

SUPREME COURT OF APPEALS OF WEST VIRGINIA

**FILED**

November 3, 1999  
DEBORAH L. McHENRY, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

September 1999 Term

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No. 26653

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**RELEASED**

November 3, 1999  
DEBORAH L. McHENRY, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL. JOHN F. RIST, III,  
Petitioner

v.

HONORABLE CECIL H. UNDERWOOD, GOVERNOR  
OF THE STATE OF WEST VIRGINIA, AND ROBERT S. KISS,  
Respondents

AND

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No. 26654

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STATE OF WEST VIRGINIA EX REL. RICHARD A. ROBB,  
W. KENT CARPER, RUDOLPH L. DITRAPANO, ROGER D. FORMAN,  
MARVIN W. MASTERS, ANTHONY J. MAJESTRO, AMERICAN CIVIL  
LIBERTIES UNION OF WEST VIRGINIA, THOMAS W. PETTIT,  
MARK E. GAYDOS, CARL N. FRANKOVITCH, MICHAEL G. SIMON,  
JAMES C. PETERSON, R. EDISON HILL, HARRY G. DEITZLER,  
MICHAEL C. BEE, AND NORMAN STEENSTRA, JR.,  
Petitioners,

v.

HONORABLE CECIL H. UNDERWOOD, GOVERNOR  
OF THE STATE OF WEST VIRGINIA, AND ROBERT S. KISS,  
Respondents

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Petition for Writ of Mandamus and/or Prohibition

WRIT OF MANDAMUS, AS MOULDED, GRANTED

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Submitted: October 20, 1999  
Filed: November 3, 1999

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JUSTICE McGRAW delivered the Opinion of the Court.  
JUSTICE DAVIS, deeming herself disqualified, did not participate  
in the decision in this case.  
RETIRED JUSTICE MILLER, sitting by temporary assignment.  
JUDGE WATT, sitting by temporary assignment.  
CHIEF JUSTICE STARCHER concurs and reserves the right to  
file a concurring opinion.  
RETIRED JUSTICE MILLER and JUSTICE MAYNARD dissent  
and reserve the right to file dissenting opinions.

## SYLLABUS BY THE COURT

1. “A writ of mandamus will not issue unless three elements coexist—(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.” Syl. pt. 1, *State ex rel. Billy Ray C. v. Skaff*, 190 W. Va. 504, 438 S.E.2d 847 (1993).

2. Mandamus will lie to resolve the question of whether a gubernatorial appointee is constitutionally qualified to assume the office to which he or she has been appointed.

3. “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.” *State ex rel. Brotherton v. Blankenship*, 157 W. Va. 100, 108, 207 S.E.2d 421, 427 (1973).

4. “Questions of constitutional construction are in the main governed by the same general rules applied in statutory construction.” Syl. pt. 1, *Winkler v. State School Bldg. Auth.*, 189 W. Va. 748, 434 S.E.2d 420 (1993).

5. “Statutes which relate to the same subject matter should be read and applied together so that the Legislature’s intention can be gathered from the whole of the enactments.” Syl. pt. 3, *Smith v. State Workmen’s Compensation Comm’r*, 159 W. Va. 108, 219 S.E.2d 361 (1975).

6. Article VI, § 15 of the West Virginia Constitution, with one exception, renders a member of the Legislature ineligible to be elected or appointed to a civil office for profit in this State, which has been created, or the emoluments of which have been increased, during the legislator’s term of office. The exception for “offices to be filled by election by the people,” operates to allow an otherwise ineligible legislator to gain public office through popular election. In effect, only a vote of the people can overcome the impediment imposed by the Emoluments Clause.

McGraw, Justice:

This case raises the issue of whether the Emoluments Clause contained in Article VI, § 15 of the West Virginia Constitution prohibits the Governor of this State from appointing the current Speaker of the West Virginia House of Delegates as a Justice of this Court, where, during the Speaker's current term of office, the Legislature enacted a pay increase with respect to such judicial office. The Emoluments Clause at issue, Article VI, § 15, provides in pertinent part:

No senator or delegate, during the term for which he shall have been elected, shall be elected or appointed to any civil office of profit under this State, which has been created, or the emoluments of which have been increased during such term, except offices to be filled by election by the people.

We are specifically asked to determine the meaning of the exception for “offices to be filled by election by the people,” and whether this language renders the current Speaker eligible to assume the office to which the Governor has appointed him.

Any examination of our Constitution—the organic law of our State—must proceed with utmost care and concern for the future impact of our decision. The ripples created by our interpretation of this important question will propagate far into the future of our jurisprudence. Before commencing, we note the counsel of Thomas Jefferson:

On every question of construction [of the Constitution] let us carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and

instead of trying what meaning may be squeezed out of the text, or intended against it, conform to the probable one in which it was passed.

Letter from Thomas Jefferson to Justice William Johnson, June 12, 1823, in *Thomas Jefferson on Constitutional Issues* (Va. Comm. on Constitutional Government 1962). With this wisdom as our watch star, we examine the provision at issue, in the context of our constitutional history, and in the context of the history of our State.

## **I.**

### **BACKGROUND**

The facts in this case are not disputed. On August 31, 1999, the Honorable Margaret L. Workman resigned as a Justice of this Court, thereby creating a vacancy that can be filled only by gubernatorial appointment pursuant to Article VIII, § 7 of the West Virginia Constitution. On September 9, 1999, respondent, the Honorable Cecil H. Underwood, Governor of the State of West Virginia, announced his decision to appoint the Honorable Robert S. Kiss, currently Speaker of the House of Delegates, to fill Justice Workman's unexpired term, which ends following the 2000 general election. On September 22, 1999, Governor Underwood notified the Secretary of State that the appointment of Speaker Kiss as Justice of this Court would become effective, and that Speaker Kiss would begin to serve, at 12:00 a.m. on September 23, 1999.

Speaker Kiss was a member of the West Virginia House of Delegates during the 1999 legislative session.<sup>1</sup> During that session, the Legislature passed H.B. 105, which *inter alia* amended W. Va. Code § 51-1-10a by increasing the salary of the Justices of this Court from \$85,000 to \$95,000, effective July 1, 1999. *See* 1999 W. Va. Acts ch. 8. Petitioners rely upon this event in asserting that Speaker Kiss is constitutionally disqualified from serving on this Court.

After Governor Underwood publicly announced the appointment of Speaker Kiss as a Justice of this Court, and prior to the filing of the petitions in this matter, a ceremony was scheduled for September 20, 1999 for the purpose of administering the oath of office. Once the issue that is the subject of this case was publicly raised, however, Speaker Kiss canceled the swearing-in ceremony.

