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A JUDICIAL DILEMMA: REAL OR IMAGINED?

FOREST JACKSON BOWMAN*

The use of words is to express ideas. Perspicuity requires not only that ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate to them. But no language is so copious as to supply words and phrases for every complex idea, nor so correct as not to include many equivocally denoting different ideas. The Federalist, (No. 37) (J. Madison).

All construction is the ascertainment of meaning. And literalness may strangle meaning. Felix Frankfurter, Utah Junk Co. v. Porter, 328 U.S. 39, 44 (1945).

Look to the essence of a thing, whether it be a point of doctrine, or practice, or of interpretation. Marcus Aurelius, Meditations VIII 22.

INTRODUCTION

Being a judge in West Virginia, as Thomas Hughes said of life itself in Tom Brown's School Days, "isn't all beer and skittles."1 West Virginia's judges2 are limited in their range of per-

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This article is the outgrowth of research conducted for a special committee of The West Virginia Bar Association. I am grateful for the advice and assistance of the other two members of that committee, Lee M. Kenna, Esquire, of Charleston, and Harry E. Moats, Esquire, of Harrisville, and for the untiring efforts of Ms. Anita Harold, West Virginia University College of Law, Class of 1981, who served as my research assistant under a grant funded by the Arthur B. Hodges trust fund.

Certain statements regarding the workings of the West Virginia Judicial Council and the Governor's Committee on Crime, Delinquency and Corrections are the result of personal knowledge acquired during my service as Secretary to the Judicial Council and member of the Governor's Committee during the period 1975-1979.

1 T. Hughes, Tom Brown's School-Days 31 (1886).
2 The term "judge" as used in this article, when referring to West Virginia
missible activity by the West Virginia Judicial Code of Ethics, yet they must seek office in a partisan political election. They are paid a salary that is modest by most objective standards, yet they are prohibited by the West Virginia Judicial Code of Ethics from practicing law or engaging in many of the various activities with which they could supplement their incomes. They are required to be “patient, dignified and courteous” to all with whom they deal in their official capacities, yet they lack any effective means of defending themselves from unjustified criticism and attack.

judges, includes only judges of the Circuit Courts and justices of the Supreme Court of Appeals.

Canon 7 of the West Virginia Code of Ethics has been extensively revised by the Supreme Court of Appeals of West Virginia, most recently on March 1, 1977. While the canon as revised gives a judge considerably more latitude with respect to political activity than does Canon 7 of the Code of Judicial Conduct drafted by the Special Committee on Standards of Judicial Conduct of the ABA, a judge who must run for election on a partisan political ballot still faces severe constraints as a practical matter.

W. Va. Const. art. VIII, § 5 provides in part that, “The legislature may prescribe by law whether the election of such judges is to be on a partisan or nonpartisan basis.” Bills providing for the nonpartisan election of judges have been introduced in the legislature since the ratification of the Judicial Reorganization Amendment of 1974 (which first contained the language quoted above) but no such legislation has been enacted. Notice that the Constitution of West Virginia specifically requires election of judges, thus eliminating any consideration of appointment of judges under a merit plan.

As of April 1, 1980, West Virginia’s Circuit Judges, receiving an annual salary of $35,000, ranked 37th among the fifty states. West Virginia’s Supreme Court Justices, with an annual salary of $38,000, were tied with three other states for 44th place among the fifty states. This information was provided by the Honorable Paul Crabtree, Administrative Director of the Supreme Court of Appeals of West Virginia.

Canon 5 of the West Virginia Judicial Code of Ethics places limitations on judges’ extra-judicial activities, including financial dealings. While Canon 5 of West Virginia’s Judicial Code of Ethics has been amended to provide considerably more latitude than that allowed under Canon 5 of the ABA’s Code of Judicial Conduct, judges are still subject to extensive limitations with regard to their financial conduct.

Canon 3A(3) of the West Virginia Judicial Code of Ethics provides that: “A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.”

