

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

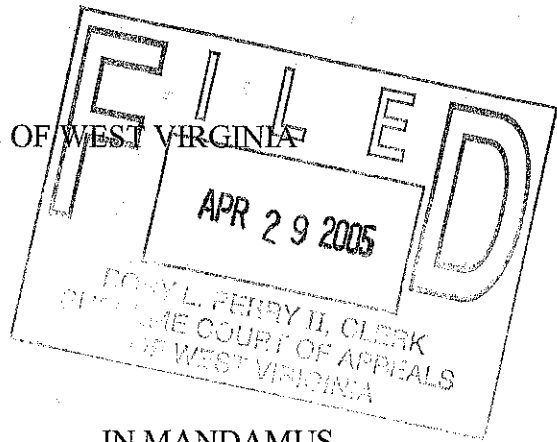
STATE OF WEST VIRGINIA, ex rel.
MARY ANN PODELCO,

Relator,

v.

EARL RAY TOMBLIN, President of the Senate;
ROBERT S. KISS, Speaker of the House of
Delegates; and Office of the Governor of the
State of West Virginia; RICHARD ALKER,
Executive Director of the West Virginia Ethics
Commission; GLENN GAINER, the Auditor of the
State of West Virginia; JOHN PERDUE, Treasurer
of the State of West Virginia; GREGORY GRAY, Clerk
of the West Virginia House of Delegates; and
DARRELL HOLMES, Clerk of the West Virginia Senate,

Respondents.



IN MANDAMUS
ORIGINAL JURISDICTION
No. 31793

MEMORANDUM IN SUPPORT OF
MOTION OF RESPONDENTS
EARL RAY TOMBLIN, PRESIDENT OF THE SENATE,
AND ROBERT S. KISS, SPEAKER OF THE HOUSE OF DELEGATES,
ET AL., FOR RECONSIDERATION OF ORDER AND TO
DISMISS THE ACTION AGAINST THE LEGISLATURE

Respondents Earl Ray Tomblin, President of the Senate, Robert S. Kiss, Speaker of the House of Delegates, Darrell Holmes, Clerk of the Senate, and Gregory M. Gray, Clerk of the House of Delegates, set forth the following in support of their motion for reconsideration of this Court's

Order of December 1, 2004, and to dismiss the action herein as against the Legislature.

The December 1, 2004 Order

This mandamus action seeks to remedy alleged wrongs to the Petitioner. The only portion of this action applicable in any manner to the Legislature is the oblique assertion by Petitioner that if state funds weren't spent for purposes specified in budget digests, they might then be available for appropriation to the West Virginia Ethics Commission. Instead of dismissing this action as against the Legislature on the grounds that even if those funds were available, the Court has no power to direct the appropriation of money to the Ethics Commission or anywhere else that may be prayed for by Petitioner, this Court, *without lawful authority*, by its Order of December 1, 2004, has directed that the Legislature submit to a judicial review of actions taken by members and committees of the Legislature during the creation of Budget Digests since 2001 to determine whether the legislative branch of government is complying with the procedures fashioned and required by the judicial branch of government. The Order goes further. Again, *without lawful authority*, it actually purports to stay the approval and adoption of a Budget Digest, if not forever, at least until the December 1 Order is obeyed. This Court has no constitutional or other authority to take any of these actions against a co-equal branch of government.

Common Cause v. Tomblin

Almost 30 years after the statute authorizing the Budget Digest was enacted,¹ this Court

1. West Virginia Code §4-1-18 was first enacted in 1963 when the Legislature unanimously passed, and the Governor, approved, House Bill No. 577. In 1969, the statute was amended and reenacted through similar cooperative legislative and gubernatorial action. It provides:

issued an opinion which, for the first time, questioned the processes through which the Budget Digest is prepared. *Common Cause v. Tomblin*, 186 W.Va. 537, 413 S.E.2d 358 (1991) determined that the Budget Digest itself is not unconstitutional because it does not serve to alter or amend the enacted budget bill and therefore does not have the force and effect of law.² This Court did, however, direct some changes in the manner in which the Budget Digest is prepared. First, it required that at least a quorum of the Conferees Committee on the Budget (not just its Chairmen) must meet and approve the Budget Digest before it may be published. The Court's legal justification, its authority, for this directive, was the language of *W. Va. Code* §4-1-18, which expressly required the meeting.³ Second, this Court directed that the Budget Digest must clearly state that the Budget Digest does not have the force and effect of law. Its justification for this directive was that if a Budget Digest had the force and effect of law, it would be unconstitutional. To remain constitutional, a Budget Digest must not be perceived as "enjoying legal force and effect."⁴ To remain constitutional, each Budget Digest must clearly state otherwise.⁵

"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 [abolished], and the various state spending units for such use as may be deemed proper."

