams' ability to apply for a judicial position based upon his political party affiliation violated his First Amendment rights.

In *Elrod vs. Burns*, a plurality opinion held that the practice of patronage dismissals is a violation of the First Amendment. Patronage dismissals consist of dismissing a civil servant because his political affiliation differed from the political party in power. The rule against patronage dismissal was said only to apply in connection with those who were not policymakers. Non-policymakers were to be protected from patronage dismissal. Most of the case law deals with the general prohibition on politically-motivated discharge, promotions, transfers or hiring where the individual in

question was not a policymaker. “Unless these patronage practices are narrowly tailored to further vital government interest, we must conclude that they impermissibly encroach on First Amendment freedoms.” At *Rutan*, Page 74.

The argument in the Third Circuit case of *Adams vs. Governor of Delaware*, addressed the question as to whether the officials in question were policymakers and hence could be viewed as politically expendable. Examining the case law shows that certain positions have been found to be insulated from political affiliation considerations. *Adams* concluded that a judicial officer, whether appointed or elected, is not a policymaker. If judges are not policymakers, they cannot be subject to political exclusion.

What about County Commissioners? Undoubtedly, they are involved in policy making. Does that mean that the Pennsylvania Constitution can guarantee a seat to the “minority” party which conceivably may not be Republicans or Democrats but can also be Independents, the Green party, Socialist, Communists or others?

The First Amendment also guarantees Association Rights. Several federal administrative agencies use some form of political balance requirement for decision making bodies including the Federal Deposit Insurance Corporation, the Federal Trade Commission, the Securities and Exchange Commission, and others. “To justify a rule that impinges an employee’s First Amendment association rights, the state must show both that the rule promotes ‘a vital state interest’ and that the rule is ‘narrowly tailored’ to that interest.” *Common Cause Indiana vs. Individual Members of the Indiana Election Commission*, 800 F.3d 913, 922-23 (7th Cir. 2015).

The real question is whether county voters throughout Pennsylvania have a “right” to elect all commissioners from the same party or whether the rule that ensures that only two out of three county commissioners will be of the same party advances a legitimate state interest? Once again, we see the classic legal seesaw between protection of the minority as opposed to the right of free association.

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