CHAPTER 5. SEPARATION OF POWERS

Read Article V.

NOTES

1. *State ex rel. Richardson v. County Court of Kanawha*, 138 W.Va. 885, 78 S.E.2d 569 (1953). This mandamus proceeding challenged as violative of Article V a statute that authorized the Domestic Relations Court in Kanawha County to fix the salaries of probation officers and clerical staff. The Court noted the rationale and roots of the doctrine of separation of powers, quoting *Kilbourn v. Thompson*, 103 U.S. 168 (1880):

> "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers entrusted to governments, whether state or national, are divided into the three grand departments of the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system, that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other."

To implement those concepts, the *Richardson* Court relied on doctrine that categorized the branches' legitimate spheres of operation according to the nature of legislative, judicial, and executive functions. Thus, the question to be answered was whether the legislature here assigned the judiciary an essentially legislative or executive function.

Justice Given's opinion canvassed the State's precedents striking down legislative efforts to impose various responsibilities on the courts. Those authorities and the invalidated provisions included: *Sims v. Fisher*, 125 W.Va. 512, 25 S.E.2d 216 (1943)(statute had empowered courts to supervise the sale of forfeited and delinquent lands administratively instead of judicially); *Staud v. Sill and See*, 114 W.Va. 208, 171 S.E. 428 (1933)(statute provided for confirmation by circuit courts of sales made under deeds of trust); *Hodges v. Public Service Comm.*, 110 W.Va. 649, 159 S.E. 834 (1931)(legislation allowed for *de novo* circuit court review of agency determinations on applications for a license to build a dam where the standard to be applied required a court "to weigh from the standpoint of the state as a whole and the people thereof the advantages and disadvantages arising therefrom"); *County Court of Raleigh County v. Painter*, 123 W.Va. 415, 15 S.E.2d 396 (1941)(the law provided circuit court deputies and assistants right to appeal the amount of their salary as set by the county court [which was like today's county commission] to the circuit court); *Baker v. County Court of Tyler County*, 112 W.Va. 406, 164 S.E. 515 (1932)(statute provided, similar to law in *Painter*, deputy sheriffs with an appeal of their salaries to circuit court). Accordingly, the Court found that the delegation challenged in *Richardson* conferred a legislative function on the judiciary and was therefore void.

The Court conceded "there cannot be, in the very nature of things, any exact delineation of judicial, legislative or executive powers. There must be some mingling or overlapping. The overall purpose of the Constitution is to create a workable form of government, and to deny to any one of the three departments any function actually necessary for the operation of that department would effectively render the form of government impotent. The Constitution itself in effect provides exceptions to the separation of departments made by Article V. . . . This Court, however, is not warranted in making exceptions thereto merely because the Founders thought it wise to do so in certain circumstances. Neither is it within the province of this Court to declare that matters primarily legislative, not inherent in the functioning of the judicial department, may be exercised by the judicial department."

2. *State ex rel. State Building Comm. v. Bailey*, 151 W.Va. 79, 150 S.E.2d 449 (1966), struck down legislation that had included the president of the senate, the speaker of the house of delegates, and the minority leaders of both chambers as members of the State Building Commission, which oversaw the construction and operation of state buildings. The Act violated Article V by attempting to confer and impose executive or administrative duties upon members of the Legislature.

Bailey was one of many West Virginia cases to insist "that no question can be raised as to the plain meaning of [Article V] . . . and that its plain language calls not for construction but only for obedience." So much for empty aphorisms.

3. *State ex rel. Sahley v. Thompson*, 151 W.Va. 336, 151 S.E.2d 870 (1966), concluded that Article V was not offended by a city charter provision that authorized the mayor, city clerk, clerk of a municipal court, chief of police, and the captains and lieutenants of the police departments to issue arrest warrants for violations of the city charter. (Neither the majority nor the dissenting opinion mentioned the Fourth Amendment or Article III.) Separation of powers principles do not apply to local governments.

4. For renditions on separation of powers developments in the West Virginia and United States Supreme Courts, *see* Jason C. Pizatella, Note, *Separation of Powers and the Governor's Office in West Virginia: Advocating a More Deferential Approach to the Chief Executive from the Judiciary*, 109 W. VA. L. REV. 185 (2006); Frank R. Strong, *Judicial Review: A Tri-Dimensional Concept of Administrative-Constitutional Law*, 69 W. VA. L. REV. 111 and 249 (1967), and Kenneth Culp Davis, *Judicial Review of Administrative Action in West Virginia – Study in Separation of Powers*, 44 W. VA. L. Q. 270 (1938)

STATE ex rel. JOINT COMMITTEE ON GOVERNMENT AND FINANCE OF WEST VIRGINIA LEGISLATURE v. BONAR, 159 W.Va. 416, 230 S.E.2d 629 (1976).

WILSON, Justice:

Appellant, Robert L. Bonar, Superintendent of the West Virginia Department of Public Safety, appeals from an order of the Circuit Court of Kanawha County, West Virginia, entered on August 6, 1975, awarding a writ of mandamus by which the appellant was compelled and commanded to provide the Joint Committee on Government and Finance of the West Virginia Legislature with certain records theretofore demanded in a subpoena issued by the Joint Committee and served on the appellant on April 21, 1975.

Appellant contends that the records which are sought are privileged and confidential and that the information sought violates the rights of employees of the Department of Public Safety.

The Joint Committee on Government and Finance, created by statute, is empowered, among other things, to study and survey matters of government and finance; is granted access to records of every agency or department of the State; and is specifically granted the power to compel the attendance of witnesses and the production of books, papers, documents and records by the issuance of a subpoena. See W.Va.Code, Chapter 4, Article 3, Sections 1--4.

By House Concurrent Resolution No. 8, adopted May 24, 1974, the Legislature directed the Joint Committee on Government and Finance to make a comprehensive study of the administration and personnel policies of the Department of Public Safety so that recommendations might be made and legislation might be adopted to improve such administration and policies. By House Concurrent Resolution No. 45, adopted March 9, 1975, the [Committee] was directed to continue such studies.

Pursuant to such statutory and legislative authority and directions, a subcommittee of the Joint

Committee issued and served a subpoena on Robert L. Bonar, Superintendent of the West Virginia Department of Public Safety, directing him to produce certain writings, documents or reports.[1]

The appellant refused to comply with the subpoena, and on June 10, 1975, the Joint Committee sought to enforce the subpoena by petitioning the Circuit Court of Kanawha County, West Virginia, for a writ of mandamus, the awarding of which prompts this appeal. . . .

[T]o resolve the issues presented by this appeal with due regard for the real or imagined intrusions by one branch of government into the affairs of another, the common constitutional starting point is as follows:

> 'The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; . . .' W.Va.Const., Art. V, § 1.

Inherent in the constitutional concept of separation of powers is the acknowledgement that the powers granted and exercised by each department separately must in some way be conjoined to produce a governmental entity.

Equally important is the acknowledgement that each separate department, in addition to its specific powers, has certain inherent powers without which its specific powers would be meaningless, and these inherent powers must also be conjoined to produce a governmental entity.

For example, the Legislature, in order to exercise its separate and distinct powers effectively, must have broad powers to acquire information regarding the subject matter of its legislation and to that end must necessarily acquaint itself with the manner in which various agencies of the government are being run. This Court has previously recognized this principle. Sullivan v. Hill, 73 W.Va. 49, 79 S.E. 670 (1913); and Cashman v. Sims, 130 W.Va. 430, 43 S.E.2d 805 (1947). It does not question that principle now. It recognizes that legislative investigatory powers are grounded in English, colonial and Congressional history.

West Virginia history is free of instances in which the Executive Department of government has felt compelled to assert some sort of executive privilege against legislative investigatory intrusions. However, such confrontations, although infrequent, are a well-recognized part of the history of relationships between the Congress and the President of the United States.

Other instances of constitutional confrontations have concerned clashes between individual rights and legislative powers; individual rights and executive privilege; legislative powers and judicial powers; and executive privilege and judicial process.

Many of these conflicts come to the courts in the context of the effect to be given to legislative or judicial subpoena powers.

When such conflicting claims must be judicially resolved, courts must endeavor to balance competing interests in such a manner as to do no violence either to the separate integrity of any branch of government or to the successful conjoinder of powers necessary to the formation of a governmental entity or to the individual rights of a free people.

This balancing of interests has produced some well-recognized and workable guidelines for those whose competing interests are, in the final analysis, defined and determined by the courts.

The judiciary has always guarded its own subpoena powers against any claim of executive privilege. See United States v. Burr, 25 Fed.Cas.No.14,692d (C.C.D.Va.1807); and United States v. Nixon, 418 U.S. 683 (1974). Likewise, the courts go far to protect the rights of the Legislature in the pursuit of a legitimate legislative purpose by pertinent inquiries against any claim of privilege by individuals, other than the privilege against self-incrimination. . . . Similarly, the judiciary will not interfere with the legislative exercise of a subpoena power when such issuance is within a specific constitutional grant. . . .

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[1][The subpoena sought production of the originals of activity reports from the Department's Central Headquarters and the originals of performance rating sheets of specifically named personnel. Ed. note.]

However, the courts will not assume that every legislative investigation is justified by a public need that overbalances private or executive rights or privileges. See Watkins v. United States, 354 U.S. 178 (1957), and Sinclair v. United States, 279 U.S. 263 (1929).

A less precise formula for the balancing of interests prevails in civil litigation. Cases can be found in which the courts have refused to require a department head to disclose information in civil actions. State v. Bouchelle, 122 W.Va. 498, 11 S.E.2d 119 (1940)[.] . . . On the other hand, the courts will sometimes require production of documents, at least for in camera inspection. [Smith v. Schlesinger, [513 F.2d 462 (1975); and Sun Oil Company v. United States, 514 F.2d 1020 (1975).]

From the above authorities, with specific reference to the judicial or legislative subpoena power, it is apparent that the courts jealously guard their own subpoena powers and equally jealously guard the legislative subpoena power.

However, neither subpoena power is subject to unquestioned enforcement. The courts will, on proper motion, refuse to enforce a judicial subpoena duces tecum calling for the production of documents in the absence of a showing that the documents sought are relevant and material to the matter in controversy and that proof is not otherwise practically available. Ebbert v. Bouchelle, 123 W.Va. 265, 14 S.E.2d 614 (1941). A similar standard should prevail when the courts are asked to enforce a legislative subpoena duces tecum, and this would require the Legislature to show: (1) that a proper legislative purpose exists; (2) that the subpoenaed documents are relevant and material to the accomplishment of such purpose; and (3) that the information sought is not otherwise practically available.

The Joint Committee chose in this instance not to use legislative power to enforce obedience to its subpoena by attachment, fine or imprisonment. See W.Va.Code, Chapter 4, Article 1, Section 5; and Sullivan v. Hill, supra.

Instead, the Joint Committee chose to attempt to have the courts enforce its subpoena by mandamus. It might have sought the assistance of the courts under the W.Va.Code, Chapter 4, Article 3, Section 4, which provides as follows:

> '. . . If any witness subpoenaed to appear at such hearing shall refuse to appear or to answer inquiries there propounded, or shall fail or refuse to produce books, papers, documents or records within his or her control when the same are demanded, the committee shall report the facts to the circuit court of Kanawha county or any other court of competent jurisdiction and such court may compel obedience to the subpoena as though such subpoena had been issued by such court in the first instance. . . .'

Under the provisions of Article 5, Section 1 of the Constitution of West Virginia, this must be considered a grant of judicial authority, because the courts of this State are forbidden to exercise legislative authority of any kind. See County Court v. Demus, 148 W.Va. 398, 401, 135 S.E.2d 352 (1964); and Sutherland v. Miller, 79 W.Va. 796, 91 S.E. 993 (1917).

Consequently, in considering the enforcement of a legislative subpoena duces tecum, the courts will apply principles long used by them in determining whether to enforce a judicial subpoena duces tecum.

In the instant case, the broad legislative purpose as proclaimed by the Legislature is not open to question and should not generally be resisted by any claim of executive or other privilege by the Superintendent of the Department of Public Safety. However, the relevancy and materiality of the documents requested, namely the originals of certain Activity Reports and Rating Sheets, have not been established. The Joint Committee made no effort, in its petition filed below, to set forth facts showing such necessity. It did not otherwise endeavor to make such a showing. Likewise, not only did it fail to establish that the information sought was not otherwise practically available, but indeed it appears from the face of the record that much of the requested material had previously been supplied in the form of copies. Some parts of the Joint Committee's subpoena here in issue seem more dictated by local rather than legislative interests. Further, some of the Joint Committee's

arguments sound more in prosecutorial than in legislative concerns.

Perhaps the most pertinent case having a bearing on the issues involved in the instant case is Senate Select Committee v. Nixon, [498 F.2d 725 (1974)]. The court held that it would not enforce a Congressional subpoena duces tecum served on the President of the United States for the production of tape recordings of conversations between the President and a presidential aide. The rationale of the court's decision was that the court could find no merit in the argument that the Committee needed to resolve conflicting testimony and that such resolution was critical to the Committee's performance of its legislative function. The court frankly acknowledged that fact-finding by a legislative committee was undeniably a part of its task. However, it pointed out that Congress frequently legislated on the basis of conflicting information provided in its hearings. The court further rejected any comparison between the proceedings of a legislative committee and the proceedings of a grand jury. It pointed out that the proper discharge of the responsibility of a grand jury would turn entirely on its ability to determine whether there was probable cause to believe that certain named individuals committed certain specific crimes. Such judicial need for a showing of probable cause, the court contended, was much different from the legislative need for information which might very well be expected to be conflicting without interfering with the proper legislative purpose of legislating.

In the absence of a showing by the Joint Committee of the relevancy and materiality of the specific documents to a proper legislative as opposed to some other purpose, and in the absence of a showing that the information sought was not otherwise practically available, the court below should have denied access to such material, particularly when the Superintendent of the West Virginia Department of Public Safety raised such questions based on the protection of whatever rights employees of the Department might have against unnecessary disclosure of personal and confidential information concerning them.

For the reasons above stated, the order of the Circuit Court of Kanawha County, West Virginia, issuing a writ of mandamus compelling the production of the originals of certain specified documents from the Superintendent of the West Virginia Department of Public Safety, is reversed, and the case is remanded to that court with directions to dismiss the proceeding. . . .

NEELY, Justice (dissenting):

I respectfully dissent from the majority opinion. Under the Constitution and the laws of this State, the West Virginia Legislature is absolutely entitled to subpoena every scrap of paper from every official file of every officer, agent, employee, and servant of the State of West Virginia. Although the majority opinion does not appear to question this proposition, insofar as the Legislature may enforce obedience to its subpoena by attachment, fine or imprisonment, it is illogical that the less disrupting remedy of mandamus is not also available.

The right of the West Virginia Legislature to inquire into all the operations of the executive branch is supported not only by a constitutional tradition based upon nine centuries of Anglo-American precedent but also by our statutory law, W.Va.Code, 4-1-5 (1923); W.Va.Code, 4-3-4 (1965). When statutes are plain and unambiguous they should be applied and not construed. Crockett v. Andrews, 153 W.Va. 714, 172 S.E.2d 384 (1970). Consequently there is a clear legal right; the contempt power is not made an exclusive remedy and mandamus will lie.

The facts of this case indicate that the Joint Committee on Government and Finance was empowered by the Legislature to conduct a study of the administrative and personnel policies of the Department of Public Safety, with particular regard to its policies on discipline, promotion, transfer, suspension, and termination of members. Two transfers were brought to the attention of a subcommittee duly authorized by the appellee Joint Committee to hold hearings to determine whether the current discretion given to the Superintendent of the Department of Public Safety to

make transfers should be modified by new legislation.

During the course of its investigation the subcommittee held a hearing on February 3, 1975, to inquire into the circumstances of Corporal Gordon L. Swartz' transfer from the Clarksburg detachment of the Department to the West Union detachment. One of the witnesses at this hearing, Lieutenant Colonel H. C. Beverly, second in command to the Superintendent, told the subcommittee that he would provide them with the rating sheets covering the period during which Corporal Swartz was stationed in Clarksburg. . . .

The subcommittee found inconsistencies in the testimony of various members of the Department which raised questions about the veracity of the records presented at the hearing concerning Sergeant Armstrong, and accordingly the subcommittee directed its staff to request from the Superintendent the originals of all documents which Captain White stated he had sent to Department Headquarters before Sergeant Armstrong's transfer. At the same time a request was made for Corporal Swartz' records which Lieutenant Colonel Beverly had promised but not provided. While this controversy might at first appear petty, it is not; in fact, the legislative inquiry which is the subject of this appeal goes to the question of possible perjury by employees of the executive branch before a legislative subcommittee.

