

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Upon Original Jurisdiction

No. 10-1494 and No. 10-4004

State of West Virginia ex rel. Citizen Action Group, Petitioner

vs.) No. 101494

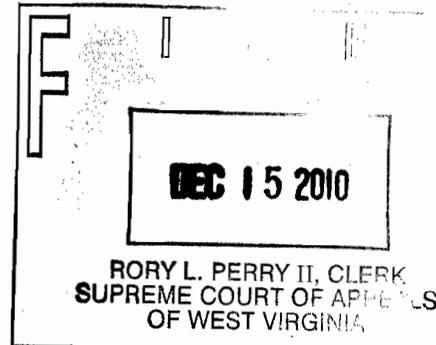
Earl Ray Tomblin, President of the West Virginia Senate, Richard Thompson, Speaker of the West Virginia House of Delegates, and Natalie E. Tennant, Secretary of State of West Virginia, Respondents

--AND--

State of West Virginia ex rel. Thornton Cooper, Petitioner

v.) No. 10-4004

Earl Ray Tomblin, Acting Governor of the State of West Virginia, And president of the West Virginia Senate, Richard Thompson, Speaker of the West Virginia House of Delegates, and Natalie Tennant, Secretary of State of West Virginia, Respondents



**BRIEF OF INTERVENER, KENNY PERDUE,
AS PRESIDENT OF THE WEST VIRGINIA AFL-CIO,
IN SUPPORT OF MOTION TO INTERVENE**

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BRIEF OF INTERVENER, KENNY PERDUE, AS PRESIDENT OF THE WEST VIRGINIA AFL-CIO, IN SUPPORT MOTION TO INTERVENE

Kenneth M. Perdue, as President of the West Virginia AFL-CIO, respectfully petitions the Court on behalf of the West Virginia AFL-CIO to intervene under *Rev. R.A.P.* 32 in the above-styled matter since all of its members have an interest in the outcome of this litigation. The issues presented in this case affect or may affect many West Virginia AFL-CIO members and their families, and, therefore, are important issues to this organization.

The West Virginia AFL-CIO is a federation of 550 local unions, over 60 districts, and 13 central bodies from 58 national and international labor unions representing 123,000 active and retired West Virginia working men and women from every walk of life. The West Virginia AFL-CIO is affiliated with the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with a total membership in excess of 13 million active working men and women. The West Virginia AFL-CIO works to assist in the development of jurisprudence establishing legal standards which affect its members and families. The issues presented to the Court in this case are of vital importance to its members.

The West Virginia AFL-CIO respectfully requests this Court to resolve the multiple constitutional and statutory issues created by the resignation of Joseph Manchin as Governor of the State of West Virginia, whereby Earl Ray Tomblin, an elected senator for the Seventh Senatorial District and duly elected President of the West Virginia Senate, is to act as governor under Article VII, § 16, of the *West Virginia Constitution*, until a new election takes place under this article, and Chapter 3-10-2, et seq., of the *Code of West Virginia*. President Tomblin, acting as Governor of the State, has indicated that he is not required to hold a special election until November 2012. [CAG Memorandum, P.3 and Exhibit C.]

Article VII, § 16, of the *West Virginia Constitution*, specifically states:

“§ 16. In case of the death, conviction on impeachment, failure to qualify, resignation, or other disability of the governor, the president of the Senate shall act as governor¹ until the vacancy is filled, or the disability removed; and if the president of the Senate, for any of the above named causes, shall become incapable of performing the duties of governor, the same shall devolve upon the speaker of the House of Delegates; and in all other cases where there is no one to act as governor, one shall be chosen by joint vote of the Legislature. Whenever a vacancy shall occur in the office of governor before the first three years of the term shall have expired, a new election for governor shall take place to fill the vacancy. [emphasis added]

FACTS

This intervener has reviewed the facts set forth by Petitioners CAG and Thornton Cooper (hereinafter referred to as “CAG” and “Cooper”), and believes that they are accurate and related to the issues presented.

