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DISQUALIFICATION OF JUSTICES AND THE CONSTITUTIONAL STATUS OF THE JUDICIAL BUDGET:

State ex rel. Bagley v. Blankenship

On June 19, 1978, the Supreme Court of Appeals of West Virginia reiterated and enlarged upon two sensitive and vital areas of law: disqualification of justices and the constitutional status of the judicial budget. The issues were prompted by the actions of the West Virginia Legislature during the 1978 regular session and culminated in *State ex rel. Bagley v. Blankenship*.¹

Two members of the West Virginia State Bar, as attorneys and taxpayers, presented a petition for a writ of mandamus to require the Clerk of the House of Delegates to record and publish a corrected budget bill reflecting the judiciary budget as submitted by the judiciary's administrative director. The disputed bill, which had been passed by the legislature and approved by the Governor, reflected decreases in five judiciary items.

This case began with the submission of the judiciary's 1978-1979 budget to the State Auditor in accordance with the Judicial Reorganization Amendment² and article VI, section 51 of the West Virginia Constitution.³ The request totalled \$14,911,054, but included in this figure were \$375,400 of proposed salary increases. If these increases were not enacted by the legislature, the court administrator advised the representatives that the request would consequently be reduced to \$14,535,654. The salary increases were in fact deleted and the budget bill submitted by the Governor reflected the lesser amount. However, the budget bill reported out of the joint conference committee and passed by the legislature disclosed a total for the judiciary of \$12,741,034. Five line items—personal services, other expenses, other court costs, judicial training program and the law libraries program were decreased—resulting in a reduction of \$1,794,620. The petition for a writ of mandamus soon followed.

¹ 246 S.E.2d 99 (W. Va. 1978).

² In March 1974, the legislature proposed the Judicial Reorganization Amendment to the constitution which was ratified at the general election on November 5, 1974.

³ W. VA. CONST. art. VI, § 51(B) outlines the procedure for legislative appropriations.

DISQUALIFICATION OF JUSTICE MCGRAW

Upon presentation of the petition for a writ of mandamus, four justices of the court voluntarily disqualified themselves. Justice McGraw declared that he knew of no good and valid reason to require his disqualification and declined to disqualify himself. He and four retired judges of the state convened and heard the case.⁴ The respondent, C.A. Blankenship, Clerk of the House of Delegates, filed a motion that Justice McGraw disqualify himself from the case, or, in the alternative, that the permanent members of the court or the special panel take the necessary action to disqualify him. The motion was referred to the permanent members of the court, who declared themselves disqualified for *all* issues.⁵ The motion was then redirected to the special panel.

The respondent cited "bias, prejudice, partiality, and due process violations" as requiring the disqualification of the justice and included newspaper exhibits which allegedly expressed public criticism by Justice McGraw of the legislature's actions.⁶ With Justice McGraw abstaining from this portion of the opinion, the court concluded that it had no power or authority to disqualify him from the proceedings when the justice, in his own judgment and discretion, had found no reason to do so.

At early English common law, a judge could be disqualified from hearing a case only if it could be shown that he had an "interest" in the case.⁷ This "interest" alludes to a direct pecuniary interest in the outcome,⁸ and the principle prompted Lord Coke's famous maxim, *aliquis non debet esse iudex in propria causa*—no man shall be a judge in his own case.⁹ Eventually, pecuniary interest was joined by "relationship to a party" and

⁴ The Judicial Reorganization Amendment provides:

A retired justice or judge may, with his permission and with the approval of the supreme court of appeals, be recalled by the chief justice of the supreme court of appeals for temporary assignment as a justice of the supreme court of appeals, or judge of an intermediate court, a circuit court or a magistrate court.

W. VA. CONST. art. VIII, § 8.

⁵ 246 S.E.2d at 106.

⁶ *Id.*

⁷ *Regina v. Hertfordshire, Justices*, 6 Q.B. 753 (1845).

⁸ Note, *5th Circuit Adopts Standard for Disqualification of Judges for Bias*, 7 CUMB. L. REV. 185, 188 (1976).

⁹ *Dr. Bonham's Case*, 77 Eng. Rep. 646, 652 (K. B. 1609).

