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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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No. 27905 - State of West Virginia ex rel. The League of Women Voters of West Virginia; American Civil Liberties Union of West Virginia; West Virginia Citizen Action Group; West Virginia Education Association; Common Cause of West Virginia; and Delegate Arley R. Johnson, a member of the West Virginia House of Delegates v. Earl Ray Tomblin, President of the West Virginia Senate, and Robert S. Kiss, Speaker of the West Virginia House of Delegates, and the Office of Governor of the State of West Virginia

Davis, J., dissenting:

The Honorable Chief Justice Thomas B. Miller, in his dissent to *Common Cause of W. Va. v. Tomblin*, 186 W. Va. 537, 413 S.E.2d 358 (1991), eloquently predicted that the Court's decision therein to permit the Budget Digest to include additional expenditures not approved of by the entire Legislature during its Regular Session was, in fact, "a great deal of unreality and a future potential for much mischief." *Id.*, 186 W. Va. at 579, 413 S.E.2d at 400. Much to the chagrin of the citizens of this State, Chief Justice Miller's prophesy has become self-fulfilling. And, like the proverbial ostrich who sticks his head in the sand to avoid seeing the obvious, the majority of this Court has refused to recognize the blatantly unlawful nature of the present Budget Digest preparation practice by actually allowing one of the biggest legal fictions in West Virginia history to continue unchecked *ad infinitum*. Although I agree that

a writ of mandamus should be issued in this case, I do not concur with my colleagues as to the nature of the relief that should be awarded. Rather than the toothless writ they have deemed to be appropriate, I believe that the proper remedy is to require the Legislature, in its future preparation of the Budget Digest, to strictly abide by the clear directives contained in Article VI, section 51 of the West Virginia Constitution and W. Va. Code § 4-1-18 (1969) (Repl. Vol. 1999). At present, however, the Legislature's actions could not be further from those prescribed by the above-referenced authorities.

In its announcement of today's decision, the majority has obfuscated the law which governs this proceeding by crafting new holdings which do not acknowledge the actual state of affairs underlying the instant controversy and by reaching an ultimate result that is completely at odds with its analysis. As an alternative to the convoluted reasoning relied upon by the majority of my brethren, I submit that the more straightforward and legally sound approach rests upon longstanding principles of established law.

A. West Virginia Constitutional Law

Pursuant to the Constitution of this State, the government of West Virginia is divided into three co-equal branches of government: "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 . . . ." W. Va. Const. art. V, § 1.[1] Integral to the separation of powers is the notion that each of the branches of government has

[1]*See also* Robert M. Bastress, *The West Virginia State Constitution: A Reference*
(continued...)

its own constituent components and its own defined functions. *See, e.g.*, Syl. pt. 1, *State ex rel. Barker v. Manchin*, 167 W. Va. 155, 279 S.E.2d 622 (1981) ("Article V, section 1 of the Constitution of West Virginia which prohibits any one department of our state government from exercising the powers of the others, is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed."). *But cf. Chapman v. The Huntington, West Virginia, Hous. Auth.*, 121 W. Va. 319, 336, 3 S.E.2d 502, 510 (1939) ("The separation-of-power rule, as expressed in the West Virginia Constitution, however, is not adamant. . . . Necessarily, in order to make government workable and economical, it must lend itself to practical considerations. Thus, we find in practice the three departments of our government, both state and federal, are mutually dependent upon, and support, each other." (citations omitted)).

Of particular importance to the instant proceeding is the composition of the legislative branch. In this regard, the Constitution provides that "[t]he legislative power *shall* be vested in a senate *and* house of delegates." W. Va. Const. art. VI, § 1 (emphasis added). Thus, it is apparent that West Virginia's Legislature is bicameral in nature, meaning that an action of the Legislature contemplates action by both houses thereof. *See Lusher v. Scites*, 4 W. Va. 11, 13 (1870) ("The legislative power is an attribute of sovereignty, and the exercise of that attribute is vested by the people of the State in the Senate *and* House of Delegates." (emphasis added) (citation omitted)); *Boyers v. Crane*, 1 W. Va. 176, 180

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[1](...continued)
Guide 124 (1995) ("This section . . . sets forth a fundamental principle of American government: that governmental powers must be allocated among the separate branches to ensure each has independent strength.").

