[39 MAP 2013]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

JUDGE ROCHELLE S. FRIEDMAN, JUDGE ALAN M. RUBENSTEIN, IN HER AND HIS OFFICIAL CAPACITY, ROBERT H. RIEFLE, BONITA L. DICARLO AND THOMAS A. BECKLEY, INDIVIDUALLY AND ON BEHALF OF QUALIFIED ELECTORS IN THE COMMONWEALTH OF PENNSYLVANIA, Petitioners v. GOVERNOR THOMAS W. CORBETT JR., COURT ADMINISTRATOR ZYGMONT A. PINES, SECRETARY CAROL T. AICHELE, AND TREASURER ROBERT M. MCCORD, EACH IN THEIR OFFICIAL CAPACITY, Respondents	: No. 39 MAP 2013 : : Plenary Jurisdiction assumed from : Commonwealth Court at No. 81 MD 2013

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE **FILED: July 16, 2013**

I agree that the gravamen of the complaint here is controlled by the core constitutional holding in Driscoll v. Corbett, __ A.3d __ (Pa. 2013), and that further proceedings are pointless. However, this is not to say that I have no reservations, given the arguments presented, or that I believe that the constitutional scheme here is a

particularly rational one. There obviously is discrimination in the constitutional provision at issue; it is based squarely on age; and the 2001 amendment allowing service to the end of the calendar year, rather than, for example, until the next election cycle, is a half-solution to the disruption caused by the age restriction.

If the judicial age restriction at issue here and in Driscoll represented mere legislation, I have little doubt that it would be unconstitutional. Limits upon service can be expressed in multiple ways (*e.g.*, term limits, the length of terms); this one is premised solely upon (older) age. A particularly young judge could serve for four decades; or an attorney could win election for the first time at age 69, turn 70 in the January in which he assumes office, and then "be retired." The line is drawn solely upon age – no citizen past 70 need apply, no matter how well-qualified. Classifications based upon older age are sensitive and potentially invidious ones. But this age-based discrimination, particular to the judiciary, is not mere legislation – it is found in the Pennsylvania Constitution itself, and the constitutional issues are controlled by Driscoll and, more globally, Gregory v. Ashcroft, 501 U.S. 452 (1991).

Notably, the age limitation set in place after the 1967-68 Constitutional Convention was not the subject of a specific, narrow question presented to the people for approval (in contrast to the provision concerning the manner of selecting judges, see infra n.1; or the narrow 2001 amendment, which arose from the actions of the General Assembly, and once approved by the voters extended judicial service to the end of the year in which a jurist turns 70). Rather, it was included in a mass of wide-ranging reforms regarding a new Article V about the judiciary. Driscoll, __ A.3d at __, *1 (noting that Article V was "completely rewritten" during the Convention).

Here is how the drafters described to the people the measure for ratification of these reforms at the April 23, 1968 Presidential Primary Election: "Shall Proposal 7 on the JUDICIARY, adopted by the Constitutional Convention, establishing a unified judicial system, providing directly, or through Supreme Court rules, for the qualifications, selection, tenure, removal, discipline and retirement of, and prohibiting certain activities by justices, judges, and justices of the peace, and related matters, be approved?" Constitutional Proposals Adopted by the Convention, THE PENNSYLVANIA CONSTITUTIONAL CONVENTION 1967-68, 7. The subject matter covered by this one-sentence ballot question, which includes unspecified "related matters," actually engendered twenty-five single-spaced, small-font pages of additional explication in a separate "Summary and Explanation" offered "for the convenience of the people." Id. at 26-50. Even this Summary and Explanation, which was apparently intended to be transmitted to the Pennsylvania electorate in some way in conjunction with the election, was not to be "considered an official interpretation" of the proposed changes, which included, *inter alia*, the creation and composition of the unified judicial system and the courts embodied therein, the powers and duties of those courts, how judges would be elected and vacancies filled, the creation of a Judicial Inquiry and Review Board, rules for judicial candidates, and special considerations for the judicial districts of Philadelphia and Pittsburgh. Id.[1]

[1] The revised Article V contained alternative methods for selecting judges: one by election and one by appointment, and explicitly noted that the determination of which system would prevail would depend upon a choice to be presented to the qualified electors at the primary election in 1969. See PA. CONST. art. V, § 13(d) ("At the primary election in 1969, the electors of the Commonwealth may elect to have the justices and (continued…)

The Pennsylvania Constitution may be amended in two ways: via Convention, or via the procedure originating with the General Assembly specified in Article XI, Section 1. Stander v. Kelley, 250 A.2d 474, 479 (Pa. 1969); see also Harry L. Witte, Amending the Pennsylvania Constitution, THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES, 847 (Ken Gormley ed., 2004) ("Pennsylvania has two recognized methods of proposing amendments, the legislative proposal mechanism, which is detailed in Article XI of the Constitution, and the constitutional convention, which enjoys no textual sanction."). The scope of amendments by Convention can be as broad as the authorization of the Convention. But, the Article XI amendment procedure has a significant limitation, similar to constitutional limitations governing most legislation,[2] to ensure that discrete subjects are subject to separate, meaningful vote: " . . . When two or