On September 23, 1999, John F. Rist, III, in his capacity as a citizen and taxpayer of the State of West Virginia, filed the instant petition for writ of mandamus and/or prohibition. In his petition, Rist asserts that Speaker Kiss is ineligible to serve the unexpired term created by the resignation of Justice Workman, based upon Article VI, § 15 of the West

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<sup>1</sup>Speaker Kiss' present two-year term as a member of the House of Delegates will expire after the next general election. He will hold the position as presiding officer of the House of Delegates, however, until a successor is elected and qualified, irrespective of the results of such election. W. Va. Code § 4-1-8 (1980); *see State ex rel. McGraw v. Willis*, 174 W. Va. 118, 323 S.E.2d 600 (1984).

Virginia Constitution. Later, on September 29, 1999, a second petition was filed by Richard A. Robb, and others, similarly asserting that Speaker Kiss is constitutionally disqualified from serving as a Justice on this Court pursuant to Article VI, § 15. Petitioners request that this Court issue an order directing Governor Underwood to appoint a constitutionally eligible person to fill the unexpired term of Justice Workman.

After the filing of the petitions in this matter, this Court issued a rule to show cause and determined that, because the principal issue—the eligibility of Speaker Kiss to occupy the position of Supreme Court Justice—was identical in both proceedings, the two cases should be consolidated and resolved jointly.

## II.

### STANDARD FOR MANDAMUS

Petitioners seek to invoke this Court’s original jurisdiction<sup>2</sup> by way of the extraordinary remedy of mandamus. Traditionally, we have confined mandamus to “limited and truly exceptional circumstances.” *State ex rel. School Bldg. Auth. v. Marockie*, 198 W. Va. 424, 432, 481 S.E.2d 730, 738 (1996) (citations omitted). *Accord State ex rel. Charleston Bldg. Comm’n v. Dial*, 198 W. Va. 185, 191, 479 S.E.2d 695, 701 (1996). This

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<sup>2</sup>Petitioner Rist relies upon the statutory mandamus remedy provided by W. Va. Code § 3-1-45 (1963) (“A mandamus shall lie from the supreme court of appeals . . . to compel any officer herein to do and perform legally any duty herein required of him”), rather than the original jurisdiction of this Court. Without passing upon whether such remedy is appropriate in the present context, we treat Rist’s claim for relief under the Court’s original jurisdiction.



Court applies a now-familiar three-part test to determine whether mandamus relief is appropriate:

A writ of mandamus will not issue unless three elements coexist—(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

Syl. pt. 1, *State ex rel. Billy Ray C. v. Skaff*, 190 W. Va. 504, 438 S.E.2d 847 (1993).

In Syllabus point 3 of *State ex rel. Brotherton v. Moore*, 159 W. Va. 934, 230 S.E.2d 638 (1976), the Court held that “[m]andamus lies to compel the governor to exercise his power of appointment under Section 9 of Article VII of the Constitution of West Virginia when the governor declines or fails to exercise his power for an unreasonable period of time.” The Court in *Moore* noted that “[w]hile mandamus cannot be used to compel the choice of a particular individual, it can be used to compel the exercise of the appointive power.” 159 W. Va. at 941, 230 S.E.2d at 642. Rather than seeking the appointment of a particular individual, however, petitioners effectively request the Court to compel Governor Underwood to exercise his appointive responsibilities in conformance with the constitutional requirement set forth in Article VI, § 15. For the purposes of the instant case, there is no significant distinction to be drawn between an appointment that is unreasonably delayed, and an appointment that contravenes constitutional requirements. Consequently, in line with our conclusion in *Moore*, mandamus will lie to resolve the question of whether a gubernatorial

appointee is constitutionally qualified to assume the office to which he or she has been appointed.

Although petitioner Robb seeks to invoke this Court's mandamus jurisdiction, he nevertheless argues that we should apply the jurisprudential doctrine of ripeness to avoid passing on the issue presented. Robb's ripeness argument appears to be grounded upon the fact that Speaker Kiss purports to still be a member of the House of Delegates, and thus, according to petitioner's argument, the issue of eligibility has not matured into a controversy suitable for our adjudication because the Governor's appointee has not assumed office.

We concur with petitioner Robb's underlying assumption that one may not hold judicial and legislative offices at the same time. This is a fundamental tenet of the separation of powers doctrine contained in our Constitution:

No person holding any other lucrative office or employment under this State, the United States, or any foreign government; no member of Congress; and no person who is sheriff, constable, or clerk of any court of record, shall be eligible to a seat in the legislature.

W. Va. Const. art. 6, § 13; *see also* W. Va. Const. art. V, § 1. Additionally, no Justice of this Court may hold any other office: "No justice, judge or magistrate shall hold any other office, or accept any appointment or public trust, under this or any other government." W. Va. Const. art. 8, § 7.

We have found in other cases that, where the prompt resolution of a controversy was necessary for the efficient operation of our government, arguments may be heard by this Court, although the ultimate outcome of a given question may remain inchoate.

When considering the weighty question of whether former Governor Moore could seek a third term of office in the elections of 1976, the Governor's counsel argued that mandamus was an improper remedy. Although the technical nature of that argument differed from the instant matter, we recognized this Court's power, and obligation, to act, even though it was still theoretically possible that Governor Moore would lose the election and render moot the question of his eligibility for a third term:

[T]his Court has recognized that some form of proceeding must be available by which interested parties may challenge in advance of a primary or general election the eligibility of questionable candidates in order to assure that elections will not become a mockery.

*State ex rel. Maloney v. McCartney*, 159 W. Va. 513, 527, 223 S.E.2d 607, 616 (1976). We recognized in a later case:

Experience dictates that there are occasions on which courts must undertake something in the nature of advisory opinions. We have done this in cases involving elections because of the expense attendant upon campaigns and the deleterious effect on representative government which uncertainty in elections causes. *State ex rel. Maloney v. McCartney*, [159] W. Va. [513], 223 S.E.2d 607 (1976). Similarly we have rendered essentially advisory opinions when it was necessary to permit bond counsel to authorize the marketing of bonds for public authorities. *State ex rel. City of Charleston v. Coghill*, 156 W. Va. 877, 207 S.E.2d 113 (1973). The need for certainty

before the investment of enormous amounts of human effort and before the investment of vast sums of money has led us to an *ad hoc* reappraisal of the common law requirement of a true adversary “case or controversy” as a condition precedent to court review.

*State ex rel. Alsop v. McCartney*, 159 W.Va. 829, 834-35, 228 S.E.2d 278, 281 (1976).

In the case before us today, it is clear that the Governor has appointed Speaker Kiss to fill (if eligible) the vacancy on this Court, and that no other person stands in the same position as the current appointee. Because of the importance of this issue—to this Court, the Legislature, and the public at large—we consider the present question ripe for adjudication.