Giving or conspiring to give false testimony are, of course, serious offenses for which one may be subject to criminal prosecution. Initiating such prosecution is not, however, the Legislature's sole means of vindicating the integrity of its fact-finding process. The West Virginia Constitution vests power in the Legislature to impeach any officer of the State for 'maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor.' W.Va. Constitution, Art. 4, § 9. Within the broad scope of the provision there surely exists a mandate for the impeachment of officials who are implicated in presenting false testimony or documents to a properly constituted legislative subcommittee engaged in its constitutional business.[3] Therefore, I conclude that there is constitutional as well as statutory support for the Joint Committee's subpoena, inasmuch as the materials sought to be produced might have a bearing on impeachable offenses, possibly committed by officers of the State of West Virginia.[4]

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[3]While there has been much debate recently within the national government as to the meaning and content of'high crimes and misdemeanors,' few would contend that the phrase does not include violations of existing criminal law. Furthermore, the West Virginia Constitution provides other bases for impeachment which give the West Virginia Legislature greater latitude than the United States Congress in controlling officials in the other branches of government. Compare W.Va.Const., art. 4, § 9 With U.S.Const., art. 2, § 4. 'Maladministration,' as found in the West Virginia impeachment provision, was, for example, proposed for inclusion in the corresponding United States Constitutional provision but rejected on grounds that 'so vague a term will be equivalent to a tenure during the pleasure of the Senate.' 2 M. Farrand, The Records of the Federal Convention of 1787, 550 [1911]. Although a popular view of impeachment might only contemplate the removal of a chief executive, in fact the impeachment power has traditionally been used as much to remove corrupt officials serving under the chief executive. Such action might well be pursued under the rubric of 'maladministration.'

[4]A careful reading of the history of the impeachment power in Anglo-American legal tradition lends considerable support to the proposition set forth in the text. The history demonstrates that impeachment was for the English 'the chief institution for the preservation of government.' Said by the House of Commons in 1679, quoted 1 Sir W. S. Holdsworth, A History of English Law 383 (London, 3d ed. 1922). And with the English experience fresh in mind the framers of the United States Constitution were doubtless well aware of the high political purposes served by impeachment. See B. Bailyn, Ideological Origins of the American Revolution [1967].

Impeachment originated in England in the late fourteenth century and, except for a 162 year lapse between 1459 and 1621, continued to be a potent weapon for Parliament in its struggle to gain supremacy over the Crown. Direct attacks upon the King were unthinkable, so Parliament exerted its control indirectly, by bringing to heel the King's ministers. As Blackstone commented, 'For as a king cannot misuse his power, without the advice of evil counsellors, and the assistance of wicked ministers, these men may be examined and punished.'. . . The following examples are illustrative of Parliament's exercise of the impeachment power and the development of ministerial accountability. Chancellor Michael de la Pole, Earl of Suffolk was charged in 1386 with misappropriation of funds, and Sir Edward Seymour was likewise charged in 1680.

The judiciary is not the repository of all knowledge and wisdom in government despite pervasive notions to the contrary among courts and members of the bar. The West Virginia Legislature may not be perfect; however, it is the only legislature that we have to protect the rights, privileges, and immunities of the citizens of this State from an over-zealous, non-responsive, and potentially tyrannical executive branch.

A reasonable inference may be drawn from the facts presented to this Court that public support for certain members of the Department of Public Safety who were popular in the areas from which they were transferred caused certain legislators to take up the cause of these members in the context of an investigation of the Department of Public Safety. However, the motives of the Legislature are irrelevant, so long as its activities are conducted pursuant to a legislative purpose.

Increasingly the most important governmental decisions are made by officials of the executive branch who are neither democratically elected nor popularly responsive. While theoretically the Governor, who is the appointing authority, is both democratically elected and popularly responsive, the degree of actual democratic control of any part of the executive branch is speculative at best.

Under our scheme of government each branch is checked and balanced by the other two, yet the clear direction of this Court in deciding constitutional questions between the legislative branch and executive branch is increasingly to place all the power on the side of the executive. State ex rel. Brotherton v. Blankenship, W.Va., 207 S.E.2d 421 (1973) (Neely, J. dissenting at 436); State ex rel. Brotherton v. Blankenship, W.Va., 214 S.E.2d 467 (1975) (Neely, J. dissenting at 492).

The history of liberty is the history of legislatures. Legislatures are not an abstract outgrowth of classical Greek or Roman political philosophy, but rather a valuable inheritance from medieval England. Cf. 1 and 2 G. Trevelyan, History of England; 1 T. Macaulay, History of England, chapter 1. The spirit of medieval law was highly respectful of established rights in property, status, and privileges throughout society from the king to the lowliest unfree men. 1 F. Pollock & F. Maitland, History of English Law, book 2, chapters 1 and 2.

From the days in which Simon de Montfort challenged Henry III in the Baron's War, there has been a constant struggle between the centralized power of the executive branch (which today includes such appointed figures as the Superintendent of Public Safety) and the people through their parliaments or legislatures. The people have always, rightly or wrongly, struggled agaisnt interference by the executive with the traditional way in which they have ordered their lives as evidenced as early as 1236 in the Merton Parliament at which the Barons declared with one voice 'nolumus leges Angliae mutare.'

No one has ever accused a legislature of being efficient; however, efficiency is not the ultimate end of government. The lack of efficiency is frequently a conscious effort on the part of individuals to humanize society. On the other hand, efficient government, which is often best accomplished through the use of colorless, odorless, tasteless, non-political, non-responsive, bureaucratic appointees is not necessarily good government. The governance of a prison operates with methodical efficiency. However, unchecked power in the guise of efficiency encourages tyranny. I would agree with Mary McCarthy that 'bureaucracy, the rule of no one, has become the modern form of despotism.' . . .

The Duke of Buckingham in 1626 and Peter Pett, Commissioner of the Navy in 1668 were both charged with neglect of duty. For abuse of official power many were charged, including the Duke of Suffolk in 1450, the Duke of Buckingham in 1626, Justice Berkley in 1637, Attorney General Yelverton in 1621, Viscount Mordaunt in 1660, and Chief Justice Scroggs in 1680. Sir Richard Gurney, lord mayor of London (1642) and Chief Justice North (1680) were called to account for their encroachment on Parliament's prerogatives. And finally, and perhaps of most interest, charges were brought against some of the King's ministers for giving pernicious advice to the Crown. Included within this last category, were the Earl of Oxford (1701), Lord Somers (1701), Lord Halifax (1701), Viscount Bolingbroke (1715), the Earl of Strafford (1715), and the Earl of Oxford (1717).

The State of West Virginia is not the Federal Government;[5] precedent applicable to the President of the United States, who is responsible for the national defense, is not applicable to the Governor of West Virginia or his appointees. There is no colorable state interest in secrecy when the national security is not involved. While there are alien enemies who could profit militarily from the disclosure of certain information guarded by the national government, the State of West Virginia has no alien enemies, only its own citizens. While irate and concerned citizens may appear hostile and seditious to those holding authority, such citizens are the mainstay of a freewheeling and critical democratic process which is the only protection against both governmental excess and indifference.

It is impossible to find a consistent thread of precedent through Anglo-American jurisprudence with regard to the proper boundaries of the executive and legislative powers. On the question of the Legislature's power to subpoena information from the executive branch there are as many opinions as there are executives, legislators, and judges.

... My own conclusion from the precedents of both law and history is that the legislative branch should be strengthened rather than weakened. I perceive the majority opinion as but one more step in the removal of the control of government from democratically elected and popularly responsive political officials whose contact with the citizenry is real and not theoretical in favor of placing the control of government in the hands of a distant bureaucracy whose responsiveness to the citizenry is exclusively theoretical.

STATE ex rel. BARKER v. MANCHIN,
167 W.Va. 155, 279 S.E.2d 622 (1981).

McGRAW, Justice:

The relator, Naaman Jackson Barker, a resident and citizen of West Virginia employed as a surface miner in or near Logan County, West Virginia, seeks a writ of mandamus under the original jurisdiction of the Court to compel the respondent, A. James Manchin, Secretary of State of West Virginia, to file in the permanent register of rules certain rules and regulations promulgated by the Director of the Department of Mines governing the safety of persons employed in and around surface mines operated within the state so that they will be in force and effect and can be enforced as contemplated and required by law. The relator contends that the provisions of the West Virginia Administrative Procedures Act, particularly W.Va.Code 29A-3-11 and 29A-3-12 (1980 Replacement Vol.), pursuant to which the rules in question were disapproved by the Legislative Rule-Making Review Committee, are unconstitutional and void and that the respondent, therefore, has a nondiscretionary duty to file the rules and regulations in the permanent register. We conclude that the relator's arguments are meritorious, and we award the writ.

The facts of the case are not in dispute. In 1967 the Legislature, in enacting surface mining and reclamation legislation, provided that the Director of the Department of Mines "shall promulgate reasonable rules and regulations, in accordance with provisions of chapter 29A ... of said Code, to protect the safety of those employed in and around surface mines, and the enforcement of all laws, and rules and regulations relating to the safety of those employed in and around surface mines is hereby vested in the department of mines." W.Va.Code s 20-6-20 (1967). In 1979, before this

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[5]I would note one significant difference which bears directly upon the allocation to the Legislators of the power here in issue. In the Federal Government Congress receives its power only by express grant or by necessary implication from an express grant. In contrast the West Virginia Legislature's power is almost plenary, subject only to express or necessarily implied constitutional restrictions. State ex rel. County Court v. Demus, 148 W.Va. 398, 135 S.E.2d 352 (1964); Robertson v. Hatcher, 148 W.Va. 239, 135 S.E.2d 675 (1964).

litigation was commenced, the Legislature amended chapter 20, article 6 of the Code, manifesting the intent that the Department of Natural Resources and the Department of Mines were to cooperate in the promulgation of rules and regulations relating to the mining industry. W.Va.Code s 20-6-1 (1979). In 1980, after the commencement of these proceedings, the Legislature amended the state's surface mining and reclamation laws to reflect its intention that safety in and around surface mining operations be the responsibility of the Department of Mines. W.Va.Code 20-6-34 (1980 Cum.Supp.) provides:

> "... The director of the department of mines shall promulgate reasonable regulations in accordance with the provisions of [§ 29A-1-1 et seq.] of this Code to protect the safety of those employed in and around surface mines...."

The Legislature also charged the Department of Mines with certification and training of persons responsible for blasting or the use of explosives in surface mining . . . and with promulgating rules and regulations concerning the certification of surface mine foremen. . . . This brief summary of legislation, before and after the commencement of the pending mandamus proceeding, clearly affirms the position of the relator that the Department of Mines is required by law to promulgate rules and regulations relating to personnel safety in and around surface mining operations.

[In 1976], the Legislature revised the West Virginia Administrative Procedures Act . . . in an attempt to maximize public participation in administrative rule-making. . . . See generally Neely, Rights and Responsibilities in Administrative Rule-Making in West Virginia, 79 W.Va.L.Rev. 513 (1977) (hereinafter cited as Neely). The 1976 amendments did not alter the portion of the Act which provides that lawfully adopted rules and regulations of administrative agencies of the State shall be of no legal force and effect unless they are filed in the permanent register in the office of the Secretary of State, who is responsible under the law for the maintenance of the register and for the reception and official filing of rules and regulations therein. W.Va.Code [29A-2-1]. As part of the revision, however, a new legislative body was created, the Legislative Rule-Making Review Committee, the constitutional validity of which is at issue here. W.Va.Code [29A-3-11].[2]

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[2]W.Va.Code 29A-3-11 reads in pertinent part:

(a) There is hereby created a statutory body to be known as the legislative rule-making review committee, to review all rules or regulations of the several agencies following the proposal thereof, except those rules or regulations described in subsection (a), section seven of this article. The committee shall be composed of six members of the senate, appointed by the president of the senate, and six members of the house of delegates, appointed by the speaker of the house of delegates. In addition, the president of the senate and the speaker of the house of delegates shall be ex officio nonvoting members of the committee and shall designate the co-chairmen. Not more than four of the voting members of the committee from each house shall be members of the same political party.... The committee shall meet upon call of the cochairmen and may meet at any time, both during sessions of the legislature and in the interim.

(b) No adoption, amendment or repeal of any rule or regulation, except a rule or regulation described in subsection (a), section seven of this article or a rule or regulation issued pursuant to section fourteen thereof, shall be effective until seventeen copies thereof have been presented to the legislative rule-making review committee by the agency proposing such rule or regulation at a regular meeting of said committee, and approved by the committee. The form of proposed rules or regulations which are presented to the committee shall be as follows: New language shall be underlined and language to be deleted shall be stricken-through but clearly legible. The committee shall study all proposed rules or regulations and, in its discretion, may hold public hearings thereon.

Within six months after the proposed rule or regulation is presented to the committee, the committee shall either approve, approve in part and disapprove in part, or disapprove the proposed rule or regulation and file notice of its action in the state register and with the agency. In the event no notice of approval or disapproval is filed by the committee in the state register within one hundred eighty days after the presentation of the proposed rule or regulation to the committee, the committee shall be deemed to have approved all of the proposed rule or regulation for the purposes of this section. To the extent that a proposed rule or regulation is approved by the committee it shall be effective thirty days after the filing of notice of approval or on the effective date proposed by the agency, whichever is later, or if no notice is filed, thirty days after approval is deemed to have occurred for the purposes of this section. The secretary of state shall note every such effective date in the state register. To the extent that the committee disapproves a proposed rule or regulation no agency shall thereafter issue any regulation or directive or take other action to implement such disapproved rule or regulation except

Briefly, section 11 of the Administrative Procedures Act provides that no agency rule or regulation shall become effective until it has been presented to and approved by the Committee. The Committee is composed of six members of the Senate and six members of the House of Delegates, appointed by the President of the Senate and the Speaker of the House of Delegates, respectively, who also act as ex officio non-voting members. The Committee has six months after the presentation of the proposed rule or regulation within which to approve or disapprove, in whole or in part, the proposed agency action. If the Committee fails to act on proposed rules and regulations within that time period, it is deemed to have approved all of the proposed regulation. Barring action by the Legislature as a whole, approved regulations become effective after thirty days. Disapproved regulations are invalid and may not be implemented by the agency unless the full Legislature reverses the Committee disapproval.

Under the provisions of W.Va.Code [29A-3-12], the Committee is required to submit to the Legislature copies of the rules and regulations it has considered at least thirty days before the end of each regular session. The rules and regulations are referred to the appropriate committees of the Legislature for study. Committee hearings are required to be held on rules and regulations disapproved in whole or in part by the Legislative Rule-Making Review Committee:

> [T]he legislature may by concurrent resolution either sustain or reverse, in whole or in part, the action of the legislative rule-making review committee under the provisions of section eleven, except that if the legislature fails during its regular session to sustain by resolution the disapproval of a rule or regulation proposed for the purpose of implementing a federally subsidized or assisted program, such disapproval shall be deemed reversed for purposes of this section and the proposed rule or regulation shall become effective . . .. W.Va.Code 29A-3-12.

The language of this statute implies that the action of the Committee is a recommendation to the Legislature. Theoretically, the Committee's action is only a starting point for review by the full Legislature. However, while the statute contemplates such review, it clearly does not require it. While the Legislature "may" approve or disapprove the Committee recommendation, it is not required to. In only one instance is formal action by the Legislature required in order to validate the Committee action. If the Committee disapproves a rule designed to implement "a federally subsidized or assisted program," then such disapproval must be formally sustained. W.Va.Code 29A-3-11. In this instance alone, inaction by the full Legislature is "deemed" to reverse the Committee. W.Va.Code 29A-3-12. Presumably, in all other cases, inaction by the Legislature constitutes tacit approval of the Committee action. Thus, in all areas except federal aid programs, there is no formal requirement for review of the Committee's action. Its decisions stand on their own and serve as a final "veto" of any disapproved rule.

The surface mine safety rules and regulations here in issue were adopted by the Department of Mines and transmitted to the Secretary of State in January of 1979. Notice of opportunity for interested persons to submit data and proposed amendments to the rules and regulations was given and a date for a public hearing was set in compliance with W.Va.Code [29A-3-8 and 9]. When finally adopted with amendments, the rules and regulations were transmitted to the Secretary of State and to the Legislative Rule-Making Review Committee on April 23, 1979. At the Committee's meeting on June 25, 1979, the proposed surface mine safety rules and regulations were considered and, after discussion, were disapproved. The relator, a citizen of West Virginia and a surface miner, brought this action in mandamus to compel the respondent to file the proposed surface mine safety

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that the legislature may reverse such disapproval under the provisions of section twelve of this article. If the committee disapproves any rule or regulation proposed for the purpose of implementing a federally subsidized or assisted program the legislature shall either sustain or reverse every such disapproval.

(c) Any rule or regulation described in subsection (a), section seven of this article shall be effective thirty days after filing in the state register.

rules in the state register as final rules having full force and effect of law, contending that the Legislative Rule-Making Committee and the Legislature, acting pursuant to the provisions of W.Va.Code 29A-3-11 and 12, have unconstitutionally prevented the Department of Mines from promulgating and implementing valid surface mine safety regulations as required by law.

The respondent, in his verified answer, interposes eight defenses, including the assertion that the statutory creation of the Legislative Rule-Making Review Committee is constitutional and was warranted by past abuses of administrative agencies. The Legislative Rule-Making Review Committee, Robert M. Steptoe and William E. Shingleton, as Co-Chairmen and as citizens and taxpayers, permitted on their motion to intervene in the litigation, set out six defenses in their verified answer, adopting and supporting generally the defenses interposed by the respondent. The West Virginia League of Women Voters, particularly manifesting interest in the effect of these review procedures on the promulgation of rules and regulations of the West Virginia Air Pollution Control Commission, appeared in the proceedings to file a brief as amicus curiae. . . .

