



2010

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Recommended Citation

Powell, Matthew (2010) "Recent Developments: *Smigiel v. Franchot*: The General Assembly Has the Power to Enact Legislation That Is Contingent upon Passage of a Constitutional Amendment through Popular Vote That Would Allow Slot Machines in Maryland,"

University of Baltimore Law Forum: Vol. 40 : No. 2 , Article 12.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol40/iss2/12>

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RECENT DEVELOPMENT

SMIGIEL v. FRANCHOT: THE GENERAL ASSEMBLY HAS THE POWER TO ENACT LEGISLATION THAT IS CONTINGENT UPON PASSAGE OF A CONSTITUTIONAL AMENDMENT THROUGH POPULAR VOTE THAT WOULD ALLOW SLOT MACHINES IN MARYLAND.

By: Matthew Powell

The Court of Appeals of Maryland held that the General Assembly validly enacted legislation that was contingent upon voter approval of a proposed constitutional amendment to allow slot machines in Maryland. *Smigiel v. Franchot*, 410 Md. 302, 978 A.2d 687 (2009). Furthermore, the court held that a judicial challenge to one house's adjournment for more than three days, without the consent of the other house, was a nonjusticiable political question. *Id.* at 325-26, 978 A.2d at 701.

On October 29, 2007, Governor Martin O'Malley proposed legislation designed to generate funds to increase budget savings and combat a potential \$1.7 billion deficit by implementing slot machines in Maryland. The General Assembly conducted a special session for the sole purpose of passing or rejecting the Governor's proposed legislation. On November 12, 2007, which was a Monday and Veterans' Day, it was evident that the House of Delegates would not have a bill prepared for the Senate's consideration for several days. In light of this, on the same day, the President of the Senate contacted the Speaker of the House of Delegates and requested the House's approval of the Senate's extended adjournment. The Speaker consented, and the Speaker's staff issued and responded to a memorandum of consent. However, neither message was read to the House of Delegates, nor did the House of Delegates vote on whether to approve the Senate's extended adjournment. Still, the Senate extended its adjournment, which had already consisted of the three-day Veterans' Day weekend, until Thursday, while it awaited receipt of the House's version of the bill.

On November 15, 2007, the Senate reconvened and remained in session along with the House until November 19, 2007, when the

houses reconciled differences between their versions of the bills and passed legislation entitled “Maryland Education Trust Fund-Video Lottery Terminals,” which Governor O’Malley signed into law on the same day. The enactment of the bill was contingent upon the passage of a constitutional amendment through a majority vote in a general election.

However, prior to the Senate reconvening on November 15, 2007, Michael Smigiel (“Smigiel”), a member of the House of Delegates, inquired as to whether the Senate’s adjournment extension violated Article III, section 25 of the Maryland Constitution, which requires approval from the other chamber for adjournments of more than three days. The House Parliamentarian rejected Smigiel’s challenge and concluded that the General Assembly was “constitutionally proceeding appropriately.”

On December 13, 2007, Smigiel filed a Verified Complaint seeking Emergency Declaratory and Injunctive Relief in the Circuit Court for Carroll County challenging the legislation. On January 10, 2008, the circuit court granted the State’s Motion to Dismiss, holding that the legislation was valid. Smigiel appealed to the Court of Special Appeals of Maryland while simultaneously petitioning the Court of Appeals of Maryland for writ of certiorari. The Court of Appeals of Maryland granted the writ before the Court of Special Appeals of Maryland could hear oral arguments.

The court considered two issues. *Smigiel*, 410 Md. at 310, 978 A.2d at 692. First, the court addressed whether the General Assembly may pass a bill that is contingent upon voter approval of a proposed constitutional amendment. *Id.* Second, the court considered whether bills passed during an extraordinary session, in which the Senate extended its adjournment without obtaining approval of the House of Delegates, are valid. *Id.*

As to the contingency issue, Smigiel contended that the legislation was an unconstitutional delegation of lawmaking power. *Id.* Smigiel relied on *Browner v. Supervisors of Elections*, wherein the court struck down legislation that hinged its effectiveness and validity upon voter approval. *Id.* at 311-12, 978 A.2d at 693-94 (citing *Browner*, 141 Md. 586, 602, 119 A. 250, 254 (1922)).