2. *Common Cause*, at 186 W.Va. 540, 413 S.E.2d 361.

3. *Id.*, at 186 W.Va. 542, 413 S.E.2d 362. Following the issuance of the opinion, each budget digest has been approved at a public meeting by a majority of the Conferees Committee on the Budget Bill.

4. *Id.*, at 186 W.Va. 543, 413 S.E.2d 364.

5. "Consequently, although we do not find §W.Va.Code, 4-1-18 [1969], either unconstitutional on its face or unconstitutionally applied in the type of document currently promulgated pursuant to its authority, we do find that the Budget Digest must have an adequate disclaimer. All legislative budget digests should clearly state that the Budget

The final directive of *Common Cause* initiated this Court's unwarranted intrusion into Legislative procedural matters. Without any basis in fact, the Court first assumed as a matter of fact that the only contents of a budget digest are the results of "negotiations and compromises" that occur during the Legislature's formulation of a Budget Bill during a legislative session.⁶ Then, *without any basis in law*, the Court ruled as a matter of law that nothing other than those "results" may be included in a budget digest.⁷ Finally, *without any basis in law*, the Court ruled that every provision of a budget digest should be substantiated by memoranda and recordings of votes and discussions that occurred during the Legislature's consideration of the Budget Bill.⁸

Digest is a summary of what the members of the Conferees Committee on the Budget believe the legislature's intent to be, but that the Budget Digest does not have the force and effect of law and in no way circumscribes the discretion of spending units. Thus spending units may allocate money appropriated to them under the broad line items of the budget bill without regard to the suggestions of the Budget Digest when, in their discretion, such action is appropriate." *Id.*

Following the issuance of the opinion, each budget digest has included language clearly complying with this directive. For example, the FOREWORD TO THE BUDGET DIGEST of the West Virginia Legislature *Fiscal Year 2004 - 2005* begins:

"West Virginia Code §4-1-18 directs that a digest or summary of each Budget Bill be prepared at the direction of and approved by the members of the West Virginia Legislature's Conference Committee on the budget bill.

"Notice is hereby given that this 2004 Budget Digest was prepared and approved by the Conference Committee on the Budget Bill and that this Budget Digest does not carry the force and effect of law. This digest was approved at a meeting open to the public, and documents used to prepare the digest may be inspected in the Finance Committee offices of the Senate and the House of Delegates.

"Although the format of the digest is patterned after that of the Budget Bill, no provision of this digest operates to appropriate or is intended to appropriate money from the state treasury. Any provision of the Budget Bill that may be contained in this digest is included for formatting and reference purposes only. The digest merely contains recommendations developed by the Conference Committee that reflect, in its judgment, the intent of members of the Legislature as to certain appropriations made in the Budget Bill. These recommendations are set forth throughout this document where determined appropriate. No such recommendation should be construed as legally binding."

6. "The long and the short of all this is that various compromises and agreements emerge from myriad negotiations, and it is those negotiations and compromises that are, at least theoretically, summarized in the Budget Digest." *Id.*, at 186 W.Va. 541, 413 S.E.2d 362.

7. "... nothing may be published in the Budget Digest that does not reflect committee or sub-committee votes, actual negotiations, compromises, and decisions of the legislative committees, sub-committees, or chairmen, and the files of the committees or their chairmen must be maintained, open to public inspection, supporting the specific provisions of the Budget Digest." *Id.*, at 186 W.Va. 543, 413 S.E.2d 364.

8. "It is only fair to state agencies and affected constituencies to provide some protection against inclusion in the Budget Digest of language not faithfully reflecting the various agreements and compromises that occurred during the legislative session. Thus, all of the specific provisions of the Budget Digest, except those that simply restate

State ex rel. League of League of Women Voters v. Tomblin

This Court issued a second opinion questioning the processes through which the Budget Digest is prepared in *State ex rel. League of Women Voters of West Virginia v. Tomblin*, 209 W.Va. 565, 550 S.E.2d 355 (W.Va. 2001). The opinion affirmed the conclusion that budget digests do not have the force and effect of law and do not confer upon anyone the ability to require by law the expenditure of funds for purposes specified in budget digests.⁹ However, this Court made further unwarranted intrusions into Legislative procedural matters by purporting to further restrict items that may be included in budget digests.¹⁰ Where the decision in *Common Cause* directed that the contents of budget digests must be limited to materials that were the subject of negotiations and compromises during the Legislature's consideration of the Budget Bill, those limitations included negotiations and compromises had during private discussions, as long as they were documented.¹¹ The decision in *State ex rel. League of Women Voters* limited the material that may be included in budget digests to only those materials that were the subject of "discussion, debate and decision" in

provisions of the Budget Bill, should be supported by memoranda of the negotiations, compromises and agreements or audio recordings of committee or sub-committee meetings where votes were taken or discussions had that substantiate the material which is organized and memorialized in the Budget Digest." *Id.*, at 186 W.Va. 542, 413 S.E.2d 363. *See also*, footnote no. 7.