(1865) ("[T]he legislative power is vested in the Senate *and* House of Delegates[.]" (emphasis added) (citation omitted)). Likewise, neither legislative chamber may act alone in a bicameral system.[2]

In addition to establishing our tripartite system of government and defining the components of the legislative branch thereof, the Constitution also delineates specific duties for each of the government's separate branches. At issue in the petitioners' request for relief are the particular duties ascribed to the Legislature vis-a-vis the budgetary process. In section 51 of Article VI of the West Virginia Constitution, the procedure for proposing the budget bill, as well as any appropriations extraneous thereto, is set forth in great detail. Insofar as supplemental appropriations are concerned, this section directs that "[t]he legislature shall not appropriate any money out of the treasury except in accordance with provisions of this section," W. Va. Const. art. VI, § 51, and that "[e]very appropriation bill shall be either a budget bill, or a supplementary appropriation bill . . . ." *Id.* at subsec. A, para. 1. *Accord* Syl. pt. 10, *Dadisman v. Moore*, 181 W. Va. 779, 384 S.E.2d 816 (1989) ("'Section 51, Article VI, West Virginia Constitution,

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[2]This is so because

> [t]he legislative powers of the state are ordinarily vested, under constitutional provisions, in a legislature composed of a senate and house of representatives or bodies equivalent thereto, although otherwise designated, elected by the people, the bodies being integral parts which, combined, are the legislative branch or agency of the state, and *it has been said that neither is an entity of government without the other. The legislature must act as a body, and, under the bicameral system, it is only where both bodies are lawfully assembled that they constitute the legislature.*

81A C.J.S. *States* § 40, at 372-73 (1977) (emphasis added) (footnotes omitted).

commonly known as the "Budget Amendment", is couched in mandatory terms, and clearly embraces a mandate of the electorate of this State governing the Legislature in the appropriation of [public] funds.' Syl. Pt. 2, *State ex rel. Trent v. Sims*, 138 W. Va. 244, 77 S.E.2d 122 (1953).").[3]

Once it has been determined that supplementary appropriations are necessary, the Constitution provides further guidance for their consideration.

> Neither house shall consider other appropriations until the budget bill has been finally acted upon by both houses, and no such other appropriations shall be valid except in accordance with the provisions following: (a) Every such appropriation shall be embodied in a separate bill limited to some single work, object or purpose therein stated and called therein a supplementary appropriation bill; (b) each supplementary appropriation bill shall provide the revenue necessary to pay the appropriation thereby made by a tax, direct or indirect, to be laid and collected as shall be directed in the bill unless it appears from such budget that there is sufficient revenue available.

W. Va. Const. art. VI, § 51, subsec. C, para. 7.

An appropriations bill may be enacted into law only after it has been duly considered and approved by both legislative chambers and, thereafter, presented to the Governor for approval or disapproval.

> *Every* budget bill or *supplementary appropriation bill passed by a majority of the members elected to each house of the legislature shall, before it becomes a law, be presented to*

[3]*See also* W. Va. Const. art. X, § 3 ("No money shall be drawn from the treasury but in pursuance of an appropriation made by law, . . . nor shall any money or fund be taken for any other purpose than that for which it has been or may be appropriated, or provided.").

> *the governor*. The governor may veto the bill, or he may disapprove or reduce items or parts of items contained therein. If he approves he shall sign it and thereupon it shall become a law. The bill, items or parts thereof, disapproved or reduced by the governor, shall be returned with his objections to each house of the legislature.
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> Each house shall enter the objections at large upon its journal and proceed to reconsider. If, after reconsideration, two thirds of the members elected to each house agree to pass the bill, or such items or parts thereof, as were disapproved or reduced, the bills, items or parts thereof, approved by two thirds of such members, shall become law, notwithstanding the objections of the governor. In all such cases, the vote of each house shall be determined by yeas and nays to be entered on the journal.
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> A bill, item or part thereof, which is not returned by the governor within five days (Sundays excepted) after the bill has been presented to him shall become a law in like manner as if he had signed the bill, unless the legislature, by adjournment, prevents such return, in which case it shall be filed in the office of the secretary of state, within five days after such adjournment, and shall become a law; or it shall be so filed within such five days with the objections of the governor, in which case it shall become law to the extent not disapproved by the governor.

