

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

Upon Original Jurisdiction

STATE OF WEST VIRGINIA
ex rel WEST VIRGINIA CITIZEN
ACTION GROUP,

Petitioner,

v.

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,

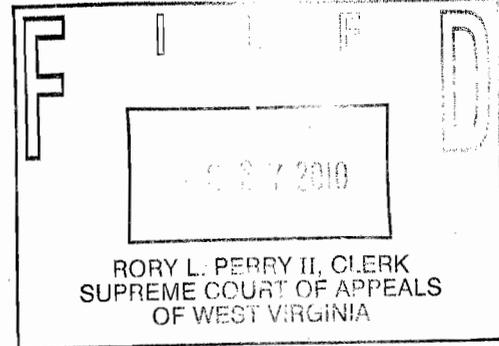
Petitioner,

v.

No. 10-4004

EARL RAY TOMBLIN,
President of the West Virginia Senate,
RICHARD THOMPSON,
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Respondents.



RESPONSE OF RICHARD THOMPSON, SPEAKER OF THE WEST VIRGINIA HOUSE OF DELEGATES, TO THE PETITIONS FOR WRIT OF MANDAMUS

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RESPONSE OF RICHARD THOMPSON, SPEAKER OF THE WEST VIRGINIA HOUSE OF DELEGATES, TO THE PETITIONS FOR WRIT OF MANDAMUS

Article VII, § 16 of the West Virginia Constitution requires that when there is a vacancy in the office of the governor, the President of the Senate may not act as governor for almost two years without calling for a new election to fill the vacancy. For this reason, as is more fully set forth herein, Speaker Thompson requests that this Court grant the writ mandamus and order Respondent Earl Ray Tomblin, President of the West Virginia Senate (“President Tomblin”), to call an election for governor on or before November 8, 2011.

QUESTION PRESENTED

Whether article VII, § 16 of the West Virginia Constitution, W.Va. Code § 3-10-2 and article IV, § 7 of the Constitution require the President of the Senate to call a new election to fill the vacancy in the office of the governor on the Tuesday next after the first Monday in November of 2011?

STATEMENT OF THE CASE

The basic underlying facts surrounding this case are set forth in the two petitions filed in this case. In sum, then Governor Joe Manchin, III was elected to a second four-year term on November 4, 2008. The term that began on January 19, 2009 and was scheduled to end on January 14, 2013. On June 28, 2010, Senator Robert C. Byrd passed away. A special election to fill the United States Senate vacancy was held on November 2, 2010, and the voters elected Manchin to fill the vacancy. On November 15, 2010, Manchin resigned as governor and was sworn in

as United States Senator. His resignation created a vacancy in the office of the governor. On the same day that Manchin resigned, President Tomblin was sworn in as acting governor.

At the time of the vacancy there remained two and one-quarter years of the four-year term. President Tomblin apparently intends not to call a new election for governor until the November 6, 2012 general election, the same day the voters will select a governor to fill the full four-year term that begins on January 14, 2013. *See Cooper App. at p. 7.* While President Tomblin contends that the election laws provide that the election will occur in November, 2012, *id.*, he has yet to issue the proclamation setting the new election for governor required by W.Va. Code § 3-10-2.

If the new election to fill the vacancy occurs on November 6, 2012, President Tomblin will have served as an unelected acting governor for two years. The person elected to fill the remainder of the term will serve in that position for two months and two days (at most).

If a separate new election for governor is held, there will be some cost to the State. In the most recent United States Senate special primary election, the cost of that election was much lower than anticipated. While estimates were that a special statewide election would cost \$5.9 million, the end result was much lower with the total election cost being only \$3.08 million. *Compare App. at p. 7* (fiscal note for election with \$5.9 million estimate) *with App. at p. 6* (actual election reimbursements of \$3.08 million).

Although the Constitution authorizes President Tomblin to temporarily “act as governor,” W.Va. Const., art. VII, § 16, President Tomblin apparently envisions a more permanent role. His role as President of the Senate is less clear. President Tomblin has publicly stated: “I will spend my time as Governor running the executive branch of government. I do not plan on presiding over or voting in the Senate.” *Id.* However, the Senate President is a constitutional officer with duties under the code and constitution. W.Va. Const., art. VI, § 24; *see also syl. pt., State ex rel. McGraw v. Willis*, 174 W.Va. 118, 119, 323 S.E.2d 600, 600 (1984) (“The Office of the President of the West Virginia Senate under W.Va. Const. art. VI §§ 18 and 24 and W.Va. Code 4-1-8 [1980] is a distinct and separate office of a two-year duration.”).

The uncertainty over the duration and scope of President Tomblin’s dual role had created a controversy in the Senate. Under current Senate rules, the Senate President is elected by the members of the Senate; the President then appoints a President *pro tempore*, “who during the absence of the President, shall preside and perform all the duties of the President.” *See* West Virginia Senate Rule 3 (President elected) & Rule 4 (President *pro tempore*).