9. *State ex rel. League of Women Voters*, at 209 W.Va. 573-575, 550 S.E.2d 363-365.

10. The Court also suggested that future budget digests omit the use of the term "Legislative Intent". *Id.*, footnote no. 20. Following the issuance of the opinion, the use of the term "Legislative Intent" has been omitted from the budget digests approved by the conferees, and each specific item of recommendation made by the conferees has had the following heading and introductory language:

"Conference Committee Recommendation
"It is the recommendation of the Conference Committee that"

For similar changes in the forewards to budget digests, *see* footnote no. 5, *supra*.

11. *Common Cause*, at 186 W.Va. 541, 413 S.E.2d 362. *See also*, footnote nos. 6-8, *supra*.

the committees or subcommittees of the Legislature prior to enactment of the Budget Bill.¹² That decision was based upon its own interpretation of *W. Va. Code §4-1-18*,¹³ an interpretation made *without citing any authority to do so* that would supersede the Legislature's plenary power to determine its own processes for the formulation of budget digests. Yet the Court, in the exercise of its legislative functions to make decisions on the issuance of rules such as the Rules of Professional Conduct, does not impose upon itself any requirements of public discussion, debate and decision even though such rules do have the force and effect of law.¹⁴

Plenary Power of the Legislature

It may be viewed by some as "fair" for the process of fashioning budget digests to be controlled by the judiciary. It may be viewed by some as appropriate for the judicial branch of government to impose its own "interpretation" on words in a statute that could also be interpreted as language providing an example of what may be included, rather than words of limitation.¹⁵ The legal reality is, however, that the Legislature is master of its own processes. The power of the legislative branch of government is plenary and it exceeds its constitutional authority only when it

12. *State ex rel. League of Women Voters*, at 209 W.Va. 576, 550 S.E.2d 366, and at footnote 33.

13. *Id.*, at 209 W.Va. 576, 550 S.E.2d 366.

14. *See, Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 732, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980).

15. The Court "interpreted" the words of W.Va. Code §4-1-18, "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. . . ." to limit the contents of budget digests. *Id.* Appropriate deference to the Legislature's prerogative to establish its own procedures for the formulation of the tool for its political dialogue with the executive branch of government budget digests obviates the need to make any interpretation of a statute which directs that budget digests "shall be prepared *at the direction of* and approved by members of the conferees committee on the budget. . . ." and contains no words authorizing the Court to establish procedures for the preparation of these documents.

violates restrictions upon it imposed by the Constitution of this State.¹⁶ In the exercise of that power, it has adopted a statute that requires that budget digests “be prepared at the direction of and approved by members of the conferees committee on the budget.”¹⁷ In the exercise of that power, the Legislature has, in each year beginning in 2001, enacted law expressing its intent that the members of the conference committee may formulate their recommendations for the expenditure of moneys in a budget digest after the enactment of the budget bill.¹⁸ In the exercise of that power, the Legislature has chosen not to require that materials included in the budget digest must first be even mentioned in committee and subcommittee meetings. In the exercise of that power, the Legislature will choose whether and to what extent to make records of discussions of and decisions about budget digest matters. Even if it chooses to record private discussions between members and others about these matters, it will choose whether such records of deliberations within the legislative sphere are subject to disclosure. This Court has no more power under the Constitution to tell the Legislature what it must discuss and what it must record and disclose to qualify for its inclusion in the budget

16. "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 constitution[.]").