The respondent has [questioned] the standing of Mr. Barker to seek relief in this case. The crux of this argument is that the relator has shown no "direct injury" such as was traditionally required under cases such as Massachusetts v. Mellon, 262 U.S. 447 (1923). This point is not well taken. This Court rejected this strict standard in the case of State ex rel. Brotherton v. Moore, W.Va., 230 S.E.2d 638 (1976), where it was stated in syllabus point 1 that:

"A citizen and taxpayer of this State has a right to a mandamus proceeding in order to compel a public official to perform a non-discretionary constitutional duty."

We specifically stated that no "special or pecuniary interest must be shown by individuals who sue in this capacity." 230 S.E.2d 638, 640-641. See also State ex rel. Brotherton v. Blankenship, W.Va., 214 S.E.2d 467 (1975)[.] . . . In the present case the relator, in addition to being a citizen and taxpayer, is a coal miner on a surface mine operation. He is a citizen who would be most directly affected by the safety regulations involved here. There is no legitimate question concerning the sufficiency of his personal interest to bring this suit. . . .

[It is also] contended that this suit presents a political question not subject to judicial treatment in that we are asked by the relator to implement a specific policy. Our determination of the issues in this case does not represent a political policy choice by the Court. Indeed, for our purposes the specific content of the rules in question is immaterial. What we are asked to decide is whether the disapproval by the Legislature of these or any other administrative rules and regulations, which have been validly promulgated by an administrative agency pursuant to statutory authorization, by means of a statutory scheme of legislative veto power is inconsistent with fundamental principles embodied in our constitution. Thus, even though political issues may appear on the record, the questions for our determination are clearly justiciable.

Having disposed of the preliminary issues and defenses raised in the case, we turn our attention to resolution of the major issue presented for our determination: Whether W.Va.Code 29A-3-11 and 12, which provide for the review and disapproval of otherwise validly promulgated administrative rules and regulations by the Legislature through its Legislative Rule-Making Review Committee are unconstitutional as violative of the separation of powers doctrine embodied in article V, section 1 of the Constitution of West Virginia.

Article V, section 1 of the state constitution . . . prohibits any one department of our state government from exercising the powers of the others is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed. . . .[3]

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[3]There are some examples of constitutionally-approved intrusions into the legislative sphere by the executive which are worth noting here. The governor, the chief executive of the State, is required to prepare and submit to the Legislature a budget, W.Va. Const. art. VI, § 51, and is empowered to convene the Legislature, W.Va.Const. art. VI, § 19, to call extraordinary sessions, W.Va.Const. art. VII, § 7, and to veto bills, W.Va. Const. art. VII, §§ 14, 15. [A]

The powers and duties of each of our three branches of government are set forth in the constitution. Powers and responsibilities of the Legislature are detailed in article VI. Article VII relates to the powers and duties of the Executive Department and article VIII defines the powers and responsibilities of the Judicial Department. Generally speaking, the Legislature enacts the law, the Governor and the various agencies of the executive implement the law, and the courts interpret the law, adjudicating individual disputes arising thereunder. W.Va.Const. art. VI, § 1; art. VII, § 5; art. VIII, § 1. The relator here contends that the Code provisions relating to the authority of the Legislative Rule-Making Review Committee to disapprove proposed agency rules and regulations and of the entire Legislature to do so by concurrent resolution offends the doctrine of separation of powers by permitting the Legislature to exercise power properly belonging to the Executive Department.

Our state constitution imposes certain mandatory duties upon the Legislature. . . . As a general rule, however, the Legislature has plenary power to act unless prohibited from doing so by the constitution itself. . . . The police power of the State is broad and sweeping and the Legislature, as its depository, may delegate to the Executive, within certain limits, its power to enact rules and regulations for the protection of the public welfare, health and safety which have the force of law. Mountaineer Disposal Service, Inc. v. Dyer, 156 W.Va. 766, 197 S.E.2d 111 (1973); State ex rel. Morris v. West Virginia Racing Comm., 133 W.Va. 179, 55 S.E.2d 263 (1949). The Legislature may not vest uncontrolled discretion in the Executive to promulgate rules and regulations, but must provide the Executive with sufficient standards or policy for guidance. Rinehart v. Woodford Flying Service, 122 W.Va. 392, 9 S.E.2d 521 (1940). Of course, the Legislature in its wisdom may choose to grant no rule-making power at all to an agency or to grant such power to only a few agencies. There is no allegation here that the delegation of the rule-making power to the Department of Mines was invalid as not being within these limitations.

The Governor, as the chief executive of the State, is the head of the Executive Department. W.Va.Const. art. VII, § 5. In that capacity he is empowered to appoint all officers "whose offices are established by this Constitution, or shall be created by law, and whose appointment or election is not otherwise provided for; and no such officers shall be appointed or elected by the legislature." W.Va.Const. art. VII, s 8. Officers appointed by the Governor to administrative offices are officers of the Executive Department. The Governor also has the power to veto enactments of the Legislature. W.Va.Const. art. VII, § 14.

When the Legislature delegates its rule-making power to an agency of the Executive Department, as it did here by requiring the Director of the Department of Mines to promulgate surface mine safety rules and regulations, it vests the Executive Department with the mandatory duty to promulgate and to enforce rules and regulations. Once the executive officer or agency has made and adopted valid rules and regulations pursuant to the grant of the legislative powers, they take on the force of statutory law. . . . Under the provisions of the 1976 revision of article 3 of the Administrative Procedures Act, however, rules and regulations of administrative agencies become effective only upon compliance with the provisions of the Act, including § 29A-3-11, creating and granting authority to disapprove regulations to the Legislative Rule-Making Review Committee, and § 29A-3-12, relating to the action of the entire Legislature on the Committee's report. W.Va.Code [29A-3-3]. Thus, even though an executive officer or agency has fulfilled its duty by drafting and approving otherwise valid regulations pursuant to a delegation of the legislative rule-making power, the statute precludes the regulations from taking effect and prevents such officer or agency from implementing those measures until they are approved by the Legislature or a portion of its membership. No standards are provided for the review of rules and regulations by the Legislature.

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particularly interesting, even intriguing, constitutional intrusion by the executive on the legislative power is the Citizens Legislative Compensation Commission, established by W.Va.Const. art. VI, § 33. . . .

A twelve-member committee may, in its discretion, approve or disapprove, in whole or in part, any proposed administrative rules and regulations. The Committee may in fact attempt to influence or dictate the content of the rules and regulations of an executive agency, separate and distinct from the Legislative Department.[5] The entire Legislature may, at some later date, sustain or reverse the action of the Committee by concurrent resolution. Inaction by the Legislature validates the Committee's disapproval of rules and regulations and precludes their implementation by the Executive Department. The power of a small number of Committee members to approve or to disapprove otherwise validly promulgated administrative regulations, and of the entire legislative body to sustain or to reverse such actions either by concurrent resolution or by inertia, constitutes a legislative veto power comparable to the authority vested in the Governor, as head of the Executive Department, by [art. VII, § 14], and reverses the constitutional concept of government whereby the Legislature enacts the law subject to the approval or the veto of the Governor.

As we noted before, our constitution places strict procedural and substantive limitations upon the power of the Legislature to enact law. The constitution outlines the procedure for exercising legislative power. This language is a self-contained standard to which all enactments must conform. If the passage of a purported law has not strictly conformed with the standards, it is void. The magic gantlet is spelled out in article VI and VII of the constitution.

Article VI, section 1 vests the Senate and the House of Delegates with the legislative power and requires enactments to be styled, "Be it enacted by the Legislature of West Virginia.". "Bills and resolutions may originate in either house, but may be passed, amended or rejected by the other." W.Va.Const. art. VI, § 28. Section 29 of article VI prohibits a bill from becoming law "until it has been fully and distinctly read, on three different days, in each house ...", except in cases of urgency. No act of the Legislature may embrace more than one object, which must be expressed in the title of the act, nor may any law be revived or amended by reference only to its title. W.Va.Const. art. VI, § 30. Article VI, § 31 provides for the passage of amended bills or resolutions upon the affirmative vote of a majority of the house in which the bill or resolution was originally passed. Additional procedures for the passage of budgetary items and appropriations bills are set out at length in article VI, § 51 and its subsections. Before any bill passed by the Legislature can become law, it must be submitted to the Governor for his approval. If the Governor disapproves the bill, it is returned first to the house in which it originated and then to the other house. The Governor's veto may be overriden by a majority vote of the members of both houses. [Art. 7, § 14]. Detailed procedures for the Governor's veto or approval of appropriations bills are set forth in article VI, [§ 51(11) and article VII, § 15].

These constitutional provisions clearly limit the power of the Legislature to give the binding effect of law to its actions. It may create law only by following the formal enactment process. Where it seeks to give legal force to informal actions, the Legislature exceeds the limits of its constitutional authority. Thus, it has been held from the earliest days of our statehood that the Legislature cannot give a matter the force and effect of law by joint resolution when such matter is properly the subject of the enactment process. Boyers v. Crane, 1 W.Va. 176 (1865). Joint or concurrent resolutions, while they may bind the members of the legislative body, are not statutes and do not have the force and effect of law. . . .

Of course, when an administrative agency promulgates rules and regulations pursuant to a grant of power by the Legislature, it is not limited by the constitutional restraints on legislative action. The

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[5]See, Schubert, Legislative Adjudication of Administrative Legislation, 7 J. PUB. LAW 134, 157-158 (1958): "It would doubtless be unrealistic to assume that a group of state legislators would be content to make judgments about the legal power of administrative agencies, and ignore the political implications of administrative policies as these are revealed in actual application in specific instances. Legislative review of administrative rule-making is almost certain, in the United States, to be political review."

constitutional limitations outlined above apply only to the legislative branch of our government. Moreover, since the executive cannot be delegated plenary rule-making power but must adhere to legislative guidelines in promulgating regulations, such restraints are less critical to control the exercise of that power by the executive. Thus, so long as it acts within the limits of the legislative grant of rule-making power, the executive may properly make rules having the force and effect of law without following the constitutional enactment procedures required of the Legislature when it exercises its law-making power.

What the Legislature has attempted to do here is to invest itself with the power to promulgate rules having the force and effect of law outside the constitutional limitations imposed upon the legislative branch in the exercise of that power. In effect, the Legislature abdicates in favor of the executive its power to make rules and then asserts that because the rule-making power so delegated is legislative in nature, it may step into the role of the executive and disapprove or amend administrative regulations free from the constitutional restraints on its power to legislate. The statutory scheme brings to mind the Old Testament quotation from Job I:21, "The Lord gave, and the Lord hath taken away." The Legislature at one time created and delegated powers and responsibilities to the Department of Mines and at a later time attempted to take away some of those important powers and responsibilities and to lodge them in the hands of the Legislature and its personnel. Such a mechanism for legislative review of executive action may properly be called an "extra-legislative control device" for it permits the Legislature to act as something other than a legislative body to control the actions of the other branches. This is in direct conflict with our constitutional requirement of separation of powers. The power of the Legislature in checking the other branches of government is to legislate. State v. Harden, 62 W.Va. 313, 58 S.E. 715 (1907). While the Legislature has the power to void or to amend administrative rules and regulations, when it exercises that power it must act as a legislature through its collective wisdom and will, within the confines of the enactment procedures mandated by our constitution. It cannot invest itself with the power to act as an administrative agency in order to avoid those requirements.

Other jurisdictions have reasoned in a similar manner to reach the conclusion that a legislature may not act informally to check the activities of the other branches of government.

... This is not to say that we believe all legislative review of rule-making to be void. Legislative rule-making review has purpose and merit and may be beneficially exercised and employed when contained within its proper and constitutional sphere. The respondent asserts that the purpose of creating the Legislative Rule-Making Review Committee and the present statutory scheme was to correct abuses of authority by administrative agencies and officials in exercising the rule-making power.[8] We do not question that some procedure for review of agency rules and regulations may well

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[8]Many scholars point to the burgeoning bureaucracy in government today and tout the practicality of legislative rule-making review as a solution to the problem of insuring executive compliance with the legislative will in the face of increasing administrative regulation. . . . They cite with approval the British system of "laying" rules before Parliament for its approval and applaud the system as an efficient means of insuring faithful execution of the laws. While we commiserate with the Legislature in its attempts to diminish the negative effects of the current plague of "red tape" and "over-regulation", we think the respondent's argument misses the point.

Regardless of its inherent efficiency, informal coercive review of executive rule making is not permissible in the presence of a constitutional mandate that the powers of government be maintained in separate and distinct branches. In a parliamentary system, the executive branch is merely an arm of the legislative body. In a tripartite republic, the two branches are independent. The matter was summed up quite well by Chief Judge Crane in the case of People v. Tremaine, 281 N.Y. 1, 12, 21 N.E.2d 891, 896 (1939), where he stated in part:

> "We are not a parliamentary government where the Executive branch is also part of the Legislative .... We start with a Constitution which is our province to interpret as it is written, and not as we think it might have been written."

The same point was stated less subtly by [the Alaska Supreme Court in State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (1980)]:

> "(T)he question of whether the legislature might perform a task more efficiently if it did not have to follow (the

be warranted, but we must require that it be done within the limits of the separation of powers doctrine and according to the system of checks and balances in our governmental framework.

... One of the most impressive pieces of literature on this subject which we have encountered is provided by H. Lee Watson in his article, *Congress Steps Out; A Look at Congressional Control of the Executive*, 63 Cal. L. Rev. 983 (1975) [hereinafter cited as *Watson*]. Specifically analyzing the use of what he calls "extra-legislative control devices" (means for direct legislative review of executive action without the safeguards of the enactment process), Mr. Watson, using a test made up of four specific criteria,[10] concludes that such devices result in an unconstitutional framework; "the creation of power to be wielded by the hand creating it." *Watson, supra*, pp. 990-991. Interestingly, Watson saves his most intense criticism for the sort of framework presented in this case.

Watson concludes that the legislative committee veto is the most clearly constitutionally invalid of the legislative control devices, rendered invalid per se by virtue of its impact on the process. By placing the final control over governmental actions in the hands of only a few individuals who are answerable only to local electorates, the committee veto avoids the concept of "constitutional averaging" foreseen by the framers of the constitution as a means of balancing the dual role given legislators. While Watson views this consequence to our system of government as the most significant constitutional deficiency of the committee veto, he also considers it infirm in that it gives a small portion of the legislative membership a continuing role in governmental decision making once the formal lawmaking processes have been completed. The legislature vests the members of the committee with a post-legislative discretionary power, the exercise of which impermissibly fosters legislative dominance and expansion of power in several ways. First, by providing that the executive exercises discretion only at the pleasure of the reviewing committee, the legislature usurps the traditional role of the executive to fill in the interstices left by flexible statutory standards by exercising legislatively delegated discretionary power. In effect the executive exercise of discretion is replaced by committee exercise of discretion, increasing the role of the legislature at the expense of the executive.

Secondly, as the power of the executive to execute the laws is determined by the amount of discretion given it by the legislature, the more broadly a statute is drawn, the more power will be abdicated to the executive. Ordinarily the legislature attempts to prepare specific and narrowly drawn legislation in order to limit or to control the exercise of discretion by the executive. Where, however, the legislature retains jurisdiction over the discretionary power it vests in the executive, it no longer has the incentive to limit that power. The element of balance between the two branches no longer exists.

Finally, Watson decries the creation of discretionary power to be wielded by the same hand. "Where the effectiveness of discretionary power is maximized by delegating the authority to a group of manageable size, a committee or even an individual, the danger of self-interest is also maximized." . . . These guidelines should prove useful in helping to avoid the infirmities which

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constitution) is essentially irrelevant. Since (the constitution) applies, the question of whether efficiency takes primacy over other goals must be taken to have been answered by our constitutional framers. 606 P.2d at 778-779.

[10]The four criteria are as follows:
(1) whether the measure under examination forces legislators to choose between their constituency and the national interest;
(2) whether the measure encourages the exercise of self-interest independent of any pre-existing or co-existing local orientation of the power-wielding body;
(3) whether the statute tends toward legislative dominance of the government; and
(4) whether the statute fosters increase of overall federal power. [Not applicable to the discussion herein].

render void the statutory rule-making review scheme embodied in our Administrative Procedures Act.

Upon the record and in consideration of the briefs and arguments of counsel, we conclude and hold that W.Va.Code 29A-3-11 and 12, empowering the Legislative Rule-Making Review Committee to veto rules and regulations otherwise validly promulgated by administrative agencies pursuant to a legislative delegation of rule-making power, violate the separation of powers doctrine embodied in article five, section one of our state constitution and are, therefore, void. ...

For the reasons stated herein, the petitioner's prayer is granted and a writ of mandamus will promptly issue directing and requiring the respondent [to] place in force and effect the validly promulgated rules and regulations governing the safety of those employed in and around surface mines in West Virginia of the Department of Mines, as transmitted to him, on or about April 23, 1979, by Walter L. Miller, Director of the Department of Mines[.] . . .

