

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

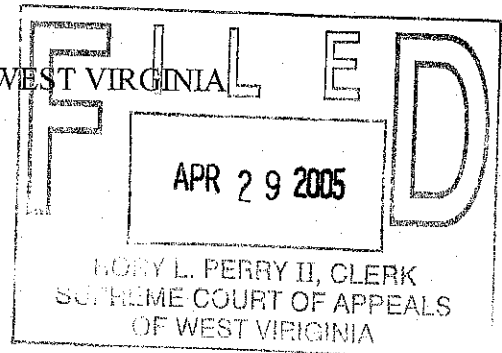
STATE OF WEST VIRGINIA, ex rel.
MARY ANN PODELCO,

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

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

Pursuant to Rule 17(a) and Rule 2 of the Rules of Appellate Procedure, 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, MOVE the Court to reconsider its order of December 1, 2004, and to dismiss the action herein as against the

Legislature for the reasons stated herein.

Since 1991, this Court has attempted to fashion and impose upon the Legislature procedural rules dictating the content of the Budget Digest and record-making requirements relating to its creation of the Budget Digest. *Common Cause v. Tomblin*, 186 W.Va. 537, 413 S.E.2d 358 (1991); *State ex rel. League of Women Voters of West Virginia v. Tomblin*, 209 W.Va. 565, 550 S.E.2d 355 (W.Va. 2001). 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.¹ Now, by its order of December 1, 2004, this Court 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, actually purporting to enjoin the approval and adoption of a Budget Digest, if not forever, at least until the December 1 Order is obeyed.

This Court has no lawful authority to take any of these actions against a co-equal branch of government. The Legislature has its own processes for the approval and adoption of budget digests. The power of the legislative branch of government is plenary and it exceeds its constitutional authority only when it violates restrictions upon it imposed by the *Constitution* of this State. Since the processes which the Legislature has provided for the approval and adoption of its Budget Digests is not prohibited by the *Constitution*, the judicial branch of government is therefore barred by the

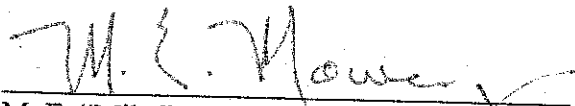
1. See, *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 732, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980).

doctrine of the separation of powers from substituting its processes for those approved by the Legislature, and is barred from subjecting those legislative processes to judicial review. As a co-equal branch of government, the Legislature, its members and staff, may not be compelled to participate in any manner in a judicial review which violates the Constitution, including, but not limited to, participation by way of submission to subpoenae or subpoenae duces tecum, nor may its Conferees of Conference on the Budget Bill be precluded from approving and adopting future Budget Digests.

In summation, there is no lawful authority for this Court to either direct the processes by which the Legislature must fashion the Budget Digest or to require the submission of those processes to judicial review. Further, there is no lawful authority for this Court to enjoin acts of members of the legislative branch in this regard in advance of those actions. As is obvious from the record and the oral arguments had in this action, there is no lawful authority for this Court to appropriate money to the Ethics Commission or anywhere else that may be prayed for by Petitioner, regardless of what a review of the processes by which the Budget Digest is fashioned may reveal. Therefore, in behalf of the Legislature, the undersigned Respondents respectfully request that the Order of December 1, 2004, be set aside and the Legislature be dismissed from this action.

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

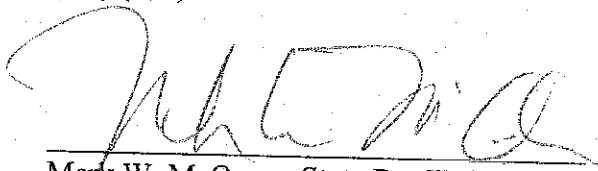
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Gregory M. Gray, Clerk of the House of Delegates,
Respondents*

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 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.

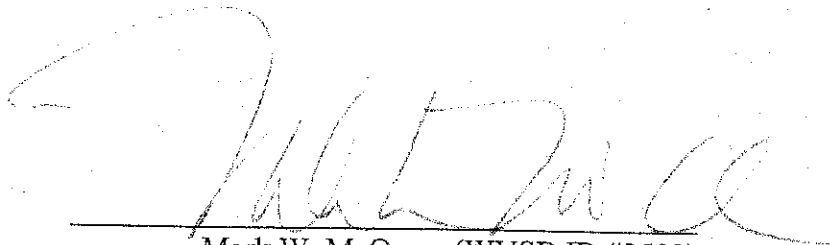
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