Four Problems with the Lawsuit Against the Incumbent Protection Act

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Forward

On April 2, 2015 Elizabeth Dillon, United States District Judge on the U. S. District Court Bench for the Western District of Virginia, passed a judgment of "Dismissal" for a complaint filed by Kenneth H. Adams (Plaintiff) and another by Daniel Moxley (Intervenor-Plaintiff) against Virginia Code Title 24.2 Chapter 509, Part B, (REF 1), which is popularly called "The Incumbent Protection Act" and herein designated as "IPA." Adams's complaint claimed the code forced the Republican 24th Legislative District Committee (LDC) of the Republican Party of Virginia (RPV) to hold a process of choosing a nominee that violated their First Amendment freedoms of association and speech. Moxley's complaint centered on a claim that the IPA represents a Constitutional equal protection violation, in that it gives an incumbent unique advantages over all other candidates, (REF 2).

Judge Dillon dismissed the complaints on the grounds that the By-Laws ("Party Plan") of the RPV, (REF 3), Article V, Section D, Paragraph 1.a. limits a LDC's choice of method for nomination to that "where permitted to do so by Virginia Law." Thus the RPV voluntarily acquiesced to the IPA and so neither Adams nor Moxley had grounds for complaint and thus no Standing before the Court, (REF 4).

Adams has filed an Appeal to the Court on the same grounds as he originally filed and Moxley has again filed as an Intervenor-Planitiff on the same grounds as his original, (REF 5).

There are Four (4) fundamental problems with the positions taken by Adams and Moxley that argue the United States Court of Appeals for the Fourth Circuit should find against the appeals. These four problems have nothing to do with whether for, against, or indifferent towards the IPA nor do they have anything to do with whether or not a particular incumbent is supported or opposed.

Problem 1 – Use of a Federal Court to Overturn a State Law

The Tenth Amendment to the U. S. Constitution, (REF 6), states,

> *"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."*

Yet the Federal Government through its own initiative or by suits filed in Federal Court has repeatedly assumed powers not delegated to it in the U. S. Constitution. The use of the Federal Courts is a method frequently employed by the Left when it cannot achieve its goal(s) by what rightfully should be a legislative process. In response the Right complains, "The Judge (Court) is making law."

The IPA is a Virginia law. The subject of that law is the election process of General Assembly Legislators, and others, who are incumbents. There is nothing in the U. S. Constitution that delegates any power to the U. S. Government for the election of Members of the Virginia General Assembly. Thus for The Tenth Amendment to prevail the Federal Courts have no role in making a decision pertaining to the IPA. To use the Federal Court System in a suit against the IPA simply erodes The Tenth Amendment in the same manner as the Left has done so in other matters. Employment of the Federal Court System in what is a State matter grows the size and power of the Federal Government and usurps the power of the States, something the two individuals filing their complaints, who claim to be Conservative, would oppose for a host of other matters. So it isn't explicable why someone who claims to be Conservative would attempt to employ the Federal Courts for what is clearly a State matter.

Problem 2 – Threat Posed to the U. S. Constitution and the Virginia Constitution

The U. S. Constitution, (REF 7), Article I, Section 4, Paragraph 1 states,

> *"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."*

Restated in simple language: The Virginia General Assembly, not the State nor Federal Courts, establishes the rules by which Congressional House Representatives and Senators for the Commonwealth of Virginia are elected in primaries and general elections.

The General Assembly did as the U. S. Constitution instructed for Federal Legislators. The following is Title 24.2, Chapter 509, Part B (A.K.A. IPA), (REF 1), where highlighted in YELLOW pertains to Congressional House Representatives and Senators.

> *"Notwithstanding subsection A, the following provisions shall apply to the determination of the method of making party nominations. A party shall nominate its candidate for election for a General*

Assembly district where there is only one incumbent of that party for the district by the method designated by that incumbent, or absent any designation by him by the method of nomination determined by the party. A party shall nominate its candidates for election for a General Assembly district where there is more than one incumbent of that party for the district by a primary unless all the incumbents consent to a different method of nomination. A party, whose candidate at the immediately preceding election for a particular office other than the General Assembly (i) was nominated by a primary or filed for a primary but was not opposed and (ii) was elected at the general election, shall nominate a candidate for the next election for that office by a primary unless all incumbents of that party for that office consent to a different method.