Half of the members of the Senate and a majority of the Senate’s Democratic members have concluded that, because President Tomblin’s currently role as acting governor makes him head of the executive branch, having his appointee lead the Senate would violate the separation-of-powers clauses in the Constitution. *See* Thompson Appendix (“App.”) at pp.1-3 (Charleston Daily Mail, Dec. 23, 2010).

These senators believe that the Senate should, independent of the executive branch, select its leaders rather than be governed by an executive appointee. *Id.* To address these concerns, they have proposed an amendment to the Senate rules creating an elected office of Acting Senate President to perform the role currently held by the appointed President *pro tempore*. *Id.*

Led by President Tomblin, a minority of the Senate's Democratic members and all of its Republican members opposed the change. *Id.* For several days a stalemate ensued with 17 members supporting the change and 17 members opposing it. In addition, members who support the rule change were threatening to withhold their vote for Tomblin's election as President if he voted against the proposed rule change. *Id.* The deadlock led to a "paralysis" in the Senate. App. at p. 4 (Metronews Talkline, Dec. 22, 2010). As of today, it appears that the Rule change now has enough votes to pass. App. at p. 191 (Metronews Talkline, Dec. 27, 2010).

Of course, whether the members of the Senate change the rules or not, the Constitution and a number of provisions of the West Virginia Code set forth specific duties for the President of the Senate. Indeed, over eighty different statutes designate the President of the Senate to perform official Senate duties and no provision of the code provides for someone else to serve in this role. Consequently, President Tomblin continues to serve as Senate President with respect to some duties. *See, e.g.*, App. at p. 8 (President Tomblin signing as Senate President on Memorandum of Understanding between Senate, House, Department of Military

Affairs and Division of Protective Services). No provision of the Constitution or the West Virginia Code even mentions the President *pro tempore* or Acting Senate President let alone authorizes them to act in the President's statutory or Constitutional role.

What is remarkable about the current situation is the potential that a majority of the majority party has the power to replace the Senate President and with it the person who will act as governor. While the proposed rule change gives the appearance of separation of powers, the reality is a minority of the Senate potentially has the power to control the executive by using or threatening to use the power to elect and remove officers found in article VI, section 24 of the Constitution.

The next regular session of the West Virginia Legislature will commence on January 12, 2011 at noon. At that time, each house will proceed to organize by electing officers. Speaker Thompson believes that prompt resolution by this Court of the gubernatorial succession issues raised in these cases will provide a degree of certainty that will allow the political branches to conduct the people's business over the term of the legislative session.

SUMMARY OF ARGUMENT

Upon the resignation of the governor, article VII, section 16 of the West Virginia Constitution provides that the "the President of the Senate *shall act as governor, until the vacancy is filled.*" The choice of this language was intended to

provide the State with a temporary chief executive until the vacancy can be filled by a “new election.”

The conclusion that the West Virginia Constitution commands that the executive power be exercised only temporarily by a member of the legislative branch is supported by numerous Constitutional provisions reinforcing the American norm of separation of powers -- a doctrine that clearly requires separation of the legislative and executive power. Thus, the West Virginia Constitution permits a limited exception to the rule of separation of powers only until there can be a new election to fill the vacancy.

Thus, in language plain enough for every citizen to understand, section 16 commands: “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.”

The history of the development of this provision dates back prior to the creation of the State of West Virginia. This history supports the argument that the West Virginia Constitution was drafted and adopted by people who valued an elected governor and purposefully picked a gubernatorial succession scheme that would limit the time an unelected legislator would act as governor to approximately a year.

The Respondent President of the Senate has incorrectly interpreted West Virginia election laws as permitting him to act as the State’s unelected governor until the 2012 general election. The Senate President’s interpretation of these laws

violates the long established principles that statutes should be interpreted to avoid both conflict with the Constitution and absurd results.

Instead, article VII, § 16 of the West Virginia Constitution, W.Va. Code § 3-10-2 and article IV, § 7 of the Constitution require the President of the Senate to call a new election to fill the vacancy in the office of the governor on the Tuesday next after the first Monday in November of 2011.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Speaker Thompson believes that a Rule 20 oral argument is appropriate in this case. Speaker Thompson respectfully submits that the issues involved in these cases involve issues of first impression; issues of fundamental public importance; and constitutional questions regarding the validity of a statute. *See* W.Va. R. App. Pro. 20(a)(1)-(3). This Court has never interpreted the constitutional and statutory provisions for gubernatorial succession in the context of a vacancy occurring with more than one year remaining on the term. The issues are of fundamental public importance as they involve questions regarding separation of powers and the election of the State's chief executive officer. Finally, the issues involve the proper interpretation of West Virginia's election laws in light of constitutional requirements. For all of these reasons, a Rule 20 argument is appropriate.