“previous involvement as counsel in the case” as grounds requiring the disqualification of a judge.¹⁰

The West Virginia Supreme Court of Appeals follows the common-law grounds for disqualification¹¹ and the legislature has enlarged upon them by codification.¹² Interest¹³ and relationship to a party¹⁴ have been recognized by the West Virginia Supreme Court of Appeals as grounds for disqualification of trial judges. Bias and partiality, not due to interest or relationship, however, have been slow to gain recognition in the West Virginia courts. Only recently did the court in *Louk v. Haynes*¹⁵ call for disqualification of a judge where circumstances evinced a possibility of bias and subsequent due process violations. *Louk* is noted in *Bagley*¹⁶

¹⁰ For an excellent summary, see Note, *Disqualification of Judges*, 56 YALE L.J. 605, 609-12 (1947).

¹¹ State *ex rel.* Monongalia Valley Traction Co. v. Beard, 84 W. Va. 312, 99 S.E. 452 (1919).

¹² [W]hen such a judge [circuit, criminal or intermediate] is a party to a suit, or is interested in the result therefor otherwise than as a resident or taxpayer of the district or county, or is related to either of the parties, as a father, father-in-law, son, son-in-law, brother, brother-in-law, nephew, uncle, first cousin, or guardian, or if at the time of the institution of the suit, or at any time before its final determination, he, his wife, or any party or parties related to him in the degree hereinbefore specified, is a stockholder, or officer, in any stock company or corporation which is a necessary party to the proceedings, or if he is a material witness for either party, he shall not take cognizance thereof unless all parties to the suit consent thereto in writing . . . W. Va. Code § 51-2-8 (1976 Replacement Vol.).

¹³ State *ex rel.* Brotherton v. Blankenship, 214 S.E. 2d 467 (W. Va. 1975); State *ex rel.* Shrewsbury v. Poteet, 202 S.E.2d 421 (W. Va. 1974); State *ex rel.* Brotherton v. Blankenship, 207 S.E.2d 421 (W. Va. 1973); State *ex rel.* Matko v. Ziegler, 154 W. Va. 872, 179 S.E.2d 735 (1971); Osborne v. Chinn, 146 W. Va. 610, 121 S.E.2d 610 (1961); Chevront v. Holmer, 62 W. Va. 476, 59 S.E. 964 (1908); City of Grafton v. Holt, 58 W. Va. 182, 52 S.E. 21 (1905).

¹⁴ State *ex rel.* Monongalia Valley Traction Co. v. Beard, 84 W. Va. 312, 99 S.E. 452 (1919).

¹⁵ 223 S.E.2d 780 (W. Va. 1976). The court concludes that:

We find, therefore, that under the facts and circumstances of this case, petitioner was also denied due process of law because of the failure of the trial judge to recuse himself . . . We do not hold that every sentencing judge is per se ineligible from hearing and deciding an issue of probation revocation. Where, however, a challenge to a judge's impartiality is made for substantial reasons which indicate what the circumstances offer a possible temptation to the average man as a judge not to hold the balance nice, clear and true between the State and the accused, a judge should recuse himself. *Id.* at 791.

¹⁶ 246 S.E.2d at 106.

but is summarily disregarded as correct but inapplicable. *Louk* is a criminal case and the bias arises from the fact that the sentencing judge later acted as judge in a parole revocation hearing. Although it may be inapplicable for the purposes of *Bagley* due to factual differences therewith, it is important to note that the West Virginia Supreme Court of Appeals has at least once held that a circuit court judge committed prejudicial error by failing to disqualify himself due to bias. *Bagley*, unfortunately, leaves one with the impression that disqualification on grounds of bias and partiality is solely a personal decision and the court is completely powerless even to review such issues after a judge has refused to relinquish his position.¹⁷

The distinction between *Louk* and *Bagley* could lead one to suggest that there should be distinct standards utilized for the disqualification of circuit court judges as opposed to supreme court justices. In *Louk* the decision necessitated a review of the circumstances of a probation violation and a personal evaluation of the offender. In such a case, bias and partiality are more than merely relevant: they could easily be decisive. On the other hand, in cases where the issue is one of interpreting the existing law or constitutional provisions, personal bias or partiality should theoretically not be a factor in the decision.