(…continued)
judges of the Supreme, Superior, Commonwealth and all other statewide courts appointed by the Governor from a list of persons qualified for the offices submitted to him by the Judicial Qualifications Commission. . . ."). The entirety of the revised Article V was then placed before the electorate in April 1968, including the alternative manners of judicial selection and the notation that the voters were to decide that question separately the next year. In May 1969, in a close vote (624,453 to 643,960) engaging barely 23% of registered voters, the electorate rejected the option of having an appointed judiciary selected through a "Judicial Qualifications Commission." See PA. CONST. art. V, § 14 & Note, "Operative Effect" (question of appointing justices and judges was rejected by voters; section 14 is not operative and Judicial Qualifications Commission does not exist); Berardocco v. Colden, 366 A.2d 574, 576 n.4 (Pa. 1976) ("In the primary election of 1969, the electors of Pennsylvania rejected the option of having an appointed judiciary which was presented to them by section 13(d) of Article V of the Pennsylvania Constitution."); Joint State Government Commission, Ballot Questions and Proposed Amendments to the Pennsylvania Constitution: A Compilation with Statistics from 1958-2006, Staff Report of the The General Assembly of the Commonwealth of Pennsylvania, 21 (2007).

[2] See PA. CONST. art. III, § 3 ("No bill shall be passed containing more than one subject, which shall be clearly expressed in its title, except a general appropriation bill or a bill codifying or compiling the law or a part thereof.").

more amendments shall be submitted [to the qualified electors of the State] they shall be voted upon separately." PA. CONST. art. XI, § 1. If the complete rewriting of Article V had been accomplished via the Article XI process, it obviously would have been subject to a viable constitutional challenge. See Bergdoll v. Kane, 731 A.2d 1261 (Pa. 1999) (ballot question encompassing amendments to both PA. CONST. art. I, § 9 and art. V, § 10(c), without allowing electorate to vote separately upon each of the amendments, held to violate art. XI, § 1); see also Pennsylvania Prison Soc. v. Commonwealth, 776 A.2d 971 (Pa. 2001) (although Court was divided on whether multiple amendments were at issue, and proper test for measuring whether multiple amendments were at issue, no disagreement concerning the limiting effect of Article XI amendment process). Notably, the Article V provision regarding the method of selection of statewide judges and justices was presented in a separate election. See supra n.1.

But, the complicated package of comprehensive amendments to Article V that included the brand new mandatory judicial retirement age was presented to the voters in 1968 in a package of reforms via the Convention procedure. Voters were faced with a yes or no vote on the whole package. It is fictional to say that voters who approved of such a massive constitutional revision affirmatively embraced any one measure within it, just as it would be fictional to say that all of the men eligible to vote on the original U.S. Constitution who voted in favor of it affirmatively embraced provisions respecting the perpetuation of slavery and weighting of federal power in favor of slave states via the

"three-fifths compromise." [3] But, this is the way broad Constitution-making via Convention (as opposed to specific, single-subject adjustments arising via political determinations by the General Assembly) works: it involves precisely such difficult decisions, and voters have to decide whether or not to take the bad with the good.

The concern with the 2001 amendment, in my view, is not so much with its constitutionality, but with its practicality. The 1968 amendments specified that judicial elections occur in municipal election years, *i.e.*, in odd-numbered years. PA. CONST. art. VII, § 3. Judges can "age out" at any time within the two years between elections, meaning that judges born in even-numbered years will be retired a year before their seat can be filled. This does not present a difficulty in the lower courts, where senior judges

[3] Article I, Section 2 of the U.S. Constitution originally provided that "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons." Under the provision, slave states would receive disproportionate representation in the U.S. House of Representatives (and therefore also an increase in presidential electors) based upon inclusion of a percentage of their resident slaves in apportioning the House. Gouverneur Morris, one of Pennsylvania's delegates to the 1787 Constitutional Convention, was recorded by James Madison as stating during debate on the measure: "Upon what principle is it that the slaves shall be computed in representation? Are they men? Then make them Citizens and let them vote. . . . The admission of slaves into the representation when fairly explained comes to this: that the inhabitant of Georgia and South Carolina who goes to the Coast of Africa, and in defiance of the most sacred laws of humanity, tears away his fellow-creatures from their dearest connections and damns them to the most cruel bondage, shall have more votes in a government instituted for the protection of the rights of mankind, than the Citizen of Pennsylvania or New Jersey who views with a laudable horror, so nefarious a practice." Wendell Phillips, THE CONSTITUTION. A PRO-SLAVERY COMPACT: OR SELECTIONS FROM THE MADISON PAPERS, ETC., 29 (2nd ed., 1845). Following a bloody Civil War, the clause was abrogated by the Fourteenth Amendment. U.S. CONST. amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.").

can fill the void; and indeed, many judges who reach mandatory retirement age immediately enter into senior service. On the Supreme Court, however, extending a term only to the end of the year a Justice turns seventy leads to a disruptive one-year vacancy for those Justices born in even-numbered years; notably, four of the six Justices currently serving on the Court were born in an even-numbered year. The General Assembly, which apparently is considering recommending a constitutional adjustment to address the age discrimination feature of Article V, may want to keep this additional fact in mind.

Sensitive as I am to how the health and mental acuity of mature Americans have improved since 1968, and sensitive as I am to the concerns of the distinguished jurists who have served this Commonwealth well and who have brought these challenges, I do not view the existing provisions subject to challenge, problematically discriminatory as they are, to be unconstitutional under our charter, and as for the federal question, Gregory is the law of the land, and this Court is duty-bound to enforce it.