NOTE

Following the decision in Barker, the Legislature amended the Administrative Procedures Act to provide that no regulation would become final unless it was approved in a bill passed by both houses of the Legislature and presented to the governor. W. Va. Code 29A-3-12(b). The Legislature quickly took to the practice of including in one omnibus bill all of the regulations to be approved during that particular legislative session. The Court found that practice invalid under the Single Object Clause in Article VI, § 30. Kincaid v. Mangum, 189 W.Va. 404, 432 S.E.2d 74 (1993) (reproduced in Chapter 6, Section D-2, infra.) That cleared the stage for a direct challenge to the revised procedures of § 29A-3-12(b) and led to the following decision.

STATE OF WEST VIRGINIA EX REL. MEADOWS v. HECHLER,
195 W. Va. 11, 462 S.E.2d 586 (1995).

WORKMAN, Justice:

This original proceeding was initiated to determine whether West Virginia Code § 29A-3-12(b), which permits proposed administrative regulations to "die" if the Legislature fails to take action on them, is a violation of our constitutional separation of powers requirement found in article V, section 1. The language of West Virginia Code § 29A-3-12(b) provides that:

> If the Legislature fails during its regular session to act upon all or part of any legislative rule which was submitted to it by the legislative rule-making review committee during such session, no agency may thereafter issue any rule or directive or take other action to implement such rule or part thereof unless and until otherwise authorized to do so.

Id. Petitioners argue that the broad legislative veto power created by West Virginia Code § 29A-3-12(b) upsets the balance of power required between the executive and legislative branches of state government by invasively intruding into executive function.

The separation of powers doctrine expressly stated in our constitution is a core principle of our system of government, whose roots can be traced back to the founding of this country. . . . In State ex rel. State Building Commission v. Bailey, 151 W. Va. 79, 150 S.E.2d 449 (1966), we discussed this fundamental precept of government:

> 'The Constitution, in distributing the powers of government, creates three distinct and separate departments--the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, namely, to preclude a commingling of these essentially different powers of government in the same hands. * * *.
>
> If it be important thus to separate the several departments of government and restrict them to the

> exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent of the others--independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments . . . .'
>
> [. . .] It is . . . essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.' . . .

We crystallized the significance of the separation of powers doctrine in syllabus point one of [State ex rel. Barker v. Manchin]:

> Article V, section 1 of the Constitution of West Virginia which prohibits any one department of our state government from exercising the powers of the others, is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed. . . .

West Virginia Code § 29A-3-12(b) grants, in effect, an outright veto power to the Legislature by permitting that branch to block the implementation of proposed agency regulations "if the Legislature fails during its regular session to act upon all or part of any legislative rule . . . submitted to it by the legislative rule-making review committee." The question before us is whether this unchecked legislative veto power over administrative agency rules impermissibly encroaches upon the functioning of the executive branch in violation of the separation of powers provision of our constitution.

Respondents Tomblin and Chambers (hereinafter the "legislative Respondents") plenarily deny the existence of a separation of powers issue. They argue that the executive branch and the attendant concerns of separation of powers are not introduced into the rule-making equation until the Legislature actually approves of proposed agency rules. The legislative Respondents premise their reasoning upon the postulate that rule-making "at its essence, [is] a legislative function" which only becomes executive in function upon an express delegation of authority by the Legislature. Specifically, the legislative Respondents contend that: "The agency was never authorized to act, only to propose a rule. The agency has no power to promulgate the rule until such time as the Legislature . . . has authorized the promulgation." Based on this view that the executive branch lacks authority to promulgate regulations, the legislative Respondents deny the existence of a legislative veto arising from the provisions of West Virginia Code § 29A-3-12(b). In other words, until the Legislature approves of proposed regulations, no delegation of executive authority has occurred and therefore, no separation of powers problem comes into existence.

Not only do we find this argument to be spurious, but as Petitioners observe, such a position "is the most extreme assertion of legislative authority." As we explained in Barker, "When the Legislature delegates its rule-making power to an agency of the Executive Department, as it did here . . ., it vests the Executive Department with the mandatory duty to promulgate and to enforce rules and regulations." [Id.] Contrary to the argument advanced by the legislative Respondents, the rule-making function comes under the executive department's bailiwick upon the delegation of the duty to propose rules for promulgation. . . .

There is very little to distinguish between what we found to be unconstitutional in Barker and what is at issue here. ... Petitioners argue that the proposed regulations were prevented from being approved by the full Legislature because of one or two individuals who were acting at the behest of special interest groups. Since the legislative Respondents do not dispute Petitioners' contention that the tabling of the proposed regulations can be and was effectuated by one or two individuals, the separation of powers concerns that [Barker] described are obviously present here. Moreover, this ability of a few individuals to curb further consideration of proposed regulations illustrates the very abuse of power that our country's forefathers sought to prevent by requiring a separation of the three

branches of government.

In the case of [General Assembly of New Jersey v. Byrne, 90 N.J. 376, 448 A.2d 438, 443 (N.J. 1982)], the New Jersey Supreme Court reviewed a legislative veto statute which permitted "the Legislature to veto by a concurrent resolution of both houses 'every rule hereafter proposed by a State agency,' with certain limited exceptions." 448 A.2d at 439. The court ruled that the statute violated the separation of powers principle

> by excessively interfering with the functions of the executive branch. The Legislature's power to revoke at will portions of coherent regulatory schemes violates the separation of powers by impeding the Executive in its constitutional mandate to faithfully execute the law. The legislative veto further offends the separation of powers by allowing the Legislature to effectively amend or repeal existing laws without participation by the Governor. . . .
>
> The full impact of legislative veto was realized in Byrne:
>
> Even where the Legislature is not using its veto power to effectively change the law, the veto can illegitimately interfere with executive attempts to enforce the law. The chief function of executive agencies is to implement statutes through the adoption of coherent regulatory schemes. The legislative veto undermines performance of that duty by allowing the Legislature to nullify virtually every existing and future scheme of regulation or any portion of it. The veto of selected parts of a coherent regulatory scheme not only negates what is overridden; it can also render the remainder of the statute irrational or contrary to the goals it seeks to accomplish. . . . Moreover, the Legislature need not explain its reasons for any veto decision. Its action therefore leaves the agency with no guidance on how to enforce the law.
>
> Broad legislative veto power deters executive agencies in the performance of their constitutional duty to enforce existing laws. Its vice lies not only in its exercise but in its very existence. Faced with potential paralysis from repeated uses of the veto that disrupt coherent regulatory schemes, officials may retreat from the execution of their responsibilities. They will resort to compromises with legislative committees aimed at drafting rules that the current Legislature will find acceptable. ...

In our case, the Legislature delegated a broad responsibility to the Executive branch for the purpose of establishing standards and enforcement mechanisms concerning personal care homes. After the Executive branch developed the regulations necessary to implement the comprehensive regulatory scheme, implementation was thwarted by legislative veto. The veto amounted to an intrusion into the Executive branch's ability to effectuate its mandated responsibilities. Accordingly, we determine that the legislative veto contained within the APA is unconstitutional based upon the same reasoning expressed in Barker and Byrne. West Virginia Code § 29A-3-12(b) violates the separation of powers requirement of Article V, Section 1 of the Constitution of West Virginia in that the legislative veto created through such section impermissibly encroaches upon the executive branch's obligation to enforce the law. . . .

While it remains for the Legislature to draft a new provision for the APA regarding the approval or disapproval of administrative regulations, we observe that several states permit regulations to automatically go into effect if the Legislature fails to reject the proposed regulations within a specified number of days. . . .

We hesitate to order the filing of the regulations in the instant case without their having had legislative review, although we could do so. As a matter of comity to the Legislature, we decline to do so at this time in order to give the Legislature the opportunity in its next regular session to consider the regulations. Further, we direct the Legislature to promptly draft legislation to replace the unconstitutional section of article 29A and additionally, to consider passage of legislation that would exempt certain administrative regulations from conformance with APA implementation requirements, such as where compliance with federal law is mandated. Should the Legislature fail to exercise its proper prerogative to consider these regulations and to consider such recommended legislation, then this Court will be required to fill these legal voids. . . .

NOTES

1. *The West Virginia Administrative Procedures Act*, W. Va. Code 29A-3-1, *et seq*. Following *Meadows*, the Legislature again amended the State's Administrative Procedures Act. The relevant provisions on rule-making now read:

§ 29A-3-1. Rules to be promulgated only in accordance with this article.

In addition to other rule-making requirements imposed by law and except to the extent specifically exempted by the provisions of this chapter or other applicable law, and except as provided for in article three-a of this chapter, every rule and regulation (including any amendment of or rule to repeal any other rule) shall be promulgated by an agency only in accordance with this article and shall be and remain effective only to the extent that it has been or is promulgated in accordance with this article. . . .

§ 29A-3-5. Notice of proposed rulemaking.

When an agency proposes to promulgate a rule other than an emergency rule, it shall file with the secretary of state, for publication in the state register, a notice of its action, including therein any request for the submission of evidence to be presented on any factual determinations or inquiries required by law to promulgate such rule. At the time of filing the notice of its action, the agency shall also file with the secretary of state a copy of the full text of the rule proposed, and a fiscal note as defined in subsection (b), section four of this article. If the agency is considering alternative draft proposals, it may also file with the secretary of state the full text of such draft proposals.

The notice shall fix a date, time and place for the receipt of public comment in the form of oral statements, written statements and documents bearing upon any findings and determinations which are a condition precedent to the final approval by the agency of the proposed rule, and shall contain a general description of the issues to be decided. If no specific findings and determinations are required as a condition precedent to the final approval by the agency of the approved rule, the notice shall fix a date, time and place for the receipt of general public comment on the proposed rule. To comply with the public comment provisions of this section, the agency may hold a public hearing or schedule a public comment period for the receipt of written statements and documents, or both. . . .

§ 29A-3-9. Proposal of legislative rules.

When an agency proposes a legislative rule, other than an emergency rule, it shall be deemed to be applying to the Legislature for permission, to be granted by law, to promulgate such rule as approved by the agency for submission to the Legislature or as amended and authorized by the Legislature by law.

An agency proposing a legislative rule, other than an emergency rule, after filing the notice of proposed rulemaking required by the provisions of section five of this article, shall then proceed as in the case of a procedural and interpretive rule to the point of, but not including, final adoption. In lieu of final adoption, the agency shall finally approve the proposed rule, including any amendments, for submission to the Legislature and file such notice of approval in the state register and with the legislative rule-making review committee, within ninety days after the public hearing was held or within ninety days after the end of the public comment period required under section five of this article[.] . . .

Such final agency approval of the rule under this section is deemed to be approval for submission to the Legislature only and does not give any force and effect to the proposed rule. The rule shall have full force and effect only when authority for promulgation of the rule is granted by an act of the Legislature and the rule is promulgated pursuant to the provisions of section thirteen of this article.

§ 29A-3-10. Creation of a legislative rule-making review committee.

(a) There is hereby created a joint committee of the Legislature, known as the legislative rule-making review committee, to review all legislative rules of the several agencies and such other rules as the committee deems appropriate. The committee shall be composed of six members of the Senate, appointed by the president of the Senate, and six members of the House of Delegates, appointed by the speaker of the House of Delegates. In addition, the president of the Senate and the speaker of the House of Delegates shall be ex officio nonvoting members of the committee and shall designate the cochairmen. Not more than four of the voting members of the committee from each house shall be members of the same political party[.] . . .

§ 29A-3-11. Submission of legislative rules to the legislative rule-making review committee.

(a) When an agency finally approves a proposed legislative rule for submission to the Legislature, pursuant to the provisions of section nine of this article, the secretary of the executive department which administers the agency pursuant to the provisions of article two, chapter five-f of this code shall submit to the legislative rule-making review committee at its offices or at a regular meeting of such committee fifteen copies of: (1) The full text of the legislative rule as finally approved by the agency, with new language underlined and with language to be deleted from any existing rule stricken through but clearly legible; (2) a brief summary of the content of the legislative rule and a description and a copy of any existing rule which the agency proposes to amend or repeal; (3) a statement of the circumstances which require the rule; (4) a fiscal note containing all information included in a fiscal note for either house of the Legislature and a statement of the economic impact of the rule on the state or its residents; (5) one copy of any relevant federal statutes or regulations; and (6) any other information which the committee may request or which may be required by law. If the agency is an agency, board or commission which is not administered by an executive department as provided for in article two, chapter five-f of this code, the agency shall submit the final agency-approved rule as required by this subsection.

(b) The committee shall review each proposed legislative rule and, in its discretion, may hold public hearings thereon. Such review shall include, but not be limited to, a determination of:

(1) Whether the agency has exceeded the scope of its statutory authority in approving the proposed legislative rule;

(2) Whether the proposed legislative rule is in conformity with the legislative intent of the statute which the rule is intended to implement, extend, apply, interpret or make specific;

(3) Whether the proposed legislative rule conflicts with any other provision of this code or with any other rule adopted by the same or a different agency;

(4) Whether the proposed legislative rule is necessary to fully accomplish the objectives of the statute under which the rule was proposed for promulgation;

(5) Whether the proposed legislative rule is reasonable, especially as it affects the convenience of the general public or of persons particularly affected by it;

(6) Whether the proposed legislative rule could be made less complex or more readily understandable by the general public; and

(7) Whether the proposed legislative rule was proposed for promulgation in compliance with the requirements of this article and with any requirements imposed by any other provision of this code.

(c) After reviewing the legislative rule, the committee shall recommend that the Legislature:

(1) Authorize the promulgation of the legislative rule; or

(2) Authorize the promulgation of part of the legislative rule; or

(3) Authorize the promulgation of the legislative rule with certain amendments; or

(4) Recommend that the proposed rule be withdrawn.

The committee shall file notice of its action in the state register and with the agency proposing the rule: *Provided,* That when the committee makes the recommendations of subdivision (2), (3) or (4) of this subsection, the notice shall contain a statement of the reasons for such recommendation.

(d) When the committee recommends that a rule be authorized, in whole or in part, by the Legislature, the committee shall instruct its staff or the office of legislative services to draft a bill authorizing the promulgation of all or part of the legislative rule and incorporating such amendments as the committee desires. If the committee recommends that the rule not be authorized, it shall include in its report a draft of a bill authorizing promulgation of the rule together with a recommendation. Any draft bill prepared under this section shallcontain a legislative finding that the rule is within the legislative intent of the statute which the rule is intended to implement, extend, apply or interpret and shall be available for any member of the Legislature to introduce to the Legislature.

§ 29A-3-12. Submission of legislative rules to Legislature.

(a) No later than forty days before the sixtieth day of each regular session of the Legislature, the cochairmen of the legislative rule-making review committee shall submit to the clerk of the respective houses of the Legislature copies of all proposed legislative rules which have been submitted to and considered by the committee pursuant to the provisions of section eleven of this article and which have not been previously submitted to the Legislature for study, together with the recommendations of the committee with respect to such rules, a statement of the reasons for any recommendation that a rule be amended or withdrawn and a statement that a bill authorizing the legislative rule has been drafted by the staff of the committee or by legislative services pursuant to section eleven of this article. The cochairman of the committee may also submit such rules at the direction of the committee at any time before or during a special session in which consideration thereof may be appropriate. The committee may withhold from its report any proposed legislative rule which was submitted to the committee fewer than two hundred twenty-five days before the end of the regular session. The clerk of each house shall submit the report to his or her house at the commencement of the next session.

All bills introduced authorizing the promulgation of a rule may be referred by the speaker of the House of Delegates and by the president of the Senate to appropriate standing committees of the respective houses for further consideration or the matters may be otherwise dealt with as each house or its rules provide. The Legislature may by act authorize the agency to adopt a legislative rule incorporating the entire rule or may authorize the agency to adopt a rule with any amendments which the Legislature shall designate. The clerk of the house originating such act shall forthwith file a copy of any bill of authorization enacted with the secretary of state and with the agency proposing such rule and the clerk of each house may prepare and file a synopsis of legislative action during any session on any proposed rule submitted to the house during such session for which authority to promulgate was not by law provided during such session. In acting upon the separate bills authorizing the promulgation of rules, the Legislature may, by amendment or substitution, combine the separate bills of authorization insofar as the various rules authorized therein are proposed by agencies which are placed under the administration of one of the single separate executive departments identified under the provisions of section two, article one, chapter five-f of this code or the Legislature may combine the separate bills of authorization by agency or agencies within an executive department. In the case of rules proposed for promulgation by an agency which is not administered by an executive department pursuant to the provisions of article two of said chapter, the separate bills of authorization for the proposed rules of that agency may, by amendment or substitution, be combined. The foregoing provisions relating to combining separate bills of authorization according to department or agency are not intended to restrict the permissible breadth of bills of authorization and do not preclude the Legislature from otherwise combining various bills of authorization which have a unity of subject matter. Any number of provisions may be included in a bill of authorization, but the single object of the bill shall be to authorize the promulgation of proposed legislative rules.