Id. at subsec. D, para. 11 (emphasis added).

Given that the grant of authority to the Legislature generally encompasses all that is not specifically prohibited by the Constitution,[4] it is apparent that the Legislature is empowered to appropriate

[4]"'The general powers of the legislature are almost plenary. It can legislate on every subject not interdicted by the constitution itself.' Point 2 Syllabus, *State Road Commission v. The County Court of Kanawha County*, 112 W. Va. 98[, 163 S.E. 815 (1932)]." Syl. pt. 8, *Farley v. Graney*, 146 W. Va. 22, 119 S.E.2d 833 (1960). *Accord* Syl. pt. 1, *Foster v. Cooper*, 155 W. Va. 619, 186 S.E.2d 837 (1972) ("The Constitution of West Virginia being a restriction of power rather than a grant thereof, the legislature has the authority to enact any measure not inhibited thereby."); *Lusher v. Scites*, 4 W. Va. 11, 13 (1870) ("[T]he only limitation on the power in the legislature, is to be sought for in the

money from this State's treasury as long as it complies with the procedures set forth in W. Va. Const. art. VI, § 51. *See* Robert M. Bastress, *The West Virginia State Constitution: A Reference Guide* 180 (1995) ("The first sentence of section 51 . . . makes clear that the legislature must use the procedures in this section to appropriate any money from the treasury."). In fact, this Court has previously observed that "[t]he power to appropriate money is vested exclusively in the legislature." *State ex rel. West Virginia Bd. of Educ. v. Miller*, 153 W. Va. 414, 420, 168 S.E.2d 820, 824 (1969) (citing *Sims*, 138 W. Va. 244, 77 S.E.2d 122).[5]

When particular responsibilities have been ascribed to the Legislature, the focus then shifts to a determination of whether that particular function is a purely legislative duty. Such a distinction between pure legislative duties and discretionary tasks, which have been assigned to the Legislature, is important as the former are not delegable while the latter may be delegated for performance by another governmental entity. "Purely legislative power, which can never be delegated, has been described as the authority to make a complete law---complete as to the time when it shall take effect and as to whom it shall be applicable---and to determine the expediency of its enactment." *State ex rel. West Virginia Hous. Dev. Fund v. Waterhouse*, 158 W. Va. 196, 211, 212 S.E.2d 724, 733 (1974) (internal quotations

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[4](...continued)
constitution[.]").

[5]*See also Gribben v. Kirk*, 197 W. Va. 20, 24, 475 S.E.2d 20, 24 (1996) (per curiam) (observing that "the power to appropriate money from the treasury of this State is vested in the legislature subject to specific requirements for executive action by the Governor pursuant to *W. Va. Const.* Art. VI, § 51" (footnote omitted)); *State ex rel. Brotherton v. Blankenship*, 157 W. Va. 100, 127, 207 S.E.2d 421, 437 (1973) (Neely, J., dissenting) (recognizing "the Legislature's absolute power over the appropriation of funds").

and citations omitted).[6] "[U]nder the separation of powers provision of the Constitution of this State, the power of enacting legislation is vested solely in the legislature," *State ex rel. Carson v. Wood*, 154 W. Va. 397, 401, 175 S.E.2d 482, 485 (1970), and, "as a general rule in this jurisdiction, the legislature cannot delegate its power to make law," *Waterhouse*, 158 W. Va. at 211, 212 S.E.2d at 733. *Accord State v. Grinstead*, 157 W. Va. 1001, 1013, 206 S.E.2d 912, 920 (1974) ("The authority to enact laws, being exclusively a legislative function, cannot be transferred or abdicated to others." (citation omitted)). Because the process of appropriating funds necessarily entails the enactment of such directives into law, the Legislature's appropriations authority is a purely legislative duty which is not delegable. *See generally* W. Va. Const. art. VI, § 51 (providing procedure whereby legislatively proposed appropriations are ultimately enacted into law).

