CHAPTER 7. THE EXECUTIVE

A. Election and Qualification

Read Article VII, §§ 1-4.

GOFF v. WILSON,
32 W.Va. 393, 9 S.E. 26 (1889).

SNYDER, PRESIDENT.

On March 7, 1889, Nathan Goff presented his petition to this Court, then in session, in which the petitioner avers in substance as follows: that at the general election held in this State on November 6, 1888, he was voted for and elected by the qualified voters to the office of Governor of the state for the term commencing on March 4, 1889; that the commissioners of the respective county courts ascertained the result of said election in their several counties in respect to the office of governor in the manner prescribed by law and made out and signed certificates, which they transmitted in due form of law to the Secretary of State, in sealed envelopes directed to the speaker of the house of delegates; that the Secretary of State delivered said certificates to the speaker of the house as required by law; that said certificates contained the result of said election for the auditor and other executive officers as well as for governor, and all of said county certificates were enclosed in one envelope; that the speaker of the house in the presence of a majority of each house assembled in the house of delegates for that purpose opened the envelopes containing all the said certificates and returns, and as to the aforesaid officers other than governor published the same, and as to the office of governor the said certificates and returns, after they had been opened as aforesaid, were delivered to a committee of the legislature appointed under the statute relating to contests for governor to report upon the same; that the said certificates and returns with respect to the office of governor showed that for said office petitioner received at said election 78,714 votes, A. B. Fleming received 78,604 votes, and all other persons together received for said office less than 5,000 votes, thereby showing that petitioner had received a plurality of all the votes cast for said office at said election; that said A. B. Fleming had caused a notice of contest for the office of governor to be given to petitioner, and he in turn had a counter-notice given to said Fleming, both of which notices had been served and were on January 1, 1889, presented to the legislature and printed at large upon the journal of the house of delegates, which notices as well as the journals of the senate and house of delegates, so far as the same show the action had with respect to ascertaining the result of said election and in the matter of said contest for the office of governor, are made parts of the petition; that on March 4, 1889, petitioner took the oath of office of governor in the manner prescribed by law, and on the afternoon of that day he went to the Governor's office in the state capitol, where he found E. W. Wilson, who had been elected governor at the election held in 1884, and had held said office for four years ending on said 4th day of March, 1889, and still had in his possession the property and insignia of said office, and demanded of him the possession of said office and the property and insignia of, belonging and pertaining thereto, but the said Wilson refused to surrender and deliver such possession to petitioner, and held and still holds and detains the office, property, and insignia against

the right and demand of petitioner and declares, that he will continue to do so. Petitioner insists that he was elected to the office of governor; that neither the speaker of the house, the two houses of the Legislature, nor either of them, did or would declare him elected, but wholly failed and refused to do so, or to declare any one elected to said office; and that such failure to make such declaration can not affect his right to said office. Petitioner therefore prays for the writ of *mandamus* against said E. W. Wilson, to require him to show cause why he should not be compiled to surrender to petitioner said office, and all the property arid insignia belonging thereto etc. . . .

It appears from the journal of the house of delegates, . . . that the following resolutions were adopted by the joint vote of the two houses of the legislature assembled in the house of delegates for the purpose of complying with section 3 of article VII of the constitution of this state, relative to the returns of the election for state officers, held November 6, 1888: "Whereas, it appears that there is a contest as to the result of the election for governor of the state, as set forth in the petition and notice of the Hon. A.B. Fleming against the Hon. Nathan Goff, presented before this joint assembly this day, therefore be it resolved, that the publishing and declaration of the result of the vote for the said office of governor be suspended until said contest be decided in the manner prescribed by law. Resolved, that it is hereby declared as the opinion and decision of this joint assembly, that the mere reading of the returns of the election for governor, already opened, shall not be construed to give either the Hon N. Goff or the Hon. A. B. Fleming any claim or right to the office of governor, and that all of the returns of the said election shall be referred without reading any of the returns not yet opened to the joint committee provided by the law, relating to contests for the office of Governor, and be hereafter considered and have the effect as if none of the said returns had been read."

It further appears, that a joint committee of the two houses was appointed to examine and report upon the contest between Fleming and Goff for the office of governor, and all the returns and papers relating thereto were referred to said committee. It further appears upon said journal that on January 4, 1889, an order was made by the Circuit Court of Kanawha county superseding the certificate of the commissioners of the County Court of Kanawha county ascertaining the result of the election for the office of governor, held on November 6, 1888, in said county. . . . It is conceded, and it is unquestionably true that, if the petitioner is entitled to the office of governor, he may obtain it by mandamus. [The Court's reprinting of Article VII, §§ 1-3 and Article IV, § 7 is omitted.]

. . . [T]he legislature at its session in 1873 passed an act providing that, if the election of governor, treasurer, auditor etc. be contested, the contestant must give notice to the person whose election is contested within sixty days thereafter, and within, thirty days thereafter the party, whose election is contested, shall in like manner give notice to the contestant, The parties shall finish taking depositions within forty days after the last-mentioned notice is delivered. In case the contest is for the office of governor, the petition of the contestant and the depositions shall be referred to a joint committee of the two houses for examination and report. The contest shall be determined by the legislature, both houses thereof sitting in joint session in the hall of the house of delegates, the speaker of which house shall preside. . . . It will thus be observed that it required at least 110 days from the date of the election to mature the contest for trial, which would still leave ample time for the trial and determination of the contest before March 4th, the time at which the governor goes into office. But by amendment of said section 7 of article IV of the constitution adopted in 1880 the time of holding the general election for governor and other state officers was changed from the second

Tuesday in October to the next Tuesday after the first Monday in November, thus leaving an insufficient time intervening between the date of the election and the 4th of March to mature and determine the contest for the office of governor. Since this change in the constitution no alteration has been made by the legislature in respect to the time for maturing the trial of a contest for the office of governor[.] . . . In this condition of the law the legislature, when it assembled in January last and found, that there was a contest pending between Gen. Goff, and Judge Fleming for the office of governor, was confronted with this very grave and serious question: Was it their duty to declare either of the claimants elected to the office of governor, until after the contest could be decided ? If they or the speaker of the house should at the commencement of the session, or during the term fixed by law for its continuance in regular session, declare either Goff or Fleming governor, the inevitable consequence would be, that the person so declared would have to assume the duties of the office, before it would be possible to try the contest or determine his right to the office under the existing law. The result of this might be to place in the high and responsible office of governor and at the head of the state government a person, who had never been elected or otherwise designated by either the constitution or the law to discharge the duties of that office; for, if the trial of the contest should result in favor of the other claimant his title would relate to the date of his election, and he would be the *de jure* governor from the commencement of the term fixed by the constitution. The decision upon the contest would be simply the determination of a fact. It would not create a fact or a right nor confer the office. The election gives the right to the office, and the decision of the tribunal fixed by law to try the contest simply declares the title upon the evidence but does not create or confer it; and if a person has the title by virtue of his election, his qualification entitles him to exercise the duties of the office. *Bier v. Gorrell*, 30 W. Va. 95, 100, (3 S. E. Rep. 30.) This being so, it is plain, that the person thus placed in the office before the decision of the contest would be there without any legal right. He would be a mere intruder, because he had never been elected, and was never legally entitled to the office.

It is not overlooked, that under some constitutions and systems of government it may occur and is contemplated that a person may during a contest exercise the functions of an office to which he has not been elected, and which he had no legal right to hold. This is conspicuously so in the cases of members of the legislature and the lower house of congress. In these cases such a result is unavoidable, because the very body, in which such person sits, is the tribunal appointed to determine the contest. But such is not the case in respect to the governor and other executive officers of this state. Our constitution provides, that the terms of all officers except the executive officers shall commence on January lst, but, in order that the governor and other executive officers may not be called upon to exercise the duties of their respective offices until any contest in respect thereto may be determined, the constitution wisely postpones the commencement of their terms until March 4th. It may also be conceded that by the provision of the constitution before quoted, which provides for the opening, publishing and declaring the result of the election, it was intended that this declaration of the result should precede the contest, and thus give to the person having the highest number of votes shown by the certificates and returns, the *prima facie* title to the office and the right to the advantageous position of contestee in the subsequent contest. But, while this may have been

contemplated by the framers of the constitution, it is just as plain that they also contemplated that the legislature would, as it was clearly its duty to do, provide by law for the maturity and trial of a contest for any and all of said offices before the time fixed for the commencement of the term. It is scarcely possible to believe, that it was contemplated by those who made and adopted our constitution that we should ever have the anomaly of a person discharging the high and responsible duties of the chief executive office of the state who had never been elected or otherwise designated by law to perform the duties of that office. The careful and guarded provisions of the constitution itself as well as its general policy forbid any such construction, unless there is no escape from it. The joint assembly of the two houses finding itself in this serious dilemma produced not by any question as to the intent and purpose of the organic law but by a defective statute or the omission of the legislature,--whether resulting from inadvertence or other cause it is immaterial to inquire,--to provide in a proper and practicable manner and in accordance with the express power conferred upon it by the constitution, for the trial and determination of a contested election for the office of governor before the commencement of the term of office, decided, as, we must assume, it believed it had the right to do, to refer the certificates and returns for said office to a joint committee on the contest, appointed in the manner prescribed by law, and to suspend the publishing and declaration of the results until said contest should be decided. This decision and action of the joint assembly, to say the least of it, do not appear to be either unreasonable or unjust to any one under the peculiar and embarrassing circumstances of the situation before them.

But for the purposes of the case now before us it is unnecessary for us to determine whether this action of the joint assembly was right or wrong. The real questions for us to decide are: (1) Did that assembly or any constituent part of the legislature have jurisdiction of the subject? that is, whether or not it had the constitutional right to determine the question; and, (2) if so, had it any discretion as to how it should determine the question, or the manner in which, or the time within which, it should finally decide? If these two inquiries are solved in the affirmative, then, so far as this proceeding by mandamus is concerned, it had the same legal power to decide wrong that it had to decide right; for it is a principle of law too well settled to justify the citation of precedent, that, while mandamus may be invoked to compel the decision of a discretionary question, it cannot be used to dictate or control that decision, even when directed to the officer or tribunal having the power to determine the question; much less will a court in a collateral proceeding, such as the one before us, undertake to review or correct such decision, however erroneous it may be, or however unjust and unreasonable.

1. That either the Speaker of the House or the joint assembly (and for present purposes it is immaterial which) has jurisdiction to open and publish the returns of the election and declare the result, there can be no denial; for the right to do so is conferred by the constitution in express terms. . . .

2. The important inquiry is, whether or not this authority, by which is given the right to open and publish the returns and declare the result, is in any way a discretionary power; that is, whether or not the power conferred is merely mechanical or purely ministerial involving no act in which there is any legal right to exercise discretion[.] . . .

[T]he joint assembly, sitting for the purpose of opening and publishing, or hearing opened and published, the returns of the election for governor and other executive officers acted in a quasi

judicial capacity, at least in respect to determining the genuineness of the certificates, and that it was not bound to publish the returns or declare the result, until it had before it all the genuine returns, or exhausted all the means in its power to obtain them without being able to do so; and it having a quasi judicial or discretionary authority in respect to these matters, and not having finally refused to exercise that authority, this Court can not by mandamus, if it could do so in any proceeding, take jurisdiction, either for the purpose of determining those matters for itself, or of determining the result of the election. . . .

I have thus far considered the important questions presented without reference to the fundamental principles lying at the basis of our republican system of government, and which were so learnedly and ably discussed by counsel. According to these principles the case must also be determined against the claim of the petitioner. Our constitution declares: "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." Article V. Other portions of the constitution, as we have seen, not only provide, that the legislative department of the government shall open and publish the returns of the election for governor and declare the result, but confer upon that department the exclusive right to try and determine contested elections for that office. It was admitted in the argument in this case that the legislature must first act upon the returns of the election for governor, or at least that body or some constituent part of it is the only authority by which the returns can be opened and published; but it is denied by the counsel for the petitioner, that, if that body refuses to declare the result of the election, such refusal will prevent the person having the highest number of votes from qualifying and exercising the duties of the office; and as a corollary of this proposition they insist that the judiciary department has the power, in case the legislative department fails to discharge its whole duty by declaring the result of the election, to declare that result or, what is the same in effect, to adjudge the person receiving the highest number of votes for the office of governor to be in fact the governor.

It is claimed, that this right or power in the court is the result of absolute necessity; for otherwise the sacred rights of the people are at the mercy of the legislature, however corrupt or partisan may be its actions. This was a proper matter for the consideration of the framers of the constitution and of the people when they adopted it, but when the people in their sovereign capacity declared in their constitution that this power should be vested in the legislative department of the government, and that the judiciary should not exercise any of the powers belonging to that department, the question was settled, and the courts have no power to interfere or question its wisdom. . . .

[T]he declaration of the result of the election for governor under the provisions of our constitution is essential to the right to exercise the duties of that office; and, as the constitution has conferred the power to make this declaration upon the legislative department, that power is exclusive, and beyond the control or interference of the courts in any manner. To dispense with this declaration would be to nullify an express requirement of the constitution. This we are not at liberty to do. This declaration is the only record provided by the constitution to show who is entitled to the office of governor. It is the only commission provided for him and is the only constitutional evidence of his

title to the office.

. . . I am [therefore] of the opinion, that the peremptory writ of mandamus should be denied, and the petition dismissed. . . .

CARR V. WILSON,
32 W.Va. 419, 9 S.E. 31 (1889).

BRANNON, Judge:

Robert S. Carr is president of the Senate. He filed his petition in this court, averring that on the 4th of March, 1889, the office of Governor of the State had become and remains vacant, and that under sec. 16, art. VII, of the constitution it is his right and duty to act as Governor; that at the election last held for governor, Nathan Goff and A. B. Fleming were the two candidates receiving the highest number of votes for that office; that Goff claiming to have received a greater number than Fleming, on 4th of March, 1889, took the oath of office and demanded possession of the office, but that E. Willis Wilson, a private citizen, found in its possession, refused to admit Goff; that Goff asked this Court for a mandamus to compel Wilson to surrender the office to him, but that the Court held, that be was not entitled to the writ for reasons stated in the opinion and decision of the court; and that the act of Goff in taking the oath was void and of no effect.