ARGUMENT

I. THE HISTORY OF ARTICLE VII, SECTION 16 OF THE WEST VIRGINIA CONSTITUTION ESTABLISHES THAT THE CONSTITUTION DOES NOT PERMIT THE NEW ELECTION FOR GOVERNOR REQUIRED BY THAT SECTION TO BE DELAYED FOR ALMOST TWO YEARS.

Article VII, section 16 of the West Virginia Constitution provides as follows:

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 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.

This provision allows President Tomblin to “act as governor,” and, when more than three years remain in the term, section 16 requires that “a new election for governor shall take place to fill the vacancy.” The history behind this provision requires the conclusion that the “new election for governor” cannot be delayed for two years. Indeed, by its terms, section 16 requires a new election unless there is only a year left in the original term. The clear implication from this provision is that one year is the maximum time the constitution permits a Senate President to act as governor.

While article VII, section 16 was first included in the 1872 West Virginia Constitution, the provision was not adopted in a vacuum. This Court has long recognized that the history of a constitutional provision’s adoption is important to its interpretation. *State ex rel. Rist v. Underwood*, 206 W.Va. 258, 264, 268, 524

S.E.2d 179, 185, 189 (1999) (“We begin our analysis with a detailed examination of the history of the constitutional provision at issue. . . . The upshot of this discussion is that the men who drafted the 1872 Constitution . . . came from this background and lived in these times; the events of those days were fresh in their memories when they forged our present Constitution.”); *State ex rel. K.M. v. West Virginia Dept. of Health and Human Resources*, 212 W.Va. 783, 795, 575 S.E.2d 393, 405 (2002) (“history known to or experienced by the framers of the Constitution must play some role in our interpretation of their words”). Moreover, this Court has not limited its inquiry to events surrounding the adoption of the 1872 Constitution. Instead, it has also looked to events surrounding the adoption of the state’s first constitution and the predecessor constitutions in Virginia. See *West Virginia Trust Fund, Inc. v. Bailey*, 199 W.Va. 463, 477, 485 S.E.2d 407, 421 (1997) (confirming 1872 constitutional interpretation with statements made at constitutional convention in 1862); *State ex rel. Forbes v. Caperton*, 198 W.Va. 474, 481, 481 S.E.2d 780, 787 (1996) (reviewing Virginia predecessors to W.Va. Constitution); *Winkler v. State School Bldg. Authority*, 189 W.Va. 748, 777, 434 S.E.2d 420, 449 (1993) (concurring opinion) (“Courts, with their long and secure tenure are the repository of society’s collective memory. That, in many regards, is what a constitution is all about. . . . [W]hat can be said is that when each scheme is evaluated on its merits, the history of other states’ fiscal problems and the fiscal problems of the mother Commonwealth of Virginia at the time our Constitution was drafted will be what most forcefully instruct our understanding.”). In this case, the rich history of our

State, both before and after its creation, evidence a strong preference for the election of the independent chief executive over appointment by a privileged few. This history supports the conclusion that the Constitution permits the President of the Senate to act as governor only as a temporary measure and does not permit a two-year delay in the new election required by article VII, section 16.

A. Opposition to the Selection of a Chief Executive by the Legislature by Western Virginia Citizens Prior to the Creation of the State of West Virginia

Our first state constitution predates both West Virginia and the adoption of United States Constitution. Adopted on June 29, 1776, the first Virginia Constitution did not provide for the popular election of the governor: “A Governor, or chief magistrate, shall be chosen annually by joint ballot of both Houses [of the Legislature].” App. at p. 13 (Constitution of Virginia (1776)). Under the 1776 Constitution, a legislatively selected executive council which included the governor shared executive responsibilities. *Id.*

While the Legislature picked the governor, the members of the Legislature were popularly elected. *Id.* However, Virginia’s suffrage and apportionment rules conspired against those who reside in what is now West Virginia. *See* M. F. Callahan, *Evolution of the Constitution of West Virginia*, p. 1-2 (1909) (attached, App. at pp. 18-19). The members of each house of Virginia’s legislature were elected by “freeholders” who were white males owning at least 25 acres of improved or 50 acres of unimproved land while representation was apportioned by county rather than population. App. at 12 (Constitution of Virginia (1776));

Callahan, *supra*, p.2 & n.2 (App. at 19); West Virginia Archives & History, “A State of Convenience – The Creation of West Virginia,” Chapter One, <http://www.wvculture.org/history/statehood/statehood01.html> (App. at 27). This arrangement discriminated against the fast growing counties in what became West Virginia where there were few large landowners who qualified as freeholders. *See* App. at p. 27 (A State of Convenience, *supra*). While suffrage was limited to white freeholders, apportionment was determined by total population including slaves, which further disenfranchised the people who lived in the western Virginia counties.¹ *Id.*

The western Virginians became increasingly dissatisfied with this arrangement. A convention was held in 1816 in Staunton. Even with the support of Thomas Jefferson, who called for representation based on white population, free white male suffrage, and popular election of state and local officials, the legislators elected by politically more powerfully eastern landowners defeated these reforms. *Id.*; *see also* App. at p. 21 (Callahan, *supra* pp. 4-5). A second Staunton meeting was held in 1825. At that time, the delegates passed a number of resolutions including one for changes in the executive branch by abolishing the executive council and making the executive more responsive to the people. App. at p. 22 (Callahan, *supra* p. 5). As a result of these resolutions, the question of whether to