### III.

#### DISCUSSION

There can be no debate concerning the reach, and effect, of the basic prohibition contained in Article VI, § 15, as it provides a straightforward and absolute bar against a member of the Legislature obtaining any public office that was created, or the emoluments of which were increased, during the legislator’s term of office.<sup>3</sup> What is at issue

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<sup>3</sup>In what appears to be a veiled portent of things to come, Governor Underwood alludes in his brief to the possibility of the Legislature’s negating the effect of the Emoluments Clause by repealing the underlying judicial pay increase, or enacting legislation reducing the compensation of Speaker Kiss to the salary in effect immediately prior to the most recent increase. Other state courts have rejected such devices. *See Vreeland v. Byrne*, 72 N.J. 292, 297, 370 A.2d 825, 827 (1977) (striking down as special legislation measure providing that pay increase for associate justice would not apply to member of legislature appointed to such position); *cf. State ex rel. Fraser v. Gray*, 158 Fla. 465, 470, 28 So.2d 901, (continued...)

in this case is the meaning to be ascribed to the exception regarding “offices to be filled by election by the people.” Speaker Kiss and Governor Underwood argue that this language broadly excepts offices that are elective in nature—in effect contending that the Emoluments Clause never applies to an office that will be subject to popular election at some future date. On the other hand, petitioners assert that the exception applies only to the more narrow circumstance of where a legislator is, in fact, elected by the people to a particular office. We begin our analysis with a detailed examination of the history of the constitutional provision at issue, and then turn to the more difficult task of ascertaining the meaning of the exception clause.

A.

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<sup>3</sup>(...continued)

903 (1947) (holding that appointee “cannot avoid the constitutional prohibition by remitting the raise in salary for the period of this election to the legislature”).

Both courses suggested by Governor Underwood would clearly run afoul of the Emoluments Clause, since there is no provision permitting the Legislature to annul operation of the rule by later decreasing the emoluments of an office. As one commentator has noted in the context of Congressional legislation aimed at circumventing the federal Emoluments Clause, “[a] statute cannot repeal history; it cannot undue the fact that the emoluments of the office *had been* “increased” during the [legislator’s term of office] . . . .” Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 Stan. L. Rev. 907 (1994) (emphasis in original) (contending that the appointment of Senator Bentsen as Treasury Secretary violated the Emoluments Clause); *see also* John F. O’Connor, *The Emoluments Clause: An Anti-Federalist Intruder in a Federalist Constitution*, 24 Hofstra L. Rev. 89 (1995). The former dean of the West Virginia College of Law astutely observed in testimony before the Congress that such rescission measures “smack[] of clever manipulation,” and makes the provision “the subject of deft maneuver.” *To Reduce the Compensation of the Office of Attorney General: Hearings on S. 2673 Before the Comm. On the Judiciary*, 93d Cong., 1st Sess. 43 (1974) (statement of Dean Willard D. Lorenson).

*History and Context of the Emoluments Clause  
in Virginia and West Virginia*

*1. The Emoluments Clause in Antebellum Virginia.*

The forerunner to Article VI, § 15 of the present West Virginia Constitution was enacted by the Virginia General Assembly in 1794. 1794 Va. Acts ch. 22, 1 *Statutes at Large of Virginia* 306 (Richmond, Samuel Shephard 1835).<sup>4</sup> The wording of the 1794 provision was taken almost verbatim from Article I, § 6, cl. 2, of the United States Constitution,<sup>5</sup> which was submitted for ratification by the states just seven years before.

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<sup>4</sup>This 1794 enactment provided:

That no senator or delegate, shall during the time for which he was elected, be appointed to any civil office under the authority of the Commonwealth, which shall have been created, or the emoluments whereof shall have been increased or decreased during such time.

<sup>5</sup>The Emoluments Clause of the United States Constitution provides as follows:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time . . . .

The emoluments prohibition was given constitutional status with the adoption of the Virginia Constitution of 1830.<sup>6</sup> Significant for present purposes was the insertion in the 1830 provision of an exception for “offices as may be filled by elections by the people.” The records of the constitutional convention shed no light, however, on the intended meaning of this language, as the provision was adopted without amendment or debate. *See Proceedings and Debates of the Virginia State Convention of 1829-1830* 40, 460-61, 804-5 (Richmond, S. Shepherd & Co. 1830).

The Framers of the 1830 Constitution would have understood the Emoluments Clause as primarily imposing a check on legislative corruption. A contemporary interpretation offered by Justice Story<sup>7</sup> indicated that the purpose behind the federal

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<sup>6</sup>Article III, § 8 of the Virginia Constitution of 1830 provided:

The members of the assembly shall receive for their services a compensation to be ascertained by law and paid out of the public treasury; but no law increasing the compensation of the members shall take effect until the end of the next annual session after such law shall have been enacted. And no senator or delegate shall, during the term for which he shall have been elected, be appointed to any civil office of profit under the commonwealth, which shall have been created, or the emoluments of which shall have been increased, during such term, except such offices as may be filled by elections by the people.

<sup>7</sup>Justice Joseph Story, of Massachusetts, served on the United States Supreme Court from 1812 to 1845. Appointed by President Madison, Story was the youngest person, at age 32, ever appointed to the Court.

provision was “to take away, as far as possible, any improper bias in the vote of the representative, and to secure to the constituents some solemn pledge of this disinterestedness.” Joseph Story, *Commentaries on the Constitution of the United States* § 867, at 330-31 (Boston, Hilliard, Gray & Co., 1st ed. 1833).<sup>8</sup> In addition to protecting the public fisc from collusive and self-serving conduct by legislators, the Emoluments Clause was also recognized as playing a crucial role in maintaining separation of powers. Alexander Hamilton succinctly observed that the Emoluments Clause “guards against the danger of executive influence upon the legislative body.” *The Federalist* No. 76 at 459 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Madison likewise noted that this provision was intended to limit the potential of the executive using its appointive power to corrupt the Congress:

Is there a danger apprehended from the other branches of government? But where are the means to be found by the President, or the Senate, or both? . . . . The only means, then,

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<sup>8</sup>Justice Story went on to say:

It is not easy, by any constitutional or legislative enactments, to shut out all or even many of the avenues of undue or corrupt influence upon the human mind. The great securities for society—those on which it must forever rest in a free government—are *responsibility to the people through elections*, and personal character and purity of principle. Where these are wanting there never can be any solid confidence or any deep sense of duty. Where these exist they become a sufficient guaranty against all sinister influences, as well as all gross offenses.

Story, *supra*, § 868, at 332 (emphasis added).



which they can possess, will be in the dispensation of appointments. Is it here that suspicion rests her charge. Sometimes we are told that this fund of corruption is to be exhausted by the President in subduing the virtue of the Senate. Now, the fidelity of the other House is to be the victim. . . . But, fortunately, the Constitution has provided a still further safeguard. The members of the Congress are rendered ineligible to any civil offices that may be created, or of which the emoluments may be increased, during their term of election. No offices therefore can be dealt out to the existing members but such as may become vacant by ordinary casualties . . . .