QUESTIONS PRESENTED

Article VII, § 16 states in the case of a vacancy in the office of governor,

“...Whenever a vacancy shall occur in the office of governor before the first three years of the term shall have expired, a new election for governor shall take place to fill the vacancy.” [emphasis added]

Respondent Tomblin’s dual position also raises additional constitutional questions under:

[1] Article V, § 1, the separation of powers clause;

[2] Article VII, § 4 - the governor “shall not hold any other office during the terms of his service”....; and

[3] Article VI, § 13 - No person holding any other lucrative office or employment under this State...shall be eligible to a seat in the Legislature.”

¹ When used as a verb ²act is defined to discharge the duties of a specific office or post. *Webster's Third New International Dictionary, Unabridged.*

The constitutional question arising from Respondent Tomblin's dual position that, under Article VII, § 16, he need not call for a special election until November 2012, calls for an expedient resolution of such constitutional question in order to provide legal certainty in the operation of our government. During the period of time from December 2010 until November 2012, there will be two regular sessions of the West Virginia Legislature, at least two budget extra sessions, one special session for federal and state legislative redistricting, and most likely additional special sessions. The approval or vetoing of legislation enacted during these sessions, as well as appointments of state officials, legislators, and judges by a sitting senator acting as governor, many of which require senate approval, is an invitation for serious additional constitutional challenges which may prove to be expensive and destructive of the efficient and reasonable operation of the State in conducting its normal business affairs.

ARGUMENT

This intervener acknowledges that should this Court determine that Earl Ray Tomblin, acting as governor under Article VII, § 16, must issue a proclamation under Article VII, §16, for a new election, that mandamus under Rule 16 of *Rev. R.A.P.* is the appropriate remedy, and this intervener adopts the authorities cited by Petitioners CAG and Cooper's briefs.

MANDATORY REQUIREMENT OF ELECTION UNDER ARTICLE VII, § 16

This Court in *State ex rel. Moore v. C.A. Blankenship*, 158 W.Va. 939, S.E.2d 232 (1975), instructing on the Constitution, stated:

“Accordingly the Court would remind both the Legislature and the Governor that ‘in considering [these budgetary issues] then, we must never forget, that it is *a constitution* we are expounding.’ An American constitution is not only a written document, but is as well the collective wisdom of a well articulated tradition spanning eight hundred years of British and American history. A constitution embodies the most basic vision of a people with regard

to the structure and administration of their government. Whenever any individual or group of individuals under color of the *Constitution* seek to use the technicalities of one provision to subvert the entire structure, then that action is an unconstitutional variance from the general plan. In construing a constitution, what is implied is as much a part of the instrument as what is expressed. *Dillon v. Gloss*, 256 U.S. 368, 41 S.Ct. 510, 65 L.Ed. 994 (1921).” *Id.*, at 956-957.

In *State ex rel. Brotherton v. Blankenship*, 157 W.Va. 100, 108, 207 S.E.2d 421, 427

(1973), the Court held:

“... The fundamental principle in constitutional construction is that effect must be given to the intent of the Framers of such organic law and of the people who ratified and adopted it.” (case cites omitted)

This Court has consistently held that:

“Where a provision of a constitution is clear in its terms and of plain interpretation to any ordinary and reasonable mind, it should be applied and not construed.” Syl. pt. 3, *State ex rel. Smith v. Gore*, 150 W.Va. 71, 143 S.E.2d 791 (1965); and see Syl. pt. 1, *State ex rel. Maloney v. McCartney*, 159 W.Va. 513, 223 S.E.2d 607 (1976).

