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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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No. 26653 - State of West Virginia ex rel. John F. Rist, III, v. Honorable Cecil H. Underwood, Governor of the State of West Virginia, and Robert S. Kiss

No. 26654 - 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. v. Honorable Cecil H. Underwood, Governor of the State of West Virginia, and Robert S. Kiss

Maynard, Justice, dissenting:

With the majority decision, this Court has attacked both the Legislature and the Governor with a sledgehammer. I, for one, do not believe that they will take it lying down. This decision will have far-reaching and long-lasting consequences for the entire judicial branch of government in West Virginia for many years to come.

Every eighth grade West Virginia civics student understands our system of checks and balances. When one branch of government becomes arrogant in its use of power, the system of checks and balances provides a remedy. In plain language, when one branch behaves like barracudas, another branch "reels'em" in. In this case, the majority has stripped the Governor of his power of appointment and denied members of the Legislature their right to hold certain public offices. I fear the outcome will be grave.

This decision amounts to nothing less than a judicial Pearl Harbor. Japanese Admiral Isoroku Yamamoto is quoted as saying about the United States right after the attack, "I fear all we have done is awaken a sleeping giant and fill him with a terrible resolve." To continue the metaphor, that is precisely what this Court has done to the Legislature of West Virginia. This Court cannot continue to thumb its nose at the other branches of government. The Legislature and the Governor will not stand by and continue to allow this Court to usurp their constitutional powers. I genuinely fear that the Legislature will now be "a giant filled with a terrible resolve." There is already talk in the press that the Legislature may attempt to make changes in the budget making power of the Court. I fervently hope that does not occur. But some effort to exercise checks and balances on this Court's power will surely be attempted. That effort could even result in a fundamental change in the way we select judges in this State. In fact, many West Virginia lawyers and several state newspapers have already advocated radical changes in the judicial selection process. Some urge merit selection for judges and others support nonpartisan elections. The minority opinion in The Final Report of the Commission on the Future of The West Virginia Judiciary recommends the merit selection of judges. It would not surprise me if there was a movement to adopt the Virginia system wherein judges are selected by the Legislature. While it is impossible to predict what specific changes will come about as a result of this decision, make no mistake, changes are coming.

Aside from the many negative practical effects of this decision, a few of which are set forth above, the majority is wrong about the law. First, the majority ignores clear constitutional language. Article VI, Section 15 of our Constitution prohibits a senator or delegate from being elected or appointed to a civil office of profit during the same term in which the civil office was created, or its emoluments increased, "except offices to be filled by election by the people." Thus, this provision expressly excludes publicly-elected offices from its prohibition. It is undisputed that the office of justice of the supreme court of appeals is constitutionally established as a publicly-elected office or one to be filled by election by the people. Article VIII, Section 2 of the Constitution provides, in relevant part, that "[t]he justices shall be elected by the voters of the State for a term of twelve years, unless sooner removed or retired as authorized in this article." Delegate Kiss fits within the exception to the prohibition contained in Article VI, Section 15 because he was appointed to the office of justice which is an office to be filled by election by the people. The office does not temporarily shift from being an elective office to being an appointive office merely because a seat is vacated which must be filled until the next election.

Second, the majority opinion is wrong because it disregards our precedential authority which states that when we consider the constitutionality of an executive appointment, there is a strong presumption in favor of eligibility. As noted above, I believe the language of Article VI, Section 15 is clear. Even if it is not clear, however, the respondents should prevail. Our law states that "[i]n the event of ambiguity a constitutional

amendment will receive every reasonable construction in favor of eligibility for office[.]" Syllabus Point 3, *State ex rel. Maloney v. McCartney*, 159 W.Va. 513, 223 S.E.2d 607 (1976). This is because the governor's power of appointment, within constitutional limits, is plenary. Also, the valuable right of a citizen to hold public office should not be denied except by plain provisions of the law. In the instant case, Governor Underwood used his authority under Article VIII, Section 7 of the Constitution to appoint Speaker Kiss to fill a vacancy of this Court. During oral argument, the petitioners in case No. 26654 acknowledged that Article VI, Section 15 is susceptible of two different interpretations. Accordingly, we should construe any ambiguity in Article VI, Section 15 in favor of Speaker Kiss's eligibility for office as plainly required by well-settled law. Instead, the majority does the opposite and construes an ambiguity manufactured by these petitioners in favor of ineligibility.

Third, the majority opinion is wrong because it ignores the persuasive authority of other states. Courts which have considered this issue under state constitutions with similar provisions have ruled that such provisions do not prohibit the gubernatorial appointment of members of the legislature to a judicial office where the members of such judicial office are subject to public election. The constitutions of nine other states have constitutional provisions similar to our own which exempt offices to be filled by election by the people. *See* Ala. Const. Art. IV, § 59; Cal. Const. Art. 4, § 13; Ind. Const. Art. 4, § 30; Iowa Const. Art. 3, § 21; Ky. Const. § 44; Me. Const. Art. 4, Pt. 3, § 10; Miss. Const. Art. 4, § 45; Nev.

Const. Art. 4, § 8; and Or. Const. Art. IV, § 30. In *Opinion of the Justices*, 279 Ala. 38, 181 So.2d 105 (1965) and *Carter v. Commission on Qualifications of Judicial Appointments*, 14 Cal.2d 179, 93 P.2d 140 (1939), the supreme courts of Alabama and California concluded that a legislator may be appointed to an office which is normally filled by election by the people. The Supreme Court of Alabama opined:

> If 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 construction 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."