(b) If the Legislature during its regular session disapproves all or part of any legislative rule which

was submitted to it by the legislative rule-making review committee during such session, no agency may thereafter issue any rule or directive or take other action to implement such rule or part thereof unless and until otherwise authorized to do so, except that the agency may resubmit the same or similar proposed rule to the legislative rule-making review committee in accordance with the provisions of section eleven of this article.

(c) Nothing herein shall be construed to prevent the Legislature by law from authorizing, or authorizing and directing, an agency to promulgate legislative rules not proposed by the agency or upon which some procedure specified in this chapter is not yet complete. . . .

§ 29A-3-13. Adoption of legislative rules; effective date.

(a) Except as the Legislature may by law otherwise provide, within sixty days after the effective date of an act authorizing promulgation of a legislative rule, the rule shall be promulgated only in conformity with the provisions of law authorizing and directing the promulgation of such rule. In the case of a rule proposed by an agency which is administered by an executive department pursuant to the provisions of article two, chapter five-f of this code, the secretary of the department shall promulgate the rule as authorized by the Legislature. In the case of an agency which is not subject to administration by the secretary of an executive department, the agency which proposed the rule for promulgation shall promulgate the rule as authorized by the Legislature.

(b) A legislative rule authorized by the Legislature shall become effective thirty days after such filing in the state register, or on the effective date fixed by the authorizing act or if none is fixed by law, such later date not to exceed ninety days, as is fixed by the agency. . . .

§ 29A-3-14. Withdrawal or modification of proposed rules.

(a) Any legislative rule proposed by an agency may be withdrawn by the agency any time before passage of a law authorizing or authorizing and directing its promulgation, but no such action shall be construed to affect the validity, force or effect of a law enacted authorizing or authorizing and directing the promulgation of an authorized legislative rule or exercising compliance with such law. The agency shall file a notice of any such action in the state register.

(b) At any time before a proposed legislative rule has been submitted by the legislative rule-making review committee to the Legislature pursuant to the provisions of section twelve of this article, the agency may modify the proposed rule to meet the objections of the committee. The agency shall file in the state register a notice of its modifying action including a copy of the modified rule, but shall not be required to comply with any provisions of this article requiring opportunity for public comment or taking of evidence with respect to such modification. If a legislative rule has been withdrawn, modified and then resubmitted to such committee, the rule shall be considered to have been submitted to such committee on the date of such resubmission.

Are the revised procedures constitutional?

2. *Appalachian Power Company v. Public Service Commission of West Virginia*, 170 W.Va. 757, 296 S.E.2d 887 (1982), held that a broad statutory grant of contempt power to an administrative agency violated separation of powers because of agency administrators' frequent "lack of legal training coupled with with the broad range of subjects presented to them." In reaching that conclusion, Justice Miller made the following observation about West Virginia's separation of powers doctrine:

> As early as Wheeling Bridge T. Ry. Co. v. Paull, 39 W.Va. 142, 19 S.E. 551 (1894), we recognized that from a practical standpoint, it was often impossible to maintain a complete separation between the three branches of government. . . . [W]e have recognized the need for some flexibility in interpreting the separation of powers doctrine in order to meet the realities of modern day government and particularly the proliferation of administrative agencies. We have

not however hesitated to utilize the doctrine where we felt there was a direct and fundamental encroachment by one branch of government into the traditional powers of another branch of government. E.g., State ex rel. Barker v. Manchin, 167 W.Va. 155, 279 S.E.2d 622 (1981); State ex rel. State Building Commission v. Bailey, 151 W.Va. 79, 150 S.E.2d 449 (1966); West Virginia State Bar v. Earley, 144 W.Va. 504, 109 S.E.2d 420 (1959); State v. Huber, 129 W.Va. 198, 40 S.E.2d 11, 168 A.L.R. 808 (1946). . . .

FRYMIER-HALLORAN v. PAIGE,
193 W.Va. 687, 458 S.E.2d 780 (1995).

CLECKLEY, Justice:

This appeal is brought pro se by the appellant, Teresa Frymier-Halloran, who requests this Court to reverse the final order of the Circuit Court of Kanawha County, dated June 13, 1994, which affirmed and adopted the findings of fact and conclusions of law of an administrative decision, dated December 23, 1992, made by the Office of Hearings and Appeals of the State Tax Department of West Virginia. The circuit court specifically found that "[a]fter a thorough consideration and review of the record and all assignments of error, ... the [administrative] decision ... is not plainly wrong with respect to the facts of this case and that the questions of law presented were decided correctly." The administrative decision determined that the appellant was personally liable as a corporate officer of Four P., Inc., dba and hereinafter referred to as Sunlite Seafoods, for unpaid consumers sales and service tax in an amount totaling $13,512.13 and a penalty in the amount of $586.62.

The appellant argues the circuit court erred by affirming the administrative decision because the evidence demonstrates she was not a corporate officer of Sunlite Seafoods and, therefore, cannot be held personally liable for its tax liability. . . . [T]he appellant [also] alleges the circuit court erred by issuing its final order without holding a hearing and before she filed a brief with the circuit court.

I. FACTS AND PROCEDURAL BACKGROUND

[In 1991, the Department of Tax and Revenue issued tax assessments against the appellant for Sunlite Seafoods' unpaid consumers sales and the accompanying penalty.] The appellant timely filed with the Office of Hearings and Appeals for each assessment to be reassessed. A hearing was held on October 14, 1992, at which the appellant appeared pro se and testified. . . .

The only issue before the Office of Hearings and Appeals at the 1992 hearing was whether the appellant could be considered a corporate officer or otherwise be held personally responsible for paying the balance of the tax due. [The Office, through the decision of a hearing examiner, concluded that she was a corporate officer and thus upheld the assessments. Appellant appealed to the Kanawha County Circuit Court. After refusing the appellant an opportunity to present evidence, the Circuit Court affirmed the Tax Office decision on the basis of the administrative record.]

III. LACK OF A HEARING
BEFORE THE CIRCUIT COURT

The appellant asserts that she was not given the opportunity to be heard before the circuit court to refute and to complain of the factual findings and conclusions of law made in the December 23, 1992, order of the hearing examiner. In her appeal to the circuit court, the appellant requested an opportunity to offer additional evidence to support her case. The appellant never received such an opportunity.

The issue before this Court is whether the circuit court is obligated to give a taxpayer a de novo hearing on appeal. We conclude the circuit court is not obligated nor constitutionally permitted to conduct a de novo appeal. Rather, we find, unless the request to receive new evidence comes within the limited exceptions we authorize in this opinion, the circuit court only may permit the introduction of additional evidence by remanding the case to the Tax Commissioner for a new or supplemental

hearing so that a complete record can be developed for judicial review.

A circuit court's review of an administrative decision issued under the Tax Commissioner is controlled by W.Va.Code, 11-10-10(e) (1986). W.Va.Code, 11-10-10(e), provides, in relevant part:

> "Hearing of appeal.--The [circuit] court shall hear the appeal and determine anew all questions submitted to it on appeal from the determination of the tax commissioner. In such appeal a certified copy of the tax commissioner's notice of assessment or amended or supplemental assessment and administrative decision thereon shall be admissible and shall constitute prima facie evidence of the tax due under the provisions of those articles of this chapter to which this article is applicable." (Emphasis added).

This Court reviews questions of statutory interpretation de novo. See Mildred L.M. v. John O.F., 192 W.Va. 345, 350, 452 S.E.2d 436, 441 (1994). After examining our prior cases interpreting this statute, we must reject the contention of the appellant as to her right to a de novo hearing on appeal.

There is no question that the statute seems to provide for a de novo hearing on appeal. W.Va.Code, 11-10-10(e), provides a circuit court "shall hear the appeal and determine anew all questions submitted to it[.]" The word "anew" is broad and is indeed the functional equivalent of "de novo." Such an interpretation, linguistically speaking, is permissible. The dictionary states the words "de novo" and "anew" are synonymous. Black's Law Dictionary 435 (6th ed. 1990) ("De novo.... Anew; afresh; a second time").

However, any interpretation permitting either a de novo hearing or a de novo appeal would be inconsistent with our prior decisions. See Chesapeake and Potomac Co. of W.Va. v. State Tax Dep't, 161 W.Va. 77, 239 S.E.2d 918 (1977); Virginia Elec. and Power Co. v. Haden, 157 W.Va. 298, 200 S.E.2d 848 (1973)[;] Walter Butler Bldg. Co. v. Soto, 142 W.Va. 616, 97 S.E.2d 275 (1957). Collectively, these cases hold the circuit court is unable constitutionally to consider additional evidence not presented before the Tax Commissioner. As we stated in Virginia Electric and Power Co. v. Haden, 157 W.Va. at 305, 200 S.E.2d at 853:

> "To allow the circuit court to determine an issue on evidence not considered at the administrative hearing would cast the court in the role of performing an executive function. Under the acknowledged principle of separation of powers this cannot be permitted. Thus, the circuit court must decide the case on the evidence in the record as it was received or it must return the case to the Tax Commissioner for the further presentation of evidence on values."

We have construed W.Va.Code, 11-10-10, narrowly and held that circuit courts are not to review de novo the Tax Commissioner's factual determinations. We have done so to avoid conflict with Section 1 of Article V of the West Virginia Constitution. Our cases, however, have not articulated fully why or how Article V is implicated. Although some of our earlier decisions attempted to explain the Article V issue in terms of a functional analysis--that a directive to courts to review an agency's finding de novo would require judges to perform a legislative function--the attempt was not wholly persuasive.[9]

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[9]After all, courts perform a judicial function when they hear evidence and make findings about the application of a tax statute to a particular individual--just as the hearing examiner functioned in an "adjudicatory" capacity here. See W.Va.Code 11-10-9 (1978); see also West Virginia's Administrative Procedures Act, W.Va. Code, 29A-1-1, et seq., and especially W.Va. Code, 29A-5-1 through -4 (contested cases). There is, therefore, nothing inherent in the nature of the task at hand that makes it unsuitable for courts. Compare W.Va. Const. art. VI, § 40 (legislature may not confer appointment power on judges).

Indeed, a holding that Article V precludes courts from indulging in de novo fact-finding seems at first glance paradoxical: How can a Separation of Powers Clause bar judges from doing what judges normally do? Judges typically conduct hearings, decide the facts, and apply the law to

Our cases that construe Article V recognize a role for administrative agencies in the distribution of powers. Necessarily, this constitutionalization of an agency's role largely has been one of judicial development with due respect accorded in that process to the views of the other branches. This result occurred because neither the framers of our Constitution nor George Mason and the other framers of the Virginia Declaration of Rights, from which Article V was extracted, could have envisioned the proliferation of administrative agencies, the formation of the modern bureaucratic state, and the construction of a body of administrative law.

Despite the absence of specific textual treatment, we have developed doctrines that attempt to define this constitutional role for administrative agencies and to protect them from legislative and judicial overreaching. State ex rel. Barker v. Manchin, 167 W.Va. 155, 279 S.E.2d 622 (1981). Similarly, we have held that once the legislature creates an administrative agency and assigns adjudicatory decision making to that agency, then courts must defer to its decisions and cannot review factual determinations de novo. Walter Butler Bldg. Co., supra; Hodges, supra.[10] As a result of these and other decisions, we have established that administrative agencies are active players in the division of powers, and, while always subject to properly enacted and valid laws and to constitutional constraints, their actions are entitled to respect from both the legislature and the courts.

The accumulation of these various holdings makes it evident that courts will not override administrative agency decisions, of whatever kind, unless the decisions contradict some explicit constitutional provision or right, are the results of a flawed process, or are either fundamentally unfair or arbitrary. Our constitutionalization of judicial deference to agency determinations is presented starkly in the cases interpreting W.Va.Code, 11-10-10, and its predecessor statute, for in those decisions we have declined to follow what might appear to be a legislative directive to second guess the Tax Commissioner. As noted, we have in other contexts struck down statutes that clearly require de novo review of administrative determinations. E.g., Hodges, supra. Whether we should continue to hold that courts must defer to bureaucratic results despite directions from our popularly elected representatives to do otherwise is a question we need not decide today.[11] For nearly forty years, we have construed W.Va.Code, 11-10-10, to provide for only a limited review of the Tax Commissioner's factual determinations. It is too late in the day to change that practice, as we must infer legislative acquiescence in our interpretation. If the legislature wants to force the issue, it will have to do so affirmatively and explicitly.

Our decisions have, in effect, limited judicial review of the Tax Commissioner's decision to the same scope permitted under the State's Administrative Procedures Act, W.Va.Code, 29A-1-1, et seq.

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the facts. How can those functions be outside judicial capacity? The way out of the paradox begins with the recognition that our system is not a composite of three hermetically sealed spheres of operation; rather, it is one of shared powers. Characterizing a particular task as "legislative," "executive," or "judicial," though sometimes relevant, frequently hides the rationale rather than explains it.

[10]In striking down a statute dealing with judicial review of an administrative decision that licensed the construction of a series of dams, Hodges stated: "[T]he legislature intended the circuit court to try and determine these legislative matters de novo, without regard to the findings of the commission. Such a proceeding would plainly traverse ... article V." . . .

[11]That is, it is one thing for us to conclude that courts must defer to an agency where an agency's authorizing statute is silent or ambiguous as to the standard of review. It is quite another thing for us to say that the legislature is disempowered from directing courts to closely scrutinize the adjudicatory findings of a particular agency.

This Act provides in W.Va.Code, 29A-5-4(g)(5) and -4(g)(6) (1964), that an agency action may be set aside if it is "[c]learly wrong in view of the reliable, probative and substantial evidence on the whole record; or ... [a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Under this standard, the task of the circuit court is to determine "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." . . .

The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume the agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. When reviewing the administrative decision of the Tax Commissioner, the circuit court is required to engage in a substantial inquiry, but it must not substitute its own judgment for that of the Tax Commissioner.[14] We, therefore, make it explicit that the same standard set out in the State Administrative Procedures Act is the standard of review applicable to review of the Tax Commissioner's decisions under W.Va.Code, 11-10-10(e). Thus, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.

Even under this limited and deferential standard of review, certain circumstances may justify expanding review beyond the record or permitting some discovery at the circuit court level. For example, an allegation that the Tax Commissioner (1) failed to mention a significant fact or issue having a substantial impact on the tax liability of the taxpayer, (2) failed adequately to discuss some reasonable alternative, or (3) otherwise swept stubborn problems or serious criticism under the rug may be sufficient to permit the introduction of new evidence outside the administrative record. ...

We find the facts of this case compel a remand to the circuit court. Both at the administrative hearing and before the circuit court, the appellant requested an opportunity to supplement the record. At both levels, the request was denied. The record before us does not justify such a summary rejection of these requests. Upon remand, the circuit court, in light of today's decision and after hearing the nature of the proffered evidence, must decide whether it is better for the circuit court or the administrative law judge to receive the supplemental evidence. As we stated earlier, the circuit court upon judicial review must be able to examine such evidence to ensure there will be a full presentation of the issues before it. . . .

BROTHERTON, J., did not participate.

MILLER, Retired, J., and FOX, J., sitting by temporary assignment.

STATE EX REL. WEST VIRGINIA CITIZENS ACTION GROUP v. WEST VIRGINIA ECONOMIC DEVELOPMENT GRANT COMMITTEE, 213 W. Va. 255, 580 S.E.2d 869 (2003).

Albright, Justice.

The West Virginia Citizen Action Group (hereinafter referred to as "CAG") appeals from the January 21, 2003, order of the Circuit Court of Kanawha County upholding the constitutionality of portions of West Virginia Code § 29-22-18a(d)(3) (Supp. 2002), specifically as it pertains to the manner in which the members of the Appellee West Virginia Economic Grant Committee

[14]Although the agency's decision is entitled to a presumption of validity, the circuit court, nevertheless, must engage in a "substantial inquiry," or in other words, "a thorough, probing, in-depth review." ...

(hereinafter referred to as the "Grant Committee" or the "Committee") are appointed and the process by which the Grant Committee selects and approves grant applicants. The challenged legislation involves a mechanism previously approved by this Court in the context of school bonds whereby revenue bonds are issued, without a vote of the state's citizenry, and repaid from an account within the West Virginia Lottery Fund designated as the "state excess lottery revenue fund." While no such bonds have been issued due to the litigation at hand, the bonds contemplated by the subject legislation would be dedicated to a host of projects chosen by the Grant Committee for the express objective of "advancing the business prosperity of this state and the economic welfare of the citizens of this state."

I. Statutory and Procedural Background

At the center of this dispute is the statutory method for selecting the membership of the Grant Committee. The nine-person committee is comprised of the following individuals:

> the governor, or his or her designee, the secretary of the department of tax and revenue, the executive director of the West Virginia development office, three persons appointed by the governor from a list of five names submitted by the president of the West Virginia senate, and three persons appointed by the governor from a list of five names submitted to the governor by the speaker of the West Virginia house of delegates.

W.Va. Code § 29-22-18a(d)(3). The involvement of the Legislature in identifying the list of potential committee members has sparked weighty challenges to this statute based on concerns rooted in the separation of powers provision of our state constitution. [W.Va. Const. art. V, § 1.]