¹As Thomas Jefferson noted: “The majority of the men in the state who pay and fight for its support are unrepresented in the legislature. . . . Among those who share the representation the shares are unequal.” App. at p. 20 (Callahan, *supra*, p. 3 (*quoting* Jefferson’s Works, vol. 3, p. 360)).

hold a constitutional convention was submitted to a vote of the freeholders who approved it on the strength of the near unanimous support of the western voters. App. at p. 28 (A State of Convenience, Chapter One, *supra*).

The convention was held in Richmond from 1829-1830. *Id.* At the convention, Phillip Doddridge of Brooke introduced a resolution calling for an elected executive, unhampered by a council. App at p. 23 (Callahan, *supra*, p. 7); App. at p. 31 (Debates of the Virginia Convention, 1829-30, p. 464). In support of an elected executive Doddridge forcefully argued against the then current Virginia arrangement. "What is the Executive of Virginia? It is nothing more or less than an emancipation of the Legislative power. He is appointed every year and only responsible to those to whom he is looking for reappointment." App. at p. 33 (1829 Debates, *supra*, p. 466). The delegates from the East, who had disproportionate power, opposed Doddridge's resolution and it failed. App. at p. 23 (Callahan, *supra*, p.7); App. at p. 28 (A State of Convenience, Chapter One, *supra*). After the 1830 Virginia Constitution was approved by a margin of 26,055 to 15,566 (with voters in present-day West Virginia rejecting it 8,365 to 1,383), there were calls for secession by the western counties from Virginia. *Id.*

These calls for succession led to the 1850-51 Virginia Constitutional Convention. Known as the Reform Convention, the delegates finally adopted the reforms sought by the westerners including the direct election by the voters of the governor. App at p. 24 (Callahan, *supra*, p. 12); App. at p. 9 (Virginia Constitution of 1851, art. V., § 1). The 1851 Constitution also provided for the election of a

lieutenant governor who would serve as President of the Senate. *Id.* at art. V, §§ 8, 10. With respect to gubernatorial succession, the Constitution provided that in the case of a vacancy in the office of the governor, “the said office, with its compensation, shall devolve upon the Lieutenant Governor.” *Id.* at art. V, § 9.

B. The Adoption of the 1863 West Virginia Constitution

The State of West Virginia was founded following Virginia’s 1861 succession from the union. The first West Virginia Constitution was adopted at a convention held in Wheeling beginning in November 1861. App. at p. 25 (Callahan, *supra* p. 17). The Constitution, which was formerly adopted in 1863, provided for an elected governor and included the following provision regarding succession:

In case of the removal of the governor from office, or of his death, failure to qualify within the time prescribed by law, resignation, removal from the seat of government, or inability to discharge the duties of the office, the said office, with its compensation, duties and authority, shall devolve upon the president of the senate, and in case of his inability, or failure from any cause to act, on the speaker of the house of delegates; and the legislature shall provide by law for the discharge of the executive functions in other necessary cases.

App. At p. 68 (West Virginia Const. of 1863, art. V, sec. 6).

The first report from the convention’s Committee on the Executive Department created a governor and lieutenant governor and provided that in the event of gubernatorial vacancies, “the said office, with its compensation, power and authority, shall devolve upon the lieutenant-governor.” App. at p. 77 (Debates and Proceedings of the First Constitutional Convention of West Virginia, December 5,

1861, reprinted at <http://www.wvculture.org/history/statehood/cc120561.html>). In the debates, one delegate observed that the function of the lieutenant governor was “to do nothing until the governor dies.” App. at p. 114 (Debates and Proceedings, December 13, 1861, <http://www.wvculture.org/history/statehood/cc121361.html>). The delegates rejected the Virginia model of having the lieutenant governor serve as presiding officer of the Senate on separation of powers grounds. Instead, the solution suggested in 1861 was to have the president of the senate become governor:

Well, sir, the point might as well be decided now as at any other time whether an executive officer shall be a component part of the legislature. Now, sir, it is very easy to provide that the senate shall elect a president and that in case of any difficulty with the governor that the president of the senate shall act as governor for the time being or where the necessity continues, or that in the death of the governor he shall become the governor. He ceases to be a legislative officer then and takes the place of governor.

Id. Ultimately, the convention’s Committee on the Executive removed the provisions for a lieutenant governor, and the convention adopted the succession provision quoted above in which the Senate President becomes governor upon a vacancy.

The preference for an elected governor extended to debates over the term of the office. While the original draft of the 1863 Constitution gave the governor a four-year term, the Convention shortened it to two years. App. at p. 139 (Debates and Proceedings, February 4, 1862, <http://www.wvculture.org/history/statehood/cc020462.html>). Members of the House were elected to one-year terms and

members of the Senate were elected to two-year terms. App. at p. 64 (1863 Const., art. IV, sec. 3).