It is not contended that the supreme court justices had absolutely no personal interest in the outcome of *Bagley*. Though their individual salaries are fixed by statute, their office budgets, library funds and training programs were reduced. The predominant issue to be determined, however, was not the reasonableness or necessity of the individual items in the budget request, but whether the legislature had acted in violation of the constitution. As the court said, "[t]he controlling issue . . . can readily be decided on bases of well-established principles of constitutional law. Contamination of the balance through personal feelings, bias, prejudice or partiality is foreign to the decisional process in such cases."¹⁸

It was then asserted that the authority for the court to disqualify Justice McGraw is found in the West Virginia Constitution. As

¹⁷ *Id.*, quoting *State ex rel. Matko v. Ziegler*, 154 W. Va. 872, 179 S.E.2d 735 (1971), where the plaintiff had sought a writ of prohibition to prevent the judge from proceeding in the case: "A majority of this Court, Judge Browning not participating, denies that motion for the reason that the question whether Judge Browning should participate in the consideration and decision of this proceeding should be decided by him and not by this Court."

¹⁸ *Id.* at 107.

Bagley correctly points out,¹⁹ however, the constitution only gives the Supreme Court of Appeals the power to “censure or temporarily suspend”²⁰ a judge or justice for violation of the Judicial Code of Ethics.

Disqualification is only mentioned in Canon 3(C) of the Judicial Code of Ethics. Canon 3(C) states that a judge or justice “should disqualify himself in a proceeding in which his impartiality might reasonably be questioned,”^{20.1} but does not say that he *must* disqualify himself, or that the court is empowered to disqualify a judge or justice. Therefore, at the present time in West Virginia, as unfair as it may seem to litigants, if a judge wrongfully refuses to disqualify himself due to bias or partiality, the remedy is an “after the fact” reprimand or temporary suspension for a violation of the Code of Ethics unless, as in *Louk*, an actual denial of due process is found on appeal.²¹

Canon 3(A)(6) mandates that judges and justices are to “abstain from public comment about a pending or impending proceeding in any court.” The section goes on, however, to state that comments made “in the course of their official duties” or for “explaining for public information the procedures of the court” are not prohibited.^{21.1} The court in *Bagley* properly indicated that the issue to be decided was the authority of the court to disqualify a justice, not to determine if Justice McGraw violated the Code of Ethics. That is a determination to be made through judicial self-regulation by the Commission of Inquiry and Judicial Board of Review.^{21.2}

¹⁹ *Id.*

²⁰ The provision, in applicable part, provides:

Under its inherent rule-making power, which is hereby declared, the supreme court of appeals shall, from time to time, prescribe, adopt, promulgate and amend rules prescribing a judicial code of ethics, and a code of regulations and standards of conduct and performances for justices, judges and magistrates, along with sanctions and penalties for any violation thereof, and the supreme court of appeals is authorized to censure or temporarily suspend any justice, judge or magistrate having the judicial power of the State, including one of its own members, for any violations of any such code of ethics, code of regulations and standards, or to retire any such justice, judge or magistrate who is eligible for retirement under the West Virginia judges' retirement system.

W. Va. Const. art. VIII, § 8.

^{20.1} W. VA. CODE, Judicial Code of Ethics, 3(C)(1) (1978 Replacement Vol.).

²¹ *Louk v. Haynes*, 223 S.E.2d 780 (W. Va. 1976).

^{21.1} W. VA. CODE, Judicial Code of Ethics, 3(A)(6) (1978 Replacement Vol.).

^{21.2} The present Judicial Code of Ethics was adopted by the Supreme Court

Bagley, in reiterating precedent and constitutional and statutory principles concerning disqualification of judges or justices for bias or prejudice, points to an obviously deficient and sensitive area of West Virginia law. Litigants may have virtually no means of having a judge removed on grounds of bias or partiality *prior* to trial,²² for it is the challenged judge who rules on the motion. The fear of causing judicial hostility by filing of a motion may prevent many litigants from even raising the issue. This unfortunate state of affairs exists in West Virginia and, as evidenced by *Bagley*, any needed changes will not be forthcoming from the courts.

