

No. 26364 -- State of West Virginia ex rel. The Affiliated Construction Trades Foundation, a division of the West Virginia Building and Construction Trades Council, AFL-CIO, and all those similarly situated v. William F. Vieweg, Commissioner, Bureau of Employment Programs, and Compensation Programs Performance Council

Davis, Justice, concurring:

***The Separation of Powers Clause Prohibits
Granting the Relief Sought in this Case***

In order for this Court to have taken the steps urged by the petitioners, we would have had to destroy the constitutional division of power between the three branches of state government. In spite of any emotional appeal that may be engendered by the dissenters in this case, it is not now nor will it ever be the province of this Court to abolish the clear separation of powers that is etched in our state constitution and guaranteed by the federal constitution.

This Court observed in *State ex rel. Lambert v. Stephens*, 200 W. Va. 802, 809, 490 S.E.2d 891, 898 (1997) that “[a]s part of our constitutional democracy on both the national and state level, we ascribe to the principle that there shall be three equal branches of government--legislative, executive, and judicial.” It is firmly rooted in Article V, § 1 of the state constitution that “[t]he legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others[.]” As simplistic as the latter few words may appear, they are in reality a complex formula that has kept the government of this state intact since its founding in 1863.

The Separation of Powers Clause is not self-executing. Standing alone the

doctrine has no force or effect. The Separation of Powers Clause is given life by each branch of government working exclusively within its constitutional domain and not encroaching upon the legitimate powers of any other branch of government. This is the essence and longevity of the doctrine. In the case at hand the petitioners would have this Court obliterate the time-honored bright lines between the branches of our state government. A majority on this Court has refused to violate the constitution.

In my judgment, this case, brought in prohibition, with little to no factual record, turned on a simple point of executive discretion. The authority being exercised by the respondents and challenged by the petitioners is discretionary authority so long as that discretion is exercised within the bounds of the law and in accordance with the highest fiduciary duty. Accordingly, on the limited record available, I cannot conclude that the decision of the commissioner to drop the lawsuits constituted a violation of his fiduciary duty. This issue is simply not appropriate for issuance of a writ in mandamus or prohibition. No statute, rule or constitutional provision placed any direct limitation on the respondents' authority to drop the civil suits in question. This Court has recognized that "[w]hen an act is committed to executive discretion, the exercise of that discretion within the constitutional bounds is not subject to the control or review of the courts. To interfere with that discretion would be a violation of the doctrine of separation of powers.'" *State ex rel. Robinson v. Michael*, 166 W.Va. 660, 674 n.12, 276 S.E.2d 812, 820 n.12 (1981), quoting *Public Defender Agency v. Superior Court*, 534 P.2d 947, 950 (Alaska 1975).

I need to pause for a moment to clearly illustrate the incorrectness of the path the

petitioners chose to take in bringing this action. If this Court had relinquished its duty to uphold the Separation of Powers Clause in this case, where would the litigation end? Here are but a few examples:

- 1) State tax commissioners often institute tax amnesty programs as an alternative to commencement of litigation to collect delinquent taxes. May this Court require, through the issuance of a rule in prohibition, the Commissioner of the West Virginia Department of Tax and Revenue to explain his reasons for implementing a tax amnesty program, rather than pursuing suit against individual taxpayers?
- 2) The attorney general has decided against negotiating separate settlements against tobacco companies unlike several other states in favor of continuing to be part of the global settlement. Can a citizen and taxpayer subject the attorney general to suit based upon an allegation that a more favorable compromise can be obtained through separate negotiations?

The dissenters in this case have not even paused to consider the utter chaos that would ensue if this Court abdicated its duty to obey the Separation of Powers Clause. With their position I cannot agree. Therefore, I concur.