In 1869, West Virginia's first governor, Arthur Boreman resigned seven days before the end of his third two-year term to accept nomination to the U. S. Senate. Daniel Duane Tompkins Farnsworth, a Buckhannon Republican, as Senate president, became the state's second governor until March 4, 1869, when William Erskine Stevenson was inaugurated. App. at p. 145 (Biography of Daniel D. T. Farnsworth in <http://www.wvculture.org/history/farnswor.html>). Stevenson had been previously elected to a full term in the October 1868 general election. See App. at p. 146 (Biography of William E. Stevenson in <http://www.wvculture.org/history/stevens.html>). Until this year, no other West Virginia governor had left office prior to the conclusion of his term.

C. The Adoption of the Current West Virginia Constitution in 1872

Starting on January 16, 1872, a second constitutional convention was held in Charleston and lasted eighty-four days. The result of that convention was the current West Virginia Constitution which contains the provisions at issue in this case.²

²Unlike the 1861 convention, the delegates in 1872 did not create a record of the debates. The delegates did produce a convention journal containing a record of the votes and proceedings along with some of the drafts of early versions of the provisions. Excerpts from this journal related to executive department are included in the Appendix. See App. at pp. 152 to 157 (Journal of Constitutional Convention, Assembled at Charleston, West Virginia, January 16, 1872).

The recent (but short-lived) experience with a gubernatorial vacancy was likely fresh on the minds of the 1872 convention delegates. Daniel Farnsworth, the first Senate President to fill a gubernatorial vacancy, was a delegate to the 1872 convention.³ App. at p. 145 (Farnsworth Bio., *supra*). The convention considered and rejected a constitutional provision barring a sitting governor from becoming a candidate for the United States Senate during his gubernatorial term. App. at p. 149, 150 (1872 Convention Journal at pp. 69, 88). The debates and provisions ultimately adopted evidence a conscious decision to provide that gubernatorial vacancies would be temporarily filled by the Senate President as an acting governor who would serve only until a new election could be held.

The convention's Committee on the Executive Department first reported a draft article on the Executive Department to the convention on February 26, 1872. App. at 151 (1872 Convention Journal at p. 122). With respect to the issue of gubernatorial succession, the original draft suggested a return to the 1850 Virginia Constitution with an elected lieutenant governor who would have served as President of the Senate. After the convention received the report from the Committee on the Executive Department, it adjourned itself into the Committee of the Whole for consideration of the report. The Convention Journal shows a strike

³Indeed, it was Farnsworth's motion to fly the United States flag over the convention that provoked a colorful debate over whether to fly the United States or West Virginia flag. See App. at p. 25-1 (Callahan, *supra*, p.31 & n.66). Farnsworth was almost killed when the convention building caught fire and he and two other rushed into the burning building to save the United States flag. Cutright, W. B., *The History of Upshur County, West Virginia: From Its Earliest Exploration*, p. 443 (1907).

out and insert version⁴ showing the original proposal of Committee on the Executive Department and the modifications made in the Committee of the Whole:

LIEUTENANT GOVERNOR

[18. In case of the death, conviction on impeachment, failure to qualify, resignation or other disability of the Governor, the powers, duties and emoluments of the office, for the residue of the term or until the disability shall be removed, shall devolve upon the Lieutenant Governor.]

[19. The Lieutenant Governor shall be President of the Senate and shall vote only when the Senate is equally divided. The Senate shall choose from their own body a President *pro tempore*, to preside in case of the absence or impeachment of the Lieutenant Governor, or when he shall hold the office of Governor.]

[20. If there be no Lieutenant-Governor, or if the Lieutenant-Governor, for any reason of the cases specified in section eighteen of this article, becomes incapable of performing the duties of the office,] *“In case of the death, conviction, or impeachment, failure to qualify, resignation or other disability of the Governor,”* the President of the Senate shall sit 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 joint ballot 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.”

App. at pp. 164-165 (Convention Journal, Report of the “Committee of the Whole” on the Committee of the Executive Department” at pp. 7-8) (emphasis by bolding

⁴“The words included in brackets, thus [] were struck out of the original text, in Committee of the Whole, and the words in italics inserted.” App. at p. 161 (Convention Journal, Report of the “Committee of the Whole” on the Committee of the Executive Department at p. 1).

added). The convention approved the proposed amendments of the Committee of the Whole on March 18, 1872. App. at p. 154 (Convention Journal, p. 188).