*The Federalist* No. 55 at 345 (James Madison).<sup>9</sup> Indeed, George Mason even went so far as to state that the provision provides “the corner-stone on which our liberties depend.” 1 *The Records of the Federal Convention of 1787* 381 (remarks of George Mason) (Max Farrand ed., 1911).

The Emoluments Clause was retained in the Virginia Constitution of 1851, although the exception language was truncated to “offices filled by elections by the people.”<sup>10</sup> While this alteration suggests an intent to clarify that popular election was the

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<sup>9</sup>James Madison participated in the drafting of the federal Emoluments Clause, and was also a leading figure in the convention that produced the 1830 Virginia Constitution.

<sup>10</sup>Article IV, § 10 of the Virginia Constitution of 1851 provided:

The members of the assembly shall receive for their services a compensation to be ascertained by law, and paid out of the public treasury; but no act increasing such compensation shall take effect until after the end of the term for which the members of the house of delegates voting thereon were elected. And no senator or delegate shall, during the term for which he

(continued...)

only means of abating the impediment imposed by the Emoluments Clause, the proceedings of the constitutional convention do not indicate an intent to work any substantive changes on the provision. The Committee on the Legislative Department, which was charged with drafting the article of the constitution dealing with the legislative branch of government, reported the provision to the Committee of the Whole without recommending any alterations to the language employed in the 1830 instrument. Likewise, no amendments to the section were recommended by the Committee of the Whole, nor was there any debate concerning any proposed changes. *See Journal, Acts and Proceedings of the General Convention of the State of Virginia, Assembled at Richmond, on Monday, the Fourteenth Day of October, Eighteen Hundred and Fifty* 330-357 (Richmond, W. Culley 1850).<sup>11</sup>

## 2. West Virginia During Reconstruction.

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<sup>10</sup>(...continued)

shall have been elected, be appointed to any civil office of profit under the commonwealth, which shall have been created, or the emoluments of which have been increased, during such term, except offices filled by elections by the people.

<sup>11</sup>The fact that the Framers of the Constitution of 1851 did not intend to substantively alter the provision in question does not necessarily support the notion that the exception was meant to broadly exempt all offices elective in nature. Indeed, the fact that the drafters of this later constitution made significant deletions without any recorded intent to substantively change the provision can certainly be construed as suggesting a then-existing acceptance of the exception clause as requiring popular election. *See* 1 A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 486 (1974) (noting that Emoluments Clause of 1830 Constitution “except[ed] offices filled by popular election,” and “saw only minor changes [in Virginia] until 1902 . . .”).

The Emoluments Clause of preceding Virginia constitutions was not incorporated into West Virginia's first constitution, which was ratified in 1863. Rather, it was inserted in its present form—with only minor modifications to the language employed in earlier Virginia constitutions—in the Constitution of 1872.

The architects of our 1872 Constitution, who restored this provision, were no doubt influenced by the Reconstruction era.<sup>12</sup> The contentious history of the State's creation, forged in the crucible of the Civil War, is well known; the stories of brother fighting brother, of counties and communities torn apart, are familiar to all. What must also be recalled in addressing the issue before the Court in the instant case, is the impact that the conditions prevailing at that time had on the shaping of our present Constitution.

A hallmark of the Reconstruction era was the failure of democratic institutions to preserve the peace, and a concomitant weakening of the people's faith in those institutions.

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<sup>12</sup>Indeed, some states were moved by the experiences of Reconstruction to altogether eliminate the exception for popular elections. As the Florida Supreme Court recounted in *State ex rel. West v. Gray*, 74 So.2d 114, 117 (Fla. 1954):

[A]t that time [of amendment], the people were just emerging from the reconstruction period following the War Between the States; they still bore the scars of Carpetbag Rule; the memories of the political abuses suffered thereunder were still fresh in their minds; and we can well surmise that they intended to prohibit “trafficking” in public offices, both elective and appointive, from which they had suffered during that regime.

The decisive events in our early history—the First Wheeling Convention of May 1861, the Second Wheeling Convention of June 1861, the referendum on our separation from Virginia, and the selection of delegates to the First Constitutional Convention of West Virginia—all failed to draw a truly democratic and full accounting of the will of the people. Close examination of any of those votes reveals very “undemocratic” results concealed beneath a veneer of popular democracy. An elected representative to the first Constitutional Convention, a Mr. Hagar of Boone County, remarked upon the unsatisfactory way in which the delegates were selected:

“If . . . Cabell County, which borders on the Ohio River, had to have a military force to hold an election there; if Boone had to have a military force to hold an election at two points [out of the usual eight]; if a detachment went up and . . . got into a corner of Raleigh and held an election there, with what difficulty are the counties represented!”

James C. McGregor, *The Disruption of Virginia* 268-269 (1922).<sup>13</sup> Much the same could be said of the eventual adoption of the first Constitution of this State by the people, which “was adopted by the suspiciously large majority of 20,442 to 440.” Richard Orr Curry, *The Virginia Background for the History of the Civil War and Reconstruction Era in West*

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<sup>13</sup>Other historians have commented upon this. Rice and Brown note that Webster and Monroe Counties sent no delegates at all to the First Constitutional Convention, and war-time disturbances interfered with the vote in Calhoun, Clay, Fayette, Logan, McDowell, Mercer, Nicholas, and Wyoming Counties. Otis K. Rice & Stephen W. Brown, *West Virginia, A History* 140-41 (1993). “For instance, Dr. D.W. Gibson of Pocahontas County was elected [to the convention] by refugees at Buckhannon in Upshur County.” *Id.* at 141. Furthermore, Wyoming and Fayette Counties never even held elections to select delegates, but were instead represented by delegates who came to the convention bearing petitions signed by residents of their counties. McGregor, *supra*, at 258.

*Virginia: An Analytical Commentary*, 20 W. Va. History 215, 244 (1959) (noting that Greenbrier, Logan, McDowell, Mercer, Monroe, Raleigh, and Wyoming Counties never reported returns for or against the first Constitution).

Ardent Unionists, firmly in control of the legislature of the new state they had created, wished to ensure that former rebels were punished for their crimes and kept far from the rudder of the ship of state. This sentiment manifested itself in the form of the “test oath” or “loyalty oath” that became mandatory for a host of occupations.<sup>14</sup> The oath was designed

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<sup>14</sup>The oath read as follows:

I, A.B. (name of affiant) do solemnly swear that I have never voluntarily borne arms against the United States, the reorganized government of Virginia, or the State of West Virginia; that I have never voluntarily given aid, comfort or assistance to persons engaged in armed hostility against the United States, the reorganized government of Virginia, or the State of West Virginia; that I have not at any time sought, accepted, exercised, or attempted to exercise any office or appointment whatever, under any authority or pretended authority, hostile or inimical to the United States, the reorganized government of Virginia, or the State of West Virginia; that I have not at any time yielded a voluntary support to any government or pretended government, power or constitution within the United States, hostile or inimical thereto, or hostile or inimical to the reorganized government of Virginia, or the State of West Virginia; that I will support the constitution of the United States and the constitution of the State of West Virginia; and I take this oath freely without any mental reservation or purpose of evasion.