Opinion, 279 Ala. at 39, 181 So.2d at 107. Likewise, the Supreme Court of California explained:

> If the section as originally adopted had any other meaning than that 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. . . . 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 or character of the offices thereby removed from the operation of the prohibitory clause and not the method by which the offices were to be filled.

Carter, 14 Cal.3d at 186, 93 P.2d at 144. I believe this reasoning is right on point and should have been adopted by this Court.

What truly astonishes me about the majority opinion is the fact that it is so empty of legal support. The majority admits that "[t]he records of the constitutional convention shed no light . . . on the intended meaning of [the language of Article VI, Section 15], as the provision was adopted without amendment or debate." The majority then proceeds, however, to discern the thoughts and intentions of a disparate group of Framers from 1872 despite the nonexistent records. For example, the majority finds that the Framers of the 1830 Constitution "would have understood the Emoluments Clause as primarily imposing a check on legislative corruption." On what does the majority base such a claim? The majority also concludes that the alteration in the 1851 Virginia Constitution "suggests an intent to clarify that popular election was the only means of abating the impediment imposed by the Emoluments Clause" even though "the proceedings of the constitutional convention do not indicate an intent to work any substantive changes on the provision." Further, opines the majority, "[t]he architects of our 1872 Constitution . . . were no doubt influenced by the Reconstruction era." Were they really? In what way were they influenced? In addition, we are informed by the majority that "[p]reventing abuses and self-dealing of the 'carpetbaggers' of the Reconstruction period must have been foremost in the[Framers'] minds." Again, asserts the majority, "[t]he abuses that occurred during Reconstruction, which resulted most notably from a lack of popular accountability, must

surely have molded the thinking of the Framers[.]" I wish I had been invited to the seance, or had access to the majority's crystal ball, so that I too could have engaged in enlightening dialogue with the 1872 Framers.

Seriously, though, the language of this decision, such as "would have understood," "suggests," "were no doubt," "must have been," "must surely have," points to the simple fact that the majority was guessing. Finding a complete lack of legal support for its desired result, the majority made up history out of whole cloth. For thirty-seven pages the majority raises the specter of carpetbaggers and the evil of the reconstruction era, wholly irrelevant to the instant case, only to reach the conclusion that the writ is granted because the majority does not want Speaker Kiss on this Court. Finally, the majority fails to see how its conclusion will have any serious negative impact upon the ability of members of the Legislature to later serve the people of the State. Well, let me tell you how.

Every member of the Legislature should be appalled and furious when they realize that this decision has effectively denied each of them one of the most basic rights of all Americans - the right to hold certain public offices. But it goes much further than that. Now, when the Legislature votes for *any* increase in emoluments applicable to all state employees, regardless of how small the increase, delegates and senators are disqualified from appointment to all state offices during that term. In other words, if the Legislature votes the slightest increase to state employees in health coverage, or retirement benefits, or vacation

benefits, or travel expenses, or per diem pay, all delegates and senators are now barred from appointment to any other state position which becomes vacant during that same term. The door to judicial and executive branch positions has been slammed shut to legislators for a significant period of time after any increase in emoluments. This is true even of those legislators who vote no on any increase! For example, no delegate can be appointed to any vacant senate seat following a legislative pay raise, or *any* increase in legislative per diem, or *any* emolument. This is just one small illustration of the brutal impact of this decision on legislators. There are many more but to list them all would cut down a small forest.

Also, this decision will have an awful effect on all our circuit judges. One of my main priorities as a member of this Court has been to preserve and enhance the authority, independence and discretion of the office of Circuit Judge. This means guarding the rights of circuit judges both on the law side and the administrative side of courts, which includes preserving judges' tenure in office, improving salary and benefits, and providing adequate support staff and equipment. I hope this decision does not portend failure in this important goal, but I fear that it does.

In addition, the majority has done a grave disservice to Speaker Kiss. This decision is the political mugging of a good man. Speaker Kiss is an able man of great integrity and intellect, respected and honored by his peers in State government and in the

legal profession. He has a sharp mind and a big heart. He would be a superb judge. Sadly, he has been robbed of his legitimate right to sit on this Court.

Finally, aside from legal considerations, there is real irony in this decision. At the outset, I am not suggesting by this comment that cases should be decided based on such factors. This is merely an observation, nothing more. It has nothing to do with the law. The observation is thus: some members of this Court argued the case and demonstrated the need for a judicial pay raise for all judicial officers during the 1999 legislative session. Some of the same members of this Court have now voted to deny to a member of that same Legislature his legal right to sit on this Court because of that very pay raise. What irony! What chutzpah!

Tragically, people today in West Virginia and across the country have lost confidence in the American court system. The decision in this case is a perfect example of the reason why. The majority has taken the simple, plain language of a clear constitutional provision and twisted it beyond all recognition in order to achieve its own ends. With this decision, the majority abandons the sure foundation of settled law; ignores plain constitutional language; rejects the authority of the Governor to fill vacancies on this Court; usurps the power of the Legislature; and disregards precedential and persuasive authority. The consequences are troubling. We are subjected to a legal opinion bereft of sound legal precedent and supported only by the majority's own spurious reasoning. This decision is on

par with that of Captain Smith to go full steam ahead on that frigid night in 1912 when he steered the Titanic. Therefore, I dissent.

I am authorized to state that Justice Miller joins me in this dissent and also reserves the right to file a separate opinion.