The debate over succession as reported in *The Kanawha Daily* focused on competency and separation of powers. In defending the use of a lieutenant governor, Mr. Johnson of Tyler County argued that “a provision [might be] made as not to require him to preside over the Senate.” App. at p. 167 (*The Kanawha Daily*, February 28, 1872, p.2). Mr. Johnson believed that the characteristics of a person who would serve as a lieutenant governor were different from that of a person selected as the Senate’s presiding officer. *Id.* Mr. Armstrong “thought it unwise to take away from a deliberative body, the power to control the presiding officer of the Senate.” *Id.* Instead, he advocated for the allowing a temporary successor to “issue a writ of election, if necessary, in the event of a vacancy. . . .” *Id.* Mr. Johnson, of Wood County, who was the Chair of the Committee on the Executive, opposed this thinking, arguing that “in heavy artillery every carriage carried an extra wheel.” *Id.* In the end, the convention delegates rejected Wood’s position, and the delegates struck the lieutenant governor and adopted the language providing for the Senate President to perform temporarily the duties of the governor pending a new election.

The amended provision on the executive originally had the Senate President “sit” as Governor. Following approval of the amendment of the Committee of the Whole of the Report of the Committee of the Executive Department, the provision was changed and the convention substituted “act for “sit” as the operative verb. Compare App. at p. 165 (Report of the Committee of the Whole, *supra*, p. 8) (“. . .

the President of the Senate shall *sit* as Governor until the vacancy is filled or the disability removed”) (emphasis added) *with* App. at p. 180 (Constitution of 1872 (as adopted), art. VII, sec. 16) (“ . . . the President of the Senate shall *act* as Governor until the vacancy is filled or the disability removed”) (emphasis added). The obvious reason for this change was to emphasize again the temporary nature of the arrangement. The entire article on the executive was finally approved on April 6. App. at p. 159 (Convention Journal, p. 301).

In sum, our state’s founders (and even their predecessors) had a history of opposing the prior Virginia system of appointed governors. In each of our two constitutional conventions, the drafters rejected (on separation of powers grounds) an elected lieutenant governor who would have both legislative and executive responsibilities. Moreover, the evolution of the specific language of the succession provisions, from one where “office, with its compensation, duties and authority, shall devolve upon the president of the senate” to the current “act as governor” phrasing is further support of this intent. Finally, the 1872 drafters made this change immediately following the first experience with gubernatorial succession after the delegates debated the very circumstances surrounding that vacancy at the convention. This clearly establishes that the changes between the two constitutions were intentional. Each of these pieces of historical evidence supports the conclusion that the drafters of the West Virginia Constitution envisioned a scheme where, in the event of a gubernatorial vacancy, the Senate President would act as a temporary chief executive pending an election.

II. SEPARATION OF POWERS CONCERNS SUPPORT THE CONCLUSION THAT THE DRAFTERS OF THE 1872 CONSTITUTION INTENDED THE SENATE PRESIDENT'S DUTIES AS GOVERNOR TO BE TEMPORARY PENDING AN ELECTION.

The legislative history noted above evidences a reluctance to have a lieutenant governor in part because of separation of powers concerns. The drafters of the 1872 Constitution did not limit their concerns over separation of powers to the debates. Instead, a number of provisions of the Constitution make explicit the desire to separate legislative and executive functions.

This Court has emphasized that the doctrine of separation of powers is not a suggestion; rather, it is a fundamental command of the Constitution. Syl. pt. 2, *State ex rel. Holmes v. Clawges*, ___ S.E.2d ___, 2010 WL 4273239 (W.Va. 2010); syl. pt. 1, *State ex rel. Barker v. Manchin*, 167 W.Va. 155, 279 S.E.2d 622 (1981). It is a doctrine that has long been enforced by this Court. Syl. pt. 1, *State ex rel. Miller v. Buchanan*, 24 W.Va. 362 (1884) (“The legislative, executive and judicial departments of the government must be kept separate and distinct, and each in its legitimate sphere must be protected.”); *Appalachian Power Co. v. PSC*, 170 W.Va. 757, 759, 296 S.E.2d 887, 889 (1982); *State ex rel. West Virginia Citizens Action Group v. West Virginia Economic Dev. Grant Comm.*, 213 W.Va. 255, 580 S.E.2d 869 (2003); *State ex rel. Meadows v. Hechler*, 195 W.Va. 11, 462 S.E.2d 586 (1995); *State ex rel. State Bldg. Comm'n v. Bailey*, 151 W.Va. 79, 150 S.E.2d 449 (1966) (finding statute naming legislative officers to State Building Commission violated Separation of Powers Clause).

As the Petitioners have noted, a number of provisions of the Constitution evidence the importance of the separation of powers doctrine in our government's constitutional structure. *See* W.Va. Const., art. V, § 1 (“The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time. . .”); *id.* at art. VII, § 4 (barring executive officers from serving in any other office); *id.* at art. VI, § 13 (persons holding “any other lucrative office” ineligible to serve in the Legislature); *see also id.* at art. VIII, sec. 7 (barring judges from holding any other office).

In this case, the drafters of the 1872 Constitution explicitly rejected the prior practice in Virginia of having an elected lieutenant governor succeed as governor in the event of a vacancy. They also rejected the prior West Virginia constitution's transfer of the office to the President of the Senate. Instead, the very deliberate use of the phrase “act as governor” and the legislative history of that provision show that the arrangement was intended to be a short term solution to the problem of gubernatorial succession.