When, under any of the foregoing provisions, no incumbents offer as candidates for reelection to the same office, the method of nomination shall be determined by the political party.

For the purposes of this subsection, any officeholder who offers for reelection to the same office shall be deemed an incumbent notwithstanding that the district which he represents differs in part from that for which he offers for election."

If the Federal Court were to rule in favor of the Adams and Moxley Appeals then such a ruling will have declared what is clearly and explicitly in accordance with the U. S. Constitution to not be constitutional. No Court, Federal or State has this power. To assume that power is a direct attack on the U. S. Constitution.

The U. S. Constitution says nothing in regards to the election of State Government Legislative Members thus, because of the Tenth Amendment, State Government has an exclusive power for those elections. The Virginia Constitution, (REF 8), Article II, Section 4. Paragraph 2 states:

"The General Assembly shall provide for the nomination of candidates, shall regulate the time, place, manner, conduct, and administration of primary, general, and special elections, and shall have power to make any other law regulating elections not inconsistent with this Constitution."

Thus the IPA is constitutional in the eyes of both the U. S. Constitution and the Virginia constitution. For the Federal Court to rule in favor of the appeal would be to rule the IPA is not constitutional. Such a ruling would be a direct attack on the Virginia Constitution by the Federal court system and, moreover, is outside the bounds of that court system.

Problem 3 – Whose Decision is It For Whom is the Party Candidate?

The underlying complaint made by Adams and by Moxley is that the IPA allows the incumbent, not them, to determine the method (Primary, Convention, Canvass, or Mass Meeting) for selecting a Republican Candidate for an elected office. To restate their complaints:

> *"the IPA forced the Republican 24th Legislative District Committee (LDC) of the Republican Party of Virginia (RPV) to hold a process of choosing a nominee that violated their First Amendment freedoms of association and speech"* and *"that the IPA represents a Constitutional equal protection violation, in that it gives an incumbent unique advantages over all other candidates."*

Though not pertaining to any of the 4 Problems the following is added here. The RPV submitted an amicus curiae in support of Adams appeal, stating that the content of their By-Laws, A.K.A. Party Plan, (REF 3), "where permitted to do so by Virginia Law" was not meant to require a Legislative District Committee to adhere to the IPA. Even if this were an accurate statement, or even if the RPV were to formally remove the language from its By-Laws, the RPV, including the 24th Legislative District Committee, would still be subject to the IPA because Section 6 of Article IX of the Constitution of Virginia requires all Virginia corporations, of which the RPV is one, to be subject to Virginia codes.

The question to ask is whether or not these complaints are correct**.**

To the first of the two complaints,

> *"… to hold a process of choosing a nominee that violated their First Amendment freedoms of association and speech.":*

Virginia Constitution, Article I, Section 6: (Free elections; consent of governed) states,

> *"That all elections ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed, or deprived of, or damaged in, their property for public uses, without their own consent, or that of their representatives duly elected, or bound by any law to which they have not, in like manner, assented for the public good."*

This states that everyone, including the members of the 24th Legislative District Committee, have a right to vote for their choice of a nominee, even as governed by the IPA. What Adams and Moxley want is the exclusive right to tell those who are not on the 24th Legislative District Committee, i. e. the Registered Voters, what process will be used to select a candidate, who amongst Registered Voters would participate in that process, and whom those Registered Voters will be able to vote for in a general election. If Adams and Moxley were to have their way is it possible it would be the Registered Voters whose "freedoms of association and speech" have been violated?

Next, to the second of the two complaints,

> *"equal protection violation, in that it gives an incumbent unique advantages over all other candidates."*

The Virginia Constitution, Article II, Section 3, Paragraph 2 states

> *"provides equal protection of registered candidates, which from such group a nominee is chosen by a primary process."*

This states that under the IPA a challenger to an incumbent is provided protection equal to that of an incumbent. Whether or not the challenger can conduct a winning campaign is something independent of the IPA, unless those on the Legislative District Committee want to eliminate the IPA so that they can manipulate a successful challenge by control of the election process, such as a Convention.

But to the general point of these two complaints: The fundamental of the complaints made by Adams and Moxley is that they are unhappy they are not free to exercise their choice of the method to nominate, and perhaps control, who is nominated as a Republican Candidate to replace Emmett Hanger because the IPA allows the incumbent to select the method. (Note: This is to neither argue Senator Hanger, any other member of the Virginia General Assembly, or member of the U. S. Congress should not be challenged nor that there are no reasons for such challenges.)