[Carr] further states in said petition that either Goff or Fleming was elected, but that both were and still are under such disability, as prevents their acting; that Fleming failed to qualify and for that reason and others is disabled from entering on the duties of the office; and that Goff for reasons stated in said opinion of this Court is disabled from so doing; also that he, Carr, demanded the office from Wilson and was refused admission, and he alleges in said petition, that Wilson had no right to the office. Carr asked a mandamus to compel Wilson to yield the possession of the office to him. By consent, the petition stands as an alternative mandamus.

Wilson filed a return. It denies that any vacancy in the office exists, and that Carr has under the constitution any right to act as governor; and avers, that he [Wilson] under the constitution had the right and was under duty to continue in the discharge of the powers of the office until his successor should be declared elected and should qualify. He admits, that said Goff and Fleming were candidates for Governor, each claiming to have received the highest number of votes, but whether either received a majority of legal votes, or both an equal number, neither said Carr nor he could possibly know, as the returns of the election were sealed and transmitted to the Secretary of State, to be disposed of as directed by sec. 3, art. VII, of the constitution; that under the constitution said returns cannot be published, declared or made known except as by it provided; that in fact they had never been published and made known; that there is no law whereby they can be legally published except as set forth in said section 3; and therefore any averment of the petition that either Goff or Fleming had received a majority or had been elected, or did not receive an equal number of votes, is beyond the possibility of the petitioner's knowledge and therefore untrue. It avers that neither Goff nor Fleming, nor any one else, had been declared elected, and therefore it was untrue, that either a failure to qualify or any disability or any condition of facts whatever had occurred concerning the governor that entitled Carr to act. It avers that Wilson had been elected in October, 1884, governor

for four years, beginning March 4, 1885, and that he was eligible to be so elected and was declared elected and served as such governor for such term, and is still in the office performing its duties, his successor not having been declared elected and qualified, within the meaning, intent and requirement of the constitution. It avers that Goff and Fleming were candidates for governor at the election [in November, 1888], for the term commencing March 4, 1889, and both of them and no other person claimed to have been elected. It also avers that said Fleming instituted proceedings contesting the election of said Goff before the legislature in joint assembly at its session commencing [in January, 1889]; that the petition and notice of contest of Fleming and the counter-petition and notice of Goff were presented, received and entered on the journals of both houses of the legislature and also in the joint assembly, and that the necessary steps were taken by the joint assembly and the houses for the trial of the contest. Copies of the journal are filed with the return.

It appears therefrom that the joint assembly adopted a resolution referring to said contest and suspending the declaration of the result as to governor until the decision of said contest; and that it was the opinion and decision of said assembly that the mere reading of the returns already opened (those from a few counties had been opened) should not be construed to give either Goff or Fleming any claim or right to the office, and that all the returns should be referred without reading any of them not yet opened to the joint committee provided by law relating to contests for the office of governor and be considered, as if none of said returns bad been read. Such a committee was appointed to examine and report on the contest between Fleming and Goff, and all returns and papers relating to it were referred to the committee. It appears, also, that on the 4th January, 1889, an order was made by the Circuit Court of Kanawha suspending the delivery of the certificates of the commissioners of that county as to the election for Governor. . . . Plaintiff, Carr, demurred to the return of said Wilson. The case was fully argued, and submitted to the decision of the court.

SYLLABUS BY THE COURT

1. Where persons are voted for governor at a regular election for the office of governor, but there has been no declaration of the result of the election by either the Speaker of the House of Delegates or the joint assembly of the two branches of the Legislature, and a contest for that office is pending before such joint assembly, and the declaration of the result has been by such assembly postponed until the decision of such contest, that does not create such condition of things, within the meaning of § 16, art. VII, of the constitution, as will entitle the President of the Senate to act as Governor.

2. In such case the governor elected for the next preceding term has the right and is under duty, by virtue of § 6, art. IV, of the constitution, to continue to discharge the duties of his office until a successor shall be declared elected.

3. The act of taking the official oath prescribed for governor by a candidate voted for governor at such election, before a declaration of his election, under § 3, art. VII of the constitution would not entitle him to take office, and his inability to take office for want of such declaration of election, whether he attempts to qualify or not, would not entitle the President of the Senate to act as Governor.

4. A declaration of election to the office of governor, as provided for by § 3, art. VII, of the constitution, is indispensable to perfect and consummate the title to that office.

5. The provisions of the constitution limiting the term of office of governor to four years, and making him ineligible to re-election, do not prevent him from continuing to discharge the duties of his office after his term, under sec. 6, art. IV, of the constitution, in cases where the president of the senate can not act as governor, under section 16, art. VII, of the constitution.

B. Gubernatorial Powers

Read Article VII, §§ 5-15.

STATE OF WEST VIRGINIA EX REL. WARDER v. GAINER, 153 W. Va. 35, 167 S.E.2d 290 (1969).

CALHOUN, Judge

In this mandamus proceeding instituted in this Court pursuant to its original jurisdiction in cases of this character, Francis P. Warder, the relator, seeks to require the respondent, Denzil L. Gainer, Auditor of the State of West Virginia, pursuant to duties imposed upon him as such auditor by Code, 1931, 12-3-1, as amended, to issue a warrant to the relator in the sum of $ 367.20, representing the salary alleged to be owing to the relator as a member of the West Virginia Board of Probation and Parole for the first half of the month of March, 1969, being the period of March 1 to March 16, inclusive. . . .

The relator was appointed by Governor Hulett C. Smith as a member of the board of probation and parole. He qualified as such on June 16, 1966, and his appointment was duly confirmed by the state senate at its 1967 Regular Session.

The Regular Session, 1969, of the Legislature convened on January 8, and adjourned sine die on March 11, 1969. The term of office of Governor Arch A. Moore, Jr., commenced on January 13, 1969. Governor Moore did not reappoint the relator, and has not appointed any other person in his stead, as a member of the board of probation and parole. In these circumstances, the state senate adjourned sine die without having had an opportunity to approve or to disapprove such an appointment. It is asserted in behalf of the respondent state auditor, as the basis of his refusal to honor and to sign the salary requisition in question, that, in the circumstances previously stated in this paragraph, and in the light of the provisions of [§ 6-7-2a], as last amended and reenacted on January 21, 1969, the office held by the relator became vacant upon the adjournment of the legislature on March 11, 1969. . . .

[Section 6-7-2a], as a consequence of its [1965 amendment], so far as pertinent to this case, was as follows:

> "Notwithstanding any other provision of this code to the contrary, on and after the effective date of this section, each of *the terms of* the following named appointive state officers *shall be terminated and thereafter each of such appointive state officers* shall be appointed by the governor, by and with the advice and consent of the senate. Each of such appointive state officers shall serve at the will and pleasure of the governor *for the term for which the governor was elected* and until the respective state officer's successors have been appointed and qualified. Each of such appointive state officers shall hereafter be subject to the existing qualifications for holding each such respective office and each shall have and is hereby granted all of the powers and authority and shall perform all of the functions and services heretofore vested in and

performed by virtue of existing law respecting each such office. The annual salary of each such named appointive state officer shall be as follows:***." (Italics supplied.)

Section 2a, from which the above language has been quoted, was first enacted [in] 1957. As originally enacted, the statute dealt solely with salaries of the [certain] appointive state officers[.] All the language of Section 2a quoted above was added by the 1965 amendment. The italicized portion thereof was deleted and omitted therefrom by the [1969 Act].

The [latter act] is referred to in the record in this case as Enrolled Senate Bill No. 35 ["SB 35"], was . . . made effective from the date of its passage. In addition to the deletion or omission from the statute of certain language as previously indicated, the [1969 Act] changed subsequent portions of the statute[,] [which] resulted in increases in salaries of various appointive state officers therein enumerated. We believe it is common knowledge that the basic purpose of the [1969 amendment] was to provide for increases in salaries of officers who might thereafter be appointed by Governor Moore, after the commencement of his term of office on January 13, 1969, and before the appointments became effective.

. . . The respondent admits in his answer that the relator, as a consequence of his valid appointment by the previous governor and the valid confirmation of such appointment by the senate, continued in office under the holdover provisions of the laws of this state after the expiration of the term of office of [former Governor Smith], after the commencement of the term of office of [Governor Moore], and after the enactment and effective date of [SB 35]. It is contended, however, by counsel for the respondent that the relator's holdover status as an appointive state officer terminated, by operation of law, upon the adjournment sine die of the senate. It is contended that this legal consequence arises from the enactment of [SB 35.] . . .

[Respondent relies] upon the fact that [SB 35] was made effective from the time of its passage . . . and the fact that the statute as thus [amended] contained the following language: "Notwithstanding any other provision of this code to the contrary, *on and after the effective date of this section each of the following named appointive state officers shall be appointed by the governor, by and with the advice and consent of the Senate.* Each of such appointive state officers shall serve at the will and pleasure of the governor and until the respective state officer's successors have been appointed and qualified.***." (Italics supplied.) Counsel for the respondent apparently rely primarily upon the italicized portion of [SB 35] in the quotation appearing immediately above, which was placed in the statute by the 1965 amendment and was retained without change in the [1969 Act].

Counsel for the respondent assert in their brief that, as a consequence of the enactment of [SB 35], it became the mandatory duty of the [governor] to reappoint the petitioner, or some other person in his stead, to the appointive state office in question and that, upon his failure to do so, and upon the adjournment sine die of the senate, the relator no longer had title to the appointive state office and therefore was not thereafter entitled to receive a salary as a member of the board of probation and parole. The contention urged in behalf of the respondent appears to be that [SB 35] superseded and supplanted all preexisting provisions of [§ 2a] as enacted in 1965 and created an affirmative duty upon the incoming governor ... to reappoint the relator, or some other person in his stead, so that the state senate would not be denied a right to approve or to disapprove such an appointment. We are of the opinion that this contention is not legally tenable. ...

Article IV, Section 8 of the Constitution of West Virginia is as follows: "The legislature, in cases

not provided for in this Constitution, shall prescribe, by general laws, the terms of office, powers, duties and compensation of all public officers and agents, and the manner in which they shall be elected, appointed and removed." Code, 1931, 62-12-12, as amended, provides for the creation of the West Virginia Board of Probation and Parole, consisting of three members. The statute contains the following language: "The board shall be appointed by the governor by and with the advice and consent of the senate.***Any member shall be eligible for reappointment.***." This statute was enacted pursuant to the provisions of Article IV, Section 8 of the Constitution of West Virginia. ...

Article VII, Section 9 of the Constitution of West Virginia is as follows: "In case of a vacancy, during the recess of the senate, in any office which is not elective, the governor shall, by appointment, fill such vacancy, until the next meeting of the senate, when he shall make a nomination for such office, and the person so nominated, when confirmed by the Senate,***shall hold his office during the remainder of the term, and until his successor shall be appointed and qualified. ***." . . . The following language appears in the opinion in State ex rel. Downey v. Sims, 125 W. Va. 627, 632, 26 S. E.2d 161, 163: "The Constitution provides exactly what the Senate can do with regard to gubernatorial nominations to office: It may either consent to or reject the nominee for the particular office to which he has been nominated. This is the full maximum of the grant of power of the Senate over appointments by the Governor. And this grant of a specific and clearly defined power is, by implication equally potent, a denial of any other power in the premises.***." The power thus lodged in the senate was scrupulously upheld in State ex rel. Wayne v. Sims, 141 W. Va. 302, 90 S. E.2d 288. That case involved an appointment made by the governor, during the recess of the senate, to fill a vacancy in an appointive state office. The senate thereafter met and adjourned without the appointment having been submitted to the senate for confirmation. The Court held that, in those circumstances, the appointment expired upon the adjournment of the senate, that the appointee thereafter had no title to the office and was not entitled thereafter to receive a salary for the office in question. The Wayne case is not in point in the instant case, for the reason that the appointment of the relator in this case previously had been duly confirmed by the senate. The senate, therefore, has not been denied its right to act upon the relator's interim appointment. The instant case does not involve a vacancy occurring in the appointive state office during the recess of the senate within the meaning of the constitutional provision quoted above.

Code, 1931, 6-5-2, is as follows: "The term of every officer shall continue (unless the office be vacated by death, resignation, removal from office, or otherwise) until his successor is elected or appointed, and shall have qualified."

Inasmuch as the relator continued in office under the holdover provisions of the laws of this state, there was no "vacancy" in that office within the meaning of Article VII, Section 9 of the Constitution of West Virginia, or within the meaning of Code, 1931, 6-5-2, at the time the state senate adjourned on March 11, 1969. "There is no vacancy in a public office when there is an incumbent legally authorized to discharge the duties thereof." Broadwater v. Booth, 116 W. Va. 274, pt. 2 syl., 180 S. E. 180. . . . The holdover status of the relator, however, does not preclude the power of the governor to reappoint the relator or to appoint another in his stead, subject to the approval of the senate. State ex rel. Neal v. Barron, 146 W. Va. 602, 120 S. E.2d 702.

[The language relied upon by the respondent and italicized above] was placed in the statute by the [1965 amendment]. The duty thereby imposed upon the governor was, therefore, in effect and operative upon Governor Moore when he took office on January 13, 1969. The 1969 reenactment of the statute did not create that duty nor did it add to, detract from or otherwise alter the duty imposed by the statute as [amended] in 1965.The relator was appointed by Governor Smith and the appointment was confirmed by the senate pursuant to the language then and now contained in Section 2a. The statute at that time provided expressly that the relator's term of office, pursuant to his appointment by the governor and the confirmation of the appointment by the senate, would continue until his successor was "appointed and qualified." This holdover provision of the statute was not expressly repealed, but, on the contrary, it was expressly retained by the 1969 amendment and reenactment. . . .

We must presume that the legislature did not intend, by the enactment of [SB 35], to create a vacancy in the office in question, or a hiatus or interregnum in government. "The purpose of provisions authorizing public officers to hold over is to prevent a hiatus in the government pending the time when a successor may be chosen and inducted into office." 43 Am. Jur., Public Officers, Section 164, page 21. "The law abhors vacancies in public offices, and courts generally indulge a strong presumption against a legislative intent to create, by statute, a condition which may result in an executive or administrative office becoming, for any period of time, wholly vacant and unoccupied by one lawfully authorized to exercise its functions." 67 C.J.S., Officers, Section 50, page 207. To the same effect, see State ex rel. Fox v. Brewster, 140 W. Va. 235, 254-55, 84 S. E.2d 231, 243.

For the reasons stated in this opinion, the writ of mandamus as prayed for was awarded.