Article VII, § 16, and Chapter 3-10-2 are clear and unambiguous, with the constitutional provision remaining unchanged since its adoption in 1872, stating “a new election shall take place to fill the vacancy.” The usage of the word “shall” is mandatory, and when used in the Constitution and statutes, it leaves no way open for the substitution of discretion and is of mandatory effect. *State ex rel. Aaron v. King*, 199 W.Va. 533, 540, 485 S.E.2d 702 (1997). Also see *Baer v. Gore*, 79 W.Va. 50, 90 S.E. 530 (1916); *State v. Davis*, 133 W.Va. 540, 56 S.E.2d 907 (1949); *State v. Sims*, 138 W.Va. 244, 77 S.E.2d 122 (1953); *State ex rel. Archer v. County Court*, 150 W.Va. 260, 144 S.E.2d 791 (1965); *Manchin v. Browning*, 296 S.E.2d 909 (W. Va. 1982).

SEPARATION OF POWERS QUESTION OF ARTICLE VI, § 1

President Tomblin, while acting as governor and exercising powers under Article VII, §§ 5, 8 and 14, of the *Constitution*, clearly brings into question the Separation of Powers Clause, again indicating that a speedy election is necessary. (CAG Ex. B, unnumbered p. 3; President Tomblin's statement that he does remain president while acting as governor.)

Failure to quickly resolve the uncertainty of the functions of the Governor and President of the Senate by a special election sets the stage for additional litigation which could have a serious effect on the operation of the State, resulting in economic downfalls and political losses; i.e., the redistricting congressional and state legislators set for the summer of 2011, bonding power, appointment of officials, and approval or vetoing of acts of the legislature, including the state's annual budget.

In *State ex rel. Barker v. Manchin*, 167 W.Va. 155, 279 S.E.2d 622 (1981), this Court held in Syllabus 1:

"Article V, section 1 of the Constitution of West Virginia which prohibits any one department of our state government from exercising the powers of the others, is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed." (emphasis added)

This Court went on to instruct that:

...**"This constitutional provision which prohibits any one department of our state government from exercising the powers of the others is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed. *State ex rel. State Building Comm. v. Bailey*, 151 W.Va. 79, 150 S.E.2d 449 (1966); *State v. Huber*, 129 W.Va. 198, 40 S.E.2d 11 (1946); *Sims v. Fisher*, 125 W.Va. 512, 25 S.E.2d 216 (1943). Where one branch of our state government seeks to exercise or to impinge upon the powers conferred upon another branch, we are compelled by this mandate to restrain such action, absent a specific constitutional provision permitting such interference." *Id.*, at 167.**

...“The Governor, as the chief executive of the State, is the head of the Executive Department. *W.Va.Const. art. VII, s 5*. In that capacity he is empowered to appoint all officers ‘whose offices are established by this Constitution, or shall be created by law, and whose appointment or election is not otherwise provided for; and no such officers shall be appointed or elected by the legislature.’ *W.Va.Const. art. VII, s 8*. Officers appointed by the Governor to administrative offices are officers of the Executive Department. The Governor also has the power to veto enactments of the Legislature. *W.Va.Const. art. VII, s 14*.” *Id.* at 168

The President of the Senate acting as Governor for any extended period of time is an open and obvious violation of the Separations of Powers Clause.

**INCOMPATIBILITY OF OFFICES
QUESTIONS UNDER
ARTICLE VII, § 4; AND ARTICLE VI, § 13**

The well-established common law rule of incompatibility of office is well recognized and is a part of our common law. In *State ex rel. Thomas v. Wysong*, 125 W.Va. 369, 24 S.E.2d 463 (1943), Judge Lovins, speaking for the Court, stated:

...“incompatibility rests not upon physical inability to perform the duties of both offices, but arises from the inconsistent nature of the offices and their relation to each other, rendering it improper, from considerations of public policy for one person to perform the duties of both.”... *Id.*, at 373.