B. West Virginia Code § 4-1-18

Having laid the foundation of constitutional law upon which the proper determination of this cause should rest, it is equally important to consider the statute which is at the heart of the parties' controversy. W. Va. Code § 4-1-18 (1969) (Repl. Vol. 1999) supplements the Legislature's

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[6]That is not to say, however, that the Legislature may not delegate nonlegislative duties to an administrative agency, which authority is outside the scope of this opinion. *See, e.g.*, *State ex rel. West Virginia Hous. Dev. Fund v. Copenhaver*, 153 W. Va. 636, 649, 171 S.E.2d 545, 553 (1969) ("The legislature may delegate its nonlegislative functions and confer discretion in the administration of the law, but it may not delegate purely legislative powers in the absence of constitutional authorization." (internal quotations and citation omitted)). *See also* Syl. pt. 5, *Woodring v. Whyte*, 161 W. Va. 262, 242 S.E.2d 238 (1978) ("Before a delegation of legislative power to an administrative agency will be held to be unconstitutional as a violation of Article VI, Section I of the West Virginia Constitution, such delegation must be of purely legislative power.").

constitutionally-ascribed appropriations authority by requiring it to prepare an annual Budget Digest after its passage of the Budget Bill.

> The Legislature, acting by its appropriate committees, shall consider the budget bill, the budget document and matters relating thereto, and following such consideration and upon the passage of the budget bill by the Legislature, the Legislature shall prepare *a digest or summary of the budget bill containing detailed information similar to that included in the budget document submitted to the Legislature by the governor but including amendments of legislative committees, and as finally enacted by the Legislature.* Such digest or summary shall be prepared at the direction of and approved by members of the conferees committee on the budget and shall be included in the journals of the Legislature or printed as a separate document, and copies shall be furnished to the governor, commissioner of finance and administration, and the various state spending units for such use as may be deemed proper.

W. Va. Code § 4-1-18 (emphasis added). Stated otherwise, this statute requires the Legislature, through its conferees committee on the budget, to prepare a synopsis of the Budget Bill as it was "finally enacted by the Legislature," § 4-1-18, which signifies passage thereof by "a majority of the members elected to each house," W. Va. Const. art. VI, § 51, subsec. D, para. 11.

The focus of the majority's inquiry, then, should have been to answer two simple questions arising from this statutory language. First, whether W. Va. Code § 4-1-18, which directs the preparation of a Budget Digest document, is constitutional. And second, whether the Legislature's present method of preparing the Budget Digest, wherein additional allocations are made which have not been *approved* by the entire Legislature or by the Governor, complies with the mandates of this statute.

C. Constitutionality of West Virginia Code § 4-1-18

To resolve the first query, I submit that W. Va. Code § 4 1-18 is constitutional on its face. When assessing the constitutionality of a legislative enactment, it is customary to attempt to uphold the statute and to ascribe to it an interpretation that complies with the constitutional law of this State.

> "In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt." Point 1 Syllabus, *State ex rel. Appalachian Power Company v. Gainer*, 149 W. Va. 740[, 143 S.E.2d 351 (1965)].

Syl. pt. 3, *State ex rel. West Virginia Hous. Dev. Fund v. Copenhaver*, 153 W. Va. 636, 171 S.E.2d 545 (1969).[7] Upon reading the plain language of W. Va. Code § 4-1-18, no constitutional infirmities are apparent on the face of this statute.