STATE EX REL. MAYS v. BROWN,
71 W.Va. 519 77 S.E. 243 (1912).

POFFENBARGER, President.

L.A. Mays and S.F. Nance, in the custody of M.L. Brown, warden of the Penitentiary of this State, under sentences of a Military Commission, appointed by the Governor, to sit in a territory corresponding in area and boundaries with the magisterial district of Cabin Creek, in the County of Kanawha, in which the said governor had declared a state of war to exist, by proclamation duly issued and published, seek discharges and liberation upon writs of *habeas corpus* duly issued by this Court. Upon these writs, lack of authority in the governor to institute, in cases of insurrection, invasion and riot, martial law is denied in argument. A further contention is that his power to do so extends only to the inauguration or establishment of a limited or qualified form of such law, subordinate to the civil jurisdiction and power to a certain extent; and certain provisions of the state constitution are relied upon as working this restraint upon the executive power, among them the [provisions of Article III, §§ 4 and 12]. A minor question is, whether offenses committed immediately before the proclamation of martial law, but connected with the insurrections and

operative therein, may be punished by a military commission, acting within the period of martial occupation and rule.

All agree as to the character and scope of martial law, unrestrained by constitutional or other limitations. The will of the military chief, in this instance the governor of the state, acting as commander-in-chief of the army, is, subject to slight limitations, the law of the military zone or theater of war. It is sometimes spoken of as a substitute for the civil law. It is said, also, that the proclamation of martial law ousts or suspends the civil jurisdictions. These expressions are hardly accurate. The invasion or insurrection sets aside, suspends and nullifies the actual operation of the Constitution and laws. The guaranties of the Constitution as well as the common law and statutes, and the functions and powers of the courts and officers, become inoperative by virtue of the disturbance. The proclamation of martial law simply recognizes the status or condition of things resulting from the invasion or insurrection and declares it. In sending the army into such territory to occupy it and execute the will of the military chief for the time being, as a means of restoring peace and order, the executive merely adopts a method of restoring and making effective the Constitution and laws within that territory, in obedience to his sworn duty to support the Constitution and execute the laws.

This power is a necessary incident of sovereignty. It is necessary to the preservation of the state. Subject to the jurisdiction and powers of the federal government, as delegated or surrendered up by the provisions of the federal Constitution, this state is sovereign and has the powers of a sovereign state. Like all others, it must have the power to preserve itself. Where that power resides and how it is to be exercised, are questions about which there has been some difference of opinion among jurists and statesmen. Whether the executive, without legislative authority, may exercise it, need not be discussed. Section 92 of chapter 18 of the Code confers upon the governor authority to declare a state of war in towns, cities, districts and counties in which there are disturbances by invasion, insurrection, rebellion or riot. Moreover, section 12 of Article VII, of the Constitution itself seems to confer such authority upon the governor, saying he "may call out" the military forces "to execute the laws, suppress insurrection and repel invasion." Hence we may say the inauguration of martial law in any portion of this state by proclamation of the governor, has both constitutional and legislative sanction in express terms.

The provisions against the suspension of the writ of *habeas corpus* and trial of citizens by military courts for offenses cognizable by the civil courts cannot, in the nature of things, be actually operative in any section in which the Constitution itself and the functions of the courts have been ousted, set aside or obstructed in their operation by an invasion, insurrection, rebellion or riot. In such cases, the constitutional guaranties of life, liberty and property have ceased to be operative and efficacious. The lives, liberty and property of the people are at the mercy of the invading, insurrectionary, rebellious or riotous element in control. Their will and desires, not the Constitution and laws, rule and govern. There is no court with power to grant or enforce the writ of *habeas corpus* within the limits of such territory. There is no court in which a citizen can be tried, nor any whose process can be made effective for any purpose. No doubt the Constitution and laws of the state are theoretically or potentially operative but they are certainly not in actual and effective opera-

tion. The exercise of the military power, disregarding for the time being the constitutional provisions relied upon, is obviously necessary to the restoration of the effectiveness of all the provisions of the Constitution, including those which are said to limit and restrain that power.

. . . Nothing can be higher in character or more indispensable than this power of self-preservation. The experience of all civilization has demonstrated its necessity as an incident of sovereignty. In the organization of the state, its citizens likely did not intend to omit or dispense with a power vital to its very existence or the maintenance and efficiency of its powers, under circumstances which inevitably arise in the life of every state. Hence there is strong ground for a presumption in favor of the retention of the power in question, which finds support in other constitutional provisions, authorizing the maintenance of a military organization, and the use of it by the executive in the repulsion of invasion and suppression of insurrections and riots. Art. VII, sec. 12. No rebuttal of the presumption nor abolition of this sovereign power is found in any express terms of the Constitution.

The guaranties of supremacy of the civil law, trial by the civil courts and the operation of the writ of *habeas corpus* should be read and interpreted so as to harmonize with the retention in the executive and Legislative departments of power necessary to maintain the existence of such guaranties themselves. It is reasonable and logical. Otherwise the whole scheme of government may fail. So interpreted, they have wide scope and accomplish their obvious purpose. The attempt to extend them further would be futile and result in their own destruction. The interruption is of short duration. It is only while military government is used as an instrument of warfare that the commander's will is law. *New Orleans v. Steamship Co.,* 20 Wall. 387; *Ex parte Milligan.* 4 Wall. 2, 127. . . . Martial law is operative only in such portions of the country as are actually in a state of war and continues only until pacification. Ordinarily the entire, country is in a state of peace, and, on extraordinary occasions calling for military operations, only small portions thereof become theaters of actual war. In these disturbed areas, the paralyzed civil authority can neither enforce nor suspend the writ of *habeas corpus,* nor try citizens for offenses, nor sustain a relation of either supremacy or subordination to the military power, for in a practical sense it has ceased. But in all the undisturbed, peaceable, and orderly sections, the constitutional guarantees are in actual operation and cannot be set aside. [*Ex parte Milligan*.] . . .

It seems to be conceded that, if the governor has the power to declare a state of war, his action in doing so is not reviewable by the courts. Of the correctness of this view, we have no doubt. The function belongs to the executive and legislative departments of the government, and is beyond the jurisdiction and powers of the courts. There is room for speculation, of course. as to the consequences of an arbitrary exercise of this high sovereign power[.] . . . We are not to be understood as saying there would be a lack of remedy in such a case. The sovereign power rests in the people and may be exerted through the legislature to the extent of the impeachment and removal from office of a governor for acts of usurpation and other abuses of power.

Power to establish a military commission for the punishment of offenses committed within the military zone is challenged in argument; but we think such a commission is a recognized and necessary incident and instrumentality of martial government. A mere power of detention of offenders may be wholly inadequate to the exigencies and effectiveness of such government. How long an insurrection or a war may last depends upon its character. Such insurrections as are likely

to occur in a state like this are mild and of short duration. But no man can foresee and foretell the possibilities, and a government must be strong enough to cope with great insurrections and rebellions, as well as mild ones.

That the courts of Kanawha county sit within the limits of that county and outside of the military zone does not preclude the exercise of the powers here recognized as vested in the executive of the state. These petitioners were arrested within the limits of the martial zone. There the process of the courts did not and could not run during the period of military occupation, and presumptively the state of affairs in that district, at the time of military occupation and immediately before, was such as to preclude the free course and effectiveness of the civil law and the process of the court, however effective they may have been in other sections of Kanawha county. . . . The civil tribunals, officers, and processes are designed for vindication of rights and redress of wrongs in times of peace. They are wholly inadequate to the exigencies of a state of war, incident to an invasion or insurrection. So the Legislature evidently regards them, since it expressly authorizes the Governor, "in his discretion," to "declare a state of war in towns, cities, districts and counties." He is not required by any principle of international or martial law, the Constitution, or statute, to institute it, when proper by counties. On the contrary, the statute authorizes it as to a town, a city, or a district, and he is not limited to towns, cities, and districts in which the courts sit in times of peace, nor forbidden to put a town, city, or district of a county under martial law rule by the sitting of courts elsewhere in the county. ...

The offenses for which the petitioners were punished were committed in an interim between two successive periods of martial government. The first proclamation was raised about the middle of October, and the disturbances which had occasion it immediately broke out again, and these offenses were of the kind and character which had made the occupation necessary. About the middle of November there was a second proclamation of a state of war. Just a few days before this second declaration, these offenses were committed, and the offenders were found within the military zone, and were arrested, tried, and convicted. If the offenses had been wholly disconnected with the insurrection and not in furtherance thereof, there might be doubt as to the authority of the military commission to take cognizance of them, although there are authorities for such jurisdiction and power as to any sort of offense committed within the territory over which martial law has been declared, and remaining unpunished at the time of the declaration thereof.

We are not reviewing the sentences complained of, nor ascertaining or declaring their legal limits. Our present inquiry goes only to the question of legality of the custody of the respondent at the present time and under the existing conditions. The territory in which the offenses were committed is still under martial rule. It suffices here to say whether the imprisonment is, under present conditions, authorized by law, and we think it is. We are not called upon to say whether the end of the reign of martial law in the territory in question will terminate the sentences, and upon that question we express no opinion.

. . . [T]he petitioners are in lawful custody, and we therefore remand them to the custody of the respondent. . . .

ROBINSON, Justice, dissenting.

The majority opinion boldly asserts that the sacred guaranties of our State Constitution may be set aside and wholly disregarded on the plea of necessity. It had long been supposed that such a doctrine was forever condemned and foreclosed in this State. It was believed that the ringing denouncement against that doctrine in the opening sentences of our Constitution was sufficient to bar it from recognition by any citizen, official, or judge. The unmistakable words were supposed to be too clear ever to endanger our people by a disregard of their meaning. Hear them: *"The provisions of the Constitution of the United States, and of this State, are operative alike in a period of war as in time of peace, and any departure therefrom, or violation thereof, under the plea of necessity, or any other plea, is subversive of good government, and tends to anarchy and despotism."* Art. I, § 3.

How closely akin are these words to those that were uttered by the Supreme Court of the United States shortly prior to the adoption of our Constitution: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences was ever invented by the wit of man that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false, for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence." *Ex parte Milligan,* 4 Wall 120.

A decision based on that which our people have so clearly condemned and inhibited from recognition in our State government, and which the highest tribunal in the land has so plainly declared to be pernicious and to have no place in our form of government, meets my emphatic dissent.

It is not difficult to comprehend why our State Constitution contains such a clear and unmistakable protest against the disregard of constitutional guarantees under the plea of necessity. During the decade immediately preceding the making and adoption of that instrument, this doctrine of necessity was a live issue before the American people. Indeed, just at the close of the Civil War, and immediately thereafter, the doctrine was one of the foremost issues of the times. Events brought it vividly before the nation. Those who applied the doctrine during the war and at its close for the summary trial and execution of noncombatants were met with the accusation of murder from both North and South. Even in one of the counties of this State a citizen was summarily deprived of his life under the plea of military rule and the doctrine that necessity suspended the Constitution. Instances of this character, as well as the many instances of imprisonment without civil trial, caused the question to come immediately before the statesmen of the times, and, by the debates upon it, to come directly before all the people. The people had become thoroughly familiar with the subject. Great men of the North, foremost among them the illustrious Garfield, had thundered against the doctrine. And at last, the great judicial tribunal of the nation had set its seal of condemnation upon it. *Ex parte Milligan, supra.* But even after this, and only two years prior to the assembling of our constitutional convention, the question came again before the country in the celebrated cases in North Carolina arising from the use of the militia of that State in the suppression of the Ku Klux Klan. Ex *parte Moore and others,* 64 N.C. 802. These cases, because of the marked clash between the military power and the judiciary, again made the country to notice the question and to observe

that the principle of necessity, though denounced by the Supreme Court of the United States, was claimed for the purpose of ignoring the guaranties of a state constitution. And again, in the face of the most stubborn resistance from the executive and military arm of the government of North Carolina, the principle that the plea of necessity could deprive one of constitutional trial by jury was rejected, with marked emphasis, in an opinion by the eminent Chief Justice Pearson of that State.

So it was that when our constitutional convention assembled in 1872, the persistent claim that necessity could abrogate a constitutional provision naturally came to be considered. That convention saw, by the recent example in North Carolina, that notwithstanding the condemnation that this doctrine of necessity had received from the greatest and most cautious minds of the country, it was likely still to be claimed in state government. Hence, the strong men of that convention deemed it essential to make clear pronouncement against such a doctrine ever finding hold in West Virginia. They had become fully advised about the question by having been face to face with it. The people who approved and ratified the Constitution were advised by the same experience. They hated the doctrine that a Constitution might be set aside or declared inoperative at the will of an official created by that Constitution itself, as all lovers of constitutional government hate such a doctrine. Therefore, as a part of their compact of government, they adopted the forceful declaration against abrogating the guaranties of that compact, at any time, on the plea of necessity. Let us again bring that declaration to. mind: "The provisions of the Constitution of the United States, and of this State, are operative alike in a period of war as in time of peace, and any *departure therefrom, or violation* thereof, under *the plea of necessity,* or any other plea, is *subversive of good government, and tends to anarchy and despotism.*" Can there be any mistake about the meaning of these words. Were they put in the Constitution for mere sound? No, they were put there to bind -- to be sacredly kept.

Martial law can not rightly be sanctioned in West Virginia in the face of this constitutional declaration. For, as the majority opinion admits, martial law is a departure from the Constitution, a plain violation thereof, under the plea of necessity. It substitutes the law of a military commander for the law of the Constitution. It is the total abrogation of orderly presentment and trial by jury, so jealously guarded by the Constitution. Then, since martial law is such a plain departure from the Constitution, that instrument itself brands martial law as *subversive to good government* and as *tending to anarchy.*

Having made this general declaration against martial rule, the makers of our Constitution went further. They provided that the privilege of the writ of habeas corpus should not be suspended. This was a radical change from the Constitution of 1863, and was radically different from the Constitution of the United States. Our Constitution of 1863 had provided: "The privilege of the writ of *habeas corpus* shall not be suspended except when in time of invasion, insurrection or other public danger, the public safety may require it." The Constitution of the United States provides: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." But in the making of our present Constitution, in dealing with the great writ of freedom, no exception was made. Again unmistakable, imperative words were used: "The privilege of the writ of habeas corpus shall not be suspended." Art. III, § 4. The people clearly meant something by the change. They evidently meant exactly what they said -- that the great writ, which

any citizen deprived of his liberty without due form of law may command, should in no case be suspended under a claim of necessity for military rule. Having so plainly declared in general terms against the doctrine of necessity, in the former provision, as we have seen, they made this provision as to the privilege of the writ of habeas corpus to conform to that former declaration. They well knew that the exceptions contained in their former constitution, if retained, would lead to the temptation of encroachment on the guaranties of the Constitution they were making. By providing that the privilege of the writ of habeas corpus should at all times be available, they were simply again providing against the claim that constitutional guaranties may be suspended on the plea of necessity; for, as long as the writ of habeas corpus is available, constitutional guaranties can not be ignored. . . . This great, effective writ, by the terms of our State Constitution, is always available to any citizen deprived of a constitutional guaranty. Since it is so available at all times, how can any departure from the Constitution be allowed? Indeed the provision that the privilege of the writ of habeas corpus shall not be suspended is itself virtually a prohibition against martial law, for the availability of the writ and the recognition of marital law are totally inconsistent. . . . The founders of our state Government really could have inhibited martial law by no stronger terms: "The privilege of the writ of habeas corpus shall not be suspended."