The court distinguished the instant case from *Browner*. *Id.* at 312-13, 978 A.2d at 694. In *Browner*, the court rejected the General Assembly’s effort to place an already enacted and signed statute before the voters for approval or disapproval. *Smigiel*, 410 Md. at 312-13, 978 A.2d at 694. In the present situation, however, the

legislature asked voters to approve a proposed constitutional amendment in accordance with Article XIV, section 1 of the Maryland Constitution. *Id.* at 313, 978 A.2d at 694. Voter approval of the constitutional amendment would then trigger appropriations in the already enacted bills. *Id.* As a result, the Court of Appeals of Maryland declared that, unlike the voters in *Browner*, voters in this case were not approving or rejecting a statute, but rather, were approving or rejecting a constitutional amendment upon which a statute was merely contingent. *Id.* The court held that, not only does the General Assembly have the power to enact legislation contingent upon popular approval of a constitutional amendment by the state's voters, but that this practice has occurred on multiple occasions in Maryland. *Id.* at 316-17, 978 A.2d at 696-97 (citing 1990 Md. Laws, Chapters 62 & 515 (clerks of court—employees and funding), 1980 Md. Laws, Chapters 523, 525, & 526 (supreme bench consolidation), and 1972 Md. Laws, Chapters 364 & 365 (state lottery)). This practice has also been approved by other state courts and the Supreme Court of the United States. *Id.* at 317-18, 978 A.2d at 696-97 (citing *Druggan v. Anderson*, 269 U.S. 36 (1925); *Fullam v. Brock*, 271 N.C. 145, 155 S.E.2d 737 (1967); *Henson v. Georgia Indus. Realty Co.*, 220 Ga. 857, 142 S.E.2d 219 (1965)).

Regarding the adjournment issue, Article III, section 25 of the Maryland Constitution states that neither house in the General Assembly shall adjourn for more than three days without the consent of the other house. *Smigiel*, 410 Md. at 321, 978 A.2d at 699 (citing MD. CONST. art. III, § 25). *Smigiel* argued that the President of the Senate violated article III, section 25 by extending the Senate's adjournment beyond three days without obtaining approval from the House of Delegates. *Id.* Specifically, *Smigiel* asserted that the Maryland Constitution required the Senate to obtain the consent of the House of Delegates sitting as a legislative body. *Id.* As a result of the Senate's failure to comply with the constitutional requirements, *Smigiel* argued that the court's only recourse would be to invalidate all legislation passed during the extraordinary session. *Id.* at 321-22, 978 A.2d 699.

While the court recognized that article III, section 25 ensures that both houses of the General Assembly fulfill their legislative duties, the court disagreed with *Smigiel's* assertion that the Senate's failure to comply should invalidate all legislation passed during the legislative session. *Id.* at 322, 978 A.2d at 699. As a threshold issue, the court

considered whether judicial review of the Senate's adjournment could occur. *Id.* at 323, 978 A.2d 700.

In *Lamb v. Hammond*, a case involving a court-ordered count of absentee ballots in a House of Delegates election, the court adopted a two-part test to determine whether an issue is a nonjusticiable political question that is not subject to judicial review. *Smigiel*, 410 Md. at 323-24, 978 A.2d 700-01 (citing *Lamb*, 308 Md. 286, 293, 518 A.2d 1057, 1060 (1987)). First, a court must evaluate whether the claim presented and the relief sought are capable of judicial resolution. *Id.* at 324, 978 A.2d 701 (citing *Powell v. McCormack*, 395 U.S. 486, 516-17 (1969)). Second, a court has to determine whether the governmental structure renders the presented issue a political question barred from judicial consideration under the Constitution. *Id.* at 325, 978 A.2d at 701 (citing *Powell*, 395 U.S. at 517).

The court concluded that the proposed issue contravened the second prong of the *Lamb* test as a nonjusticiable political question because addressing the issue would fail to respect a coordinate branch of government, the legislature. *Id.* at 325-26, 978 A.2d at 701. Therefore, the court declared that the issue of consensual adjournment is best resolved by the General Assembly. *Id.* at 325-26, 978 A.2d at 701.

In *Smigiel v. Franchot*, the Court of Appeals of Maryland guaranteed the General Assembly's ability to pass legislation that is contingent upon popular approval of a constitutional amendment, which allows the General Assembly to pass bills that anticipate or adapt legislation to pending constitutional amendments. In doing so, the court struck down what many recognized as an *ad hoc* and frivolous challenge to validly passed legislation. Additionally, the decision requires the General Assembly to enforce its own policies and procedures internally. While the court's decision primarily impacts legislators, practitioners and judges should also note the reaffirmation of the constitutional principle of separation of powers.