Now another inconsistency must be added to the list: West Virginia's judges are permitted, if not encouraged, by the West Virginia Judicial Code of Ethics to participate in activities and to accept appointments dealing with the improvement of the law, the legal system, or the administration of justice, but if they choose to do so, they may be found to have vacated their judicial offices! This inconsistency stems from a narrow interpretation of the following language of article VIII, section 7, of the West Virginia Constitution:

No justice, judge or magistrate shall hold any other office, or accept any appointment or public trust, under this or any other government; nor shall he become a candidate for any elective public office or nomination thereto, except a judicial office; and the violation of any of these provisions shall vacate his judicial office.

Each of the fifty states has some constitutional or statutory provision barring judges from holding certain offices. In some instances these limitations are quite narrowly drawn, as in Georgia, where all officers drawing a salary from the state or from the United States are barred from sitting in the state legislature; or in Texas, where judges are ineligible for the legislature; or in Maine, where judges are prohibited from sitting in either the state legislature or the United States Congress or from holding more than one of a number of designated offices. In the majority of states, however, the limitations are all-encompassing. Thus, for example, South Carolina prohibits judges from holding another "office or position of profit;" Arizona renders a judge ineligible to hold "any office or public employment other than a judicial office or employment;" Colorado prohibits judges from holding

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9 Canon 4(C) of the W. Va. JUDICIAL CODE OF ETHICS.
10 GA. CONST. § 2-1107.
11 TEX. CONST. art. 3, § 19.
12 ME. CONST. art. IX, § 2.
13 S.C. CONST. art. V, § 12. See also: ALASKA CONST. art. IV, § 14; FLA. CONST. art. 5, § 18; HAWAII CONST. art. V, § 3; N.J. CONST. art. 6, § 7; and PA. CONST. art. 5, § 17.
14 ARIZ. CONST. art. 6, § 11. The California Constitution has the same prohibition with nearly identical language, rendering judges ineligible for "public employment or public office other than judicial employment or judicial office." CAL. CONST. art. VI, § 18.
“any other public office;” and New York bars judges from “any other public office or trust.”

At common law, judges could not hold another office if the duties of the other office were inconsistent with their duties as a judge. The common law limitation and the constitutional limitations which prohibit judges from holding another office evidence two public policy concerns: (1) that judges not accept positions or responsibilities which will interfere with their judicial duties, and (2) that judges not be placed in the position of violating the constitutional principle of separation of powers.

Thus, in In re Richardson, the Court of Appeals of New York found that service by judges as commissioners in proceedings for the removal of the president of one of New York City's boroughs would constitute acceptance of an “office” as prohibited by the Constitution of the State of New York, since such service would consume much of the judge's time and could involve the judge in needless controversy. Speaking for the court, Chief Judge Cardozo said, “[t]he policy is to preserve the time of the judges for the performance of their work as judges, and to save them from the entanglements, at times the partisan suspicions, often the result of other and conflicting duties.”

In California, service by a judge on a “qualification board” to consider qualifications of applicants for the office of county executive was found to be of a nature that would contravene the constitutional limitation against a judge holding another office. Quoting Justice Cardozo in In re Richardson, the court said service on the qualification board would take much of the judges' time and would tend to involve judges in “entanglements” and subject them to “partisan suspicions, of which the constitutional limitation, in its wisdom, seeks to free them.” The rationale for

16 Colo. Const. art. VI, § 18.
17 N.Y. Const. art. 6, § 20.
18 State ex rel. Murphy v. Townsend, 72 Ark. 180, 79 S.W. 782 (1904); Wilson v. King, 13 Ky. (3 Litt.) 467 (1823); Howard v. Harrington, 114 Me. 443, 96 A. 769 (1916).
19 Id.
21 Id. at 420, 160 N.E. at 655.
such a policy was "to exclude judicial officers from such extra-judicial activities as may tend to militate against the free, disinterested and impartial exercise of their judicial functions."\textsuperscript{23}

On the other hand, granting to judges the authority to issue a call for military aid to suppress a riot was not prohibited by New York's constitutional provision since it did not "prohibit the exercise of a function which is merely transient, occasional or incidental."\textsuperscript{24} The court said, "the performance of administrative duties as to matters incidental to the exercise of judicial powers or which have some reasonable connection with a judicial purpose has repeatedly been sanctioned."\textsuperscript{25}

Similarly, the New York Court of Appeals held that a judge of that court could be empowered to pass upon the genuineness of certain relics of General Washington, with a view to their purchase by the state, since such a duty would not interfere with the judge's judicial duties.\textsuperscript{26} In addition, the Supreme Judicial Court of Massachusetts allowed judges to serve as members of local draft boards by holding that Massachusetts' constitutional provision barring judges from holding "any other office," in essence "contemplates that a judge shall not accept any office or position, governmental or other, \textit{which interferes} with the performance of his duties as a judge . . . ."\textsuperscript{27} The court concluded that membership on a local draft board was not a position which would interfere with judicial duties.