Not content with the two declarations against martial law which we have seen, the founders grew even more specific. They again said: "The military shall be subordinate to the civil power; and no citizen, unless engaged in the military service of the State, shall be tried or punished by any military court, for any offence that is cognizable by the civil courts of the State." Art. III, § 12. There is no ambiguity in these words. He who runs may read. They directly strike at martial law; they directly inhibit martial law. For, the height of martial law is the supplanting of the civil courts by military courts. But this provision expressly ordains that military courts shall never take the place of the civil courts of the State for the trial of civil offenses. No military sentence for a civil offense can rightly stand in the face of these words. Nor can these words rightly be overlooked in order to uphold any such military sentence. To do so is to make the Constitution a rope of sand.

The men of the Constitutional Convention of 1872 had all witnessed the suspension of the privilege of the writ of habeas corpus and the trial and sentence of citizens by military courts. They had learned that departure from the Constitution, though dictated by the best of motives, was liable to abuse. Experience admonished them to guard against anything of the kind in the future of their State. They no doubt believed that, by the three provisions which we have noticed, they had banished all claim for martial law in this State. Determination to do so was plainly dictated to them by the experiences through which they had passed. . . .

It is said that the State must live. So must the citizen live and have liberty -- the constitutional guaranties vouchsafed to him. The founders of our State government saw fit to exclude this claimed theory of implied or presumed right of self-defense in a State. They knew it to be absolutely unnecessary as to any State in the American Union under the Constitution of the United States. They knew that it was even more likely to lead to abuse than to good. . . .

It is claimed that the power given by the Constitution to the Governor, as commander-in-chief of the military forces of the State, to "call out the same to execute the laws, suppress insurrection and repel invasion," authorizes a proclamation of martial law. Are these words to undo every other guaranty in the instrument? Can we overturn the many clear, direct and explicit provisions, all

tending to protect against substituting the will of one for the will of the people, by merest implication from the provision quoted? That provision gives the Governor power to use the militia to execute the laws as the Constitution and legislative acts made in pursuance thereof provide they shall be executed. It certainly gives him no authority to execute them otherwise. In the execution of the laws the Constitution itself must be executed as the superior law. The Governor may use the militia to suppress insurrection and repel invasion. But that use is only for the purpose of executing and upholding the laws. He can not use the militia in such a way as to oust the laws of the land. It is put into his hands to demand allegiance and obedience to the laws. It, therefore, can not be used by him for the trial of civil offenses according to his own will and law; for, to so use it would be to subvert the very purpose for which it is put into his hands. By the power of the militia he may, if the necessity exists, arrest and detain any citizen offending against the laws; but he can not imprison him at his will because the Constitution guarantees to that offender trial by jury, the judgment of his peers. He may use military force where force in disobedience to the laws demand it; but military force against one violating the laws of the land can have no place in the trial and punishment of the offender. The necessity for military force is at an end when the force of the offender in his violation of the laws is overcome by his arrest and detention. There may be force used in apprehending the offender, and in bringing him to constitutional justice, but surely none can be applied in finding his guilt and fixing his punishment. . . .

We shall now soon proceed to see how these principles . . . apply to the cases of the petitioners, Nance and Mays. But before proceeding thereto, it will be necessary to show the actual status of these cases. It may be inferred from the majority opinion that Nance and Mays are mere prisoners of war. They occupy no such relation. Nor are they merely detained by the Militia in the suppression of riot, insurrection or rebellion. Their petition for writs of habeas corpus, and the returns of the warden of the penitentiary thereto make no such cases against them. Nor was it argued at the bar or in the briefs that they have any such relation. It plainly appears that they are citizens of Kanawha county not connected with the military service, charged before a military commission for violations within that county of *certain provisions of the statutes of West Virginia amounting thereunder to misdemeanors,* arrested by the militia, tried by military commission pursuant to the order of the Governor, sentenced for specific terms in the penitentiary, and transported thereto for imprisonment for their respective terms of sentence by the approval of the Governor as commander-in-chief, all at a time when the criminal courts of Kanawha county were open, able and with full jurisdiction to try the charges against them. In other words, these petitioners are held, as the returns show, on specific sentences, one for five years, the other for two, in the penitentiary, as civil offenders tried and committed by a military court under the guidance of [a military order].

What actual necessity justified the creation of this military commission and the recognition of its powers to supplant the civil courts? As we have seen, nothing but the complete lack of power of the civil courts for the trial of the charges against Nance and Mays, arising by the annihilation and inoperation of those courts, could, if martial law was at all allowable, justify their military trial and sentence. Could Nance and Mays have been tried for the offenses with which they were charged by the civil courts, under the ordinary forms of law, as an actual fact ? We know by the record of these

cases, we know judicially, that they could have been so tried. But an answer that is attempted is this, that the Governor by his proclamation had set off the portion of the county in which the offenses were committed and offenders were arrested, as a martial law district. Again we say the mere proclamation could not alone make the necessity. The physical status must make it. No physical status existed, like the destruction of the ordinary courts, to make it necessary to try Nance and Mays other than they would have been tried if no disturbances had existed in Cabin Creek District. Those disturbances had not interrupted the very court that would have tried them if there had been no such disturbances. Those disturbances did not physically prevent the transportation of Nance and Mays out of the riotous district to the county seat for trial. . . .

The offenses of Nance and Mays were cognizable by a civil court. That is, they were capable of being tried in the proper criminal court of Kanawha county, by a jury, upon presentment and indictment by a grand jury. The disturbances did not make it impossible to give them the constitutional course of trial. Thus no necessity justified the course pursued. No actual physical fact, in the widest view, prevented the operation of the direct shield of the Constitution, wherein it provides: "No citizen *** shall be tried or punished by any military court, for an offence that is cognizable by the civil courts of the State." The offenses charged against Nance and Mays were plainly cognizable by a civil court -- *capable of being presented and tried there.* The only excuse for their not being tried there is that the Governor ordered otherwise. Thus the Governor alone made the necessity. Under the circumstances, . . . their trials and sentences were not by due process of law, and were grossly illegal and void. . . .

A search of the books, extending over many days of labor in the investigation of this subject, discloses that no state in the Union has ever declared, by judicial decision or otherwise, principles to the extent of those announced by the majority opinion of this Court. West Virginia, born of a love for, and an adherence to, constitutional government, seems now to have departed furthest therefrom. . . . No court ever before upheld the action of a governor in ousting the courts of their jurisdiction as to civil offenses and in substituting himself therefor.

This State is a government of its own people. It should matter not that civil rights may at some time have been transgressed elsewhere. We should not permit them to be transgressed here. The insignia of the State bears our legend of freedom. It can not be kept unless we sacredly observe the Constitution by which all, whether guilty or innocent, are bound alike. Freedom for a West Virginian means the giving to him what his state Constitution and that of the nation guarantee to him. Nor does it matter whether that West Virginian be rich or poor, idler or laborer, millionaire or mountaineer. The Constitution is no respecter of persons.

A sense of duty has impelled the writing of this opinion. If it may in the future only cause the doctrine promulgated by the majority to be questioned, the labor will not have been in vain. . . .

Additional Opinion.
POFFENBARGER, President.

The attempt, in the dissenting opinion prepared since the filing of the Court opinion, to apply to these cases principles deemed clearly inapplicable by all concurring in the decision, renders it proper in our judgment to file an additional opinion, pointing out more specifically the grounds of

distinction, and also to direct attention to the non-judicial and speculative character of much of the matter quoted in the [dissent].

[Blah, blah, blah.]

NOTE

The labor unrest along Cabin and Paint Creeks persisted after the Mays decision, which was handed down on December 19, 1912. In February of 1913, armed conflicts again occurred and led to another proclamation of martial law. Military officers made more arrests. Among those arrested this time were the famed labor organizer, Mother Jones, the editor of the *Labor Argus* (a Socialist Party newspaper in Huntington), and two U.M.W.A. organizers. Their court-martial trial was held during the first week of March, as Henry Hatfield was succeeding Glasscock as governor. The evidence against the four consisted primarily of speeches and writings, all of which had been made outside the martial law zone, and most of them, at least, were made during times when martial law was not in effect. Following their conviction, the four prisoners sought a writ of habeas corpus in the Supreme Court of Appeals. Once again, the Court denied the writ in an opinion by President Judge Poffenbarger. Ex Parte Jones, 71 W.Va. 567, 77 S.E. 1029 (1913). Having already concluded in Mays that the timing of the alleged offenses was not dispositive, the majority this time added that their location was also not determinative. That the defendants' speeches may have incited others to engage in violence and lawlessness within the martial law district was sufficient to justify their incarceration. Judge Robinson again dissented, invoking the same arguments that he had put forth in Mays. He also contended in his Jones dissent, however, that the language, "suppress insurrection," in Article VII, § 12 applied only to rebellions against the State and did not justify invocation of martial law to quell private disorders.

Jones was decided on March 21st. During that same week, Governor Hatfield began to release many of those who had been imprisoned by the military courts. (Those released, however, did not include Mother Jones.) Meanwhile, he initiated negotiations with the coal operators and with representatives from the national U.M.W. The Governor ultimately forced a compromise, which was then to be submitted to the striking miners for their approval or disapproval. The pending vote, which was scheduled for early May, 1913, and the debate about the Governor's compromise proposal, provoked the events that led to the following case.

HATFIELD v. GRAHAM,
73 W.Va. 759, 81 S.E. 533 (1914).

WILLIAMS, JUDGE:

[The Socialist Printing Company published in Huntington, Cabal County, the "Socialist and Labor Star," which supported the miners striking in the Paint and Cabin Creek areas and which was critical of the efforts of Governor H.D. Hatfield to force a settlement to the strike. In May of 1913,

while Hatfield's proposed settlement was being considered, he ordered officers of the West Virginia National Guard to destroy the May 5th issue of the Star, take possession of its printing office, and arrest the Company's officers. His orders were executed. Subsequently, the Company sued Governor Hatfield and four of the Guard officers for trespass and sought $10,000 in damages. The defendants to that claim then sought this writ of prohibition against John T. Graham, Cabell Circuit Judge, to stop him from further entertaining jurisdiction in the trespass action.

The writ of prohibition alleged] that a state of war, insurrection and riot was and had been for a long time prior theretofore in existence in certain portions of the Counties of Fayette, Raleigh, Kanawha and Boone and recognized and proclaimed by proclamation of Wm. E. Glasscock, Governor, on the 10th day of February, 1913, and a portion of the said W. Va. National Guard then occupied said proclaimed territory; that many lives, and much property had been destroyed, and that riot and bloodshed was then rampant and pending, and that the state had spent about one-half million dollars in trying to restore peace and order, and a due execution of the laws in said proclaimed territory; that a proposition for settlement was then pending and about to be agreed to by all the contending forces in said territory and that the plaintiff, the Socialist Printing Company, was then publishing a newspaper called the 'Socialist and Labor Star' at its plant in Huntington, West Virginia, which newspaper had large circulation in the proclaimed territory and exerted great influence therein; that the plaintiff was using said newspaper unlawfully in keeping up the war, insurrection, riot and bloodshed, and counseled, aided, abetted and supported those persons therein who were at war and insurrection against the government of the State; that the issue of the said paper of the week of May 5, 1913, was especially designed to prevent a settlement of the insurrection as then proposed and about to be agreed upon, and afterwards agreed upon, and that said Governor had cause to believe and did believe that said plaintiff was combining and conspiring and supporting hostile action thereby against said state[.] . . .

[T]he only questions presented to this court are questions of law relating to the power of the governor and the jurisdiction of the court to inquire into and pass upon the legality of his official act. Could the court retain jurisdiction of the action after the official character of the petitioners and the official act of the governor, which was the cause of the alleged injury were brought to its notice by the special plea? Should it not have entertained the plea and, no issue of fact being raised, should it not have dismissed the action for want of jurisdiction? Consistent with both reason and authority we think the questions require an affirmative answer. The declaration did not disclose the official character of petitioners, or that the alleged wrong was in consequence of an official act of the governor. Consequently, so far as it appeared upon the face of the declaration, the court had jurisdiction. It had jurisdiction of causes such as was alleged. But, when the official character of defendants, and the purpose the governor, as commander-in-chief of the military forces of the State, had in view in directing the thing to be done that is complained of in the declaration, and his good faith and honest belief in the necessity for doing it, were made to appear by the special plea which was not replied to, the court should have dismissed the action for want of jurisdiction. T h e governor of the State can not be held to answer in the courts in a civil action for damages resulting from the execution of his lawful orders or warrants issued in good faith in discharge of his official duties. The Constitution and laws of the State vest in him certain powers and duties, and he is necessarily clothed with the right to determine what his duties are in any emergency; and, so long

as he acts within the limits of his constitutional powers and privileges, his official conduct is not subject to review in any other manner than that provided by the Constitution which created his high office. See. 5, Art. VII of the Constitution says, "The chief executive power shall be vested in the governor, who shall take care that the laws be faithfully executed;" and section 12 of the same article makes him commander-in-chief of the military forces of the State, except when they are called into services of the United States, and empowers him to call them out to execute the laws, suppress insurrection and repel invasion. He has the power to declare that a state of war exists in any part of the State and to proclaim martial law for the government of such disturbed district, and to make use of the military forces to restore peace, law and order; and his official acts in that respect are not reviewable by the courts. Nance and Mays case, 71 W. Va. 519. He is vested with the discretion to determine whether the conditions existing are such as to make it necessary to put in operation and effect the military power of the state, and having once exercised his judgment in the premises, in good faith, the courts have no power to review it and to declare his official act void. The fundamental idea underlying our federal and state systems of government is a division of powers among the three branches thereof, the executive, the legislative, and the judiciary. Every one of these is made as independent of the other two as it was thought wise and practicable by the framers of our constitutions to make them. The official acts, orders and proclamations of the chief executive, made within the scope of his constitutional powers, are no more subject to review by the courts than acts passed by the legislature. It follows from the very nature and constitution of our government, and from the character of the powers and duties with which it has clothed the chief executive, that he must determine for himself the necessity for the exercise of such power as is vested in him. There is no higher authority in the state to determine it for him. Within his constitutional duties and powers he is supreme. Like any other officer of the state, he is liable to impeachment in the manner provided by the Constitution (Art. IV, See. 9) for "maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor." But there is no other manner of reviewing his official conduct. If the courts could, while the governor is in office, review his official acts and proclamations and pronounce them illegal, then the judiciary, and not the governor, would be the chief executive power in the State. But there is nothing in the Constitution investing the judiciary with power to declare void an order or proclamation which the governor has the constitutional power to make. We do not mean to intimate that a governor, because of his exalted office, is incapable of doing wrong, or that he would not be liable for wantonly, maliciously and unnecessarily injuring the person or property of a citizen. We can imagine instances wherein he might so clearly overstep the bounds of his constitutional powers as to make himself personally liable, but such instances are extremely unlikely to occur, nor does the suit now pending in the circuit court of Cabell county, which we are asked to prohibit, involve an act of that character.