Given that the authorization is explicitly in the Constitution for the Senate President to act as governor, it cannot be said that this specific arrangement violates the Constitution's general provisions on separation of powers. *State ex rel. Collins v. Bedell*, 194 W.Va. 390, 400, 460 S.E.2d 636, 646 (W.Va. 1995) (“General and indefinite terms of one provision of a constitution, literally embracing numerous subjects, are impliedly limited and restrained by definite and specific terms of

another, necessarily and inexorably withdrawing from the operation of such general terms, a subject which, but for such implied withdrawal, would be embraced and governed by them.” (quoting *State ex rel. Boards of Educ. v. Chafin*, 180 W.Va. 219, 376 S.E.2d 113 (1988) and *Lawson v. Kanawha County Court*, 80 W.Va. 612, 92 S.E. 786 (1917)). Thus, an arrangement authorized by the Constitution cannot be unconstitutional. However, as the current tensions in the Senate illustrate, the potential for separation of powers conflicts supports interpreting the relevant Constitutional provisions as requiring a prompt “new election for governor.” While section 16 authorizes the Senate President to act as governor without election if there is not more than a year left in the term, the clear implication from this provision is that one year is the maximum period that this dual role is permissible.

III. THE NEW ELECTION FOR GOVERNOR REQUIRED BY THE CONSTITUTION SHOULD BE HELD ON OR BEFORE NOVEMBER 8, 2011.

As noted above, the clear implication from section 16 of article VII is that the Constitution places a one-year limit on the “term” of a Senate President acting as governor. Apparently, however, President Tomblin has interpreted the Constitution and the West Virginia Code as allowing him to act as governor until the November 2012 general election. This interpretation of the statutes should be rejected by this Court both because it conflicts with the Constitution and because it would lead to absurd results.

A. This Court Should Reject President Tomblin’s Interpretation of the W.Va. Code § 3-10-2 as Absurd and Inconsistent.

West Virginia Code § 3-10-2 provides:

In case of the . . . resignation . . . 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 prior to such election as a Class II-O legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code, and the publication area for such publication shall be each county of the state. 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.

W.Va. Code § 3-10-2.

Under President Tomblin's interpretation, a vacancy occurring 1 day prior to the general election two years into the gubernatorial term would result in the requirement of a special election. A vacancy occurring the day after that same election day would not be filled for approximately two years when only a couple of months would be left in the term.

These results are both absurd and inconsistent. This Court has long recognized that statutory interpretations that are inconsistent or absurd should be discarded. Syl. pt. 2, *Conseco Fin. Serv'g Corp. v. Myers*, 211 W.Va. 631, 567 S.E.2d 641 (2002) (“ ‘It is the duty of a court to construe a statute according to its

true intent, and give to it such construction as will uphold the law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity.’ Syllabus Point 2, *Click v. Click*, 98 W.Va. 419, 127 S.E. 194 (1925).” *Expedited Transp. Sys., Inc. v. Vieweg*, 207 W.Va. 90, 98, 529 S.E.2d 110, 118 (2000) (“It is the ‘duty of this Court to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results.’” (quoting *State v. Kerns*, 183 W.Va. 130, 135, 394 S.E.2d 532, 537 (1990) (emphasis omitted)); see also syl. pt. 2, *Newhart v. Pennybacker*, 120 W.Va. 774, 200 S.E. 350 (1938) (same); *Jefferson Utilities, Inc. v. Jefferson County Bd. of Zoning Appeals*, 218 W.Va. 436, 447, 624 S.E.2d 873, 884 (2005).

B. This Court Should Reject President Tomblin’s Interpretation of the Relevant Provisions to Avoid Serious Constitutional Questions.

President Tomblin’s interpretations of the gubernatorial succession provisions as permitting him to act as governor for two years raises serious constitutional issues as it is clear that the intent of article VII, section 16 was to place, at most, a one-year limit on the time a Senate President may act as an unelected governor.

This interpretation violates the doctrine that statutes should not be interpreted or applied in a manner that raises constitutional questions:

It is axiomatic that

... wherever an act of the legislature can be so *construed and applied* as to avoid a conflict with the constitution, and give it the force of law, such construction will be adopted by the court.

(Emphasis added.)

Peel Splint Coal Co. v. State, 36 W.Va. 802, 15 S.E. 1000, 1004 (1892). A narrow-breadth reading of a statute to assure that its application is constitutionally proper is appropriate as a less-intrusive remedy, *cf. Weaver v. Shaffer*, 170 W.Va. 107, 111, 290 S.E.2d 244, 248 (1980).