The plain language of § 4-1-18 directs the Legislature, through its conferees committee on

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[7]*See also* Syl. pt. 4, *Woodring v. Whyte*, 161 W. Va. 262, 242 S.E.2d 238 ("'When the constitutionality of a statute is challenged, every reasonable construction must be resorted to by the courts to sustain its validity and any reasonable doubt must be resolved in favor of the constitutionality of the legislative act in question.' [Syllabus Point 2,] *State ex rel. Metz v. Bailey*, 152 W. Va. 53, 159 S.E.2d 673 (1968)."); *Coal & Coke Ry. Co. v. Conley*, 67 W. Va. 129, 166, 67 S.E. 613, 629 (1910) ("The courts will never impute to the legislature intent to contravene the constitution if it can be avoided, and it can always be avoided, if there is no language in the statute, expressing intent to do so, and effect, consistent with the limitations of legislative power, can be given to the statute.").

the budget, to prepare a "digest or summary of the budget bill containing detailed information" regarding the Legislature's amendments to the Budget Bill originally submitted to it by the Governor and reflecting the final version of the Budget Bill enacted by the Legislature. W. Va. Code § 4-1-18. Absent statutory definitions for the terms "digest" and "summary", the commonly-accepted usage of these words must be employed. *See, e.g.*, Syl. pt. 1, *McCoy v. VanKirk*, 201 W. Va. 718, 500 S.E.2d 534 (1997) ("'In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.' Syllabus Point 1, *Miners in General Group v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1941), *overruled on other grounds* [*by*] *Lee-Norse Co. v. Rutledge*, 170 W. Va. 162, 291 S.E.2d 477 (1982).").

In common parlance, the term "digest" signifies "a summation or condensation of a body of information." Webster's Ninth New Collegiate Dictionary 354 (1983). *Accord* Random House Webster's Unabridged Dictionary 553 (2d ed. 1998) (construing "digest" as "a collection or compendium, usually of . . . legal . . . matter, esp. when classified or condensed"). Similarly, "summary" is commonly defined as "an abstract, abridgment, or compendium." Webster's Ninth New Collegiate Dictionary, at 1181. *Accord* Random House Webster's Unabridged Dictionary, at 1904 (indicating that "summary" denotes "a comprehensive and usually brief abstract, recapitulation, or compendium of previously stated facts or statements"). Therefore, W. Va. Code § 4-1-18 commands the Legislature to prepare a synopsis of the Budget Bill submitted to the Governor for approval or disapproval, with notations as to the Legislature's changes to the Governor's original Budget Bill.

It has further been determined that the purpose of such a document is to provide insight as to the legislative intent inherent in the Budget Bill but which may not be readily apparent therefrom. *Common Cause*, 186 W. Va. at 540, 413 S.E.2d at 361 (commenting that this Court has "looked to the *Budget Digest* to help us ascertain the intent of the legislature in making specific appropriations" (citation omitted)); *Hechler v. McCuskey*, 179 W. Va. 129, 133, 365 S.E.2d 793, 797 (1987) (recognizing that "[t]he Legislature uses this Digest as its detailed explanation concerning the manner in which appropriations are to be expended"); *Jones v. Rockefeller*, 172 W. Va. 30, 34 n.4, 303 S.E.2d 668, 672 n.4 (1983) (observing that legislative intent as to contemplated expenditure of budgetary appropriations may be gleaned from the Budget Digest). In fact, the Digest, itself, announces that it "is prepared to provide detail regarding the intent of the Legislature in enacting certain appropriations." Legislature of West Virginia, *Digest of the Enrolled Budget Bill* 1 (Fiscal Year 1999-2000). "Thus, the plain language of this statute reflects that the Digest is designed to do two things: first, summarize the budget bill as passed; and, second, reflect the legislative changes made to the budget as submitted by the governor." *Common Cause*, 186 W. Va. at 582-83, 413 S.E.2d at 403-04 (Miller, C.J., dissenting). Both of these purposes clearly fall within the scope of authority granted to the Legislature to enact laws to carry out its constitutionally-prescribed budgetary functions. W. Va. Const. art. VI, § 51, subsec. D, para. 12 ("The legislature may, from time to time, enact such laws, not inconsistent with this section [concerning the budget and supplementary appropriation bills], as may be necessary and proper to carry out its provisions."). Therefore, it would appear that W. Va. Code § 4-1-18 is constitutional *on its face*.