In *Wilson v. Moore*, 346 F.Supp. 635 (1972), before a special three-judge U.S. District in West Virginia, Field, Circuit Judge, and Maxwell and Christie, District Judges, in ruling on Article VI, § 13, citing *Thomas, Id.*, held:

“Moreover, we find the restraints imposed by the amendment [Article VI, § 13] to be in consonance with the ancient and well-established common law rule that a public officer cannot hold two incompatible offices at the same time. This common law rule, at the present, has been refined and expanded by the constitutions and statutes of the great majority of the states. Statutory and constitutional prohibitions include not only the holding of incompatible offices, but the holding of more than one public

office or employment whether or not the offices held would be considered incompatible under the old common law rule. See generally 42 Am. Jur. (Public Officers) Sec. 58, et seq.” [citations omitted] *Id.*, at 644.

President Tomblin, as a sitting member of the West Virginia Senate, while acting as governor, will be receiving the governor’s salary, making appointments of State officials, including vacancies in the legislature and judiciary vacancy, of which require senate approval, vetoing or signing into law acts passed by the legislature, all which appear to be a conflict with the provisions of the separation of power and incapability provisions of the Constitution.

CONSTITUTIONAL QUESTIONS REGARDING CHAPTER 3-10-2

CAG and Cooper have both raised constitutional questions regarding this section of the Code. This section recites verbatim the wording of Article VII, § 16, of the *Constitution*, and specifically mandates that the acting governor shall call for a special election, and further sets forth methods for nomination of candidates when it cannot be accomplished at primary elections.

Chapter 3-10-2 was originally enacted in 1881 as Chapter 4, Section 2, *Barnes’ Code 1923*, as follows:

Vacancy in Office of Governor:

“In case of the death, conviction or impeachment, failure to qualify, resignation or other disability of the governor, the president of the Senate shall act as governor until the vacancy is filled or the disability removed; and if the president of the Senate, for any of the above-named causes shall become incapable of performing the duties of governor, the same shall devolve upon the speaker of the House of Delegates; and in all other cases where there is no one to act as governor, one shall be chosen by the joint vote of the Legislature. Whenever a vacancy shall occur in the office of governor before the first three years of the term shall have expired, a new election for governor shall take place to fill the vacancy. If the vacancy occur more than forty days next preceding a general election, the vacancy shall be filled at such election and the acting governor for the time being shall issue his proclamation

accordingly, which shall be published in one newspaper in each county, where such paper is published, at least once in each week, for four successive weeks prior to said election. But if it occur less than forty days next preceding such general election such acting governor shall issue his proclamation fixing a time for the election to fill such vacancy, which shall be published as hereinbefore provided; and it shall be the duty of the commissioners of election, in each county to hold the said election accordingly. (Const. 1863, art. 5, § 6; Const. 1872, art. 7, § 16; Acts 1865, p. 59; 1872-3, cc. 118, 177; 1875, c. 66; 1881, c. 10.)”

In 1931, under the Joint Legislative Committee Resolution No. 10, Revision of the West Virginia Code, Chapter 4, § 2, *Barnes' 1923*, was re-enacted as Chapter 3-10-3, *W.Va. Code 1932*, as follows:

Vacancy in Office of Governor:

“In case of the death, conviction or impeachment, failure to qualify, resignation or other disability of the governor, the president of the Senate shall act as governor until the vacancy is filled or the disability removed; and if the president of the Senate, for any of the above-named causes, shall be or become incapable of performing the duties of governor, the same shall devolve upon the speaker of the House of Delegates; and in all other cases where there is no one to act as governor, one shall be chosen by the joint vote of the Legislature. Whenever a vacancy shall occur in the office of governor before the first three years of the term shall have expired, a new election for governor shall take place to fill the vacancy. If the vacancy shall occur more than thirty days next preceding a general election, the vacancy shall be filled at such election and the acting governor for the time being shall issue a proclamation accordingly, which shall be published once each week for four successive weeks prior to such election in one newspaper, in each county, of each of the two political parties which polled the highest and the second highest number of votes at the preceding general election in the State, published and having the largest circulation in such county. But if it shall occur less than thirty days next preceding such general election, and more than one year before the expiration of the term, such acting governor shall issue a proclamation, fixing a time for a special election to fill such vacancy, which shall be published as hereinbefore provided. [emphasis-added]