Each LDC, is composed of one representative of each of the Local Committee Units, called a Unit Representative (UR), whose geographical area lies all or in part within the Legislative District. Each UR is assigned a Voting Strength based on the number of Registered Voters (RV) within their geographical area. For example, suppose there are three URs in a House of Delegates LDC, one with 10,000 RVs in his geographical area, another with 15,000, and a third one 29,500. (There are 54,500 RVs in each House of Delegates Legislative District.) The voting strengths of the three URs respectively are 0.18, 0.28, and 0.54. Thus UR #3 controls any decision.

Now, suppose the IPA did not exist and therefore the Legislative District Committee could select the method with no interference from an incumbent. Table I, which is derived from Virginia Public Access Project District Map Data, (REF 9 and 10), shows that for 21 of the 40 (52.5 %) State Senate Districts the decision of what process (Primary, Convention, Canvass, or Mass Meeting) is in the hands of just one UR. Table II shows that for 69 of the 100 (69 %) of the State House Districts the decision is in the hands of just one UR. This is true no matter the decision of those LDCs. For the remaining Senate LCDs 32.5 % are in the hands of 2 URs and the remaining 15 % in the hands of 3 URs. For the remaining 39 % of the House LDCs the decisions are in the hands of 2 URs.

The bottom line of this arithmetic is that for a majority of the Senate LDCs and a super majority of the House LDCs one person would control the decision of what method to nominate a Republican Candidate if the IPA did not exist.

So the question is “who has the power to decide, the incumbent or simply one member, or two, of a Legislative District the process of choosing who will be that Party’s candidate for State and Congressional Offices?” It would seem rational to think that if the incumbent shouldn’t have the power then neither should that one member or two members, which would be the case if the IPA did not exist. The question is far more complex than that suggested by the complaints by Adams and Moxley.

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Senate District	Number of Legislative District Committee Members	Number of Members Needed to control the Committee
13	2	1
33	2	1
31	3	1
32	2	1
37	1	1
34	2	1
35	3	1
39	3	1
36	3	1
29	3	1
28	4	1
12	2	1
6	5	1
1	6	1
2	4	1
9	4	1
5	2	1
14	9	1
8	1	1
11	3	1
7	2	1
20	9	2
19	8	2
21	4	2
23	6	2
25	10	2
24	7	2
26	6	2
30	3	2
17	5	2
4	10	2
16	6	2
18	11	2
10	3	2
40	8	3
38	11	3
15	11	3
22	9	3
27	7	3
3	11	3

Table I

House District	Number of Legislative District Committee Members	Number of Members Needed to control the Committee	House District	Number of Legislative District Committee Members	Number of Members Needed to control the Committee
3	4	1	39	1	1
9	3	1	41	1	1
11	1	1	38	1	1
17	3	1	49	2	1
14	3	1	48	2	1
23	3	1	34	2	1
57	2	1	35	1	1
26	2	1	36	1	1
15	4	1	87	2	1
29	3	1	32	1	1
33	3	1	86	2	1
10	3	1	67	2	1
55	3	1	37	2	1
72	1	1	47	1	1
73	1	1	77	1	1
27	1	1	31	2	1
66	2	1	53	2	1
62	4	1	78	1	1
69	2	1	82	1	1
71	2	1	1	4	2
74	3	1	4	4	2
76	2	1	5	5	2
80	4	1	6	3	2
79	2	1	12	4	2
89	1	1	7	3	2
90	2	1	8	3	2
85	1	1	22	4	2
21	2	1	16	3	2
84	1	1	19	4	2
81	2	1	24	6	2
83	2	1	60	4	2
92	1	1	59	5	2
95	2	1	20	5	2
91	3	1	25	3	2
94	1	1	58	4	2
96	2	1	61	5	2
97	3	1	65	4	2
54	2	1	56	4	2
28	2	1	30	3	2
2	2	1	18	4	2
52	1	1	68	3	2
51	1	1	63	5	2
42	1	1	70	3	2
40	2	1	64	6	2
13	2	1	100	3	2
50	2	1	93	4	2
43	1	1	98	6	2
44	1	1	99	6	2
45	3	1	88	4	2
46	1	1	75	10	3

Table II

Problem 4 – What Method to Choose for Selection of a Republican Candidate?