\section*{I. The West Virginia Dilemma}

The issue has arisen in West Virginia as to whether a judge is constitutionally permitted to serve on two organizations—the West Virginia Judicial Council and the Governor's Committee on Crime, Delinquency and Corrections. Both bodies are created by statute\textsuperscript{28} and are concerned solely with improving the legal sys-

\textsuperscript{23} Id. at 229, 22 P.2d at 512.
\textsuperscript{24} People v. Bard, 209 N.Y. 304, 305, 103 N.E. 140, 141 (1913).
\textsuperscript{25} Id. at 306, 103 N.E. at 142.
\textsuperscript{26} People ex rel. Washington v. Nichols, 52 N.Y. 478 (1873).
\textsuperscript{27} \textit{In re} Opinion of the Justices, 307 Mass. 613, 621, 29 N.E.2d 738, 743 (1940) (emphasis added).
\textsuperscript{28} The West Virginia Judicial Council legislation is embodied in \textsc{W. Va. Code §§} 55-11-1 to -11 (Cum. Supp. 1980). The Governor's Committee on Crime, Delinquency and Corrections is West Virginia's name for the "state planning agency"
tem and the administration of justice. The statutes establishing both organizations require that the governor designate a certain number of judges to serve on the organizations.

The West Virginia Judicial Council was created in 1933 "for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the state." The council is required to "propose to the supreme court of appeals such changes in the practice and procedure of the State as it shall deem expedient," and to "file with the governor prior to the convening of the regular session of the legislature such proposals for legislation as it may deem necessary for making the administration of justice more efficient." Members of the council receive no compensation for their services.

The West Virginia Judicial Council was an outgrowth of an early twentieth century movement in this country to provide some mechanism for the systematic and continuing study of the operation of the courts and to recommend means of improving them. The make-up of West Virginia's Judicial Council is fairly representative of others throughout the country: one justice of the supreme court of appeals, four circuit judges, four practicing lawyers and one member of the faculty of the West Virginia University College of Law. At this time, the supreme court position and one of the circuit judge positions are vacant. At least one supreme court justice and one circuit judge have declined appointment to the council due to concern over the problem raised by article VIII, section 7, of the West Virginia Constitution.

The council has been inactive since April 1978. Prior to that date, it usually met twice a year with each meeting lasting a few hours. The council never made extensive demands on a judge-

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31 Id.
34 Personal knowledge of the author, who was Secretary of the Council from 3-8-75 to 7-15-79.
35 This information is found in the records of the judicial council, maintained
member's time and it did not become involved in "entanglements." Indeed, it would be difficult to find positions less likely to consume a significant part of a judge's time or more unlikely to embroil judges in "entanglements" or "partisan suspicions" than membership on the West Virginia Judicial Council. The function of the council is that of a purely advisory body which does not assume the role of advocate for the measures it recommends.

Likewise, the Governor's Committee on Crime, Delinquency and Corrections requires little of a member's time and has for the most part maintained a low profile. The Governor's Committee functions under the Omnibus Crime Control and Safe Streets Act of 1968, which established a "state planning agency" under the jurisdiction of the governor of the state. This agency was required to be "representative of law enforcement agencies of the State and of the units of general local government within the State." In 1976, the Act was amended to overcome criticism that such agencies were largely police-dominated and were ignoring the judicial branch. The Act now provides:

The State planning agency shall include as judicial members, at a minimum, the chief judicial officer or other officer of the court of last resort, the chief judicial administrative officer or other appropriate judicial administrative officer of the State, and a local trial court judicial officer.