“If the vacancy is to be filled at a general election and shall occur more than thirty days before the date of the primary election to nominate candidates to be voted for at such general election, candidates to fill the vacancy shall be nominated at such primary election. If the vacancy is to be filled at a general election and such vacancy occurs less than thirty days before the preceding primary election, and in all cases where the vacancy is to be filled, at a special election, candidates to be voted for at such general or special elections shall be nominated by a state convention to be called, convened and held under the resolutions, rules and regulations of the political party executive committees of the State. The laws prescribing the manner of calling, constituting and holding conventions to nominate candidates for judge of the supreme court of appeals shall, in so far as applicable, govern conventions to nominate candidates to fill any vacancy in any office to be filled by the voters of the State as a whole.” [changes emphasized]

“REVISERS’ NOTE.—The change in the manner provided in §2, c. 4, Code 1923, for publishing the proclamation of elections is made in order to avoid an unwarranted expenditure of public funds. Under the present practice and existing laws, an election to a public office receives wide publicity. In addition to making the nominations by a primary election or convention, and the campaign incident thereto, the ticket is published prior to the election in at least two newspapers in every county in the State.

“The manner of making nominations and holding special elections is made to conform to other provisions of this chapter.

“The period within which a vacancy must occur in order that it may be filled at a general election is reduced from ‘more than forty’ to ‘more than thirty days.’ This allows ample time for placing the names on the ticket; furthermore, present day means of communication are much better than in 1881, the date of the enactment of the former provision. For the same reason the period within which a vacancy must occur in order that nominations of candidates to fill such vacancy shall be made at a primary is reduced from sixty to thirty days before the primary.

“COMMITTEE’S NOTE.—This section is amended to require the acting governor to publish the election proclamation in two newspapers of opposite politics in each county, instead of in two such newspapers in each congressional district, as in the revisers’ report.” [emphasis added]

In 1963, the West Virginia Legislature repealed Chapter 3 relating to the establishment, administration and regulation of elections, and enacted a new Chapter 3. *W.Va. Acts*, 1963 c. 64. Vacancies in the Office of Governor, Chapter 3-10-3 is now Chapter 3-10-2, and Vacancies in the Office of State Officers, U.S. Senators, and Judges of the Supreme or Circuit Courts, Chapter 3-10-3, is now 3-10-4.

While the verbiage of the second paragraph of Chapter 3-10-2 is changed in the 1963 reenactment, the substance remains as before. The legislature has reaffirmed its position that there shall be a new special election if a vacancy occurs before three years of the term has expired, and if nominations cannot be accomplished at a regular primary election, candidates shall be nominated by party conventions. (See Appendix Exhibit 1 for current 3-10-2.)

In 2001, the legislature did amend and re-enact Chapter 3-10-3 as to vacancies in statewide offices, United States senators and judges by providing that if the unexpired term for justices or judges was for longer than two years, or any other office was longer than two years six months, the appointment was “until a successor to the office has timely filed a certificate of candidacy, has been nominated at the primary election next following such timely filing and has thereafter been elected and qualified to fill the unexpired term.” *W.Va. Acts* 2001 5 Ex. Sc5. The legislature, while making this major change in vacancies in the offices of secretary of state, auditor, treasurer, attorney general, commissioner of agriculture, United States senator, Judges of the Supreme Court of Appeals, and judges of circuit and family courts, left unchanged Chapter

3-10-2 relating to the nominating and filling a vacancy in the office of governor. Chapter 3-10-5, which addresses vacancies in Congress, also remained unchanged and provides for nominations to be made by party convention.