Pursuant to this statutory authorization, such a Grant Committee was selected and at its first meeting, the committee adopted a draft procedural rule delineating the criteria for considering the various submitted grant applications. The four-part standard upon which the projects were to be evaluated was: (1) the ability of the project to leverage other sources of financing; (2) job creation and retention; (3) promotion of economic development in the region; and (4) whether the project is in the public interest of the State. The enabling legislation provides that once the Grant Committee selects and certifies a list of projects, the list is not subject to alteration other than by legislative enactment. *See* W.Va. Code § 29-22-18a(d)(3).

During various meetings, the Grant Committee considered 197 submitted projects. Public hearings were held, as required by statute, in connection with the grant applications. *See* W.Va. Code § 29-22-18a(d)(3). While all 197 projects were reviewed during the period between April 25, 2002, and July 31, 2002, the Grant Committee approved the first grant recipient -- the Wheeling Project -- on May 8, 2002. The Grant Committee conditionally agreed to provide the Wheeling Project with seventy million dollars, provided that certain terms outlined in a May 13, 2002, award letter were met. An additional thirty-five projects were approved by the Grant Committee at two meetings held on October 17, 2002, and November 12, 2002.

CAG filed a petition with this Court on September 3, 2002, seeking writs of mandamus and prohibition in connection with the Wheeling Project's approval and other activities undertaken by the Grant Committee. This Court issued a rule returnable to the Circuit Court of Kanawha County to permit development of a record and to address the issues raised in an expeditious manner. Following various hearings on this matter, the circuit court issued its memorandum order on January 21, 2003, through which the trial court ruled that the Grant Committee's singular consideration and approval of the Wheeling Project resulted in a flawed certification of that project for failure to meet an implied statutory requirement that multiple grant applications should be comparatively evaluated. The circuit court found no constitutional infirmities with regard to the appointment process for the Grant Committee or the legislation authorizing the Committee's actions.

. . . Upon our review of the matter, we conclude that the appointment mechanism for the Grant Committee violates the separation of powers provision of the state constitution, and the appointments provision of the state constitution. [W.Va. Const. art. VII, § 8.] Due to the insufficiency of the statutory guidance provided for the Grant Committee's use in selecting recipients

for state funds, we determine that the Legislature has wrongfully delegated its powers in violation of the state constitution. With regard to the statutory challenges concerning alleged violations of the constitutional provisions governing debt and credit, and the statute's lack of a valid public purpose, we find no constitutional infirmities. . . .

III. Discussion

A. Separation of Powers

CAG, along with the American Civil Liberties Union of West Virginia (hereinafter referred to as the "ACLU"), as amicus curiae, strenuously assert that the appointment mechanism contained within the subject statute runs afoul of this state's separation of powers provision. . . . W.Va. Const. art. V, § 1. By creating the list from which the Grant Committee members are chosen, CAG argues that the Legislature, acting through its house speaker and senate president, has crossed a clearly demarcated line intended to separate the executive branch from the legislative branch of state government.

Interwoven with its separation of powers argument is the corollary contention that the provisions of West Virginia Code § 29-22-18a(d)(3) violate the governor's constitutionally delineated powers of appointment. *See* W.Va. Const. art. VII, § 8. Based on the legislative involvement in the committee selection process, CAG maintains that the subject legislation improperly authorizes the Legislature to invade the province of the executive branch of government.

1. Fundamental Construct

As we observed in *State v. Huber*, 129 W.Va. 198, 40 S.E.2d 11 (1946), in discussing the doctrine of separation of powers: "No theory of government has been more loudly acclaimed." *Id.* at 209, 40 S.E.2d at 18. This fundamental construct of our system of government has been the subject of countless commentaries:

> 'This separation is deemed to be of the greatest importance; absolutely essential to the existence of a just and free government. This is not, however, such a separation as to make these departments wholly independent; but only so that one department shall not exercise the power nor perform the functions of another. They are mutually dependent, and could not subsist without the aid and co-operation of each other. . . .

State v. Harden, 62 W.Va. 313, 371-72, 58 S.E. 715, 739 (1907) (quoting Lewis' Suth. Stat. Cons. § 2).

The United States Supreme Court in *O'Donoghue v. United States*, 289 U.S. 516 (1933), articulated that the objective of separating the powers of government into three distinct branches was "to preclude a commingling of these essentially different powers of government in the same hands." *Id.* at 530. . . . As we acknowledged in *Sims v. Fisher,* 125 W.Va. 512, 25 S.E.2d 216 (1943), this Court has expressed "a policy of strong adherence to the several constitutional provisions relating to the separation of powers." . . .

2. Legislative vs. Executive Powers

In [*State ex rel. Barker v. Manchin*], we outlined the division of powers and responsibilities among the three branches of state government: "Generally speaking, the Legislature enacts the law, the Governor and the various agencies of the executive implement the law, and the courts interpret the law, adjudicating individual disputes arising thereunder." *[S]ee also Springer v. Govt. of Phillipine Islands*, 277 U.S. 189 ("Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions."). There can be no question that the Grant Committee falls within the ambit of the executive branch of government as that committee is charged with the task of implementing specific legislation.

. . . Similarly beyond dispute is the fact that the Legislature can play no role in the implementation of the laws it enacts. This Court's decision in *Manchin* squarely confronted the issue of legislative encroachment into powers reserved for the executive branch. The Legislature had sought to create for itself a "mechanism for legislative review of executive action" by conferring on a legislative

committee the power to veto proposed agency rules. . . . In striking this mechanism as violative of the separation of powers, we observed that this "'extra-legislative control device' [wrongly] . . . permits the Legislature to act as something other than a legislative body to control the actions of the other branches." *[A]ccord State ex rel. Meadows v. Hechler,* 195 W.Va. 11, 462 S.E.2d 586 (1995) (finding separation of powers violation in legislation that sanctioned veto of agency regulations from committee inaction).

Underlying any encroachment of power by one branch of government is the paramount concern that such action will "impermissibly foster[] . . . dominance and expansion of power." [*Manchin*]. Applying that concern to the facts presented in *Manchin,* we observed that: "In effect, the executive exercise of discretion is replaced by committee exercise of discretion, increasing the role of the legislature at the expense of the executive." . . . In addition to upsetting the balance of powers between the branches, we identified the risk that maximization of self-interest could result where the normal limits on discretionary power are no longer in place due to legislative involvement in an executive function. [*Id.*]

3. Legislative Role in Implementing Subject Legislation

CAG argues that the Legislature, through its enactment of West Virginia Code § 29-22-18a, has put in place a mechanism by which it retains some control over the process of implementing the legislation under discussion. By virtue of its active role in choosing the slate of prospective Grant Committee members, CAG contends that the Legislature retains power to control, in either direct or indirect fashion, the actions of a majority of the Committee members. Notwithstanding the governor's actual appointment of the Committee members, CAG maintains that the constitutional impediments resulting from the statutory appointment process remain.

To support its position, CAG relies primarily on authority that bans various state Legislatures from appointing *legislative members* to serve on executive agencies, boards, or commissions. *See Greer v. State of Georgia,* 233 Ga. 667, 212 S.E.2d 836 (Ga. 1975) (declaring legislation unconstitutional that named certain legislators to governing body of World Congress Authority); *Alexander v. State of Miss. ex rel. Allain*, 441 So. 2d 1329 (Miss. 1983) (striking various statutes naming legislative members to executive offices including Board of Economic Development)*; State of N.C. ex rel. Wallace v. Bone,* 304 N.C. 591, 286 S.E.2d 79 (N.C. 1982) (striking legislation that authorized four legislators to serve on legislatively created Environmental Management Commission as violative of separation of powers); *State ex rel. State Bldg. Commn. v. Bailey*, 151 W.Va. 79, 150 S.E.2d 449 (1966) (finding separation of powers violation in legislation naming four legislative officers to State Building Commission); *see also Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 115 L. Ed. 2d 236, 111 S. Ct. 2298 (1991) (striking legislation permitting Congress to place its members on board of review having veto power over airport authority's decisions).

While the law is clear that legislators themselves cannot hold positions on executive agencies, boards, or commissions, the law is less clear as to what role a state legislature can play in compiling a list of prospective appointees for an executive appointment. CAG relies heavily on the decision reached by the Kentucky Supreme Court in *Legislative Research Commission ex rel. Prather v. Brown,* 664 S.W.2d 907 (Ky. 1984). Among the holdings in *Brown* was a ruling finding several statutes unconstitutional on separation of powers grounds that directed the governor to make appointments for executive positions from lists submitted by the Legislative Research Commission, a small group of office-holding legislators. The Kentucky Supreme Court concluded that "the General Assembly has attempted to do indirectly what it cannot do directly." *Id.* at 923-24. CAG contends that the *Brown* decision is apposite and that this Court should follow the result reached in that case.

The Grant Committee rejects *Brown* as analogous authority, arguing that a separation of powers violation does not occur in the instant case based on the simple fact that the governor, despite a legislatively prepared slate of prospective appointees, retains and exercises the constitutional right

of appointment. Focusing on the fact that the governor chooses from the names submitted to him by the house speaker and senate president and emphasizing that the governor has the implied right to reject each name on a submitted list and to continue to do so until a list of suitable names appears, the Grant Committee maintains that the statutory appointment process does not run afoul of the separation of powers provision. . . .

Citing *Prater v. Commonwealth of Kentucky,* 82 S.W.3d 898 (Ky. 2002), the Grant Committee contends that, under a legal scenario similar to *Brown,* the Kentucky Supreme Court concluded that the "legislature has not attempted to appoint administrative officers, nor has it completely denied the appointive function of the Executive." . . . The Grant Committee's reliance on *Prater,* however, is not only misplaced but, upon careful reading, *Prater* clearly supports the position of CAG, rather than that of the Grant Committee. . . .

Distinguishing the situation presented in *Brown* where both direct and indirect legislative appointments were held unconstitutional, the court in *Prater* cited two decisions upholding gubernatorial appointment to administrative bodies "from lists of persons submitted by third parties with an interest in the composition of those bodies." . . . Significantly, neither of those two cases, *Kentucky Association of Realtors, Inc. v. Musselman*[,817 S.W.2d 213 (Ky. 1991),] and *Elrod v. Willis*[, 305 Ky. 225, 203 S.W.2d 18], involved the troubling and more serious issue of legislative involvement in the appointment process. Both of those cases concerned entities other than the state legislature submitting lists of prospective board members. When the legislature confines itself to the permissible function of establishing the parameters of executive appointment without injecting itself directly in the process, as the court in *Prater* explained, there is no encroachment upon the "exercise [of] the executive power of appointment." ... Crystalizing that it is the *legislative involvement in the appointment process* which prevents a challenged statutory method of appointment from passing constitutional muster, the court in *Prater* observed:

> There is a fundamental and critical difference between the statutes held constitutionally flawed in *LRC v. Brown* and the statutes proved as constitutionally valid in *Elrod v. Willis*. . . . The statutes in *LRC v. Brown* granted the General Assembly continuing power, either directly through its leadership or indirectly through the LRC (which we recognized was *not* an independent agency but an arm of the legislature), to require the Governor to appoint to specified commissions persons who were nominees of the legislature. This transgressed the mandate in Section 27 of our Kentucky Constitution that "each" department of government shall "be confined to a separate body of magistracy," and in Section 28 that "no . . . persons, being of one of those departments, shall exercise any power properly belonging to either of the others." *But the statute presently in question, as in the Elrod . . . case[], gives the General Assembly no voice in the selection of committee members; its reach extends solely to providing a method of selection* with reasonable criteria to generate commission members qualified for the position *through participation of an organization,* the Kentucky Association of Realtors, *which is independent of legislative control*.

82 S.W.3d at 908 (quoting *Musselman*, 817 S.W.2d at 216-17) (emphasis supplied).

In seeking to bolster its position, the Grant Committee erroneously attributes a statement to *Prater* that, in actuality, emanates from *Elrod*. . . . *Elrod* involved a statute authorizing the Kentucky governor's appointment of individuals to the Disabled Ex-Servicemen's Board from a list submitted by the American Legion. The reason the Kentucky Supreme Court was able to declare in *Elrod* that the legislature had "not attempted to appoint administrative officers, nor has it completely denied the appointive function of the Executive" can be found in the very next sentence of that opinion. . . . "It has simply limited the Governor's selection to a list of men named by an organization which is not affected by the limitation of section 27 [separation of powers]." *Id.* Rather than abandoning its ruling in *Brown* concerning the unconstitutionality of legislatively prepared lists for executive appointments, the Court in *Prater* was merely clarifying that a separation of powers violation is *not* implicated when the list preparation at issue is not performed by legislators. . . .

The West Virginia Legislature, under authority of West Virginia Code § 29- 22-18a(d)(3), played

an active role in identifying which individuals should be appointed to the Grant Committee. Through its designation of these individuals for the governor's selection, the Legislature wrongly injected itself into the appointment process--a function indisputably reserved to the executive branch of government. The danger of this type of an encroachment is the possibility that such action could conceivably result in the "expansion of the legislative power beyond its constitutionally confined role." *Washington Airports Auth*., 501 U.S. at 277. While we do not wish to ascribe any improper assertion of control by the Legislature over the actions of the Grant Committee, we would be skirting our obligation to uphold the constitution of this state if we failed to recognize that the appointment mechanism established by the subject legislation does indeed set in place a device by which the Legislature may assert post-enactment control over executive branch decisions. *See* [*Manchin*].

In clear recognition of this Court's responsibility to enforce the constitutional constraints imposed upon the separate branches of government and in adherence to our longstanding practice of strictly construing the separation of powers provision, we hold that, due to the resulting encroachment on the executive power of appointment, the provisions of West Virginia Code § 29-22-18a(d)(3) that direct the presiding officers of each house of the Legislature to submit a list of prospective candidates to the Governor for the chief executive's selection of certain members of the West Virginia Economic Grant Committee are in violation of the separation of powers provision found in article five, section one of the West Virginia Constitution.

4. Governor's Powers of Appointment

In addition to violating the separation of powers provision of this state's constitution, CAG maintains that the subject legislation violates the appointments provision of the constitution, which provides that:

> The governor shall nominate, and by and with the advice and consent of the senate, (a majority of all the senators elected concurring by yeas and nays), appoint all officers whose offices are established by this Constitution, or shall be created by law, and whose appointment or election is not otherwise provided for; and no such officers shall be appointed or elected by the legislature.

W.Va. Const. art. VII, § 8. Both the Grant Committee and the circuit court reason that the appointments clause is not implicated by the subject legislation, based on their conclusion that the Committee members are not officers of the state.

Finding the reasoning employed in *Craig v. O'Rear*, 199 Ky. 553, 251 S.W. 828 (Ky. 1923), to be persuasive, the lower court determined that the Grant Committee members were not officers of the state. At issue in *Craig* was legislation that created an eight-person commission whose members were selected by legislative officers for the limited purpose of selecting sites for two schools. In addressing a separation of powers issue, the Court in *Craig* observed:

> "Practically all of the courts hold that mere temporary agents appointed to perform a particular task, who serve without term and without pay, and whose functions cease when the purpose is accomplished, may be appointed by the Legislature itself, or in any manner that it may provide. . . ."

. . . Relying on these factors, the trial court and the Committee conclude that the Grant Committee members are merely temporary agents and not officers of the state. As support for this position, they cite to the fact that under the subject statute, as it pertains to the Grant Committee, there is no salary; no specified term of appointment; no bond posting requirement; and no oath-taking requirement.[25] *See* W.Va. Code § 29-22-18a(d)(3).

What both the trial court and the Committee overlook in characterizing the Grant Committee members as temporary agents is the discerning consideration of whether those members are cloaked with authority to exercise the sovereign power of the state. In *State ex rel. Key v. Bond*, 94 W.Va.

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[25]We note, however, that the committee members did take the oath of office that is required by our state constitution for both elected and appointed office holders. *See* W.Va. Const. art. IV, § 5.

255, 118 S.E. 276 (1923), we recognized that

> as a general rule it may be stated that a position is a public office when it is created by law, with duties cast on the incumbent *which involve an exercise of some portion of the sovereign power and in the performance of which the public is concerned,* and which are continuing in their nature and not occasional or intermittent. But one who merely performs the duties required of him by persons employing him under an express or implied contract, though such persons themselves be public officers, and though the employment be in or about public work or business, is a mere employee.

Id. at 260, 118 S.E. at 279 (emphasis supplied).