The West Virginia state planning agency created by the Act was designated the "Governor's Committee on Crime, Delinquency and Correction" by Governor Hulett C. Smith in 1968. The committee meets monthly for about four hours, considers requests for Law Enforcement Assistance Administration (LEAA) Grants and votes on those grants. Little time is taken from the

in the office of the administrative director of the supreme court of appeals, who is also, by statute, Secretary of the Judicial Council.

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35 Id.
judge’s performance of judicial duties, and the committee does not become involved in “entanglements” or “partisan suspicions.” Although the committee is still functioning, it has become increasingly difficult to secure the membership of judges because of concern over the constitutional provision.

It seems reasonable to assume that the inclusion of judges in the membership of both organizations, as mandated by statute, is a reflection of the realization that judges are uniquely knowledgeable of the working of the judicial system of the state and of the problems and shortcomings in law enforcement and criminal justice. But the question looms: Is membership on the West Virginia Judicial Council or the Governor’s Committee on Crime, Delinquency and Corrections, or similar organizations, the type of activity prohibited by article VIII, section 7, of the Constitution of West Virginia—even though the “appointment” of judges was mandated by the statute creating the organization?

II. THE HISTORICAL BACKGROUND OF ARTICLE VIII, SECTION 7

While West Virginia’s constitutional prohibition against a judge holding another office is a part of the Judicial Reorganization Amendment of 1974, the concept is not new to West Virginia’s Constitution. The state’s first constitution, ratified in 1863, declared:

No Judge, during his term of service, shall hold any other office, appointment or public trust, under this or any other government, and the acceptance thereof shall vacate his judicial office; nor shall he, during his continuance therein be eligible to any political office. 42

This provision was adopted without opposition by the constitutional convention when the report of the convention’s Committee on the Judiciary was considered. The only discussion on this particular issue centered on a successful motion to add the words “under this or any other government” following the word “trust.” There was no debate or discussion regarding the principle itself or the use of the words “office, appointment or public trust.” 43

42 W. Va. Const. of 1863, art. VI, § 12.
When the Constitution of 1872 was adopted, the prohibition was expanded to bar judges from practicing law. Otherwise, it remained the same:

No judge, during his term of office, shall practice the profession of law or hold any other office, appointment or public trust, under this or any other government, and the acceptance thereof shall vacate his judicial office. Nor shall he, during his continuance therein, be eligible to any political office.

As in the First Constitutional Convention, there was no debate or discussion on the adoption of this provision by the Constitutional Convention.

For 102 years this language remained unaltered in the Constitution of West Virginia. The Judicial Reorganization Amendment of 1974 added the prohibition against a judge becoming a candidate for a nonjudicial office, an addition clearly designed to reduce the attractiveness of a judicial position as a stepping stone to higher political office.

The Supreme Court of Appeals of West Virginia has never addressed the issue directly. However, in *Old Dominion Building and Loan Association v. Sohn*, a 1903 case involving the sale of real estate wherein the deed was acknowledged before a notary public who had accepted the office of judge of the criminal court of the county, the court said that the two offices were "incompatible" and that the notary had vacated his office by accepting the judgeship. There was no inquiry into the question of whether the position of notary public was an "office" since individuals from Alabama and New York were presented, "both solemnly deciding..."

44 W. VA. CONST. of 1872, art. VIII, § 17. This section was later redesignated § 16 by a constitutional amendment ratified on October 12, 1880. There was no change in the substance of the section.

It is questionable, however, whether such a prohibition can mean much to one who is insistent upon using a judgeship as a platform for attaining political notoriety. A judgeship can provide a relatively safe, salaried platform at least until the judge-politician becomes a declared candidate for a nonjudicial office. The only effective means of preventing judicial positions from being converted into personal political empires is prompt, forceful and stringent action against such politicos through the judicial disciplinary machinery of the state and the enforcement of this discipline by the Supreme Court of Appeals, including, when necessary, enforcement of discipline against its own members.