From the facts set up in the petition and admitted in the return a case is presented which required the exercise of executive discretion. Martial law had existed in a portion of the state for many months, and had cost the state a large sum of money. The Governor was earnestly endeavoring to restore law and order, and the means employed by him, which was the submission to the opposing forces in the industrial war a proposition of compromise for their consideration, was severely

criticized. What were the terms of that proposition and the character of the criticisms which respondent had published in its newspaper, and intended to continue to publish, do not appear. But the petition alleges that their effect was to encourage a continuation of disorder and rioting in the martial zone; and that the Governor had cause to believe and did believe that it was necessary, in order to restore peace, to suppress the publication of the issue of the paper then about to be published. Under the ordinary conditions of peace the governor could not have lawfully exercised such apparently arbitrary power, but a condition existed that amounted to domestic war, and called for the exercise of the military power of the state to suppress it. The act complained of was done in obedience to a military command of the governor, acting as commander-in-chief of the state's military forces. The necessity for the act is its justification, and the governor had the discretion to determine whether the necessity therefor existed, and having had cause to believe that the necessity did exist, the courts have no power to review his discretion and pronounce his warrant or command unlawful, as being in excess of his constitutional power. True it is that our's is a government by the people, but it must also be remembered that it is a government by laws and that the people have delegated, for the time being, their power to faithfully execute the laws to their chief executive and have, by their constitution, clothed him with the requisite power to do so. Of course, the governor must act in good faith; he can not injure the person or property of a citizen unnecessarily, wantonly or maliciously, even under color of his high office; and when his act is justifiable, as in the present case, only on the ground of public necessity, he must have reasonable ground to believe that the necessity therefor exists. But the facts constituting the grounds for his belief must be viewed from his standpoint and in the light of the exigencies as they appeared to him, because he is compelled to judge of their sufficiency in the first instance and, unless his belief is wholly unfounded, the legality of his act is unquestionable. Where there is ground for his belief the court can not substitute its judgment for his. The necessity for his act makes it both lawful and "due process" within the meaning of the Constitution of the United States. Moyer v. Peabody, 212 U.S. 78.

Respondent admits that it had twenty subscribers within the martial zone. If the paper had entered the mails the governor would have had no power to prevent its circulation in that territory, and his only course was to prevent its publication. That respondent's plant was at a point in the state remote from the martial zone did not limit his power, as the military commander-in-chief, to stop the issue of the paper which he had good reason to believe was antagonizing him and encouraging further disorder. His power, military as well as civil, is co-extensive with the boundaries of the State. A person outside of the military cordon might be able to do more mischief than one within, and it would be irrational to say that the governor has no authority to prevent it. . . .

[T]he courts have been very careful to observe the line of demarcation separating the jurisdiction of the executive from the judiciary. The fact that the governor is vested by the Constitution and laws of the State with power and authority to restore peace and order, in a community wherein they have been violently set at naught, clothes him with discretion, with jurisdiction, to determine the means that are necessary for the accomplishment of the end. Respondent admits that it had at least twenty subscribers in the martial zone and that it had, in a previous issue of its newspaper, severely criticized the proposition which the governor had submitted to the contending forces for a settlement of their differences. He, therefore, had reason to believe that the newspaper was lending aid and encouragement to the rioters, and he had the constitutional power and right to arrest and imprison

anyone who was thus engaged and hold him in confinement until order was restored; and he likewise had power and right to prevent the publication within the state, and the circulation of newspapers in the strike zone, designed to prolong the disturbance and prevent the restoration of law and order. Having reason to believe that the exigencies of the situation justified the suppression of the paper until order was restored, the governor's action can not be reviewed by this court.

The governor's action not being reviewable by the courts, it follows necessarily that the action of the other petitioners, who are admitted to be his subordinate military officers, and to have acted in obedience to his orders, are not reviewable. It was their bounden duty to obey the lawful orders of the governor. To refuse to do so would have subjected them to punishment, certainly to a fine and, at the discretion of the court, to imprisonment. ...

The want of jurisdiction was brought to the attention of the court by the special plea, and it should have dismissed the action. It did not do so but retained it for the purpose of trial, thereby exceeding its jurisdiction, and the writ will be awarded.

ROBINSON, J., dissenting.

This decision extends state wide the martial law doctrine, heretofore by a majority of this court enunciated as to a particular, proclaimed zone. Again I dissent, consistently with my views in the former cases. [Mays and In re Jones.]

Moreover, a new use is made of the writ of prohibition. The decision stops the trial of an action in which the declaration alleges that certain defendants maliciously trespassed on private rights guaranteed by the Constitution, simply because the defendants say the act was done by the orders of one of them who was the Governor of the State. It prohibits the circuit court having jurisdiction to determine the fact whether the act was done maliciously, from trying that or any other issue on the declaration. The plaintiff is not allowed to be heard on its allegations that its constitutional rights have been violated, but on the other hand the word of the defendants that they violated those rights justifiably is accepted as true. The opinion, by its own dicta as well as by quotation from one of the greatest of authorities on constitutional law, admits that courts will entertain suits for damages from malicious trespasses by officials and military officers. Then, why is this action not allowed to be entertained? Though the declaration charges a malicious trespass in the plainest of terms, the presence of that charge is ignored in the majority opinion.

To stop the action by prohibition is only to deprive the plaintiff of another constitutional right -- the right to a hearing before the properly constituted trial court of the fact as to whether there was malicious or unjustifiable act. The opinion concedes that the declaration states a good cause of action, yet it prohibits the allegations of malicious trespass from being tried. This court can not rightly determine the charge presented by the declaration. It has no province for original trial of an alleged wrong. The truth of the charge of the wrong should be left to the established trial court.

Certainly the Governor can not be made to answer before the courts for acts within his political province. But the declaration alleges that he committed acts wholly beyond his official powers. No Governor as such official can do a malicious act. On such a charge as the declaration contains the

Governor is answerable before the trial court the same as any other citizen. The charge may there be shown to be untrue, or the act charged to be not malicious but justifiable. Still a competent trial court in which the charge is made has jurisdiction to determine whether the charge is true or the act justifiable.

The unsound principle established by this decision permits a Governor to deal with private rights and private property as he pleases. He has only to answer that he does so officially, and an action, though alleging facts showing that his act is wholly without his political province, will be prohibited. Such a view is wholly un-American, and inconsistent with constitutional government. Reason and authority condemn it, and the administration of even-handed justice cries out against it.

NOTE

[Extracted from ROBERT M. BASTRESS, JR., THE WEST VIRGINIA STATE CONSTITUTION 39-40 (2nd ed., Oxford University Press, 2016).]

The West Virginia Governors' use of their executive and military powers during Paint Creek-Cabin Creek uprising and the acquiescence from the West Virginia Supreme Court provoked a national condemnation and a Congressional investigation. Perhaps the public criticism affected the Court's views on the Governor's ability to suspend the Constitution. In any event, the justices reached a different conclusion when they next confronted an exercise of martial law. This time, the Mingo-Logan mine war afforded the opportunity.

On May 19, 1921, Governor Morgan faced conditions in Mingo County similar to those which prevailed during the Paint Creek-Cabin Creek war. He therefore issued a proclamation finding that a state of insurrection existed and establishing martial law in the county. Apparently, the state militia was depleted at the time--"on account of the World War," according to one source.[1] For whatever reason, the martial law was enforced by the county's civil authorities (the sheriff, constables, justices, policemen, and a *posse comitatus*), who were not enlisted or organized as the militia. These civil officers made mass arrests. Lavinder, Woolford, and Ingram were incarcerated under this regime for acts permitted by civil law but violative of the Governor's regulations for the martial law district. The three sought writs of habeas corpus in the state Supreme Court. In *Ex parte Lavinder* (1921), the Court awarded the writs.

Justice Poffenbarger, the same jurist who wrote the majority opinions in *Mays* and *In re Jones*, delivered the unanimous opinion for the Court in Lavinder. The decision turned on the fact that the martial law had been enforced by civil personnel:

> [W]hen the application of military force is necessary, [the Governor] is limited to the use of a military organization, in the effectuation of his purpose. He cannot . . . by a mere order convert the civil officers into an army and clothe them with military powers, for the purpose of suppressing an insurrection or repelling an invasion.[2]

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[1]ROBERT S. RANKIN, WHEN CIVIL LAW FAILS 128 (1939).

[2]88 W. Va. at 718-19, 108 S.E. at 430 (1921).

The Court also evinced a distinctly different tone regarding the Governor's power:

> Martial law is a drastic and oppressive system. Under it, the rights, privileges and liberties ordinarily possessed and enjoyed by citizens are greatly restricted and abridged and the powers of the military officers are infinitely larger than those conferred upon the civil officers. Hence, it ought not to be put into effect except upon occasions of dire and inexorable necessity. Limitation of the power of the Governor to invoke and apply it only on occasions of actual warfare and within the area of actual hostilities, renders it impossible for him to set aside the civil laws and rule by his practically unrestrained will, under any circumstances.[3]

"It is almost impossible to reconcile the decision in this case with that of *Hatfield v. Graham*."[4] *Hatfield*, after all, held that the Governor's decision that necessity required martial law to suppress an insurrection was not reviewable so long as it was made in good faith. The conditions in Mingo County in 1921 were no less violent than those in Kanawha County in 1912-13, and the Governor's good faith in 1921 was not questioned. If the decision that martial law is necessary to restore order is assumed to be correct, its implementation by civil authorities and deputies rather than by the National Guard would make no difference in terms of respecting civil rights. Moreover, the Court insisted in *Lavinder* that martial law "cannot extend beyond the limits of theater of actual war."[5] That clearly contradicts the specific holdings in *Jones* and *Hatfield*.

NOTE ON THE VETO POWER
Read Article VII, §§ 14 & 15

[Extracted from ROBERT M. BASTRESS, JR., THE WEST VIRGINIA STATE CONSTITUTION 233-35 (2nd ed., Oxford University Press, 2016).]

Section 14 requires that, before any bill passed by the legislature becomes a law, it must be presented to the governor for his or her consideration. The section also confers on the governor a form of a veto power which had not been included in the 1863 Constitution or in any of the prior Virginia Constitutions. Section 14 was amended in 1970 as part of the Legislative Improvement Amendment, which made several changes. It added the reference to Article VII, section 15 in the first sentence, added the third and fifth sentences, and extended the governor's time to consider bills presented to him or her at the end of the legislative session from five to fifteen days. The amendment also included numerous other clarifications in wording and punctuation.

The Presentment Clause in the first sentence is mandatory; the Legislature can enact no law without having first presented it to the governor. *State ex rel. Browning v. Blankenship* (1970); *Charleston*

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[3] 88 W.Va. at 719, 108 S.E. at 430.

[4] ROBERT S. RANKIN, WHEN CIVIL LAW FAILS 130, 132 (1939).

[5] 88 W. Va. at 716, 108 S.E. at 429.

National Bank v. Fox (1937). After the legislature does so, the governor has three options: (1) sign the bill, which makes it a law; (2) veto the bill in its entirety and return it to the legislature with his or her objections; (3) do nothing, in which case the bill becomes a law after five days, or after fifteen days if the legislature has adjourned *sine die* before the five days (excluding Sundays) have expired. There is therefore no pocket veto in West Virginia. Adjournment at the end of the regular session is considered to be sine die (without a date set to reconvene) unless the legislature votes otherwise and meets the requirements in Article VI, § 22.

If the governor does veto a bill, he or she must return it to the house in which it originated within the five- or fifteen-day period (Sundays excluded), whichever is applicable. The five-day period is quite short, given the complexity of modern legislation, which no doubt prompted the extension to fifteen days for the governor to consider the flurry of bills enacted near the end of the session. Moreover, the governor must file both the veto and his or her objections within the required time, or the veto fails. *Browning.* After a bill's return, the legislature may override the veto by a simple majority vote of the elected members in each house. That puts West Virginia in a distinct minority of states; most require at least a two-thirds vote to override, as does the U.S. Constitution (Art. I, sec. 7, para. 3). The legislature may remain in session solely for the purpose of nullifying the governor's veto power and may extend the session, with the concurrence of two-thirds of the elected members, for the same purpose. *May v. Topping* (1909). There is no time limit in which the legislature must act to override a veto. Finally, the insertion of the third sentence in section 14 empowers the legislature to reconsider a vetoed bill in a session extended solely for the purpose of passing a budget. Without that provision, Article VI, section 51, paragraph 8 would prevent such legislative action.

The next to last sentence of section 14's first paragraph, which was added in 1970, provides that, if the legislature amends a vetoed bill, it must again present it to the governor, and the process set forth in the first paragraph is repeated. In all cases in which the legislature reconsiders a vetoed bill, the votes shall be individually taken and recorded in the house journals.