Morris v. Crown Equipment Corp., 219 W.Va. 347, 355, 633 S.E.2d 292, 300 (2006); *see also State ex rel. Downey v. Sims*, 26 S.E.2d 161, 170 (1943) (“The duty of the courts so to construe a statute as to save its constitutionality when it is reasonably susceptible of two constructions includes the duty of adopting a construction that will not subject it to a succession of doubts as to its constitutionality, for it is well settled that a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubt upon that score.”).

C. Interpreting the Reference to a General Election in W.Va. Code § 3-10-2 as including the Annual General Election Set Forth in Article IV, Section 7 of the Constitution saves the Provision from Doubts Regarding its Constitutionality and Avoids an Otherwise Absurd and Inconsistent Result.

The Constitution sets a general election to occur every year in November:

The general elections of state and county officers, and of members of the Legislature, shall be held on the Tuesday next after the first Monday in November, until otherwise provided by law.

W.Va. Const., art. IV, § 7. This Court should interpret section W.Va. Code § 3-10-2 and article IV, § 7 of the Constitution as setting a general election on the Tuesday next after the first Monday in November in any year whenever a vacancy shall occur in the office of governor before the first three years of the term shall have expired.

First, the provisions are reasonably susceptible to being construed in this manner. West Virginia Code § 3-10-2 only refers to “a general election.” Nothing in the provision explicitly restricts the referenced general election to one occurring only on even numbered years. Similarly, W.Va. Const., art. IV, § 7, by its very terms, authorizes a general election every year. If W.Va. Code § 3-10-2 permits a constitutionally authorized off-year general election to fill a vacancy in the office of the governor when the first three years of the term have not expired, such a general election would not be barred under the “until otherwise provided by law” qualification.⁵

Interpreting section W.Va. Code § 3-10-2 and article IV, § 7 of the Constitution as setting a general election on the Tuesday next after the first Monday in November in any year whenever a vacancy shall occur in the office of governor before the first three years of the term shall have expired remedies the absurd and

⁵W.Va. Code § 3-1-31 (providing for general elections in even numbered years). Moreover, the “until otherwise provided by law” qualification in article IV, § 7 of Constitution does not appear to be a license for the legislature to change election days. The provision as originally adopted in 1872 provided for a general election in October; it was amended to coincide with the November federal elections in 1884. Notably the change was made by constitutional amendment rather than by statute. *See* Acts 1883, J.R. 9 and Acts 1883, c. 43, ratified Oct. 14, 1884.

inconsistent results identified above. Under this interpretation, vacancies will not be filled at a general election that is two years after the vacancy occurs and only months before the term ends. This interpretation also brings consistency to the statute, as no vacancy will last longer than one year.

Finally, interpreting section W.Va. Code § 3-10-2 and article IV, § 7 of the Constitution as setting a general election on the Tuesday next after the first Monday in November in any year whenever a vacancy shall occur in the office of governor before the first three years of the term shall have expired resolves the constitutional concerns identified above. This interpretation limits the time that the Senate President can act as an unelected governor to no more than one year. This result is both consistent with the text of the Constitution and the history of the adoption of the Constitution's gubernatorial succession scheme.⁶

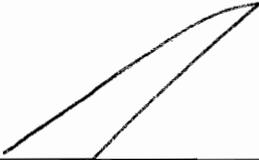
CONCLUSION

For the reasons noted herein, Speaker Thompson respectfully requests that the Court issue a writ of mandamus requiring President Tomblin to call for a new election for governor to be held on November 8, 2011. Pursuant to the provisions of article VII, section 16 and West Virginia Code § 3-10-2, should President

⁶Under the second paragraph of W.Va. Code § 3-10-2, nominations for such a new election to fill the vacancy could be by primary or convention depending on when the vacancy occurred. In this case, the determining factor would be whether the new election is ordered by this Court in sufficient time to meet the primary time requirements and procedures in article 5 of the election code. Petitioner Cooper has argued that the use of a convention would be unconstitutional. Proposed Intervenor Kenny Purdue argues that alternative methods exist in the code for ballot access. Speaker Thompson believes that, depending on when the election was ordered, either the primary or party convention method could constitutionally be used to decide which candidates should be on the ballot for the new election for Governor.

Tomblin refuse or be unable to comply with this Court's writ, Speaker Thompson stands ready to order the election required by the West Virginia Constitution.

RICHARD THOMPSON,
SPEAKER OF THE HOUSE
OF DELEGATES
By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Upon Original Jurisdiction

STATE OF WEST VIRGINIA
ex rel. WEST VIRGINIA CITIZEN
ACTION GROUP,

Petitioner,

v.

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 E. TENNANT,
Secretary of State of West Virginia

Respondents.

CERTIFICATE OF SERVICE

On December 27, 2010, comes the undersigned counsel and does hereby certify that service of the attached **RESPONSE OF RICHARD THOMPSON, SPEAKER OF THE WEST VIRGINIA HOUSE OF DELEGATES, TO THE PETITIONS FOR WRIT OF MANDAMUS** has been made upon the opposing parties by mailing a true and exact copy thereof by U.S. Mail to the addresses below:

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