By limiting its analysis to circumstances such as salary, appointment length, oath taking, and bond requirements, the lower court failed to fully analyze this issue. Two additional factors that we discussed in concluding that the chief clerk employed by the Secretary of State in *Bond* was not a public officer were the absence of job duties prescribed by law and the employee's lack of independent power or authority over the exercise of her job duties. . . . Despite the absence of certain indicia of public office, the Grant Committee members are clearly vested with authority to exercise independent judgment and discretion. The issuance of revenue bonds as a result of the Committee's actions illustrates the fact that the Grant Committee is acting on behalf of the state in performing its duties. Further evidence that the Committee has been given authority to make critical decisions invoking the sovereign power of the state is gleaned from the fact that once the Committee certifies its list identifying the selected projects, those projects are not subject to alteration. *See* W.Va. Code § 29-22-18a(d)(3). Given the independent judgment and discretion of the Committee combined with the cloak of finality that the Legislature has placed upon the actions of the Grant Committee, there can be no doubt that the Committee's decisions necessarily implicate an exercise of the sovereign power of the state. *See Hall v. Pizzino*, 164 W.Va. 331, 334, 263 S.E.2d 886, 887 (1980) (stating that county superintendent of schools '"came within the definition of a public officer in that he was authorized to exercise some of the sovereign powers of the state'") (quoting *County Court v. Nicely,* 121 W.Va. 767, 6 S.E.2d 485 (1939)).

In view of the fact that the Grant Committee members do have statutorily-prescribed job duties; their job description necessarily reposes the members with independent decision-making authority and discretion; and through the exercise of their job description the members are permitted to make financial decisions that consequently have an effect on the availability of both present and future state lottery funds, we are compelled to conclude that the Committee members are indeed officers of the state. To find otherwise, would be to ignore the realities of the decision-making power of the Grant Committee and the impact of its decisions on the financial resources of this state.

Accordingly, we hold that the provisions of West Virginia Code § 29-22-18a(d)(3) that direct the Legislature's involvement in the appointment process of the members of the Grant Committee are in violation of the appointments provision found in article seven, section eight of the West Virginia Constitution.

[Justice McGraw concurred in the Court's separation of powers analysis but dissented from applying it retroactively to the Grants Committee. Chief Justice Starcher also filed a brief concurring opinion. Justice Maynard dissented, preferring to interpret the statute as creating merely an advisory role for the legislative leaders that would not be binding on the governor. In his view, that reading rendered the statute constitutional.

[The portion of the majority opinion dealing with the delegation doctrine is reprinted in Chapter 6 and those sections addressing the validity of the financing method are discussed in Chapter 10.]

STATE OF WEST VIRGINIA EX REL. WORKMAN v. CARMICHAEL, 241 W. Va. 105, 819 S.E.2d 251 (2018).

Matish, Acting Chief Justice.

Petitioner, the Honorable Margaret L. Workman, Chief Justice of the Supreme Court of Appeals of West Virginia, brought this proceeding under the original jurisdiction of this Court as a petition for a writ of mandamus that seeks to halt impeachment proceedings against her. The Respondents named in the petition are [Senate leaders]. The Petitioner seeks to have this Court prohibit the Respondents from prosecuting her under three Articles of Impeachment returned against her by the West Virginia House of Delegates. The Petitioner . . . has alleged . . . that the Articles of Impeachment against her violate the Constitution of West Virginia because (1) an administrative rule promulgated by the Supreme Court supersede[s] statutes in conflict with [it]; (2) the determination of a violation of the West Virginia Code of Judicial Conduct rests exclusively with the Supreme Court; (3) the Articles of Impeachment were filed in violation of provisions of House Resolution 201. Upon careful review . . ., we grant relief as outlined in this opinion.[26]

INTRODUCTION

. . . There is no question that a governor, if duly qualified and serving, can call a special session of the Legislature. There is no question that the House of Delegates has the right to adopt a Resolution and Articles of a Bill of Impeachment. There is no question that the Senate is the body which conducts the trial of impeachment and can establish its own rules for that trial and that it must be presided over by a member of this Court. This Court should not intervene with any of those proceedings because of the separation of powers doctrine, and no one branch may usurp the power of any other coequal branch of government. However, when our constitutional process is violated, this Court must act when called upon.

Fundamental fairness requires this Court to review what has happened in this state over the last several months when all of the procedural safeguards that are built into this system have not been followed. In this case, there has been a rush to judgment to get to a certain point without following all of the necessary rules. This case is not about whether [a] Justice of the Supreme Court of Appeals of West Virginia can or should be impeached; but rather it is about the fact that to do so, it must be done correctly and constitutionally with due process. We are a nation of laws and not of men, and the rule of law must be followed.

By the same token, the separation of powers doctrine works six ways. The Courts may not be involved in legislative or executive acts. The Executive may not interfere with judicial or legislative acts. So the Legislature should not be dealing with the Code of Judicial Conduct, which authority is limited to the Supreme Court of Appeals. . . .

I.

FACTUAL AND PROCEDURAL HISTORY

. . . In 1988, the Petitioner was elected by the voters to [serve as a Justice of the] Supreme Court of Appeals. She left office in [1999 but] ran again for a position on the Supreme Court in 2008 and won.

In late 2017, the local media began publicizing reports of their investigations into the costs for renovating the offices of the Supreme Court Justices. Those publicized reports led to an investigation by the Legislative Auditor into the spending practices of the Supreme Court in general. The Auditor's office issued a report in April of 2018. This report was focused on the conduct of Justice

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[26] We are compelled at the outset to note that this Court takes umbrage with the tone of the Respondents brief, insofar as it asserts "that a constitutional crisis over the separation of powers between the Legislature and Judicial Branches" would occur if this Court ruled against them. This Court is the arbiter of the law. Our function is to keep the scales of justice balanced, not tilted in favor of a party out of fear of retribution by that party. We resolve disputes based upon an unbiased application of the law.

Allen Loughry and Justice Menis Ketchum [and] concluded that both Justices may have used state property for personal gain in violation of the state Ethics Act. The report indicated that the matter was referred to the West Virginia Ethics Commission for further investigation. In June of 2018 the Judicial Investigation Commission charged Justice Loughry with 32 violations of the Code of Judicial Conduct and the Rules of Professional Conduct. Justice Loughry was subsequently indicted by the federal government on 22 charges.

On June 25, 2018, Governor Jim Justice issued a Proclamation calling the Legislature to convene in a second extraordinary session to consider . . .[m]atters relating to the removal of one or more Justices of the Supreme Court of Appeals of West Virginia, including, but not limited to, censure, impeachment, trial, conviction, and disqualification[.] Pursuant to this Proclamation, the Legislature convened on June 26, 2018, [and on that date] the House of Delegates adopted House Resolution 201. This Resolution empowered the House Committee on the Judiciary to investigate impeachable offenses against the Petitioner and the other four Justices of the Supreme Court. Under the Resolution, the Judiciary Committee was required to report to the House of Delegates its findings of facts and any recommendations consistent with those findings of fact; and, if the recommendation was that of impeachment of any of the Justices, the Committee had to present to the House of Delegates a proposed resolution of impeachment and proposed articles of impeachment. . . .

The Judiciary Committee conducted impeachment hearings between July 12, 2018 and August 6, 2018. On August 7, 2018, the Judiciary Committee adopted fourteen Articles of Impeachment. The Petitioner was named in four of the Articles of Impeachment. On August 13, 2013, the House of Delegates voted to approve only eleven of the Articles of Impeachment. The Petitioner was impeached on three of the Articles of Impeachment. First, the Petitioner and Justice Davis were named in Article IV, which alleged that they improperly authorized the overpayment of senior-status judges. Second, the Petitioner was named exclusively in Article VI, which alleged that she improperly authorized the overpayment of senior-status judges. Third, the Petitioner was named, along with three other justices, in Article XIV, which set out numerous allegations against them which included charges that they failed to implement various administrative policies and procedures.

Subsequent to the House of Delegates' adoption of the Articles of Impeachment they were submitted to the Senate for the purpose of conducting a trial. On August 20, 2018 the Senate adopted Senate Resolution 203, which set forth the rules of procedure for the impeachment trial. . . . Thereafter Acting Chief Justice Farrell set a separate trial date for the Petitioner on October 15, 2018. The Petitioner subsequently filed this proceeding to have the Articles of Impeachment against her dismissed.

II.

THIS COURT'S JURISDICTION TO ADDRESS CONSTITUTIONAL ISSUES ARISING FROM THE COURT OF IMPEACHMENT

Before we examine the merits of the issues presented we must first determine whether this Court has jurisdiction over issues arising out of a legislative impeachment proceeding. The Respondents contend that this Court does not have jurisdiction over the impeachment proceeding. This is an issue of first impression for this Court.

. . . In undertaking our analysis we are reminded that the United States Supreme Court stated in *Baker v. Carr*, 369 U.S. 186 (1962), that the determination of whether a matter is exclusively committed by the constitution to another branch of government "is itself a delicate exercise in constitutional interpretation and is a responsibility of this Court as ultimate interpreter of the Constitution." . . . "[I]n every case involving the application or interpretation of a constitutional provision, analysis must begin with the language of the constitutional provision itself." *State ex rel. Mountaineer Park, Inc. v. Polan*, 190 W.Va. 276, 283, 438 S.E.2d 308, 315 (1993). The framework for impeaching and removing an officer of the state is set out under Article IV, § 9 of the Constitution of West Virginia. The full text of Section 9 provides as follows:

> Any officer of the state may be impeached for maladministration, corruption, incompetency,

> gross immorality, neglect of duty, or any high crime or misdemeanor. The House of Delegates shall have the sole power of impeachment. The Senate shall have the sole power to try impeachments and no person shall be convicted without the concurrence of two thirds of the members elected thereto. When sitting as a court of impeachment, the president of the supreme court of appeals, or, if from any cause it be improper for him to act, then any other judge of that court, to be designated by it, shall preside; and the senators shall be on oath or affirmation, to do justice according to law and evidence. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold any office of honor, trust or profit, under the state; but the party convicted shall be liable to indictment, trial judgment, and punishment according to law. The Senate may sit during the recess of the Legislature, for the trial of impeachments.

Pursuant to Section 9 "[t]he House of Delegates has the sole power of impeachment, and the Senate the sole power to try impeachments." *Slack v. Jacob*, 1875 W.L. 3439, 8 W. Va. 612, 664 (1875). To facilitate the trial of an impeachment proceeding Section 9 created a Court of Impeachment.

> [Section 9] does not provide this Court with jurisdiction over an appeal of a final decision by the Court of Impeachment. Consequently, and we so hold, in the absence of legislation providing for an appeal in an impeachment proceeding under Article IV, § 9 of the Constitution of West Virginia, this Court does not have jurisdiction over an appeal of a final decision by the Court of Impeachment.
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> Although it is clear that an appeal is not authorized from a decision by the Court of Impeachment, we do find under the plain language of Section 9, the actions or inactions of the Court of Impeachment may be subject to a proceeding under the original jurisdiction of this Court.[16] The authority for this proposition is contained in the Law and Evidence Clause found in Section 9, which states: "the senators shall ... do justice according to law and evidence." The Law and Evidence Clause of Section 9 uses the word "shall" in requiring the Court of Impeachment to follow the law. We have recognized that "[t]he word 'shall,' ... should be afforded a mandatory connotation[,] and when used in constitutions and statutes, [it] leaves no way open for the substitution of discretion." *Silveti v. Ohio Valley Nursing Home, Inc.*, 240 W. Va. 468, 813 S.E.2d 121, 125 (2018) (internal quotation marks and citations omitted). . . . Insofar as the Law and Evidence Clause imposes a mandatory duty on the Court of Impeachment to follow the law, there is an implicit right of an impeached official to have access to the courts to seek redress, if he or she believes actions or inactions by the Court of Impeachment violate his or her rights under the law.[17]

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[16]Article VIII, § 3 of the Constitution of West Virginia provides that "[t]he supreme court of appeals shall have original jurisdiction of proceedings in habeas corpus, mandamus, prohibition and certiorari."

[17]It must be clearly understood that the Law and Evidence Clause is not superfluous language. Under the 1863 Constitution of West Virginia the impeachment provision was set out in Article III, § 10. The original version of the impeachment provision did not contain a Law and Evidence Clause. The 1863 version of the impeachment provision read as follows:Any officer of the State may be impeached for maladministration, corruption, incompetence, neglect of duty, or any high crime or misdemeanor. The house of delegates shall have the sole power of impeachment. The senate shall have the sole power to try impeachments. When sitting for that purpose, the senators shall be on oath or affirmation; and no persons shall be convicted without the concurrence of two-thirds of the members present. Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold any office of honor, trust or profit, under the State; but the party convicted shall, nevertheless, be liable and subject to indictment, trial judgment, and punishment according to law. The Senate may sit during the recess of the legislature, for the trial of impeachments.The Law and Evidence Clause was specifically added to the

The implicit right of redress in the courts found in the Law and Evidence Clause, is expressly provided for in Article III, § 17 of the Constitution of West Virginia. Section 17 provides as follows:

> The courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.

The Certain Remedy Clause of Section 17 has been found to mean that "[t]he framers of the West Virginia Constitution provided citizens who have been wronged with rights to pursue a remedy for that wrong in the court system." *Bias v. E. Associated Coal Corp*., 220 W. Va. 190, 204, 640 S.E.2d 540, 554 (2006) (Starcher, J., dissenting). See *O'Neil v. City of Parkersburg*, 160 W.Va. 694, 697, 237 S.E.2d 504, 506 (1977)[.] . . . In the leading treatise on the Constitution of West Virginia, the following is said,

> The second clause of section 17, providing that all persons "shall have remedy by due course of law" ... limits ... the ability of the government to constrict an individual's right to invoke the judicial process[.]

Robert M. Bastress, *The West Virginia State Constitution*, at [132 (2016).]

. . . "[C]ourts are not concerned with the wisdom or expediencies of constitutional provisions[;] the duty of the judiciary is merely to carry out the provisions of the plain language stated in the constitution." Syl. pt. 3, *State ex rel. Casey v. Pauley*, 158 W.Va. 298, 210 S.E.2d 649 (1975).

Insofar as an officer of the state facing impeachment in the Court of Impeachment has a constitutional right to seek redress for an alleged violation of his or her rights by that court, we now hold that an officer of the state who has been impeached under Article IV, § 9 of the Constitution of West Virginia, may seek redress for an alleged violation of his or her constitutional rights in the impeachment proceedings, by filing a petition for an extraordinary writ under the original jurisdiction of this Court. [Citations to decisions in Connecticut, Florida, Pennsylvania, and New York are omitted.]

. . . The Respondents have cited to the decision in *Nixon v. United States*, 506 U.S. 224, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993) as authority for the proposition that the judiciary does not have jurisdiction over impeachment proceedings. In *Nixon*, a federal district judge was impeached and removed from office, in a proceeding in which the United States Senate allowed a committee to take testimony and gather evidence. The former judge filed a declaratory judgment action in a district court seeking a ruling that the Senate's failure to hold a full evidentiary hearing before the entire Senate violated its constitutional duty to "try" all impeachments. The District Court denied relief and dismissed the case. The Court of Appeals affirmed. The United States Supreme Court granted certiorari to determine whether the constitutional requirement that the Senate "try" cases of

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impeachment provision in the constitution of 1872. The affirmative creation and placement of the Law and Evidence Clause in the new constitution supports the significance this Court has given to that clause. A similar Law and Evidence Clause appears in the impeachment laws of 11 states. See Ariz. Const. Art. VIII, Pt. 2 § 1 (1910); Colo. Const. Art. XIII, § 1 (1876); Kan. Const. Art. II, § 27 (1861); Md. Const. Art. III, § 26 (1867); Miss. Const. Art. 4, § 49 (1890); Nev. Const. Art. VII, § 1 (1864); N.D. Cent. Code Ann. § 44-09-02 (1943); Ohio Const. Art. II, § 23 (1851); Utah Const. Art. VI, § 18 (1953); Wash. Const. Art. V, § 1 (1889); Wyo. Const. Art. III, § 17 (2016). There does not appear to be any judicial decisions from those jurisdictions addressing the application of the Law and Evidence Clause. It is also worth noting that under the 1863 Constitution of West Virginia there was no provision for a presiding judicial officer. The 1872 Constitution of West Virginia added the provision requiring a judicial officer preside over an impeachment proceeding. This requirement is further evidence that an impeachment proceeding was not beyond the jurisdiction of this Court, insofar as it solidified the quasi-judicial nature of the proceeding.

impeachment precludes the use of a committee to hear evidence. The opinion held that the issue presented could not be brought in federal court. The Court reasoned as follows:

> We agree with the Court of Appeals that opening the door of judicial review to the procedures used by the Senate in trying impeachments would "expose the political life of the country to months, or perhaps years, of chaos." This lack of finality would manifest itself most dramatically if the President were impeached. The legitimacy of any successor, and hence his effectiveness, would be impaired severely, not merely while the judicial process was running its course, but during any retrial that a differently constituted Senate might conduct if its first judgment of conviction were invalidated. Equally uncertain is the question of what relief a court may give other than simply setting aside the judgment of conviction. Could it order the reinstatement of a convicted federal judge, or order Congress to create an additional judgeship if the seat had been filled in the interim?

Nixon, 506 U.S. at 236, 113 S.Ct. at 739.