It could certainly be maintained that § 14 provides the governor with a very weak brand of an executive check against the legislature; the governor lacks the ability to make a pocket veto, has only five days during the session to act and must accompany his veto with a statement of reasons, and can be overridden by a simple majority. Indeed, the Supreme Court of Appeals has characterized the § 14 power as merely a request for reconsideration:

> The governor has no legislative functions to perform. His approval of the law passed by the legislature does, it is true, give it vitality as a law; but, should he decline to approve, a bare majority in each of the two houses may pass the law over his veto, thus showing that it was not intended that he should have any legislative power, not even the casting vote. His veto amounts to an appeal for "reconsideration" by the legislative branch, and not to a defeasance of the passage of the bill. Our constitution carefully distinguishes in its phraseology between the "passage" of a law and its "approval" by the governor. It nowhere confounds these terms.[6]

The Legislative Improvement Amendment and certain practicalities combine, however, to give the state's governor a fairly formidable check on the legislature. The vast majority of bills are enacted in the last few days of the session. Thus, they are presented to the governor for his approval or rejection

[6]*State v. Mounts*, 36 W. Va. 179, ___, 14 S.E. 407, 409 (1891).

at a time when the fifteen day period for filing vetoes will kick in. While the legislature can use the budget session to override vetoes, the governor can simply hold off on his vetoes until after that session is over, which typically concludes within a week or so. Hence, the governor can exercise his veto power on most bills after the legislature has adjourned and no longer has the ability to override any veto. The legislature could vote to extend its session to await the opportunity to override or vote to recess – rather than adjourn *sine die* which gives the governor fifteen days to veto – but those tactics would require a two-thirds vote in both houses. Remaining in session to ride out the governor's veto period would be an expensive proposition and thus would ordinarily not be a politically popular tactic. While there is no time limit for overriding a veto, the legislature could not consider an override in any special session unless the governor puts the matter on the call for the session. (That does happen when the governor has vetoed a bill because of drafting or technical errors.) The legislature can also, under Article VI, § 19, require the governor to issue a proclamation for a special session, but that requires three-fifths of the members to sign a petition calling for it. That has not happened once under the 1872 Constitution. So, absent extraordinary political circumstances, the bottom line is that the governor has the last word in the large majority of bills passed by the legislature. Indeed, the governor's veto power, especially when combined with the line item budget veto power accorded by Article VI, § 51 (which requires a two-thirds majority to be overridden), is one of the major reasons that a recent study of the institutional powers of the states' governors ranked West Virginia's as tied for the second most powerful state executive office in the nation.[7]

Section 15 reenforces what Article VI, section 51 provides: that with regard to appropriations bills, the veto provisions of section 51 (subsec. D, para. 11) control. Section 15 was amended in 1970 as part of the Legislative Improvement Amendment to make that point clear. The original 1872 version gave the governor a line-item veto power over appropriation bills, but permitted any such veto to be overridden by a simple majority of the elected legislators in each house. The now-controlling provisions in section 51 retain the line-item veto capability, but require a two-thirds vote for an override.

NOTE ON THE GOVERNOR'S REMOVAL AND APPOINTMENT POWERS
Read Article VII, §§ 8-10

As noted in cases in Chapters 4 and 5, *supra*, Article VII grants the governor important powers to appoint and remove officers, and thereby to have in positions of power individuals who will implement the governor's program. By the terms of § 8, however, as well as Article IV, § 8, the governor's appointments power exists almost entirely at legislative discretion. Under § 8 of Article VII, the governor only gets to appoint officers whose positions are offices created by the Constitution – which means the State Board of Education – and officers "whose appointment or election is not otherwise

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[7]Thad Beyle, "Gubernatorial Power: The Institutional Power Ratings for the 50 Governors of the United States" (2005), available at http://www.unc.edu/~beyle/gubnewpwr.html; see generally Pizatella, "Separation of Powers and the Governor's Office in West Virginia," 109 W. VA. L. REV. 185 (2006).

provided for." Article IV, § 8 then drives home the point that the Legislature may otherwise provide for when it states that the "legislature . . . shall prescribe . . . the manner in which [all public officers] shall be elected, appointed and removed." The senate also checks the gubernatorial appointment power because it has the power to reject nominated constitutional officers and the power to require its permission of all other public officers. The only significant constitutional limitation on the Legislature's ability to control appointment procedures is the Article VII, § 8 restriction that it cannot reserve the appointment power for itself. *See State ex rel. West Virginia Citizens Action Group v. West Virginia Economic Grants Development Committee*, 213 W.Va 255, 580 S.E.2d 869 (2003) (*see* Chapter 5). The Legislature has, however, vested the appointments power for most all public offices in the governor. The gubernatorial authority created by Article VIII, § 7, to fill temporarily judicial vacancies has also, at times, been a meaningful supplement to the governor's powers.

Article VII, § 10 permits the governor to remove any officer that he appoints, although it constricts that power to four specified grounds: "of incompetency, neglect of duty, gross immorality, or malfeasance in office." As stated in *Rice v. Underwood*, 205 W.Va. 274, 517 S.E.2d 751 (1999) (*see* Chapter 4), that is the irreducible minimum of his power, and the Legislature may enlarge it pursuant to the Article IV, § 8 power quoted above. And it has done so generously, giving the Governor complete discretion to remove any gubernatorial appointee for any reason and without the need for any procedure, W. Va. Code 6-6-4, and to remove any State elected official for listed causes, W. Va. Code 6-6-5, and pursuant to stated procedures. W. Va. Code 6-6-6. (Those provisions are reprinted in Chapter 4.)

C. The Attorney General and Secretary of State

STATE OF WEST VIRGINIA ex rel. McGRAW v. BURTON,
212 W.Va. 23, 569 S.E.2d 99 (2002).

Starcher, Justice.

This is a case where the Attorney General of the State of West Virginia claims that executive branch agencies and officials are violating our State's Constitution by using lawyers who are not employed or approved by the Attorney General. Through his petition, the Attorney General asserts that the respondents have a clear legal duty to cease authorizing the "unlawful" employment of lawyers by executive branch and related agencies of the State of West Virginia without the consent of the Attorney General, and to cease the "unlawful" expenditure of public funds for legal services that are performed by lawyers other than those who are employed or approved by the Attorney General. We hold that the employment and use of such lawyers is not barred in all cases; however, we also hold that the Office of the Attorney General may not be stripped of its inherent core functions.

I.. *Facts & Background*

The petitioner, the Honorable Darrell V. McGraw, Jr., is the Attorney General of the State of West Virginia ("the Attorney General"), an elected constitutional officer of this State. The Attorney General has filed a petition for a writ of mandamus in this Court, naming as respondents the Secretary of the West Virginia Department of Administration and the Director of the Division of Personnel of the

Department of Administration, two officials within the executive branch.

The Attorney General asks this Court to hold unconstitutional any statute that purports to authorize any executive agency, body, or similar instrumentality of the State to employ and use lawyers who are not employed or approved by the Attorney General; to prohibit payment of public funds for the services of such lawyers; to require the payment of money for all such lawyers to be directed to the budget of the Attorney General; and to deem all such lawyers who are State employees to be employees of the Attorney General.

The Attorney General specifically identifies as "unlawful" 216 State-employed lawyers (in 37 State agencies) who are not employed by the Attorney General;[8] the petition contains averments that state that the Attorney General currently employs only 65 lawyers. The Attorney General contends generally that as a result of legislation enacted over the past several decades, there has been a "creeping encroachment" and usurpation of the constitutional role of the Attorney General as the State's chief legal officer "to such an extent that the constitutionally-mandated and elected Office of the Attorney General is quickly becoming *de facto* non-existent."[9] . . .

III. *Discussion*

A.

The Office of Attorney General of the State of West Virginia is established by Article VII, Section 1 of the *West Virginia Constitution*:

> The executive department shall consist of a governor, secretary of state, auditor, treasurer, commissioner of agriculture *and attorney general*, who shall be, ex officio, reporter of the court of appeals .... They shall reside at the seat of government during their terms of office, keep there the public records, books and papers pertaining to their respective offices and shall perform *such duties as may be prescribed by law.*

(Emphasis added.)

No other constitutional language more specifically defines or delineates the Attorney General's

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[8] *Brief* of the Attorney General. Thirty-seven of these non-Attorney General-employed lawyers are administrative law judges. . . . In a reply brief, the Attorney General has removed administrative law judge positions from the ambit of the relief sought in his petition. The Attorney General has also stated in his reply brief that any lawyers who have civil service or similar job security protection in their current employment would continue to have such protection if transferred to his employment. The Attorney General's current lawyer employees are stated in the briefs to be will-and-pleasure employees.

[9] . . . [T]he undisputed numbers in the Attorney General's petition suggest that the Attorney General's office currently does not play any role with respect to approximately 75% of the professional legal services that are provided by public employee lawyers to State executive branch agencies and related entities. We note that legal services are also provided to the State of West Virginia and its employees by lawyers who are not public employees. The State Board of Risk and Insurance Management, for example, uses insurance companies and private providers of legal services to respond to liability claims against State agencies, officials, employees, instrumentalities, political subdivisions, and others. *W.Va. Code*, 29-12-1 to 29-12-13. *See Russell v. Bush & Burchett*, 210 W. Va. 699, 704-706 n.7-10, 559 S.E.2d 36, 41-43 n. 7-10 (2001). The Attorney General's petition and brief do not specifically discuss the issue of the provision of legal services to the State by non-State employees. However, this is an issue that is substantially related to the principles that we discuss herein, and we address it generally at note 25 *infra.*

constitutional role as a member of the executive department. Based on this lack of other specific constitutional language -- and based on the "as may be prescribed by law" language quoted above -- the respondents argue that the Legislature has essentially plenary and unfettered discretion to, through statutory action, delineate, limit, or even effectively eliminate the Attorney General's role in providing legal counsel and representation to State entities. *Lawson v. Kanawha County Court*, 80 W.Va. 612, 618, 92 S.E. 786, 789 (1917) ("The phrases 'prescribed by law' and 'provided by law,' when used in constitutions, generally mean prescribed or provided by statutes.")

For example, the brief on behalf of the Cabinet Secretaries of the Departments of Environmental Protection, Tax and Revenue, Education and the Arts, Health & Human Resources, Military Affairs & Public Safety, and Transportation states:

> According to the scheme of the Constitution, for example, the Legislature might have decided (or might decide in the future) that, as far as other officers in agencies in State government are concerned, the Attorney General should have purely advisory duties and no representational duties. The Legislature could have created or could create the office of "solicitor general," wholly independent of the office of Attorney General, which would be available to represent the State in courts and perform other representational functions, while the Attorney General tends to analyzing questions presented to him and to issuing advisory opinions. Since the Constitution has not mandated a representational function for the Attorney General, the Legislature is free to prescribe that duty for him, or for some other office altogether.

. . . [T]he respondents' briefs uniformly assert as a premise of their arguments the theoretical ability of the Legislature (or other officials in the executive branch, if authorized by the Legislature) to reduce the practical role of the Office of the Attorney General in the State's day-to-day legal affairs to a nullity. This overweening assertion of Legislative "discretion" is the "flip side" of the Attorney General's assertion of exclusive "jurisdiction" with respect to all legal matters of any sort in which the State is involved. We conclude that both sides are overreaching in their assertions.

This is not the first time this Court has had to wrestle with the question of the essential or inherent powers and duties of the Office of the Attorney General. In Syllabus Point 2 of *State v. Ehrlick*, 65 W. Va. 700, 64 S.E. 935 (1909), this Court concluded that the Office of Attorney General held such powers as did attorneys general under the common law, subject to redefinition from time to time by the Legislature. We addressed this issue again in *Manchin v. Browning*, 170 W.Va. 779, 296 S.E.2d 909 (1982). We concluded there that the Attorney General did *not* possess powers arising under the common law. 170 W.Va. at 785, 296 S.E.2d at 915.

We concluded in *Manchin* that the phrase "shall perform such duties as may be prescribed by law" operated to defeat the assertion that the Attorney General of West Virginia possesses common-law powers. We held in Syllabus Point 1 of *Manchin* that "the powers and duties of the Attorney General are specified *by the constitution* and by rules of law *prescribed pursuant thereto*." (Emphasis added.) We observed that: "The plain effect of the provision is to limit the powers of the Attorney General to those conferred by law laid down *pursuant to the constitution*."[6] . . . (Emphasis added.)

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[6]*Manchin* relied in part upon *Shute v. Frohmiller*, 53 Ariz. 483, 488, 90 P.2d 998, 1001 (1939), which stated in pertinent part that the "powers and duties [of the Attorney General] may be ascertained *only* by resort to the statutes." (Emphasis added.) [*Manchin*.] However, this holding of the *Shute* case was explicitly, and we believe properly, overruled by

Notwithstanding this "plain effect," we concluded in *Manchin* that the Attorney General is the "chief legal officer" of the State [charged] with representing the interests of the State in actions wherein the State is a party and charged with representing the State's officers in actions wherein the officer was a party by reason of being the State's representative. We required there that when the Attorney General represents a State officer, rather than the State itself, the Attorney General was required to advocate the policy position of the State officer in that litigation, even when the officer's policy position differed from that preferred by the Attorney General.

Most importantly, we said in *Manchin*:

> The Attorney General is more properly designated as the *chief legal officer of the State*, with the law as his area of special expertise. *** By the nature of his office he is the general lawyer for the State. *** Explicit in the title Attorney General is the proposition that the holder of the title is the *general lawyer for the State* ...

[Emphasis added.]

In *State ex rel. Caryl v. MacQueen*, 182 W.Va. 50, 54, 385 S.E.2d 646, 650 (1989), we again addressed the nature of the office, stating: "Explicit in the title attorney general is the proposition that the holder of the title is the general counsel for the State."

From the time West Virginia's *Constitution* was first adopted, there has been consistent legislative recognition of the Attorney General's role as that of the State's chief legal officer, having a central responsibility for providing legal counsel and services to the State and State entities.

The West Virginia Legislature of 1872-73 prescribed the role of the Attorney General as follows:

> The Attorney General shall give his opinion and advice in writing whenever required to do so by the governor, or other officers at the seat of government, or by the board of public works.
>
> He shall appear as counsel for the State in all cases in which the state is interested, depending [pending] in the supreme court of appeals or in the circuit court of the county in which the seat of government may be.

1872-73 W. Va. Acts, chapter 54, pp. 141-142.