Fundamental to all of this is the question of which method to use for the selection of a Republican (or Democrat) Candidate. There are four: Primary, Convention, Canvass, or Mass Meeting. Though it would be possible to use a Mass Meeting there does not appear to be any record of it having been used. So we are left with the remaining three.

A Canvass is also known as a "Firehouse Primary." Typically it consists of several, perhaps only one, location(s) within a Legislative District to which Registered Voters come on a single day, over a designated period of that day, to vote. The particular LDC is responsible for the planning and execution. The LDC collects the voting results and reports it to the Department of Elections.

A Convention is a gathering of delegates on a particular day, at a particular time and location, to vote. The length of time of the Convention depends on the registration of the delegates, their certification, all of the other protocols, candidate speeches, etc. The delegates were chosen at mass meetings for each of the local Republican Committee Units within the Legislative District in which those voters reside, which may or may not include all of the Unit's territory. Conventions are typically held in large (High School) auditoriums, the largest of which typically are on the order of 1000 seats for much of the Commonwealth. All of the planning and execution of the Convention is conducted by the LDC. The results are reported to the Department of Elections.

A Primary should be understood, such as the 2016 Primary for each Party's Presidential Candidates. It is planned and executed by the Virginia Department of Elections.

The popular arguments made for choosing a Convention as the method for selection of a Republican Party Candidate are two-fold: (1) Because Virginia does not have voter registration it facilitates keeping Democrats out of the voting process and (2) the Republican Party is financially responsible, not the general public as would be the case for a Primary.

The qualification for participating in a Republican Convention is provided in the Republican Party of Virginia's By-Laws, A. K. A. Party Plan, (Ref 3), is the following:

> *"All legal and qualified voters under the laws of the Commonwealth of Virginia, regardless of race, religion, national origin or sex, who are in accord with the principles of the Republican Party and who, if requested, express in open meeting either orally or in writing as may be required, their intent to support all of its nominees for public office in the ensuing election, may participate as members of the*

Republican Party of Virginia in its mass meetings, party canvasses, conventions or primaries encompassing their respective election districts."

This statement does not prevent anyone from participating so long as they are willing to sign an oath to this effect. Who would think a Democrat would hesitate if he/she wanted to participate? Since voting in any ensuing general election is by secret ballot there is no way to determine whether or not any Convention participant adheres to the pledge.

As for the second part of the argument, the Republican Party paying for the selection of their candidate for a general election, the reasoning is admirable.

But how does using a Convention affect Registered Voters, particularly those registered voters who are designated as "Hard" and "Soft" Republicans, who are "We the People," and thus truly "Grass Roots."

The voting in the 2015 Republican Primary for the 24th District State Senate, (REF 11), is shown in Table III

County/City	E. Hanger	All Others	Total Votes Cast
Augusta County More »	3,870	2148	6,018
Culpeper County More »	397	536	933
Greene County More »	242	373	615
Madison County More »	306	258	564
Rockingham County More »	1,011	763	1,774
Staunton City More »	1,207	486	1,693
Waynesboro City More »	615	478	1,093
Totals	7,648	5042	12,690

Table III

A total of 12,690 Voters participated. If this election had taken place in the form of a Convention, then at most 1000 voters, 7.8 % of those who voted in the Primary, would have participated because of the limited capacity of the auditorium that had been selected for the Convention. The question is whether or not 7.8 % is adequate or fair. The question asked by the Adams complaint,

"to hold a process of choosing a nominee that violated their First Amendment freedoms of association and speech"

can be equally, perhaps even better, applied on behalf of the 12,690 Registered Voters who participated in the Primary. Had the choice of a nominee been by a

Convention then about 11,690 of those Registered Voters would have been denied an opportunity to participate.

So the question boils down to “Who gets to vote, how is the voting to take place, and who makes those decisions?” The answer perhaps is, ‘We the People’, not ‘We the Members of the Legislative District Committee’, make that decision.”

Perhaps the “Take Away” from all of this is
1 – The matter is a far more complex consideration than has been made to date.
2 – This is not a matter for the Courts, neither Federal nor State.
3 – It is a matter for “We the People” and, because of the responsibility for the execution of the election processes as provided in the Constitutions of the United States and Virginia lies with the respective elected representatives of “We the People,” the Legislative Bodies. Perhaps the matter of the IPA begins with seeking the opinion of “We the People.” Some might call that ‘a process of Referendum.’

REFERENCES

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