CONSTITUTIONALITY OF LEGISLATURE'S ACTIONS

A delicate, but precarious balance exists between the three branches of our government. Theoretically, the balance should be maintained by the competing doctrines of the separation of powers and checks and balances. The foundation for the doctrine of separation of powers is the philosophical theory that governmental power should be limited. The method to do so is to allocate that power among three separate, but equal, branches.²³ The doctrine of separation of powers is clearly embodied in the West Virginia Constitution,²⁴ as it is in the constitutions of almost every other state in the nation.²⁵ But the West Virginia Constitution provides for almost complete fiscal independence for the judiciary branch, contrary to most other state policies.²⁶

of Appeals by order dated July 16, 1976. This order recognizes the authority of the Court to establish such a code of ethics and the authority of the Commission of Inquiry and Judicial Board of Review to enforce the Code's penalties and sanctions pursuant to article VIII, § 8 of the West Virginia Constitution. W. VA. CODE, Judicial Code of Ethics, Editor's note, (1978 Replacement Vol.).

²² See Note, *Recusal of Judges*, 77 W. VA. L. REV. 763, 766 (1975).

²³ A. Vanderbilt, *THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE* (1953).

²⁴ W. VA. CONST., art. V, § 1, provides: "The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible for the legislature."

²⁵ E.g., KY. CONST. § 27; MASS. CONST. art. 30; MISS. CONST. art. 1, § 1; N. C. CONST. art. 1, § 6; TEX. CONST. art. 2, § 1; VA. CONST. art. 1, § 5.

²⁶ Brennan, *Judicial Fiscal Independence*, 23 U. FLA. REV. 277, 281 (1971). In particular, the author states:

The extent of the legislative power over the judicial budget remains an open question in Colorado, while in Maryland and West Virginia the legislatures may not reduce or delete items from the judicial budget, although they may make increases. In all other states the budget of the

Historically, all governmental appropriations and budgeting have been considered to be a function of the legislative branch because it possesses the power of taxation.²⁷ The executive branch had veto power, but the judicial branch had no "power over the purse"²⁸ and consequently the judiciary was, and often still is, considered to be the weakest of the three branches.²⁹

The legislature of West Virginia evidently regarded this absence of judicial control over its own budget as a flaw and passed the "Budget Amendment" as section 51 of article VI of the constitution, which was ratified at the general election on November 5, 1918. This amendment provided that the legislature could not create a deficit bill by "increasing or diminishing the items therein relating to the legislature, and by increasing the items relating to the judiciary."^{29.1} A later amendment³⁰ was ratified in 1968 and added the current wording that "no item relating to the judiciary shall be decreased."^{30.1}

The portion of the West Virginia Constitution relating to budgeting and appropriations was adopted from the constitution of the state of Maryland.³¹ It is of interest to note that prior to 1972, Maryland's constitution gave that state legislature power only to "increase" items relating to the judiciary, but the Amendment of 1972 changed the wording to now read that the "General Assembly may amend the bill . . . by increasing or *diminishing* the items therein relating to the judiciary."^{31.1} Apparently, the people of Maryland had second thoughts about a complete, fiscally independent judiciary.

Bagley presents a paradox, not new to the West Virginia court,³² between the theory that the legislature in its role as the

judicial branch . . . is subject to modification by the legislature. *Id.* at 281 (footnotes omitted).

²⁷ Note, *Judicial Power- The Inherent Power of the Courts to Compel Funding for Their Own Needs*, 53 WASH. L. REV. 331 (1978).

²⁸ THE FEDERALIST No. 78 (A. Hamilton). Cited also in *Bagley*, 246 S.E.2d at 104.

²⁹ A. Vanderbilt, THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE, 97-98 (1953).

^{29.1} W. VA. CONST., art. VI, § 51 (1966).

³⁰ The Modern Budget Amendment, proposed by House Joint Resolution No. 3 in 1967.

^{30.1} W. VA. CONST. art. VI, § 51(B)(5) (1978 Replacement Vol.).