In 1909, the federal courts were added to the named forums in which the Attorney General "shall appear as counsel for the state," and the Attorney General was further required to "defend all actions and proceedings against any state officer in his official capacity ..., but should the state be interested against such officer, he shall appear for the state; ...." . . .[8]

Long-standing principles of constitutional construction provide that:

Hudson v. Kelly, 76 Ariz. 255, 263 P.2d 362, ___, 76 Ariz. 255, 263 P.2d 362, 366-367 (1953). In *Hudson*, the language "prescribed by law" was held to be an "implied mandate" to the Legislature to "grant such powers and duties as would enable the [constitutional officer] to perform the functions for which the office was created." *Id.*

[8]Similar provisions remain in effect today. *See W.Va. Code*, 5-3-2 [1987], discussed in more detail later in this opinion. Most recently, the 2002 Legislature enacted Senate Bill 667, creating *W.Va. Code*, 55-17-1 to 55-17-5. While we express no opinion regarding this legislation, we do observe that it requires notice to government agencies *and the Attorney General* of intended litigation against such agencies, *and service of all legal complaints on the Attorney General*. This Legislative action reflects the continued and common-sense legislative recognition of the inherent central role that the Attorney General plays in the legal affairs of the State, particularly when the State's interests may be before a tribunal.

> A contemporaneous and long-standing legislative construction of a constitutional provision is entitled to significant weight .... Where there has been a practical construction which has been acquiesced in for a considerable period, considerations in favor of adhering to this [constitutional] construction sometimes present ... a plausibility and force which is not easy to resist.

State ex rel. Board of University v. City of Sherwood, 489 N.W.2d 584, 587-588 (N.D. 1992).

We believe it is clear from these authorities that there are certain core functions of the Office of Attorney General that are inherent in the office, of which the Office of Attorney General may not be deprived, and which may not be transferred to or set up in conflict with other offices. The suggestion by some of the respondents that the Legislature possesses unfettered discretion to define, delineate, and limit the duties of the Attorney General is wholly at odds with the historical and well-settled understanding of the constitutional role of the Attorney General. Accordingly, we hold that pursuant to Article VII, Section 1 of the *West Virginia Constitution,* the Attorney General of the State of West Virginia is the State's chief legal officer, which status necessarily implies having the constitutional responsibility for providing legal counsel to State officials and State entities. The nature and extent of that "constitutional responsibility" remains to be hereinafter analyzed.

B.

Pursuant to Article IV, Section 8 of the *West Virginia Constitution*, the Legislature has broad powers with respect to delineating the role, powers, and duties of *non- constitutional* public officers:

> The legislature, in cases [of offices] not provided for in this Constitution, shall prescribe, by general laws, the terms of office, powers, duties and compensation of all public officers and agents, and the manner in which they shall be elected, appointed and removed.

[However], it has been long recognized that this power of the Legislature to create offices in addition to those created in the *Constitution* is necessarily constrained by proper respect for the offices created by and enumerated in the *Constitution*. "The legislature, of course, cannot create offices which will conflict with, or curtail the constitutional powers of, any of the offices provided for by the Constitution." *Blue v. Smith*, 69 W.Va. 761, 762, 72 S.E. 1038, 1039 (1911). Additionally, "to transfer the duties of one office to another is to abolish the former and a legislative act attempting to do so, in the case of a constitutional office, is void for that reason." *Hatfield v. County Court of Mingo County*, 80 W.Va. 165, 168, 92 S.E. 245, 246 (1917).[9] . . .

The executive branch, as well as the Legislature, is similarly constrained with respect to the inherent or core functions of constitutional offices. In a case holding that the Governor may not by veto reduce to zero the appropriations necessary to the operation of certain constitutional offices, this Court stated:

> Clearly, the framers of the Constitution and the people intended that these [constitutional] officers function as a viable part of the governmental process. How then can it be reasoned that the Governor, also no more than a constitutional officer, can eliminate and prohibit the function of these offices?

State ex rel. Brotherton v. Blankenship, 157 W.Va. 100, 118, 207 S.E.2d 421, 432 (1973).

The fundamental principle involved in all of these cases is the doctrine of separation of powers. In the case before us, the doctrine has two aspects. One aspect is the constitutional inability of the

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[9] *See also State ex rel. Joint Comm. v. Bonar*, 159 W.Va. 416, 419, 230 S.E.2d 629, 631 (1976) (each department of government has certain inherent powers without which its specific powers would be meaningless).

Legislature to define the powers and duties of the Office of Attorney General and the other constitutional offices so as to deprive the Office of Attorney General, or any of the other constitutional offices, of the inherent functions and purposes thereof. The second aspect is the maintenance of the concept of an executive branch that is itself divided among the several constitutional offices provided for in the *Constitution*, each with a separate, distinct, and vital contribution to be made to the operation of the executive branch.

Unlike the federal government, where essentially the entire executive power is vested in one elected officer, the President of the United States, our State *Constitution* apportions executive power among several elected officers. These offices, each operating in some respects independently, must combine and cooperate (even if they have differing policy views and perspectives) to provide an efficient and effective executive branch of government.[12] . . .

[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. *Appalachian Power Co. v. PSC*, 170 W.Va. 757, 759, 296 S.E.2d 887, 889 (1982).

In *State ex rel. Meadows v. Hechler*, 195 W.Va. 11, 14, 462 S.E.2d 586, 589 (1995), we stated:

> . . . 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* .... [emphasis in original].

. . . With the principles underlying these cases in mind, we therefore hold, pursuant to the separation of powers doctrine set forth in Article V, Section 1, of the *West Virginia Constitution*, that the Legislature cannot create offices that will conflict with or curtail the constitutional powers of the offices provided for by the *Constitution*; and to transfer the inherent functions of a constitutional office to another office is to curtail the former. Therefore, a legislative act that attempts to accomplish such a transfer is unconstitutional.

C.

The Attorney General argues that whenever the Legislature authorizes the provision of legal services to a State entity by a lawyer who is not employed by or with the consent of the Attorney

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[12]As of 1990, 43 of 50 state constitutions provided for the election of the attorney general. *State Attorneys General, Powers and Responsibilities*, National Association of Attorneys General, Lynne M. Ross, ed., 1990, p.15. It has been observed that "some of our States' most interesting legal and political infighting has been between the governor as the chief executive officer of the State and the attorney general as the chief legal officer. It is clear that these two offices do have the potential for built-in conflict at several levels, from politics to policy to administration." Thad L. Beyle, in *Politics in the American States* 191- 192, Virginia Gray *et al*. eds., 4th ed. (1983).

General, the constitutional scheme that creates the Office of Attorney General as that of the State's chief legal officer is violated, because that office is being stripped of its inherent functions in violation of the separation of powers doctrine.

The Attorney General urges us to treat the Office of Attorney General as possessing exclusive constitutional authority with regard to legal representation of the various entities of State government, because the office is an elective one, and because, as we discuss herein, the Office of Attorney General historically functioned for some time as essentially the sole source of legal counsel and legal representation for all of the entities of State government.

This Court recognized in *Manchin*, *supra*, that the Legislature had authorized some executive department agencies to "hire their own counsel using agency funds." 170 W.Va. at 788, n.4, 296 S.E.2d at 917-918, n.4. And we held in syllabus point 2 of *State ex rel. Caryl v. MacQueen*, 182 W.Va. 50, 385 S.E.2d 646 (1989) that: "The Attorney General is the legal representative of the State and its agencies *unless specifically exempted from his duty by statute*." (Emphasis added).[14] In neither of those cases did we intimate that the Legislature may not under any circumstances authorize the use of legal counsel other than the Attorney General -- nor did we in either case intimate that the Legislature had *carte blanche* to eviscerate the role of the Attorney General as the State's chief legal officer.

. . . The decision of West Virginia's founders to have a chief legal officer for the State cannot be treated as merely a relic from the past that has no practical force and vital importance in modern times. To the contrary, the Attorney General's constitutionally established role of chief legal officer for the State must be given as full an expression today as it was in the past.

The fundamental reason that all three branches of our State government must accord the Office of Attorney General and all constitutional offices appropriate respect and dignity rests on the fact that the people, by their *Constitution*, have spoken clearly and decisively in creating these offices. As we stated in *State ex rel. Brotherton v. Blankenship*, 157 W.Va. 100, 119-120, 207 S.E.2d 421, 433 (1973):

> On many occasions it has been suggested to the people that the election of Secretary of State, Auditor, Treasurer, Commissioner of Agriculture and Attorney General be eliminated and that the appointment to such offices be left to the discretion of the Governor. As of this date such concept has not been approved by the electorate and the Governor cannot achieve that end without such approval. ... It would defy reality and reason to say that [these] officers could conduct the business of such offices, *as intended by the people*, without any funds with which to operate and personnel to assist them. [emphasis added][16]

. . . Having carefully reviewed the specific provision of the *Constitution* at issue in the instant case,

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[14]As early as 1915, the Legislature empowered the Public Service Commission to employ non-Attorney General lawyers. *W.Va. Code*, 24-1-8 [1915], 1915 *Acts of the Legislature,* chapter 8, p. 43. The Department of Transportation was given specific authority to hire non-Attorney General lawyers in 1957, *W.Va. Code*, 17-2A-7 [1957]. . . . Concerns about the excessive use of non-Attorney General lawyers by the State have been raised by previous Attorneys General. *See*, *e.g.*, 50 W.Va. Attorney General Reports, 185, 192 (1962-1964); 31 W.Va. AG Reports xii-xv, p. 241 (1925-26).

[16]"A West Virginia poll in March 1989 resulted in 24% in favor and 63% opposed to abolishing the elected Office of Attorney General. The Gallup Opinion Poll Index: Political, Social and Economic Trends, poll information WVA31989." (reported at Matheson, Scott, "Constitutional Status & Role of the Attorney General," 6 *U.Fla.J.L. & Pub. Pol'y* 1, 28 n.145 (1993). In 1989, a proposed amendment to the *West Virginia Constitution* that would have eliminated the elected offices of Commissioner of Agriculture and Secretary of State was rejected by a vote of 220,700 to 28,634. 1998 *West Virginia Blue Book*, page 410.

we must undertake an effort to identify "the best method to further advance the goals of the framers in adopting" that provision, if the State is to find a just and workable solution to the difficult constitutional quandary presented to us by the case *sub judice.* We shall look first at how those goals and purposes were expressed in the past, and then examine what must be done to give effective and practical expression to those goals and purposes in the present. We are striving to discern what, under modern conditions, fulfills the goal and purposes of the framers of the *Constitution* in creating the elective Office of Attorney General. In other words, we are striving to discern what are the inherent or "core" functions of the State's chief legal officer under modern conditions, the elimination of which would deprive the office of its ability to serve the goal and purposes for which it was created. In 1872-73, when our *Constitution* was established, the self-evident "purpose" of having a constitutionally-established Attorney General was to give to one accountable, elected public official the responsibility for coordinating, understanding, and conducting the large majority of the State's legal business -- including research, advice, and representation. As we have noted, the statutory expression of that purpose appears clearly from the first enactment of law on the subject by the Legislature after the *Constitution* was adopted and is likewise evident from virtually every subsequent enactment thereafter.

At the time of our *Constitution's* adoption, West Virginia had a small central government of limited responsibilities; a government that in almost every instance would hold and maintain a single perspective or position on legal issues. Under modern conditions, however, our State government is a behemoth organization, comprised of scores of agencies, officials, bureaus, authorities, commissions, councils, divisions, departments, agents, associations, and public corporations. Many of these entities are in numerous respects independent, but nevertheless have sufficient State authority, direction, assistance, or funding so as to make them "State" entities in some or all circumstances.

In 1932, the Legislature amended and re-enacted what is today *W.Va. Code*, 5-3-1 [1994], reiterating the responsibility of the Attorney General to provide legal counsel to and represent virtually *all* State entities in litigation -- and, significantly, expressly prohibiting the expenditure of public funds for the provision of legal services to the State by any person other than the Attorney General, a statute that remains on the books today. This statute vests in the Attorney General a wide-ranging responsibility to advise and represent virtually every State entity in litigation. It is notable that *W. Va. Code*, 5-3-1 [1994] couches the Attorney General's duties in terms of the Attorney General being "required" or "requested" to render legal services to the officers named therein. A companion statute, *W.Va. Code*, 5-3-2 [1987], expressly *requires* that the Attorney General "*shall appear*" for the State in all litigation in this Court or any federal court "in which the State is interested." Additional provisions of that statute require the Attorney General also to "defend" State officers, etc.

Had these two statutes been scrupulously observed over the years, it is unlikely that the petition presently before this Court would ever have been filed. However, as the Attorney General's brief clearly demonstrates, the Legislature has chosen to *indirectly* amend these statutes by providing, in other enactments, express authority for various State entities to hire additional legal counsel not under the

direction of the Attorney General.[20] As noted in this opinion, *see* n.14, *supra*, at least a few of the statutory authorizations to State entities to hire and use lawyers other than those employed or approved by the Attorney General have a fairly long history to them.

One reason for the accumulation of statutes permitting the hiring and use of non-Attorney General lawyers is almost certainly the development of the large State government composed of diverse State entities, to which we earlier alluded. These State entities engage in a wide variety of activities and enterprises, often with little or no contact or coordination with one another. Complex and specialized legal issues are involved in nearly every entity's activity; many entities require intensive, day-to-day, professional legal expertise, judgment, advice, and representation. Moreover, in a not insubstantial number of cases, these diverse State entities have contrasting perspectives and interests, and may take different (even competing or conflicting) legal positions before tribunals -- sometimes on important issues involving State rights and powers generally, citizen or business rights, etc. Under these circumstances, the perceived need for specialized "in-house" legal expertise in certain fields is understandable. And in a government necessarily containing diverse entities, with diverse perspectives, there is an inherent tendency to seek to bring a particular entity's legal staff more under the direct employ and control of the State entity -- to further the ends of loyalty and accountability to the State entity. This tendency, however, may not be permitted to undermine the basic constitutional scheme that establishes a chief State legal officer with central responsibility regarding the legal affairs of the State. . . .

As we have discussed, one distinctive aspect of modern governmental conditions is the presence of multiple State entities with varying perspectives and interests. Under these conditions, if no central legal office is substantially involved with the legal affairs of a State entity, especially in litigation, legal decisions may be made by the entity (or by a tribunal) that may well have broad effects on the State and on other State entities generally -- without any awareness or input from potentially affected State entities that have no knowledge of the decisions, litigation, or issues involved. . . .