1865 W. Va. Acts ch. 56.

by those in power, and loyal to the Union, to prevent any ex-Confederate from participating in government. This was made clear in the remarks of one James H. Fergusson, of Cabell County, the author of the bill that required the oath: “I do not want the rebels to have any share in government. If they do I shall be defeated by five hundred votes.” Milton Gerofsky, *Reconstruction in West Virginia*, 6 W. Va. History 295, 302 (1945) [hereinafter *Reconstruction I*] (quoting Charles H. Ambler, *Disfranchisement in West Virginia*, 14 Yale Rev. 38 (1905)) (internal quotation marks omitted).

This Court examined the “test oath” in the context of an election for circuit clerk. William Stratton, a former Confederate, was elected Circuit Clerk of Logan County. When he refused to take the oath, the circuit judge would not qualify him for office. He requested that this Court issue a writ of mandamus on the basis that the oath was unconstitutional. This Court denied the writ, explaining:

Our legislature possessing all the legislative power of the State, it follows that it was competent for it to pass the act prescribing the test oath in question . . . .

. . . .

The provision in my judgment, is not retrospective nor *ex post facto*. No one having a natural or inalienable *right* to an office, it follows that all who seek it must accept the office with all the restrictions and conditions imposed by law.

*Ex parte William Stratton*, 1 W. Va. 304, 305-6 (1866).<sup>15</sup>

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<sup>15</sup>The Legislature of 1869 unseated a representative of Wyoming County, John McCraw (a forbearer of a member of this Court), on the basis of the oath. The voters of the  
(continued...)

The Legislature demanded, and this Court upheld, oaths for jurors, *Lively v. Ballard*, 2 W. Va. 496 (1868); lawyers, *Ex parte Hunter*, 2 W. Va. 122 (1867); *Ex parte Quarrier*, 4 W. Va. 210 (1870); *Ex parte Charles James Faulkner*, 1 W. Va. 269 (1866); litigants or potential litigants, *Higginbotham v. Haselden*, 3 W. Va. 17 (1868); and even voters in public elections, *Randolph v. Good*, 3 W. Va. 551 (1869).

Another way in which the oath was used to inflict punishment on ex-Confederates, was by denying them justice in the courts. Many ex-confederates were sued, had their land taken, or suffered other losses of money or property, and were more often than not, denied redress. Because the plaintiffs, lawyers, every member of the jury, and the judge all had to take the “test oath” before the trial, and were all presumably “loyal” as a result, unfavorable outcomes for “disloyal” defendants were the order of the day. *See, e.g., Cunningham v. Pitzer*, 2 W. Va. 264 (1867) (jury found against ex-Confederate defendant for aiding the Confederate army in the confiscation of the plaintiff’s wheat); *Caperton v. Martin*, 4 W. Va. 138 (1870) (pro-Union plaintiff sued ex-Confederate defendant for false imprisonment for his capture and captivity during the war and won \$600 in damages);

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<sup>15</sup>(...continued)

sixth delegate district chose McCraw in the election of 1868. Although the House Journal of January 19, 1869, indicates that McCraw had taken the necessary oaths and qualified for office, Delegate Smith of Kanawha County, on January 21, 1869, introduced the petition of one William Roach, who sought McCraw’s removal. On February 2, 1869, the House voted to remove McCraw, 35 to 16, resolving that “John McCraw, the sitting member from the sixth delegate district, is not entitled to his seat in this House. . . .” *Journal of the House of Delegates of the State of West Virginia*, 7th Sess., 46-47 (1869).

*French v. White*, 4 W. Va. 170 (1870) (another false imprisonment case, similar to *Caperton*). It is apparent from these cases that the Legislature used the “test oath” to disenfranchise a substantial portion of the electorate.<sup>16</sup>

This situation prevailed until the elections of 1869 and 1870, where the Democrats (including many ex-confederates) gained substantial power in the Legislature. Then, in August of 1871, West Virginians voted 30,220 to 27,658 in favor of a constitutional convention. The convention assembled at Charleston, which had become the capital by 1870, with only twelve Republican delegates (dubbed the “twelve apostles”), and with United States Senator Waitman T. Wiley, of Morgantown, as the only holdover from the First Constitutional Convention. See Milton Gerofsky, *Reconstruction in West Virginia*, 7 W. Va. History 5, 13-15 (1945) [hereinafter *Reconstruction II*].

The upshot of this discussion is that the men who drafted the 1872 Constitution, and who reinserted the Emoluments Clause as contained in previous Virginia constitutions, 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. Preventing the abuses and self-dealing of the “carpetbaggers” of the Reconstruction period must have been

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<sup>16</sup>For more discussion of the disenfranchisement suffered by those citizens who sympathized with the Confederacy, see *Reconstruction I, supra*, at 349-352.



foremost in their minds.<sup>17</sup> And so we, today, bear in mind this history as we consider the question before us.

B.

*Construction of the Election Exception*

“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.” *State ex rel. Brotherton v. Blankenship*, 157 W. Va. 100, 108, 207 S.E.2d 421, 427 (1973); *see also State ex rel. Mountaineer Park, Inc. v. Polan*, 190 W. Va. 276, 279, 438 S.E.2d 308, 311 (1993). Accordingly, our analysis in this case begins with the language of Article VI, § 15. *See Randolph County Bd. of Educ. v. Adams*, 196 W. Va. 9, 15, 467 S.E.2d

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<sup>17</sup>As an example of the evil they sought to prevent, one may examine the story of Judge Nathaniel Harrison of what was then the 7th Judicial Circuit, which encompassed Greenbrier, Nicholas, Monroe, and Pocahontas Counties—an area that was substantially pro-Confederate during the war. Among various abuses, Judge Harrison ejected all former Confederates from office, even though they had been popularly elected in the elections of 1865; enforced the “test oath” and “forfeiture” acts relentlessly; demanded that all legal ads be placed in a paper that he owned; suggested parties use a particular lawyer, from whom Harrison received a percentage of the fees; sat in cases in which he, himself was an interested party; and charged cash for approving pardon applications for ex-Confederates. *See Reconstruction II, supra*, at 13-15.

When a former Confederate officer sought Harrison’s impeachment in the House of Delegates in February of 1866, members or staff of the House beat him, ejected him from the chamber, and called his formal request for Harrison’s impeachment “a paper which was deemed by this House a malicious attempt to publicly slander one of the Circuit Judges of this State.” *Journal of the House of Delegates of the State of West Virginia*, 4th Sess., 115 (1866). Others attempted to remove Harrison from office, but he managed to hold on to his position until the Legislature of 1870 adopted articles of impeachment against him. *Reconstruction II, supra*, at 13-15.