46 54 W. Va. 101, 46 S.E. 222 (1903).
that a notary public is an officer."\(^47\) However, the court did raise the issue of separation of powers, stating that "the offices of notary public and judge may be incompatible under article 5 of the Constitution of West Virginia, declaring that the legislative, executive and judicial departments shall be separate and distinct, and that no person shall exercise the powers of more than one of them at the same time . . . ."\(^48\)

The separation of powers argument is a compelling argument when considered, as here, on a "personal" basis, that is to say, when the appointment of a judge to a nonjudicial position involves the appointment of an individual without regard to whether that individual is a judge. However, when the appointment of a judge to a nonjudicial position is made pursuant to a statute which mandates the appointment of a judge, this argument loses much of its force, for in such an instance, the judge sits in the nonjudicial position, not by virtue of his personal appointment to the position but simply by virtue of being a judge.\(^49\)

In Old Dominion,\(^50\) the appointment involved was a "personal" one, and not one made because the individual was a judge. Therefore acceptance of the appointment clearly violated the separation of powers doctrine. However, had the appointment been based solely on the individual's position as a judge, i.e., a prerequisite to the appointment, a subsequent acceptance would not have violated the doctrine of separation of powers.

The question remains whether a judge's acceptance of an "appointment" to the Judicial Council or to the Governor's Committee is the acceptance of an "office, . . . appointment or public trust" prohibited under article VIII, section 7 of the West Vir-

\(^47\) Id. at 116, 46 S.E. at 228.

\(^48\) Id. at 114, 46 S.E. at 227.

\(^49\) This was precisely what the Supreme Court of Nevada found when a district judge was appointed "town site trustee" under a Nevada statute making district judges town site trustees. The court said the position of town site trustee was in no sense personal to the person sitting as district judge and that he sat only by virtue of the statute making district judges town site trustees. The court held that the service as town site trustee by the judge did not violate the principle of separation of powers. State ex rel. Jennett v. Stevens, 34 Nev. 128, 116 P. 601 (1911).

\(^50\) 54 W. Va. 101, 46 S.E. 222 (1903).
A JUDICIAL DILEMMA

III. DEFINING THE RELEVANT TERMS

A. What is an "Appointment"?

*Appointment* is defined as "the designation of a person by the person or persons having authority therefore to discharge the duties of some office or trust."51 In this sense, of course, *appointment* is a verb. As a noun, *appointment* has been held to be a synonym for *office.*52

B. What is a "Public Trust"?

*Public Trust* has generally been defined synonymously with *office.* In *Ex Parte Yale,*53 the California Supreme Court stated that "the terms 'office' and 'public trust' in the Constitution are nearly synonymous; at least the term 'public trust' is included in the more comprehensive term 'office.' "54 The terms "have relation only to those persons and duties that are of a public nature."55

C. What is an "Office"?

Generally, "an 'office' is a public station or employment, conferred by appointment of government, and embraces the idea of tenure, duration, emolument, and duties."56 The word *office* implies "a delegation of a portion of the sovereign power to the person filling the office."57 Synonyms include *post, appointment, situation, place,* and *position.*58

In *Wilentz ex rel. Golat v. Stanger,*59 the New Jersey Supreme Court held that an "office," within the rule that one occupying an office vacates it upon acceptance of another office incom-

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51 Seattle Ass'n. of Credit Men v. General Motors Acceptance Corp., 188 Wash. 635, 639, 63 P.2d 359, 360 (1936).
52 *Ex Parte Yale,* 24 Cal. 241, 243 (1864).
53 *Id.*
54 *Id.* at 243.
55 *Id.* at 243-44.
56 Thomas v. Sitton, 213 Ark. 816, 820, 212 S.W.2d 710, 712 (1948).
59 129 N.J.L. 606, 30 A.2d 885 (1943).
patible therewith, "is the right, authority, and duty created and conferred by law, by which, for a given period, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public."\(^{60}\)

After noting that it is often difficult to determine whether a position is an "office" or a "mere employment," the Supreme Court of Delaware stated:

Generally speaking, and each case must necessarily depend upon its own facts, a state office embraces the right to exercise a state function or employment, and to take the fees and emoluments belonging thereto. It not only involves the conception of tenure, power, duration, oath, fees and emoluments but also the authority and duty to exercise some part of the sovereign power of the state either in making, administering or executing the laws of the State.\(^{61}\)

The Supreme Court of Tennessee, in holding that a county judge who was inducted into the United States Army held an "office of trust or profit" under the United States within the prohibition of the Tennessee Constitution,\(^{62}\) succinctly summarized this area:

The term 'office', in its context, must be given broad meaning, so as to effectuate the apparent intent of the constitutional prohibition against a diversion or division of the time and labor, energies and abilities of judges of our courts, which might destroy, or diminish their capacity to discharge the exacting duties of their responsible positions . . . .\(^{63}\)

In analyzing the foregoing case law, it would appear, then, that the test for whether this position is an "office" within the constitutional prohibition against judicial officers holding other "offices" hinges on whether the position:

1. involves the exercise of a portion of the sovereign power of the state;
2. involves functions that are more than merely "transient, occasional or accidental"; or
3. may reasonably tend to interfere with the due ad-

\(^{60}\) Id. at 614-15, 30 A.2d at 891.
\(^{62}\) Frazier v. Elmore, supra note 58, at 238, 173 S.W.2d at 563.
\(^{63}\) Id.
ministration of the law.

IV. WHAT DOES IT ALL MEAN?

One of the basic principles of statutory construction, *noscitur a sociis*, which means that "associated words are of assistance in determining the exact meaning to be given to a certain word," contemplates that where two or more words of similar meaning are employed together in a statute, they are understood to be used in a cognate sense, to express the same relations, and to give color and expression to each other. Thus, utilizing this principle, when the West Virginia Constitution speaks of "any other office, . . . appointment or public trust," it is speaking of one and the same thing. As shown earlier, *office, appointment, and public trust* are synonymous terms.

Participation by a judge in an organization such as the West Virginia Judicial Council or the Governor's Committee on Crime, Delinquency and Correction clearly does not fall within the commonly accepted definitions of *office, appointment* or *public trust* as those terms have been defined by the courts under statutes and constitutions prohibiting judges from holding other offices. Such participation does not:

1. interfere with the judges' judicial duties;
2. involve judges in "entanglements" and "partisan suspicions;"
3. involve the exercise of the sovereign power of the state; or
4. come to the judge personally, instead of merely by virtue of being a judge.

Whether an appointment to the Judicial Council or the Governor's Committee or a similar organization involves the acceptance of a position which is incompatible with a judicial position (regardless of how it is defined) has never been decided by the Supreme Court of Appeals of West Virginia. However, that court has ruled on the question of incompatibility of offices under article VIII, section 4 of the Constitution of West Virginia which provides that "None of the executive officers mentioned in this article shall hold any office during the term of his service." In 1948, in ruling that a person holding a temporary commission in the

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64 People v. Goldman, 7 Ill. App. 3d 253, 254, 287 N.E.2d 177, 178 (1972).
65 W. Va. Const. art. VIII, § 7 (emphasis added).
Army is not ineligible under section 4 to serve as Attorney General, the court stated:

We do not believe the question of incompatibility of offices, as defined at common law, arises in this proceeding. There is a conflict in the authorities as to what constitutes incompatibility in offices. In some jurisdictions it is held that such incompatibility exists when it is physically impossible that the duties of both offices be performed properly by the same person. But the weight of authority supports the conclusion reached in the case of Bryan v. Cattell, wherein it is held that incompatibility rests not upon physical inability to perform the duties of both offices, but arises from the inconsistent nature of the offices and their relation to each other, rendering it improper, from considerations of public policy for one person to perform the duties of both. We adhere to the holding in Bryan v. Cattel. The duties of Attorney General of the State of West Virginia and those of a commissioned officer in the Army of the United States are not inconsistent and are so divergent that no incompatibility therein will occur.

We believe that the common law principles relating to incompatibility of offices have been supplemented but not displaced by pertinent provisions of the Constitution of this State inhibiting one person from holding more than one office at the same time.

In our own jurisdiction a liberal view with respect to eligibility to office has been adopted as appears from the following: "The right of a citizen to hold office is the general rule; ineligibility the exception. Courts are hesitant to take action resulting in deprivation of the privilege to hold office, except under clear and explicit constitutional or statutory requirement." 66

In addition, the Attorney General of West Virginia has rendered a formal opinion that a judge may be employed by an interim committee of the Legislature and paid a reasonable amount to compile all the laws relating to children. 67

The supreme court decision and the opinion of the Attorney General both suggest that judges who accept "appointments" to