D. Propriety of Present Application of West Virginia Code § 4-1-18

In answering the second question raised by the petitioners, *i.e.*, whether the Legislature's present method of preparing the Budget Digest, wherein additional allocations are made which have not been *approved* by the entire Legislature or by the Governor, complies with the mandates of this statute, I disagree with the decision reached by my colleagues. Instead of blindly looking the other way while this State's precious financial resources are being diverted in contravention of the clear constitutional and statutory guidelines for appropriations, I recognize that the present state of affairs neither complies with the mandates of W. Va. Code § 4-1-18 nor comports with the overriding constitutional tenets governing such a budgetary procedure. Simply stated,

> [i]t is no objection to the remedy in such case, that the statute, the application of which in the particular case is sought to be prevented, is not void on its face, but is complained of only because its operation in the particular instance works a violation of a constitutional right.

Syl. pt. 8, *Coal & Coke Ry. Co. v. Conley*, 67 W. Va. 129, 67 S.E. 613 (1910).[8] From the memoranda of law submitted for this Court's consideration and the appended information, it appears to me that the conferees committee, in the course of declaring the Legislature's intent in the Budget Digest, is actually making additional allocations of state monies that have not been submitted for approval as required by the Constitution rather than preparing a mere "digest or summary" of the Budget Bill. *See*

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[8]*See also* Syl. pt. 12, *Farley v. Graney*, 146 W. Va. 22, 119 S.E.2d 833 ("An act of the legislature may be valid in its general scope and broad outline but invalid to the extent that the restrictions imposed thereby are clearly arbitrary and unreasonable in their application to specific property."); *Harbert v. Harrison County Court*, 129 W. Va. 54, 69, 39 S.E.2d 177, 188 (1946) ("A statute, however, may be unconstitutional and void in its application to a part of its subject matter and valid as to the remainder. It may be constitutional in operation with respect to one state of facts and unconstitutional as to another." (citation omitted)).

W. Va. Code § 4-1-18 (defining contents of Budget Digest). As such, the Budget Digest does not provide an accurate and succinct version of the Budget Bill "finally enacted by the Legislature." *Id.* The difficulties attending the Legislature's current Budget Digest compilation practice are numerous and violative of multiple fundamental principles.

First, despite the respondents' protestations to the contrary, it seems that the unauthorized allocations contained in the Budget Digest, although not formally denominated as "appropriations," nevertheless have the force and effect thereof without the benefit of the constitutional protections normally attending such disbursements. *See generally* W. Va. Const. art. VI, § 51. When viewing legislative actions, the substance of the act complained of, instead of its simple form, directs the ensuing analysis. *See, e.g.*, *Common Cause*, 186 W. Va. at 540, 413 S.E.2d at 361 (commenting that, "[i]n deciding this case, it must be reality, not theory, that is the interpretive principle"); *Chapman*, 121 W. Va. at 350, 3 S.E.2d at 517 (Hatcher, J., dissenting) ("The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty---indeed, are under a solemn duty---to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority." (internal quotations and citations omitted)). Appropriations generally are considered to be directives to spending units as to how certain monies have been allocated for use during the ensuing fiscal year. *See McGraw v. Hansbarger*, 171 W. Va. 758, 768, 301 S.E.2d 848, 858 (1983) ("The budgetary appropriation process provides the means by which . . . dedicated revenue . . . may be withdrawn from

. . . the treasury and applied to the purpose for which it was intended.").[9] Under the circumstances presented in this proceeding, I am firmly convinced that the expenditures at issue herein have the full force and effect of appropriations. The unauthorized allocations contained in the Budget Digest effectively direct various entities as to how the Legislature contemplates their spending of allotted monies and actually serve as the authorizations needed to withdraw these funds from the State's treasury.