It is obvious the legislature in enacting and reenacting of 3-10-2 (formerly Chapter 4, §2 *Barnes*' 1923 and 3-10-3 *Code of W.Va.* 1932) was complying with Article VII, § 16 of the *Constitution*, by requiring a special election when a vacancy occurs in the office of governor by establishing provisions for nominations by party conventions as being the least expense to the State. When nominations cannot be accomplished at a regular primary election, these costs are shifted and borne by the various political parties holding conventions under Chapter 3-5-21. Nonparty citizens are still able to acquire ballot access through Chapters 3-5-22 and 3-5-23 of the *Code*.

In considering the constitutionality of a legislative enactment, courts must exercise due restraint in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt. See *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965); and *State ex rel. Kanawha County Bldg. Commission v. Paterno*, 160 W.Va. 195, 233 S.E.2d 332 (1977).

While 3-10-2 of the *Code* appears to comply with Article VII, § 16, should this Court find portions unconstitutional, it may still apply the rule set forth in *State ex rel. State Bldg*

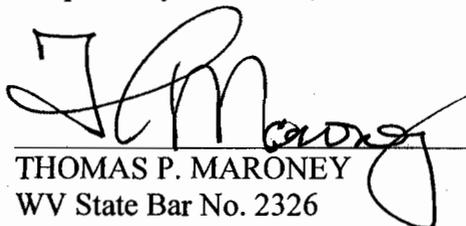
Commission v. Bailey, 151 W.Va. 79 at 92, 150 S.E.2d 449 (1966), holding the invalidity of the provisions of a statute which, however, adversely affect or invalidate the remaining portion of the statute:

“...The principle is well settled by many decisions of this Court that a statute enacted by a duly constituted Legislature in lawful, constitutional session, may contain both constitutional and unconstitutional provisions which in substance are distinct and separable so that some may stand though others must fall. And this is true whether or not the statute in question contains a separability clause. *Nuckols v. Athey*, 149 W.Va. 40, 138 S.E.2d 344; *State ex rel. Heck's Discount Centers, Inc. v. Winters*, 147 W.Va. 861, 132 S.E.2d 374; *State ex rel. The County Court of Cabell County v. Battle*, 147 W.Va. 841, 131 S.E.2d 730; *State v. Miller*, 145 W.Va. 59, 112 S.E.2d 472; *State v. Heston*, 137 W.Va. 375, 71 S.E.2d 481; *Lingamfelter v. Brown*, 132 W.Va. 566, 52 S.E.2d 687; *State v. Huber*, 129 W.Va. 198, 40 S.E.2d 11, 168 A.L.R. 808; *Harbert v. The County Court of Harrison County*, 129 W.Va. 54, 39 S.E.2d 177; *State v. Sixo*, 77 W.Va. 243, 87 S.E. 267.”

CONCLUSION

The failure to hold a special gubernatorial election until November 2012 appears to be a direct conflict with the cited constitutional provisions. Your intervener respectfully requests that this Honorable Court quickly resolve the questions of the separation of powers and a special election questions, including the method of nomination of candidates so that the government of West Virginia moves forward as the framers of our Constitution and its amendments as approved by the voters of the State are followed.

Respectfully submitted,



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Upon Original Jurisdiction

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CERTIFICATE OF SERVICE

I, THOMAS P. MARONEY, General Counsel for the West Virginia AFL-CIO, do hereby certify that I served a true and accurate copy of the foregoing **BRIEF OF INTERVENER, KENNETH PERDUE, AS PRESIDENT OF THE WEST VIRGINIA AFL-CIO, IN SUPPORT OF MOTION INTERVENE** via the United States Postal Service, postage pre-paid, on the 15th day of December 2010, upon the following counsel of record:

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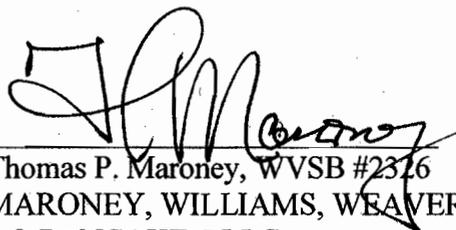
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