150, 156 (1995); *Polan*, 190 W. Va. at 283, 438 S.E.2d at 315 (stressing that “[a]s in every case involving the application or interpretation of a constitutional provision, analysis must begin with the language of the constitutional provision itself”). “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); *see also* Syl. pt. 1, *State ex rel. Maloney v. McCartney*, 159 W. Va. 513, 223 S.E.2d 607 (1976). Importantly, at this stage of statutory interpretation, “[c]ourts are not concerned with the wisdom or expediences of constitutional provisions, and the duty of the judiciary is merely to carry out the provisions of the plain language stated in the constitution.” Syl. pt. 3, *State ex rel. Casey v. Pauley*, 158 W. Va. 298, 210 S.E.2d 649 (1975).

In this case, we fail to discern any unequivocal meaning from the wording of the exception language. Reasonable persons can easily disagree as to the scope of the phrase, “offices to be filled by election by the people.” We are not the first court to recognize ambiguity in such a provision: The Supreme Court of California long ago recognized the ambiguity inherent in similar language contained in the California Constitution of 1849, stating that the inclusion of such an exception

had the effect of injecting doubt and uncertainty as to limitation thereby placed upon the operation of the language which preceded it. Did the exception mean that the language preceding it should not apply to the appointment of a legislator who should run and be elected to another elective office during

the term for which he had been elected a member of the senate or general assembly? Or did the exception mean that the prohibition should not apply to the appointment of a legislator to an elective office, that is, an office normally filled by election by the people?

*Carter v. Commission on Qualifications of Judicial Appointments*, 14 Cal.3d 179, 182-83, 93 P.2d 140, 142 (1939).

“Questions of constitutional construction are in the main governed by the same general rules applied in statutory construction.” Syl. pt. 1, *Winkler v. State School Bldg. Auth.*, 189 W. Va. 748, 434 S.E.2d 420 (1993). Because the exception clause of Article VI, § 15 is ambiguous, “ordinary principles employed in statutory construction must be applied to ascertain such intent.” *Blankenship*, 157 W. Va. at 108, 207 S.E.2d at 427. Of course, “[t]he object of construction, as applied to written constitutions, is [always] to give effect to the intent of the people in adopting it.” Syl. pt. 3, *Diamond v. Parkersburg-Aetna Corp.*, 146 W. Va. 543, 122 S.E.2d 436 (1961).

Respondents assert that because the Emoluments Clause restricts an individual’s right to hold public office, it must be construed in favor of eligibility. In support of this argument, respondents cite to *State ex rel. Maloney v. McCartney*, *supra*, where this Court stated in Syllabus point 3, in part, that “[i]n the event of ambiguity a constitutional amendment will receive every reasonable construction in favor of eligibility for office . . . .” According to Governor Underwood, “[o]nly where a constitutional provision clearly and

unambiguously precludes a gubernatorial appointment may such appointment be invalidated by the judiciary.”<sup>18</sup> We reject this standard in the present context.

While “a strong public policy exists in favor of eligibility for public office,” *Oceanographic Comm’n v. O’Brian*, 74 Wash.2d 904, 914, 447 P.2d 707, 712 (1968), in this case we are faced with the competing consideration of maintaining a constitutionally-mandated separation between the executive and legislative branches of government. Again, the Emoluments Clause is aimed not just at eliminating self-dealing on the part of legislators; rather, it is also intended to forestall even the remotest possibility of executive influence over the legislature. The Emoluments Clause is therefore part of our rigorous system of interbranch separation of powers, ancillary to the fundamental directive set forth in Article V, § 1 of the West Virginia Constitution.<sup>19</sup>

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<sup>18</sup>Speaker Kiss similarly argues that “unless this Court concludes that the exception in question unambiguously fails to exempt elective offices from the general prohibition of the Emoluments Clause, fundamental jurisprudential considerations mandate a ruling in favor of the viability of the appointment and the eligibility of the appointee to office.”

<sup>19</sup>Article V, § 1 provides:

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, except that justices of the peace shall be eligible to the legislature.

The Emoluments Clause is therefore closely related to Article VI, § 13 of the West Virginia (continued...)

As we stated in Syllabus point 1, in part, of *State ex rel. Barker v. Manchin*, 167 W. Va. 155, 279 S.E.2d 622 (1981), the doctrine of separation of powers “is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed.” *See also In re Dailey*, 195 W. Va. 330, 333, 465 S.E.2d 601, 604 (1995) (stating that “[t]he commitment of this Court to a strict application of the doctrine of separation of powers . . . [has] been unwavering.”); *State ex rel. Meadows v. Hechler*, 195 W. Va. 11, 14, 462 S.E.2d 586, 589 (1995) (“The separation of powers doctrine expressly stated in our constitution is a core principle of our system of government . . .”).

Petitioner Robb is correct in pointing out that we are not concerned in this case with the right of an individual to stand for *election* to public office, which this Court has stressed is a “fundamental right” that can only be infringed upon by a showing of “compelling state interest,” *White v. Manchin*, 173 W. Va. 526, 543, 318 S.E.2d 470, 488 (1984); instead, we are faced with the question of whether an individual who has already been elected to (and assumed) a position in the Legislature may thereafter be *appointed* to another governmental post during an existing term of office. Under these circumstances, we fail to discern any overarching public policy favoring eligibility. We therefore reject

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<sup>19</sup>(...continued)

Constitution, which prohibits a member of the Legislature from “holding any other lucrative office or employment under this State, the United States, or any foreign government . . . .”

respondents' argument that the Emoluments Clause of Article VI, § 15 should be strictly construed in favor of eligibility.

In support of their basic argument that the exception language in Article VI, § 15 exempts legislators who are appointed to offices that are elective in nature (rather than offices affirmatively “filled by election by the people”), respondents point to two cases from Alabama and California. In these cases, the courts held that since the constitutional prohibition pertains exclusively to “appointments,” the exception must be construed to relate to the nature of the appointed office if it is to have any significant meaning.

The Supreme Court of Alabama concluded in *Opinion of the Justices*, 278 Ala. 38, 38-39, 181 So.2d 105, 106-107 (1965), that

[i]f the section ended just before the word “except,” no member of the Legislature could ever be *appointed*, during his term, to any office created by the Legislature of which he was a member. But the words, “except such offices as may be filled by election by the people” must have some meaning. The only reasonable conclusion is that excepted from the rule of Section 59 is an appointment to an office which “may be filled by an election by the people.”

