

## DUELING CONSTITUTIONS

I feel like it's the 60's again. So many people are talking about the Constitution that I am reminded of Chairman Mao's followers running around with their little red books waving them tirelessly in the air. I am shocked that most people cannot guess how many constitutions we have in the United States of America. The easy answer is that there are 51 Constitutions. A citizen of any state has at least two constitutions to worry about.

Pennsylvania's first constitution was adopted in 1776, thirteen years before the United States Constitution which did not take effect until 1789.

The Pennsylvania Constitution contains a Declaration of Rights. The Declaration of Rights, for example, includes the statement that the government is instituted "for their peace, safety and happiness." Section 2. Section 6 States, "Trial by jury shall be as heretofore, the right thereof remain inviolate." Section 11 requires that courts be open and "every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay." There is a clear right to bear arms by the citizens "in defense of themselves and the State call not be questioned." Section 21. Pennsylvania has a natural resources declaration, Section 27. "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment." The Pennsylvania Constitution specifically outlaws sexual discrimination, Section 28.

A recent controversy that has sprung up throughout the Commonwealth of Pennsylvania is illustrative of the battle between the dueling constitutions. Lycoming County, Loyalsock School District Policy 227.1 requires students who wish to participate in extracurricular activities to submit to drug testing.

In *Board of Education of Independent School District 92 of Pottawatomie County vs. Earls*, 536 U.S. 822 (2000), the United States Supreme Court upheld random, suspicion-less drug testing of students who participated in "competitive" extracurricular activities. As Paul Harvey used to say, that is not the end of the story.

The Pennsylvania Supreme Court ruled in *Theodore vs. Delaware Valley School District*, 836 A.2d 76 (2003), that a random suspicion-less search policy will pass constitutional scrutiny under Article I, Section 8, only if the district makes some actual showing of the specific need for the

policy and an explanation of its basis for believing that the policy would address that need.

A recent opinion by the Court of Common Pleas of Lycoming County in the matter of *Fagnano vs. Loyalsock Area School District*, No. 11-00,908 (Lyc. Cty. April 4, 2012) assiduously followed the ruling of the Pennsylvania Supreme Court and was unable to find that an actual specific need for the policy had been articulated. The Judge showed a clear understanding of the demarcation created by the Pennsylvania Supreme Court in *Theodore vs. Delaware Valley School District*. While many students have written letters to the editor of the Williamsport Sun Gazette saying that the student in question should have submitted to the testing unless he had something to be afraid of, the high school senior had every right to invoke the guidelines set forth by the Pennsylvania Supreme Court. A state court has a legitimate right to enforce its constitution more rigorously than the United States does. Those who trumpet that the Tenth Amendment to the United States Constitution as creating or advancing the doctrine of states' rights, should applaud the role of state constitutions in addressing matters that the more general and ambiguous federal constitution does not address.

When the power of the Federal government and the Federal courts are weakened, as a result of fundamental political change, it is not uncommon for state courts and state constitutions to be more proactive. Likewise, when the battleground for individual rights and liberties shifts to the federal forum, the role of the States tends to shrink into the background.

I had a personal experience in the case of dueling constitutions a number of years ago. The Pennsylvania Legislature had just passed a bill making a substantial change in the law which was buried in another Act under a different title. Many people in Harrisburg were wringing their hands in despair and trying to figure out whether the due process clause of the Federal Constitution would somehow protect the population from this usurpation of power by the State legislators. While a great deal of cussing and cigar smoking was going on in the halls of the legislature and the offices of the political action groups, I pulled the Pennsylvania Constitution off the shelf and looked at a provision blandly referred to as Article III, Section 3. I was familiar with this section as a result of a prior constitutional challenge that I handled to an attempt to amend the Pennsylvania Constitution some years earlier, *Bergdoll, et al v. Honorable Yvette Kane*, 694 A.2d 1155, (Pa Comwlth. 1997).

When I showed the various lawyers who surrounded me, crocodile tears aflow, because of the fact that the Pennsylvania Legislature had

committed the constitutional sin of “logrolling,” people were surprised that such a procedure was banned by the Pennsylvania Constitution. In fact, Article III, Section 3 was specifically intended as a major legislative reform. In the late 1800s, there was an interest in transparency. The legislature was not supposed to pass bills that were buried in other pieces of legislation and could not be easily ascertained by the public.

Doubtless dueling constitutions will continue and in our current toxic political atmosphere, we may see even more showdowns at the OK Corral at high noon.

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