

No. 22226 -- State of West Virginia ex rel. Darrell E. Holmes, Clerk of the Senate of West Virginia, and Donald L. Kopp, Clerk of the House of Delegates of West Virginia, Relators v. Glen B. Gainer III, Auditor of the State of West Virginia, Respondent and The Honorable Herman Canady, Judge of the Circuit Court of Kanawha County, West Virginia, Respondent, Donna J. Boley and Robert P. Pulliam, M.D., Intervenors

Neely, J., dissenting in part:

I dissent to the court's holding that W.Va. Const. Art. VI, § 33 prohibits the commission from submitting a proposal for a pay increase other than once every four years. The majority uses phrases such as "[i]t is our view" and "we do not believe"; however, our "view" and our "belief" have nothing to do with the matter. The plain wording of W.Va. Const. Art. VI, § 33 permits the commission "to meet as often as may be necessary and shall within fifteen days after the beginning of the regular session of the legislature in the year one thousand nine hundred seventy-one and within fifteen days after the beginning of the regular session in each fourth year thereafter submit by resolution to the legislature its determination of compensation and expense allowances, which resolution must be concurred in by at least four members of the commission."

The plain words of § 33 allows the commission to meet as often as it wishes, but it must submit a resolution every four years.

There is nothing contradictory or ambiguous in these provisions, since as the facts of this case demonstrate, governors may be surpassingly reluctant to appoint commissions disposed to adjust legislative pay in an equitable way.

At the heart of this case is a loathing of all politicians in general and a peculiar distaste for legislators in particular.

I take time to dissent in part because I believe that someone should point out that the Legislature are the heros and not the villains of the democratic process.

It was in the Legislature, over twenty-two years ago, that I held my first elective office, and those years were a far greater education than I had ever received at Dartmouth College or Yale Law School. I remember that the senators and delegates with whom I served during those years were among the highest quality people with whom I was ever associated-- then or now-- and the process of striking the right balance among competing interests was, perhaps, the greatest challenge and most compelling experience of my life.

But the problems that confronted us in those halcyon days of economic boom and federal revenue sharing were as child's play compared to the problems that confront our Legislature today. Thus, it is the Legislature-- not this court, not the governor, and not the host of indifferent, merit-selection, colorless, odorless and tasteless, coffee-sucking bureaucrats-- who must undertake the demanding and unenviable task of rescuing a suffering West Virginia from the succession of tragedies and reversals that have daunted our progress for the last fourteen years.

The reason that all legislators are unpopular and thought deserving of economic penalties is that the legislature is the great crucible of democracy--a monument to humane and gentle government, characterized by accommodation and measured straining in opposite directions. Had I not served in the House of Delegates, I would never have understood the full dimensions of the Founding Fathers' towering vision, nor would I have appreciated the complaints that the leaders in recently freed Eastern European countries have voiced that their societies hang in the balance simply because of their own lack of experience in democratic institutions.

Although the legislature is regularly taken for granted here, it is interesting to reflect what a contribution to the peace,

order and prosperity of the world would attend the peppering of Eastern Europe with just two hundred alumni and alumnae of either house of the West Virginia Legislature. How much would a citizens' compensation commission in Ukraine, Hungary, or Belarus pay our legislators to sort things out in a peaceful way that would save thousands of lives and billions of dollars in property?

The reason for the Legislature's generally low esteem is that any legislature worth its salt is essentially in the business of allocating scarce resources among competing ends. Regretfully, a legislature is seldom called upon to decide between right and wrong; rather, legislatures are called upon to decide between right and right, and that always leaves everyone who doesn't get everything he or she wants dissatisfied. Perennial legislative fights involve rich versus poor, developer versus environmentalist, capital versus labor, minorities versus majorities, women versus men, pro-choice advocates versus right-to-life advocates, industry versus agriculture, recipients of social services versus taxpayers, parents and children versus teachers and school boards, landlords versus tenants, and creditors versus debtors.

There are some legislators who are lazy, incompetent and generally despicable, just as there are such judges, plumbers,

doctors, garage mechanics, and internal revenue agents. But the great majority of legislators work far beyond the hours demanded by the sixty day regular session. Part-time legislators must work as hard to get elected as officeholders who win full time jobs, and many legislators work as hard at being legislators as those holding full time jobs when all the hours of constituent telephone calls, town meetings, reading and answering correspondence, and campaigning (which essentially involves the useful work of meeting constituents and listening to their concerns) are taken into account.

All this returns me, then, to an analysis of what was behind the wording of W.Va. Const. Art. VI, § 33. Given the pervasive hostility to legislators, it was thought necessary to require the commission to meet at least once every four years and to issue a report. However, to the extent the commission was disposed to do so, it could meet more frequently and report as often as it wished.

Now all of this makes perfectly good sense if we realize that the Legislature has not raised its pay every four years or even come close. This is only the third pay raise the legislature has afforded itself since 1971! In years when money is tight for teachers, public employees, judges, and the state police, the Legislature can hardly give itself a raise even if such a year falls

upon the majority's magic fourth year. Occasionally it is politically possible to include the Legislature in a general raise, as occurred in 1994, and when that happens the Legislature should-- like every other public employee, teacher, judge, and cop-- have the benefit of having their salaries based on the fair value of their services in the year the raise is passed.