17. *W. Va. Code* §4-1-18

18. See, Title III, Administration, in each budget bill enacted since the issuance of *State ex rel. League of Women Votes*, found at 2001 W.Va. Acts, First Extraordinary Session, ch. 1 at 3020; 2002 W.Va. Acts ch. 13 at 241; 2003 W.Va. Acts ch. 20 at 245; and 2004, W.Va. Acts ch. 13 at 207. Each provides the following language:

“Sec. 2. Legislative intent.-It is the intent of the Legislature that the duly appointed members of the conference committee on this bill may formulate and set forth in a budget digest recommendations for the expenditure of money appropriated by this bill after its enactment. It is the further intent of the Legislature that the recommendations set forth in the budget digest are an expression of legislative intent, do not have the force and effect of law, and may not be construed to alter the lawful enactment of this bill.”

digest than the Legislature has to tell this Court what must be discussed and what the Court must record and disclose in formulating its budget request to the Governor, or in deciding whether to accept or refuse to hear a case brought before it. This Court has no more power under the Constitution to tell members of the Legislature or any collective of them what they may or may not include in a publicized list of non-binding recommendations for spending than it has to tell any individual member of the Legislature, the public, or even a member of this Court what recommendations for spending they may or may not make in private or public communications to officers or employees of a public agency. The Constitution does not prohibit the Legislature from directing a budget digest, nor does it in any manner prohibit the Legislature from allowing the conferees on the budget bill to formulate budget digests in any manner it sees fit. At any time the Legislature is dissatisfied with the conferees' procedures for formulating budget digests or with the material they include in it, whether those materials are considered before or after the enactment of the budget bill, the Legislature may impose such formal procedures and specifications as to content as it may see fit by rule or by statute. In the meantime, in the absence of any power conferred by the Constitution upon the judiciary to dictate those matters to its co-equal branch of government, this Court's Order is violative of Legislature's exercise of its plenary constitutional powers.

Practical Matters

As a practical matter, one who follows the daily progress of the Legislature today would discover the following:

1. Each year, the Legislature reaffirms with its enactment of the Budget Bill its approval of the manner in which the Conferees of the Committee on the Budget Bill formulate the Budget

Digest.¹⁹

2. Budget digests are approved at a public meeting by a majority of the Committee on the Budget Bill in the latter part of each fiscal year.

3. Each Budget Digest clearly states that it does not have the force and effect of law and are only recommendations as to spending by the Committee's conferees.²⁰

4. The chairmen of the respective houses' finance committees prepare a proposal for a budget digest after numerous discussions with members of the Legislature and others that may occur before, during, or after legislative sessions. Notes of these member deliberations are rarely made. Even if they were, such records would not be subject to judicial review under constitutional privileges and immunities provisions that remove from judicial review a legislator's actions taken within the legislative sphere.²¹

5. Although each house processes written requests for potential materials for inclusion in the Budget Digest, those records may not be kept beyond the end of the fiscal year for which they were requested.

6. Although since 1991, the Conferees have tried to limit the contents of the Budget Digest to those materials submitted for consideration, it has not always been completely successful.

19. See footnote no. 17, *supra*.

20. See, footnotes 5 and 10.

21. This Court has not addressed the legislative privileges and immunities issues that were raised by Respondents in their "Memorandum of Law in Support of Response of Earl Ray Tomblin and Robert S. Kiss" filed in this action, and which issues, while long standing with respect to the Federal and other states' Speech and Debate legislative privileges and immunities, have never been addressed by this Court despite having been consistently raised by these Respondents in this and other cases before the Court as parties more and more frequently seek to submit legislative actions to judicial review. The Respondents do advise that if this matter proceeds in the court below, they intend to assert those privileges and immunities to resist any attempt to question the actions of any member of the legislature taken within the legislative sphere, whether the attempt is made to question those actions through the member in person, or vicariously through the Legislature's records or staff.

7. Although members are never precluded from doing so, specific potential materials for inclusion in the Budget Digest are rarely mentioned, much less the subject of “discussion, debate and decision,” during any committee or subcommittee meetings held on the budget bill before its enactment. Even if they were mentioned, it is unlikely that the specifics of the discussion would be included in any minutes of the meeting.

8. Although members are never precluded from doing so, it is usually the case that the only time the conferees publicly discuss specific potential materials for inclusion in the budget bill is during their final public meetings at the end of the fiscal year. The Conferees usually meet near the end of the fiscal year on two occasions. At the first meeting, the Conferees receive the proposal for a budget digest prepared by the finance chairmen and are free to make any inquiries. At the second meeting (usually the next day) the Conferees act on the proposal, and are free to make any inquiries or amendments prior to voting on its adoption as the Budget Digest for the upcoming year. Although it is not required²², notice of each meeting is given by posting signs in the public areas of the Legislature’s corridors in the capitol building approximately 48 hours before the first meeting.