Additionally, the appropriations presently contained in the Budget Digest have not satisfied the constitutional safeguards for the proposal, passage, and presentment of such disbursements. *See generally State ex rel. Brotherton v. Blankenship*, 157 W. Va. 100, 112, 207 S.E.2d 421, 429 (1973) ("The journey taken by a Budget Bill, from its formulation to its enactment into law, well demonstrates the great detail in which it is considered. It is thoroughly studied and considered four times---twice by the Governor and twice by the Legislature (if it acts upon the Governor's veto)."). Section 51 of Article VI of the West Virginia Constitution provides specific guidelines for the proper exercise of the Legislature's appropriations authority. First, the proposed appropriation must be approved by "a majority of the members elected to each house of the legislature." W. Va. Const. art. VI, § 51, subsec. D, para. 11. If the appropriations contained in the Budget Digest are both proposed and approved by the conferees committee before their inclusion in the final Digest, the majority of legislators have not been afforded their opportunity to approve the proposed appropriations as required by the West Virginia Constitution.

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[9]*See also* W. Va. Code § 18-9B-2 (1967) (Repl. Vol. 1999) (defining "appropriation", in education context, as "an item, or the amount of an item, budgeted by a county board of education for expenditure during the fiscal year").

Moreover, following passage by the Legislature, the appropriations must then be presented to the Governor for approval or disapproval. *Id. See also* W. Va. Const. art. VII, § 15 (reinforcing requirement that "[a] bill passed by the legislature making appropriations of money must be submitted to the governor for his approval or disapproval"). Again, though, if the present procedure is followed, the Governor is deprived of the right to review the proffered appropriations. In short, the incorporation of unapproved appropriations into the Budget Digest completely ignores these procedural safeguards; disregards the constitutional procedures for the enactment of an appropriations bill; and abrogates the plainly stated requirement that the Digest serve as a synopsis of the Budget Bill finally enacted by the Legislature. *See* W. Va. Code § 4-1-18.

Finally, as I noted above, the Legislature has the sole authority to appropriate funds. *See, e.g.*, *Miller*, 153 W. Va. at 420, 168 S.E.2d at 824. Because such a function has been denominated a purely legislative function, the Legislature is required to exercise this authority itself, and it may not delegate its appropriations authority to any other entity. In other words, our bicameral system requires the *entire* Legislature to participate in the approval of proposed appropriations.[10] Just as the Legislature could not delegate its appropriations authority for performance by any other entity, it similarly cannot delegate this power to a subcommittee of itself, or to one of its individual members, because such a committee is not comprised of the entirety of both of the legislative chambers. "Unilateral action by any single participant in the law-making process is precisely what the Bicameralism and Presentment Clauses were designed to

[10]*See supra* note 2 and accompanying text.

prevent." *City of New York v. Clinton*, 985 F. Supp. 168, 179 (D.D.C.) (mem.), *aff'd*, 524 U.S. 417, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998). Thus, the Legislature's authority to make appropriations is a purely legislative duty which is not delegable. Furthermore, because the Legislature cannot delegate its appropriations authority, the Legislature's conferees committee on the budget should not be permitted to make appropriations through the Budget Digest, prepared pursuant to W. Va. Code § 4-1-18.

In spite of the Legislature's blatant variance from the governing constitutional and statutory law, it has nonetheless managed to pull the wool over the eyes of the majority and successfully left my colleagues with the impression that nothing is amiss in the wonderful world of the Budget Digest. Not only does the Court's adoption of Syllabus point 2 completely ignore the present Budget Digest preparation process, including the addition of unapproved allocations of State funds, but its further acquiescence to Syllabus point 6 perpetuates this myth, and indeed compounds this abomination.

If Syllabus point 2 existed in a vacuum, far removed from any potential for mischief, it would paint an accurate picture of the ideal application of W. Va. Code § 4-1-18. However, the reality is that "[t]he inclusion of an item in the budget digest in reference to a more generalized line item found in the budget bill *does* . . . operate to appropriate money from the state treasury[.]" (Emphasis added). Simply stated, just because the Budget Digest allocations walk like appropriations and talk like appropriations does not mean that they are not, in fact, appropriations regardless of the nomenclature used to describe them. Additionally, despite the majority's holding to the contrary, I firmly believe that "[a]ll

funds that are described in the budget digest [*do not*] reference a specific line item in the budget bill." (Emphasis added). If there were such a neat matching of these various monetary figures and budgetary documents, the present controversy would not exist and certainly would not have been presented to us not once, but twice, for final resolution. *See generally Common Cause*, 186 W. Va. 537, 413 S.E.2d 358.