66 Thomas v. Wysong, 125 W. Va. 369, 373-77, 24 S.E.2d 463, 466-68 (1943) (citations omitted).
the West Virginia Judicial Council and the Governor's Committee on Crime, Delinquency and Corrections, and similar organizations do not thereby vacate their judicial offices since such appointments do not involve incompatible offices. Moreover, such an interpretation would be consistent with another principle of statutory construction which has application to this issue—the presumption against absurdity in the construction of statutes or constitutional provisions. As the Supreme Court of Appeals of West Virginia has put it, "[W]here, as here, a literal application of the language used in the statute would lead to an absurd result, it is our duty to construe the statute so as to avoid such result and adopt a reasonable construction." Moreover, "a statute may be construed contrary to its literal meaning when a literal construction would result in an absurdity or inconsistency, and the words are susceptible of another construction which will carry out the manifested intention of the Legislature." Indeed, the court has a duty to avoid absurdity in the construction of statutes, if such construction can be avoided.  

Viewing membership affirmatively, it is evident that participation in these organizations assists judges in carrying out the mandate of Canon 4 of the West Virginia Judicial Code of Ethics. Canon 4 provides:

He (i.e., the judge) may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. He may assist such an organization in raising funds and may participate in their management and investment, but

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69 Old Dominion Bldg. & Loan Ass'n v. Sohn, supra 54 W.Va. 101, 112, 46 S.E. 222, 226 (1903).
70 Parsons v. County Court, 92 W. Va. 490, 115 S.E. 473 (1922); State v. Morris, 129 W. Va. 456, 37 S.E.2d 85 (1946). The presumption against absurdity is an old principle and not something that courts have only recently seized upon to "legislate." As far back as 1837 an English court said:

The rule by which we are to be guided in construing acts of Parliament is to look at the precise words, and to construe them in their ordinary sense, unless it would lead to any absurdity or manifest injustice; and if it should, so to vary and modify them as to avoid that which it certainly could not have been the intention of a legislature should be done.

should not personally participate in public fund raising activities. He may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

Indeed Canon 4C reads as if it were describing the duties of the members of the West Virginia Judicial Council and the Governor's Committee on Crime, Delinquency and Corrections. The commentary to Canon 4 is even more compelling:

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that his time permits, he is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.70

Interpreting West Virginia Constitution article VIII, section 7 literally and holding that a West Virginia judge cannot serve on organizations such as the Judicial Council and the Governor's Committee, in light of the clear mandate of the West Virginia Judicial Code of Ethics and in view of an understanding of what this constitutional prohibition is actually intended to prevent, would lead to an absurdity. The constitutional prohibition was enacted with a single purpose in mind—to keep judges out of politics and to keep them at the business of judging. Any construction of the constitutional provision which would prevent judges from performing one of their more valuable functions—sharing judicial expertise for the good of the system of justice—would result in an absurdity.

Finally, there is persuasive evidence that the West Virginia Legislature has interpreted the constitutional prohibition as allowing judges to serve on the West Virginia Judicial Council. After the Judicial Reorganization of 1974 eliminated courts of limited jurisdiction in West Virginia, the code section setting forth the membership in the West Virginia Judicial Council was amended to eliminate judges of the "courts of limited jurisdic-

70 (Emphasis added).
tion” from membership on the Council. This statutory change was made without any question having been raised as to the propriety of judges sitting on the Council and, indeed, the change would have been a futile act had not the Legislature interpreted the West Virginia constitutional provision to permit judges to serve on the Judicial Council.

As the Supreme Court of Appeals of West Virginia stated in 1906:

In construing statutes, courts must presume knowledge on the part of the legislature, of the provisions of the organic law of the state, relating to the subject matter thereof, as well as of the principles of the common law, and will not impute to that body any intention to obstruct or impede the operation of constitutional provisions, or to innovate upon the settled policy of the law.

V. Conclusion

What the “settled policy of the law” is, is oftentimes open to question, and we will not know to a certainty what the Supreme Court of Appeals of West Virginia will do with the constitutional provision at hand until the court should rule on the matter. However, the interpretation suggested by this article appears clear: service by a West Virginia judge on the West Virginia Judicial Council or the Governor’s Committee on Crime, Delinquency and Correction, or a similar organization does not cause the judge to vacate his seat under the provisions of article VIII, section 7, of the West Virginia Constitution.