A hearing is not necessary to ascertain those observations, and if a concession of the accuracy of those observations is all that is necessary to remove this Court’s perception of the need for a hearing, then the undersigned Respondents do so here. The point is, however, that also practically speaking, this Court is not empowered by the Constitution to enter, observe and record discussions and deliberations had in the offices of the members of the Legislature about matters related to the formulation of the Budget Bill, and ultimately the formulation of the Budget Digest, any more than the members of the Legislature are empowered to enter, observe and record discussions had in the

22. See, e.g., *Mayhew v. Wilder*, 46 S.W.3d 760 (Tenn. App. 2001)

offices of the members of this Court about matters related to the administration of justice. Ultimately, that is the power this Court has suggested it has in *Common Cause, State ex rel. League of Women Voters* and this case. If this Court now declares that such power exists, certainly the legislative branch enjoys a like power with respect to the judiciary.

Conclusion

The Legislature has chosen the manner in which it prefers to prepare one of its means of non-binding political dialogue with the executive branch of government, and no provision of the Constitution prohibits it from exercising the power to do so in the manner in which it sees fit. Moreover, the Constitution gives the judicial branch of government no discrete authority to interfere in this exercise of legislative power. Nor does the Constitution give the Court authority to stay future actions taken by members of the Legislature with respect to the Budget Digest.²³ Nonetheless, the Order of December 1, 2004, has directed a circuit judge to review legislative acts, taken in the legislative sphere, which this Court is without power to review. By sending this matter to circuit court, this Court avoids the resolution of these most earnest points of contention over the powers of co-equal branches of government and directs its co-equal branch of government to conduct its dialogue on these matters with its inferior court, albeit one that is presided over by a judge with skills, demeanor and reputation worthy of the highest respect.

The Court's Order contemplated that the judicial review to be conducted by the circuit court


23. Is it not general law that action taken within the scope of legislative powers is entitled to immunity from judicial interference, that a court normally may not enjoin the exercise of those powers, and that the adequate remedy at law for the Petitioner would be a declaratory judgment action brought after the action is taken to challenge its validity? See generally, *Perdue v. Ferguson*, 177 W.Va. 44, 47-50, 350 S.E.2d 555, 559-561 (W.Va. 1986).


be completed approximately halfway through the 2005 Regular Session of the Legislature upon waiver of the provisions of West Virginia Code 4-1-17. Those provisions were not waived as the Legislature conducted interim meetings in December, 2004, and January 2005, then proceeded into its regular session and two extraordinary sessions in January, February, March and April. Upon assertion of those provisions in the circuit court, the judicial review is now scheduled to resume May 9, 2005. In view of the foregoing, there is no basis in law for a judicial review of the legislative acts relating to the formulation of the budget bill or the budget digest. Accordingly, the Respondents respectfully request that this Court reconsider its previous action in this matter, set aside its Order of December 1, 2004, and dismiss the Legislature from this action both here and in the circuit court forthwith. The Respondents further request that in taking these actions, the Court advise the Petitioner of the exclusive power of the Legislature to determine the manner in which budget digests are approved and adopted, as well as the contents thereof, and further advise that judicial review of actions of the Legislature and its members that are taken within the legislative sphere may not be obtained in the absence of a clear violation of a specific constitutional provision.


Respectfully submitted,

Earl Ray Tomblin, President of the Senate and
Robert S. Kiss, Speaker of the House of Delegates,
Darrell Holmes, Clerk of the Senate, and
Gregory M. Gray, Clerk of the House of Delegates

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CERTIFICATE OF SERVICE

On behalf of Respondents Earl Ray Tomblin, President of the Senate, and Robert S. Kiss, Speaker of the House of Delegates, et al., the undersigned certifies that the foregoing MEMORANDUM IN SUPPORT OF MOTION OF RESPONDENTS EARL RAY TOMBLIN, PRESIDENT OF THE SENATE, AND ROBERT S. KISS, SPEAKER OF THE HOUSE OF DELEGATES, ET AL., FOR RECONSIDERATION OF ORDER AND TO DISMISS THE ACTION AGAINST THE LEGISLATURE was served upon the persons listed below by mailing a true copy thereof to the below named persons in accordance with the requirements of the West Virginia Rules of Civil Procedure on April 29, 2005.

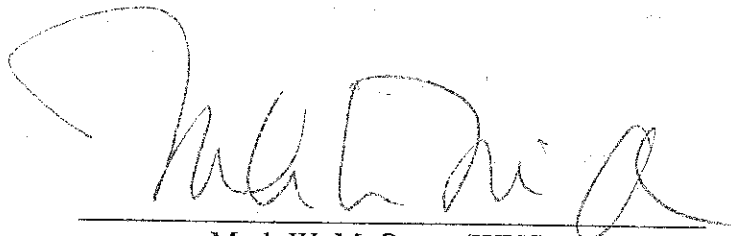
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