Moreover, Syllabus point 6 further confuses the applicable law by holding that

> [a] fair reading of West Virginia Code § 4-1-18 (1969) (Repl. Vol. 1999), contemplates and requires that the material contained in the budget digest under the heading "Legislative Intent" must have been the subject of discussion, debate, and *decision* prior to final legislative enactment of the budget bill, either within the legislative committees or subcommittees of the respective houses to which the budget bill, or parts of it, have been committed, formally or informally, or within the conferees committee.

(Emphasis added). Rather than requiring the informative "legislative intent" to have been generated by way of *approval* by the Legislature during its deliberation of budgetary matters, the majority states simply that the matter need only have been *decided* by some committee thereof. This procedure is entirely inconsistent with the second Syllabus point of the Court's decision. In short, Syllabus point 6 allows the Legislature to continue its illegal delegation of its *nondelegable* budgetary powers to a subpart of itself. Additionally, Syllabus point 6 directly contradicts the staunch holding of Syllabus point 2 by requiring not the *approval* of a budgetary line item, as contemplated by Syllabus point 2, but merely the *decision* thereof, which, in the absence of more specific language, could amount to a total rejection of the proposed expenditure. I cannot countenance the further conflagration of the law of this State in this regard.

E. Propriety of Mandamus Relief

Based upon the Legislature's continued perpetuation of the "mischief" foretold by Chief Justice Miller, I believe that the petitioners are entitled to the writ of mandamus that they seek. However, I do not find their entitlement to this relief to be based solely upon this Court's desired outcome of the case, but rather upon the petitioners' legally sound arguments and their correct interpretation of the governing law. On this point, my colleagues and I also disagree as is evidenced by the numerous patronizing admonishments that the petitioners have misunderstood this point of law or misapplied that legal principle. From my reading of the majority's unrelenting chastisement of the petitioners, I am amazed that they were granted a writ of mandamus at all. I should hope that in future opinions issued by this Court, the analysis of the parties' arguments and the final relief awarded would be more harmonious than is apparent in the case *sub judice*.

F. Activity Code 098

Lastly, I wish to reiterate my earlier stated objections to this Court's decision to hold this case over for the purpose of addressing the now-mooted issue of activity code 098 of the Governor's civil contingent fund:

> [I] deem[] it unnecessary to consider the parties' arguments regarding the "098 account" in rendering a decision in this case on the primary issue which was submitted to the Court on October 3, 2000, *i.e.*, whether the Legislature's present application of W. Va. Code, 4-1-18 (1969) (Repl. Vol. 1999) in its preparation of the annual Budget Digest is constitutional. [I] further believe[] that the resolution of the constitutionality issue would finally determine the extent of the Legislature's ability to delegate its authority and to make appropriations, thus rendering it unnecessary to join the Office of Governor as a party respondent to this proceeding.

State ex rel. The League of Women Voters of West Virginia v. Tomblin, No. 27905 (W. Va. Dec. 12, 2000). As a result of this Court's ill-advised delay in deciding this matter, which delay was occasioned by the re-briefing and re-submittal of this cause on an issue that was irrelevant and immaterial to the original question presented for this Court's resolution, the Legislature is now left with an inordinately short amount of time within which to cure the defects of its present Budget Digest preparation procedure before the conclusion of its Regular Session. I only hope that it is the quality of the remaining Session time and not its quantity that will be of use to the Legislature.

G. Conclusion

In his conclusory remarks to his *Common Cause* dissent, Chief Justice Miller said,

> What the majority has done is distort the constitutional and legislative framework surrounding the budget and ignore our cases that preclude amending legislation without the full vote of the legislature.

186 W. Va. at 583, 413 S.E.2d at 404. I echo these sage words and would add only that in this case, the majority has gone a precipitous step further by also ignoring the constitutional protections adopted to safeguard the citizens of this State. Accordingly, I respectfully dissent.