³¹ MD. CONST. art. III, § 52(6). Also noted in *State ex rel. Trent v. Sims*, 133 W. Va. 244, 270-71, 77 S.E.2d 122, 138 (1953).

^{31.1} MD. CONST. art. III, § 52(6) (emphasis added).

³² *State ex rel. Brotherton v. Blankenship*, 207 S.E.2d 421 (W. Va. 1973).

tax levying body should control the agency it funds, and the doctrine that the courts, to administer justice fairly, must be independent of the legislative and executive branches.³³

Nationally, the debate between interdependence and independence is raging in numerous states.³⁴ Many factors are motivating the crisis: overcrowded courts, lengthy litigation, more judicial activities, and outmoded methods of administration. State judiciaries are desperately in need of mechanization of records, new facilities, and more staff. In the majority of states, the past and most prevalent method today to compel the much needed funding is through the court's assertion of its inherent power to force legislative or county agencies to appropriate money.³⁵ This existence of inherent power is not often disputed; rather, it is the determination of the *extent* of this power which is at the heart of the controversy.³⁶

The peculiar nature of the West Virginia Constitution clearly and specifically grants the judiciary complete fiscal independence.³⁷ Where "a constitutional provision is clear in its terms, and the intention of the electorate is clearly embraced in the language of the provision itself, this Court must apply and not interpret the provision."³⁸

The legislature had done an act which was plainly unconstitutional in reducing five line items of the judiciary budget request. Whether the action was correct or justified could not have been an issue. The petition for a writ of mandamus to correct the budget bill was the proper action under West Virginia constitutional law.³⁹

³³ For a good theoretical overview, see Note, *Judicial Financial Autonomy and Inherent Power*, 57 CORNELL L. REV. 975 (1972).

³⁴ Roush, *Financing the Judiciary-Time for a New Approach*, 1974 ARIZ. ST. L.J. 639.

³⁵ *E.g.*, *Carlson v. State ex rel. Stodola*, 247 Ind. 631, 220 N.E.2d 532 (1966); *Commonwealth ex rel. Carroll v. Tate*, 442 Pa. 45, 274 A.2d 193 (1971); *Leahey v. Farrell*, 362 Pa. 52, 66 A.2d 577 (1949); *In re Juvenile Director*, 87 Wash. 2d 232, 552 P.2d 163 (1976).

³⁶ Note, *Judicial Financial Autonomy and Inherent Power*, 57 CORNELL L. REV. 975, 979 (1972).

³⁷ W. VA. CONST. art. VI, § 51(5): "The legislature shall not amend the budget bill so as to create a deficit but may amend the bill by increasing or decreasing any item therein: Provided, that no item relating to the judiciary shall be decreased . . ."

³⁸ This principle has been reiterated numerous times by the West Virginia Court. *E.g.*, *State ex rel. Brotherton v. Blankenship*, 207 S.E.2d 421 (W. Va. 1973); *State ex rel. Trent v. Sims*, 138 W. Va. 244, 77 S.E.2d 122 (1953).

³⁹ "Mandamus lies to require the discharge by a public officer of a nondiscre-

Unlike the situation in other states, there is no need for the West Virginia judiciary to assert its inherent power to compel funding. The judiciary cannot ignore an unconstitutional act, and effect must be given to such a clear provision as section 51 of article VI of the West Virginia Constitution. The decision of *Bagley* to award the writ of mandamus was the only constitutionally correct decision which could have been made.

Both issues presented in *Bagley* are theoretical and philosophical problems for which few scholars have immediate or exacting solutions. As with the issue of disqualification, the resolution of the debate between interdependence and independence of the judicial branch will probably not come from the West Virginia Supreme Court of Appeals. If the people perceive a financially independent judiciary as truly a threat to the stability or longevity of the democratic form of government, then they may voice their collective opinions in the form of a vote to amend the constitution. *Bagley* simply draws attention to these problems, it offers no solutions.

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tionary duty." Syllabus pt. 3, State *ex rel.* Greenbrier County Airport Auth. v. Hanna, 151 W. Va. 479, 153 S.E.2d 284 (1967).