(Emphasis added.) Likewise, in *Carter v. Commission on Qualifications of Judicial Appointments*, 14 Cal.3d 179, 93 P.2d 140 (1939), the California Supreme Court concluded as follows:

If the section as originally adopted had any other meaning than the exception removed elective offices from the operation of the

prohibitory clause, the inclusion of the exception was meaningless and surplusage, for the section would then mean that legislators were ineligible for appointment except when they obtained their offices by election. *There is, of course, a well-defined and fundamental difference between the acquisition of an office by appointment on the one hand, and by election on the other.* . . . Some meaning must be ascribed to the excepting clause and when we seek to ascertain it, the reasonable, if not the only logical conclusion is that the exception had the effect of describing the kind and character of the offices thereby removed from the operation of the prohibitory clause and not the method which the offices were to be filled.

*Id.* at 186, 93 P.2d at 142 (emphasis added).<sup>20</sup>

This Court has traditionally adhered to the rule that “if possible, effect should be given to every part and to every word of a constitutional provision and that, unless there is some clear reason to the contrary, no part of the fundamental law should be regarded as surplusage.” Syl. pt. 2, in part, *Diamond v. Parkersburg-Aetna Corp.*, *supra*. In this case, however, Article VI, § 15 proscribes *election* as well as *appointment* to office. The exception language of our Constitution can therefore be construed as requiring popular election without rendering it meaningless—*i.e.*, the exception clause pertains to a class of election, “election[s] by the people.”

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<sup>20</sup>Significantly, the emoluments provisions contained in the California Constitutions of 1849 and 1879, which were a major focus in *Carter*, pertained singularly to the eligibility of a legislator to be “appointed” to a civil office.

Respondents' argument becomes more persuasive, however, when we consider the earlier Virginia constitutions upon which Article VI, § 15 was based. The Virginia Constitutions of 1830 and 1851 merely proscribed "appoint[ment]," rather than election to office. Thus, at first blush, the rationale of the Alabama and California supreme courts would appear applicable.

A distinction between the terms "elected" and "appointed" was recognized in this jurisdiction as early as 1866, when Judge Harrison noted in dissent: "The term 'elected,' generally speaking, imports popular election. The term 'appointed' excludes that idea and refers the office or trust to some other source." *Ex Parte Faulkner*, 1 W. Va. 269, 298-99 (1866) (Harrison, J., dissenting). However, the Virginia Constitution of 1830 apparently did not employ these words as mutually exclusive terms. For example, while the instrument used the term "appoint" to refer to the General Assembly's act of selecting the attorney general and officers of the militia (above the rank of brigadier general), it described the comparable power of the legislature to select the governor and various judges in terms of "elect[ing]."

Other courts interpreting early state constitutions have made similar observations in concluding that the term "appointed" can be broadly read as encompassing the word "elected." In *State ex rel. Wagner v. Compson*, 34 Or. 25, 54 P. 349 (1898), the Oregon Supreme Court, in interpreting its state constitution, observed that



“The word ‘appoint’ was probably used as a more comprehensive term, to convey the idea of a mode of constituting or designating an officer, whether by election or otherwise. In fact, the words ‘elect’ and ‘appoint’ seem to have been regarded as synonymous by the convention.” The word “elect” simply means to pick out, to select from among a number, or to make choice of, and is synonymous with the words “choose,” “prefer,” “select,” and it was evidently used in this sense in the constitution.

While the words “elect” and “appoint” are not ordinarily synonymous, we think a careful examination of the language of our constitution will show that, in some instances, the framers of that instrument have used them as such.

34 Or. at 32-33, 54 P. at 351 (quoting *People ex rel. Aylett v. Langdon*, 8 Cal. 1 (1857)). See also *Wagner v. City of San Angelo*, 546 S.W.2d 378, 379 (Tex. Civ. App. 1977) (“[T]he term ‘appointment’ appears to be used in this section [of the statute] as a more comprehensive term, to convey the idea of a mode of constituting or designating the head of the department, whether selected by appointment, election, or otherwise.”) (citing *Compson, supra*).

The insertion of the word “elected” into the West Virginia Constitution of 1872 should properly be viewed as merely clarifying the intent of the original Framers of the provision in question. Consequently, we find no merit in respondents’ argument that the exception language of Article VI, § 15 would be rendered nugatory or meaningless when construed as requiring *de facto* popular election.

Given the long history of the emoluments clause in our jurisdiction, we are drawn back to the Virginia Constitution of 1830, where the exception language at issue today was first included. A frequently relied upon canon of construction is that statutes relating to the same subject should be construed together as far as possible to determine legislative intent: “Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments.” Syl. pt. 3, *Smith v. State Workmen’s Compensation Comm’r*, 159 W. Va. 108, 219 S.E.2d 361 (1975); see Syl. pt. 3, *Boley v. Miller*, 187 W. Va. 242, 418 S.E.2d 352 (1992). The same rule applies, of course, with equal force when discerning the intent of framers of constitutions. *Blankenship*, 157 W. Va. at 108, 207 S.E.2d at 427.

Not only did Article III, § 8 of the Virginia Constitution of 1830 contain an emoluments clause essentially indistinguishable from that which we construe today, it also provided in the very same section that “no law increasing the compensation of the members shall take effect until the end of the next annual session after such law shall have been enacted.”<sup>21</sup> The striking aspect of the compensation clause is that it effectively required an intervening popular election *before* any increase in pay could take effect.

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<sup>21</sup>See footnote 6, *supra*, for the text of Va. Const. of 1830, art. III, § 8.

Viewing the Emoluments Clause in the context of this closely-related provision, it would be unreasonable to conclude that the Framers of the 1830 Constitution (or the drafters of later constitutions) on the one hand intended to expose legislative pay increases to prior electoral scrutiny, but nevertheless acquiesced in permitting legislators to obtain similar gain through non-elective appointments to office. Our jurisprudence abhors such illogic. *See State v. Kerns*, 183 W. Va. 130, 135, 394 S.E.2d 532, 537 (1990) (recognizing “duty of this Court to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results”); *State ex rel. Simpkins v. Harvey*, 172 W. Va. 312, 321, 305 S.E.2d 268, 277 (1983) (citing earlier cases).

Consideration of the 1830 Virginia Constitution is not an idle academic exercise. The constitutional restriction on the Legislature’s ability to vote itself an immediate pay increase survived until the latter part of this century. The requirement that any legislative pay raise be preceded by a popular election was carried over into Article IV, § 10 of the Constitution of 1851.<sup>22</sup> The first West Virginia Constitution, ratified in 1863, went even further by specifying the rate of pay for legislators—effectively requiring a constitutional amendment to implement any increase in compensation. *See* W. Va. Const. of 1863, art. IV, § 33. This approach was also employed in Article VI, § 33 of the 1872 Constitution. As we recognized in *State ex rel. Holmes v. Gainer*, 191 W. Va. 686, 690, 447

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<sup>22</sup>See footnote 10, *supra*, for the text of Va. Const. of 1851, art. IV, § 10.