The decision in *Nixon* is not controlling and is distinguishable. . . . The narrowly crafted text of the impeachment provision found in the Constitution of the United States prevented the Supreme Court from finding a basis for allowing a constitutional challenge to the impeachment procedure adopted by the Senate. The text of the federal impeachment provision is found in Article I, § 3 of the Constitution of the United States and provides the following:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.
>
> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

It is clear that Article 1, § 3 does not contain the Law and Evidence Clause that is found in Article IV, § 9 of the Constitution of West Virginia. Therefore, our constitution provides greater impeachment protections than the Constitution of the United States. [Citations to a string of West Virginia decisions holding the State Constitution is often more broadly than its federal counterpart are omitted.] Moreover, *Nixon* was not called upon to address the substantive type of issues presented in this case. The case was focused upon the right of the Senate to craft rules of procedure for impeachment.

[The Court distinguished as not controlling decisions concerning impeachment from New Hampshire, Pennsylvania, and Arizona.] In the instant proceeding the Petitioner has alleged that the impeachment charges brought against her are unlawful and violate her constitutional rights. [W]e have jurisdiction to consider the validity of these allegations.

III.

STANDARD OF REVIEW

The Petitioner filed this matter seeking a writ of mandamus to prohibit enforcement of the Articles of Impeachment filed against her. This Court has explained that the function of mandamus is "the enforcement of an established right and the enforcement of a corresponding imperative duty created or imposed by law." *State ex rel. Ball v. Cummings*, 208 W. Va. 393, 398, 540 S.E.2d 917, 922 (1999). It was held in syllabus point two of *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969) that

> A writ of mandamus will not issue unless three elements coexist—(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

In our review of the type of relief the Petitioner seeks we do not believe that mandamus is the appropriate remedy. "In appropriate situations, this Court has chosen to treat petitions for

extraordinary relief according to the nature of the relief sought rather than the type of writ pursued." . . . In light of the issues raised by the Petitioner, we find that the more appropriate relief lies in a writ of prohibition. As a quasi-judicial body the Court of Impeachment is subject to the writ of prohibition. [String citations omitted.]

[W]e turn to the merits of the case.

IV.

DISCUSSION

The Petitioner has presented several issues that she contends ultimately require the dismissal of the impeachment charges against her. All of the arguments presented by the Petitioner have one common thread: they expressly or implicitly contend that the charges are brought in violation of the separation of powers doctrine. Because this common theme permeates all of her arguments, we will provide a separate discussion of that doctrine before we address the merits of each individual issue.

A.

The Separation of Powers Doctrine

"[T]he separation of powers doctrine [is] set forth in our State Constitution." *Erie Ins. Prop. & Cas. Co. v. King*, 236 W. Va. 323, 329, 779 S.E.2d 591, 597 (2015). The doctrine is set out in Article V, § 1 of the Constitution of West Virginia as follows:

> The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature.

With regard to this provision, this Court has stated:

> The separation of these powers; the independence of one from the other; the requirement that one department shall not exercise or encroach upon the powers of the other two, is fundamental in our system of Government, State and Federal. Each acts, and is intended to act, as a check upon the others, and thus a balanced system is maintained. No theory of government has been more loudly acclaimed.

State ex rel. W. Virginia Citizen Action Grp. v. Tomblin, 227 W. Va. 687, 695, 715 S.E.2d 36, 44 (2011), quoting *State v. Huber*, 129 W.Va. 198, 209, 40 S.E.2d 11, 18 (1946). . . . Professor Bastress has pointed out the purpose and application of the separation of powers doctrine as follows:

> A system of divided powers advances several purposes. First, it helps to prevent governmental tyranny. By allocating the powers among the three branches and establishing a system of checks and balances, the constitution ensures that no one person or institution will become too powerful and allow ambition to supersede the public good. . . .
>
> Thus, under the current doctrine, the court's role is to apply Article V to ensure that the system of government in the state remains balanced and that no one branch assumes powers specifically delegated to another, or imposes burdens on another, or passes on its own responsibilities to another branch in such a manner as to threaten the balance of power, facilitate tyranny, or weaken the system of government.

Bastress, *West Virginia State Constitution*[.] See Syl. pt. 2, *Appalachian Power Co. v. Public Serv. Comm'n of West Virginia*, 170 W.Va. 757, 296 S.E.2d 887 (1982) ("Where there is a direct and fundamental encroachment by one branch of government into the traditional powers of another branch of government, this violates the separation of powers doctrine contained in Section 1 of Article V of the West Virginia Constitution."). . . .

We have recognized that "[t]he system of 'checks and balances' provided for in American state and federal constitutions and secured to each branch of government by 'Separation of Powers' clauses theoretically and practically compels courts, when called upon, to thwart any unlawful actions of one branch of government which impair the constitutional responsibilities and functions of a coequal branch." Syl. pt. 1, *State ex rel. Frazier v. Meadows*, 193 W.Va. 20, 454 S.E.2d 65 (1994). We have also determined that "the role of this Court is vital to the preservation of the

constitutional separation of powers of government where that separation, delicate under normal conditions, is jeopardized by the usurpatory actions of the executive or legislative branches of government." *State ex rel. Steele v. Kopp*, 172 W. Va. 329, 337, 305 S.E.2d 285, 293 (1983). See *State ex rel. W. Virginia Citizens Action Grp. v. W. Virginia Econ. Dev. Grant Comm*., 213 W. Va. 255, 264, 580 S.E.2d 869, 878 (2003) ("Underlying any encroachment of power by one branch of government is the paramount concern that such action will impermissibly foster[ ] ... dominance and expansion of power."). Moreover, this Court has never "hesitated to utilize the doctrine where we felt there was a direct and fundamental encroachment by one branch of government into the traditional powers of another branch of government." *Appalachian Power Co. v. PSC*, 170 W.Va. 757, 759, 296 S.E.2d 887, 889 (1982). See, e.g., *State ex rel. West Virginia Citizens Action Group v. West Virginia Economic Dev. Grant Comm*., 213 W.Va. 255, 580 S.E.2d 869 (2003. [Further citations are omitted.]

The United States Supreme Court in *O'Donoghue v. United States*, 289 U.S. 516 (1933), articulated the need for separating the powers of government into three distinct branches:

> The Constitution, in distributing the powers of government, creates three distinct and separate departments—the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, *Springer v. Government of Philippine Islands*, 277 U.S. 189 [(1928)]; namely, to preclude a commingling of these essentially different powers of government in the same hands....
>
> It must also [be] understood that this Court "has long recognized that it is not possible that division of power among the three branches of government be so precise and exact that there is no overlapping whatsoever." *Sahley v. Thompson*, 151 W. Va. 336, 341, 151 S.E.2d 870, 873 (1966). . . . *See Appalachian Power Co. v. Public Service Comm'n of West Virginia*, 170 W. Va. 757, 759, 296 S.E.2d 887, 889 (1982) ("we have recognized the need for some flexibility in interpreting the separation of powers doctrine in order to meet the realities of modern day government[.]). . . .
>
> With these general principles of the separation of powers doctrine guiding our analysis, we now turn to the merits of the issues presented.

[In Parts B and C of the Discussion Part of its opinion the Court addressed issues related to the Court's powers and supremacy in fashioning rules for the administration of the court system and regulating the conduct of the judiciary. Those portions of the opinion are set forth in Chapter 8, *infra*.]

D.

The Articles of Impeachment were Filed in Violation of Provisions of House Resolution 201

Although we have determined that the Petitioner is entitled to relief based upon the foregoing, we believe that the remaining issues involving the failure to comply with two provisions of House Resolution 201 are not moot. . . . We believe that there may be collateral consequences in failing to address the issues, the issues are of great public importance, and the issues may present themselves again. *State ex rel. McKenzie v. Smith*, 212 W. Va. 288, 297, 569 S.E.2d 809, 818 (2002) ("Because of the possibility that the Division's continued utilization of this system may escape review at the appellate level, we address the merits of this case under the ... exception to the mootness doctrine.").

The Petitioner has argued that House Resolution 201 required the House Committee on the Judiciary to set out findings of fact in the Articles of Impeachment and required the House of Delegates adopt a resolution of impeachment. The Petitioner contends that neither of these required tasks were performed and that her right to due process was violated as a consequence. We agree.

. . . We have held as a general matter that "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." *State ex rel. Wilson v. Truby*, 167 W. Va. 179, 188, 281 S.E.2d 231, 236 (1981). The Petitioner has both a liberty and property interest in having the impeachment rules followed. The Petitioner has a liberty interest in not having her

reputation destroyed in the legal community and public at-large by being impeached and removed from office; and she has a property interest in obtaining her pension when she chooses to retire.

We begin by noting the record supports the Petitioner's contention that House Resolution 201 required the Judiciary Committee to set out findings of fact, and that this was not done. Rule 3 and 4 of Resolution 201 required the Judiciary Committee to do the following:

> 3. To make findings of fact based upon such investigation and hearing(s);
>
> 4. To report to the House of Delegates its findings of facts and any recommendations consistent with those findings of fact which the Committee may deem proper.

The record demonstrates that the Judiciary Committee was aware that it failed to carry out the above duties, but refused to correct the error. The following exchange occurred during the proceedings in the House regarding the failure to follow Rules 3 and 4:

> MINORITY VICE CHAIR FLUHARTY: Thank you, Mr. Chairman. Counsel, I was going through these Articles. Where are the findings of fact?
>
> MR. CASTO: Well, there—there are no findings of fact there. The Committee—
>
> MINORITY VICE CHAIR FLUHARTY: Where?
>
> MR. CASTO: I said, sir, there are no findings of fact. . . .
>
> MINORITY VICE CHAIR FLUHARTY: Well, do you know that we're required to have findings of fact?
>
> MR. CASTO: I think, sir, that my understanding is—based upon the Manchin Articles—that the term "findings of fact" which was used at the same time, that the profferment of these Articles is indeed equivalent to a findings of fact. The—but that, again, is your interpretation, sir. . . .

The record also discloses that the Judiciary Committee was warned by one of its members of the consequences of its failure to follow its own rules:

> MINORITY CHAIR FLEISCHAUER: Thank you, Mr.—thank you, Mr. Chairman. I think the gentleman has raised a valid point. If we look at the Resolution that empowers this Committee to act, it—it says that we are to make findings of fact based upon such investigation and hearing and to report to the House of Delegates its findings of fact and any recommendations consistent with those findings, of which the Committee may deem proper.
>
> * * *
>
> And I'm just a little concerned that if we don't have findings of fact that there could be some flaw that could mean that the final Resolution by the House would be deemed to be not valid.
>
> * * *
>
> So I think we—if there—there would be some wisdom in trying to track the language of the Resolution, and it would be consistent with any other proceeding that we have in West Virginia that when there are requirements of findings of fact and—in this case, it's not conclusions of law, but it's recommendations—that we should follow that.

As previously stated, the Petitioner has also asserted that the House of Delegates failed to adopt a resolution of impeachment. Rule 2 of the last Further Resolved section of Resolution 201 provides as follows:

> Further resolved ... that the House of Delegates adopt a resolution of impeachment and formal articles of impeachment as prepared by the Committee; and that the House of Delegates deliver the same to the Senate in accordance with the procedures of the House of Delegates, for consideration by the Senate according to law.

A review of the Articles of Impeachment that were submitted to the Senate unquestionably shows that the House of Delegates failed to include language indicating that the Articles were adopted by the House.

We are gravely concerned with the procedural flaws that occurred in the House of Delegates. Basic due process principles demand that governmental bodies follow the rules they enact for the purpose of imposing sanctions against public officials. This right to due process is heightened when

the Legislature attempts to impeach a public official. Therefore we hold, in the strongest of terms, that the Due Process Clause of Article III, § 10 of the Constitution of West Virginia requires the House of Delegates follow the procedures that it creates to impeach a public officer. Failure to follow such rules will invalidate all Articles of Impeachment that it returns against a public officer.

We must also point out that the Petitioner was denied due process because none of the Articles of Impeachment returned against her contained a statement that her alleged wrongful conduct amounted to maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor, as required by Article IV, § 9 of the Constitution of West Virginia. This is the equivalent of an indictment failing to allege the essential elements of wrongful conduct. See Syl. pt. 1, *State ex rel. Combs v. Boles*, 151 W. Va. 194, 151 S.E.2d 115 (1966) ("In order to lawfully charge an accused with a particular crime it is imperative that the essential elements of that crime be alleged in the indictment.").

V.

CONCLUSION

We have determined that prosecution of Petitioner for the allegations set out in Article IV, Article VI and Article XIV of the Articles of Impeachment violates the separation of powers doctrine. The Respondents do not have jurisdiction over the alleged violations in Article IV and Article VI. The Respondents also do not have jurisdiction over the alleged violation in Article XIV as drafted. In addition, we have determined that the failure to set out findings of fact, and to pass a resolution adopting the Articles of Impeachment violated due process principles. Consequently, the Respondents are prohibited from proceeding against the Petitioner for the conduct alleged in Article IV and Article VI, and in Article XIV as drafted. . . .

ACTING JUSTICE LOUIS H. BLOOM concurs in part and dissents in part and reserves the right to file a separate opinion.

ACTING JUSTICE JACOB E. REGER concurs in part and dissents in part and reserves the right to file a separate opinion.

CHIEF JUSTICE WORKMAN is disqualified.

JUSTICE ALLEN H. LOUGHRY II suspended, therefore not participating

JUSTICE ELIZABETH WALKER is disqualified.

JUSTICE PAUL T. FARRELL sitting by temporary assignment is disqualified.

JUSTICE TIM ARMSTEAD did not participate.

JUSTICE EVAN JENKINS did not participate.

ACTING JUSTICE RUDOLPH J. MURENSKY, II, and ACTING JUSTICE RONALD E. WILSON sitting by temporary assignment.

Bloom, J. and Reger, J., concurring in part and dissenting in part.

. . . We concur in the resolution of [the] three Articles of Impeachment. Even though the dispositive issues in this case were resolved when it was determined that all three Articles of Impeachment were invalid, the majority opinion chose to address another issue that was not necessary for the resolution of the case. For the reasons set out below, we dissent from the majority decision to address that issue.

Prefatory Remarks

Before we address the substantive issues of our concurring opinion, we feel that it is imperative that we make clear that it is our belief that the Legislature has absolute authority to impeach a judicial officer or any State public officer for wrongful conduct. Through the State Constitution the people of West Virginia provided that "[t]he legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others...." W.Va. Const. Art. 5, § 1. It has been observed that "[t]he doctrine of separation of powers

'is at the heart of our Constitution.'" *Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm'n*, 673 F.2d 425, 471 (D.C. Cir. 1982). . . .

The State Constitution, Article IV, § 9, invests absolute authority in the Legislature to bring impeachment charges against a public officer and to prosecute those charges. Pursuant to Article IV, § 9 "[t]he House of Delegates has the sole power of impeachment, and the Senate the sole power to try impeachments." *Slack v. Jacob*, 1875 W.L. 3439, 8 W. Va. 612, 664 (1875). Courts around the country have long recognized that the Legislature has "exclusive jurisdiction in impeachment matters or matters pertaining to impeachment of impeachable officers[.]" *State v. Chambers*, 220 P. 890, 892 (Okla. 1923). Of course "that authority is not unbounded and legislative encroachment upon other constitutional principles may, in an appropriate case, be subject to judicial review." *Office of Governor v. Select Comm. of Inquiry*, 271 Conn. 540, 574, 858 A.2d 709, 730 (2004). Even so, judicial intervention in an impeachment proceeding should be extremely rare, and only in the limited situation where an impeachment charge is prohibited by the Constitution.

Courts have observed that the "political question doctrine" is part of the separation of powers doctrine. "[T]he political question doctrine is essentially a function of the separation of powers, ... existing to restrain courts from inappropriate interference in the business of the other branches of Government, ... and deriving in large part from prudential concerns about the respect we owe the political departments." *Nixon v. United States*, 506 U.S. 224, 252-253, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993) (Souter, J., concurring) (internal quotation marks and citations omitted). The United States Supreme Court has summarized the political question doctrine as follows:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 710, 7 L.Ed. 2d 663 (1962). In the final analysis, "if the text of the constitution has demonstrably committed the disposition of a particular matter to a coordinate branch of government, a court should decline to adjudicate the issue to avoid encroaching upon the powers and functions of that branch."*Horton v. McLaughlin*, 149 N.H. 141, 143, 821 A.2d 947, 949 (2003). See *Smith v. Reagan*, 637 F. Supp. 964, 968 (E.D.N.C. 1986), rev'd on other grounds, 844 F.2d 195 (4th Cir. 1988) ("The courts have often recognized that this doctrine calls for the exercise of judicial restraint when the issues involve the resolution of questions committed by the text of the Constitution to a coordinate branch of government.").

. . . [T]he political question doctrine precluded the majority from addressing two procedural flaws in the impeachment proceeding.

1. Resolution of the Procedural Flaws in the Impeachment Proceeding Should have been Resolved by the Court of Impeachment. . . .

2. The Legislature May Seek to Impeach the Petitioner again Based upon Some of the Allegations in Article XIV of the Articles of Impeachment. . . .

It is clear that the Legislature cannot seek to impeach the Petitioner once again on the charges set out in Article IV and Article VI. However, we believe the Legislature has the right to seek to institute new impeachment proceedings to craft a constitutionally acceptable impeachment charge based upon the allegations set out in Article XIV. . . .

In view of the foregoing, we concur in part and dissent in part.