S.E.2d 887, 891 (1994), “[t]his constitutional requirement made it extremely difficult to get a legislative compensation constitutional amendment to increase legislative salaries passed with any frequency by the voters.” Only two pay increases (in 1920 and 1954) were passed by constitutional amendment prior to 1970, when the section was substantially rewritten to place the responsibility for initiating pay increases in the hands of an independent citizens legislative compensation commission.

The notion that the Emoluments Clause is part of a broader design to provide the public with an advance opportunity to pass upon potentially self-serving increases in compensation is also bolstered by reference to constitutional provisions pertaining to executive pay. The 1863 West Virginia Constitution prohibited any increase or decrease in compensation during a public officer’s term of office. W. Va. Const. of 1863 art. III,

§ 9.<sup>23</sup> This prohibition remains operative in Article VI, § 38 of our present Constitution.<sup>24</sup>

The Court previously discussed at length the purpose underlying this provision:

The command of the Constitution that the salary of no public officer shall be increased or diminished during his term of office, is a wise and salutary mandate. Its purpose is to establish definiteness and certainty in the salaries of public officers and to protect and safeguard the independence, the security, and the efficiency of the occupant of every public office. It assures the people that those who serve them as public officers shall give their services during their terms for the amount of compensation for which they were willing to serve and have been selected, and for which they were expected by the people to serve at the time of their entrance upon the performance of their duties. It prevents attacks upon officials by

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<sup>23</sup>A similar provision was contained in the 1830 Virginia Constitution, which provided that the governor's compensation "shall be neither increased nor diminished during his continuance in office." Va. Const. of 1830, art. IV, § 3; *see also* Va. Const. of 1851, art. V, § 4 (specifying gubernatorial salary and directing that such officer "shall receive no other emoluments from this or any other governments").

<sup>24</sup>Article VI, § 38 of our present Constitution provides:

No extra compensation shall be granted or allowed to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract made; nor shall any legislature authorize the payment of any claim or part thereof, hereafter created against the State, under any agreement or contract made, without express authority of law; and all such unauthorized agreements shall be null and void. *Nor shall the salary of any public officer be increased or diminished during his term of office*, nor shall any such officer, or his or their sureties be released from any debt or liability due to the State: Provided, the legislature may make appropriations for expenditures hereafter incurred in suppressing insurrection, or repelling invasion.

(Emphasis added.) *See also* W. Va. Code § 6-7-7 (1923).

those who may be possessed, at any time, of the means and the will to influence or control their course of conduct through added income at public expense; and *it removes the possibility of increasing in that manner the financial burden of the people by those who possess and exercise the power of government and the authority of public office.* The benefits which result from the operation of this provision of the Constitution promote sound and orderly administration of government, and this provision may not be dispensed with, circumvented, or ignored.

*Harbert v. County Court of Harrison County*, 129 W. Va. 54, 62-63, 39 S.E.2d 177, 185 (1946) (emphasis added); *see also Delardas v. County Court of Monongalia County*, 155 W. Va. 776, 781, 186 S.E.2d 847, 851 (1972). As Professor Bastress notes, this provision “provides a measure of independence and protection for public officials because they will not be influenced by the promise of a raise or the threat of a salary decrease. Conversely, the section prevents those in positions of power in the government from using that power to extract unreasonably high salaries.” Robert M. Bastress, *The West Virginia State Constitution* 164 (1995). With respect to the latter purpose, the ultimate check as to elective officers comes from the fact that this provision ensures an intervening popular election *prior* to the implementation of any increase in compensation.

To construe the exception language of Article VI, § 15 in the manner suggested by respondents would thus require that we ignore the constitutional scheme intended by the Framers. The fact that a vital part of that design—the limitation on the Legislature’s ability to increase its pay without an express or presupposed referendum—has since been altered by constitutional amendment, does not affect the inescapable conclusions

that must be drawn with respect to the intent of the original Framers. The recent change made to Article VI, § 33 does not diminish the considerable force that these antecedent provisions bring to bear in construing the Emoluments Clause at issue. Indeed, it is well established that “when an article has two distinct sections dealing with related matters, amendment[] to one section is not an amendment to the others because it is presumed that if the legislature had intended an amendment to apply to both sections it would have expressed such an intent.” 1A Norman J. Singer, *Sutherland Statutory Construction* § 22.34, at 298 (5th ed. 1991) (footnote omitted).

Our reading of the language of Article VI, § 15 is further strengthened when we consider the experiences of the drafters of our present Constitution, who reintroduced the Emoluments Clause into the organic law of this jurisdiction. The abuses that occurred during Reconstruction, which resulted most notably from a lack of popular accountability, must surely have moulded the thinking of the Framers of the 1872 Constitution, such that they would have intended that true, representative democracy would hold sway whenever possible. Our construction of the provision in question faithfully takes those motivations into account.

Consequently, we hold that Article VI, § 15 of the West Virginia Constitution, with one exception, renders a member of the Legislature ineligible to be elected or appointed to a civil office for profit in this State, which has been created, or the emoluments of which

have been increased, during the legislator's term of office. We also hold that the exception for "offices to be filled by election by the people," operates to allow an otherwise ineligible legislator to gain public office through popular election. In effect, only a vote of the people can overcome the impediment imposed by the Emoluments Clause. In light of such holding, we are compelled to grant the mandamus relief sought by petitioners.

We must stress, however, that the holding in this case does not pose a significant obstacle to otherwise highly qualified persons gaining appointive office. Importantly, the provision in question applies only to a legislator's current term of office. Upon the expiration of such term, a legislator again becomes eligible for appointment to civil office.<sup>25</sup> Moreover, the Emoluments Clause places no disability whatsoever on a legislator who gains office through election by the people. Thus, we fail to see how our conclusion today will have any serious negative impact upon the ability of members of the Legislature to later serve the people of this State.

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<sup>25</sup>In this respect we note that the restriction of the Emoluments Clause is more short-lived than what is imposed upon a broad class of public officials by the West Virginia Governmental Ethics Act, W. Va. Code ch. 6B. For example, the prohibition against a former public official appearing in a representative capacity before a governmental entity in which he or she previously served extends for six months *after* the term of public service has ended. W. Va. Code § 6B-2-5(g)(1) (1995).



#### **IV.**

#### **CONCLUSION**

For the reasons stated, we grant the relief requested by petitioners, and issue a writ of mandamus requiring respondent, Governor Cecil H. Underwood, to discharge his duty under W. Va. Const. art. VIII, § 7 by appointing an individual to the office of Justice of the Supreme Court of Appeals who is constitutionally qualified to hold such office, and who is not barred from such service by operation of Article VI, § 15 of the West Virginia Constitution.

Writ of mandamus,  
as moulded, granted.