We believe that under modern conditions a necessary and vital function of the State's chief legal officer, the Attorney General, is to assure that a State entity's legal policy (and particularly its assertion of legal positions before tribunals) is formulated in consultation and coordination with the legal policy and positions of other State entities.

Of course (and this point cannot be over-emphasized), each State entity is entitled to fully loyal, confidential, conscientious, and zealous legal counsel in developing, asserting, and defending its particular legal perspective. But just as importantly, each State entity -- and the State and her citizens generally -- are, pursuant to the constitutional structure established by the framers, entitled to a governmental structure wherein a central legal office, along with providing day-to-day legal services to a wide range of State entities, can consider the issues in a given case in light of the broader interests of the State and in view of the impact on the full range of State entities. In our view, this is a core function of an Attorney General's office that is essential in modern times to achieve the constitutional purpose of the framers in 1872-73 when they established a single, elected chief legal officer for the

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[20]Some of these enactments, among them statutes that are referenced by the Attorney General's petition, acknowledge *W.Va. Code*, 5-3-2 directly or indirectly. Others contain no reconciliation language. Still others are not separate enactments, but simply appropriations for the personal services of lawyers.

State.

D.

Based on all of the foregoing, we hold that the inherent constitutional functions of the Office of the Attorney General of the State of West Virginia include: (1) to play a central role in the provision of day-to-day professional legal services to State officials and entities in and associated with the executive branch of government;[24] (2) to play a central role in ensuring that the adoption and assertion of legal policy and positions by the State of West Virginia and State entities, particularly before tribunals, is made only after meaningful consideration of the potential effects of such legal policy and positions on the full range of State entities and interests; (3) to assure that a constitutional officer who is directly elected by and accountable to the people may express his legal view on matters of State legal policy generally and particularly before tribunals where the State is a party.

Additionally, in light of long-established statutes, practice, and precedent recognizing that State executive branch and related entities may in some circumstances employ and use lawyers who are not employees of the Attorney General, we hold that such employment and use -- and statutes, rules, and policies authorizing such employment and use -- are not *per se* or facially unconstitutional.

This Court invites the executive branch entities involved in the instant case, the Legislature, and the Attorney General to commence a full review of the practices that have emerged over the years with regard to the use of in-house lawyers by various State entities (and the hiring of private counsel to represent the State interest in litigation, *see* footnote 25.) The policy enunciated by the Legislature in *W.Va. Code*, 5-3-1 and 2, addresses the public interest in (1) assuring a consistent "legal policy" for the State; (2) avoiding the undue expenditure of public funds for legal counsel outside the Office of the Attorney General; and (3) recognizing the decision of the people of this State to have, in theory and in fact, an elected chief legal officer of the State, answerable to them at the polls. It is appropriate for the Legislature to undertake a review of its various enactments that may present unresolved conflict with the long-standing expressions of constitutional purpose and public policy that are reflected in *W.Va. Code*, 5-3-1, *et seq.*, in order to, in the words of the Preamble to our *Constitution*, "seek diligently to promote, preserve and perpetuate good government" for our State. ...

The principles of comity and mutual respect should govern the day-to-day operation of these relationships. It is inherent in the principles of a constitutionally divided executive and in the separation of powers that respectful cooperation and coordination are expected within the divided executive and between the executive and legislative branches, in the absence of the absolute necessity for confrontation. In that vein, this Court should not be asked to serve as -- and consequently we seek to avoid being -- a referee of the relations among constitutional equals.

Having said that, we are nevertheless of the opinion that care must be taken to accord to the

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[24]As contemplated by *W.Va. Code*, 5-3-1- and -2, and *Manchin v. Browning*, the Office of the Attorney General, upon request, provides representation in litigation to state officers, agencies and instrumentalities to advance the view of the law and facts of a case propounded by the state office, agency, or instrumentality involved. Where two or more such state entities assert differing or opposing views in the same litigation, and request representation by the Office of the Attorney General, that office has the option of providing assistant attorneys general to such entities or any of them, or authorizing special assistant attorneys general from the private sector bar for any or all such entities.

Attorney General the full opportunity to perform his constitutional and statutory duties. We therefore hold that to ensure that the Office of the Attorney General can perform its inherent constitutional functions, the Legislature has the implicit obligation to provide sufficient funding to the office. Additionally, no statute, policy, rule, or practice may constitutionally operate, alone or cumulatively, to limit, reduce, transfer, or reassign the duties and powers of the Office of the Attorney General in such a fashion as to prevent that office from performing its inherent constitutional functions.

To implement the foregoing, we further hold that in all instances when an executive branch or related State entity is represented by counsel before a tribunal, the Attorney General shall appear upon the pleadings as an attorney of record; however, this requirement does not bar other counsel from also appearing and acting in a legal capacity for the State entity. The Attorney General additionally has the right to appear as an intervenor as Attorney General on behalf of the State in all proceedings where the interest of the State or a State entity is at issue, to assert the Attorney General's view of the law on behalf of the State.[27] To maintain a proper constitutional balance, however, this right must always be exercised with restraint and due respect by the State entity and the Attorney General.

IV. *Conclusion*

We have a limited record before us, and for that reason, we decline to give any consideration to the specific attorney positions and statutes that are identified in the Attorney General's petition -- with regard to their effects, separately or cumulatively, on the ability of the Office of the Attorney General to perform its constitutional role.

Moreover, we are firmly convinced that with the foregoing principles having been articulated, the parties in the instant case now have both the tools and the duty to work together to address and resolve specific issues, using principles of accommodation, respect, and comity. We therefore deny the specific relief requested by the Attorney General, but we grant the writ as moulded by requiring the petitioner and the party respondents to be guided by the holdings set forth in this opinion. If non-judicial resolution of any specific issues that arise cannot be achieved using the principles of accommodation, respect, and comity, the parties may seek further resolution again in court.

Albright, Justice, concurring.

I concur fully in the excellent unanimous opinion of this Court authored by Justice Starcher. The opinion, in my judgment, is soundly grounded in constitutional history and precedent. It represents a superb effort to reach a balanced judgment on difficult issues that profoundly affect the relationship

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[27]The Attorney General's appearance on the pleadings necessarily implies his opportunity to consult with the State entity, consistent with applicable rules of confidentiality and professional responsibility, regarding the matters at issue before the tribunal. Leaving aside the exceptional situation, an entity taking or responding to legal action before a tribunal would ordinarily turn to the Attorney General to ascertain whether that office can and will represent the entity. As discussed *supra*, when the Attorney General is providing actual legal representation to a State entity, he or she is required under *Manchin* to represent the entity's position, and to provide a lawyer that the Attorney General in his discretion selects to perform such representation. In the event that the Attorney General takes a different view of matters before a tribunal than the State entity, the Attorney General's intervenor standing permits the presentation of the Attorney General's view. In the event that such situation arises, it is incumbent upon all parties to exercise their respective duties in such a manner as to respect the *Rules of Professional Conduct* and promote the effective disposition of legal proceedings.

among all three branches of our state government generally, and the somewhat more obscure issues posed by the decision of the framers of our state constitution to apportion the executive power of the government among several constitutional officers. . . .

I write separately primarily to underline the invitation to the parties, issued clearly by the Court's opinion, to bring about a reasoned resolution of the matters raised in the case[.] . . .

In my view, [the issues here] are subject to being properly and more appropriately resolved by the legislative and executive branches working together, all parties being sensitive to each others' constitutional prerogatives and statutory obligations. The effort by this Court to encourage all concerned parties to undertake a review of this public policy in light of the subsequent growth and modern complexity of state government deserves the prompt and thorough attention of all affected parties-hopefully in a spirit of cooperation and mutual respect.

The oft-heard call for judicial restraint has clearly been heeded here. Indeed, the Court's opinion is both a call for the parties to amicably resolve these issues outside the judicial system and a declaration of confidence that our counterparts in the legislative and executive branches will do so-for the long-term good of the state.

Kaufman, Judge, sitting by temporary assignment.

I concur with the Court's opinion and recognize the arduous task that was set before the Court with this case. Specifically, I fully concur with the Court's finding that the Attorney General is the chief legal counsel for the state. The Court's opinion strove to balance the everyday workings of governmental entities, the framework of our constitution and current legislation. The Court wanted to strike a balance between all parties and create an atmosphere where the parties could resolve and remaining issues outside the judicial forum.

However, in striking a fair balance, I feel three unresolved issues remain: the constitutionality of governmental entities hiring outside counsel despite the clear Legislative language set forth in West Virginia Code § 5-3-1 (1994); the lack of disclosure and accountability of outside attorneys representing the state's interest; and the erosion of the Attorney General's role as chief legal officer as a result of the cumulative effect of all the statutes that allow executive agencies to independently hire outside counsel.

STATE EX REL. DISCOVER FINANCIAL SERVICES, INC. v. NIBERT,
231 W.Va. 227, 744 S.E.2d 625 (2013).

DAVIS, Justice:

This matter involves two consolidated petitions for writs of prohibition filed under the original jurisdiction of this Court. The petition filed in Case No. 13–0086 was brought by the defendants in seven consolidated cases pending before the Circuit Court of Mason County; and the petition in Case No. 13–0102 was filed by GlaxoSmithKline, a defendant below, from a case pending before the Circuit

Court of Wayne County.[2] The petitioners seek a writ of prohibition to prevent enforcement of circuit court orders that denied their motions to disqualify private attorneys from representing the Respondent, the State of West Virginia,[3] as special assistant attorneys general. The essence of the Petitioners' contentions is that the special assistant attorneys general should be disqualified because their fee arrangements (1) violate the West Virginia Governmental Ethics Act; (2) violate Rule 1.7(b) of the West Virginia Rules of Professional Conduct; and (3) the Attorney General lacks authority to appoint special assistant attorneys general. After a careful review of the briefs and the record submitted in this case, and listening to the arguments of the parties, we deny the writs.

FACTUAL AND PROCEDURAL BACKGROUND

The factual and procedural background for each of the consolidated cases will be set forth separately.

A. Petitioners in Case No. 13–0086

The record in Case No. 13–0086 indicates that civil complaints were filed against each of the Petitioners by the Attorney General,[6] on behalf of the State, in August 2011. The complaints alleged that the Petitioners violated the General Consumer Protection provisions of Article 6 of the West Virginia Consumer Credit and Protection Act[9] by engaging in unfair, deceptive, and unconscionable practices designed to trick consumers into paying for credit card service plans.

On April 20, 2012, the Petitioners filed a joint motion with the circuit court seeking to disqualify the special assistant attorneys general. The motion alleged that the appointment of special assistant attorneys general violated the West Virginia Governmental Ethics Act and the Rules of Professional Conduct, and that the Attorney General did not have authority to make such appointments. A hearing on the motion was held on July 16, 2012. On August 15, 2012, the trial court entered an order denying the motion to disqualify. The Petitioners subsequently filed the instant petition for a writ of prohibition.

B. Petitioner in Case No. 13–0102

The record in Case No. 13–0102 indicates that a civil complaint was filed against the Petitioner, GlaxoSmithKline, by the Attorney General, on behalf of the State, in March 2012. The complaint alleged that the Petitioner violated the General Consumer Protection provisions of Article 6 of the West Virginia Consumer Credit and Protection Act by engaging in unfair and deceptive acts and practices and by employing unfair methods of competition in marketing the diabetes drug Avandia. The complaint also alleged the Petitioner engaged in conduct that violated the West Virginia Fraud and Abuse in the Medicaid Program Act; the West Virginia Public Employees Insurance Act; and the West Virginia Insurance Fraud Prevention Act, and set out other causes of action that included strict liability, breach of warranty, and unjust enrichment.

On August 10, 2012, the Petitioner filed a motion with the circuit court seeking to disqualify the special assistant attorneys general. The motion alleged that the appointment of special assistant attorneys general violated the West Virginia Governmental Ethics Act and the Rules of Professional Conduct, and that the Attorney General did not have authority to make such appointments. On

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[2]Unless otherwise indicated, all of the defendants below will be referred to collectively as the "Petitioners.

[3]The Petitioners have labeled the trial judges as the Respondents in these matters. However, for purposes of this opinion, we will refer to the State as the Respondent, as it is the plaintiff below in each of these cases.

September 28, 2012, the trial court entered an order denying the motion to disqualify. The Petitioner subsequently filed the instant petition for a writ of prohibition. . . .

III. DISCUSSION

As previously mentioned, the Petitioners seek to have this Court determine that the special assistant attorneys general should be disqualified because their fee arrangements violate the West Virginia Governmental Ethics Act and the Rules of Professional Conduct, and because the Attorney General lacks authority to appoint special assistant attorneys general. We will address each issue separately.

[The Court held that special attorneys general agreements did not violate either the Ethics Act or the Rules of Professional Conduct.] . . .

C. The Attorney General's Authority to Appoint Special Assistant Attorneys General

The final issue raised by the Petitioners is that the Attorney General lacks authority to appoint special assistant attorneys general. The Petitioners support this argument by asserting that, under Article VII, Section 1 of the West Virginia Constitution, the Legislature has been given exclusive authority to set out the duties of the Attorney General but that the Legislature has not granted the Attorney General the authority to appoint special assistant attorneys general. Further, the Petitioners contend that, by virtue of Article VII, Section 1, the Attorney General does not have common law authority to appoint special assistant attorneys general. Finally, it is argued by the Petitioners that, even if the Attorney General had authority to appoint special assistant attorneys general, he did not have authority to enter a fee arrangement with them. . . .

We begin by observing that Article VII, Section 1 of the West Virginia Constitution establishes the creation of the Office of Attorney General:

> The executive department shall consist of a governor, secretary of state, auditor, treasurer, commissioner of agriculture and *attorney general,* who shall be ex officio reporter of the court of appeals. Their terms of office shall be four years and shall commence on the first Monday after the second Wednesday of January next after their election. They *shall reside at the seat of government during their terms of office, keep there the public records, books and papers pertaining to their respective offices and shall perform such duties as may be prescribed by law.*

(Emphasis added). *See* Syl. pt. 2, *State ex rel. McGraw v. Burton,* 212 W.Va. 23, 569 S.E.2d 99 (2002) ("Pursuant to Article VII, Section 1 of the West Virginia Constitution, the Attorney General of the State of West Virginia is the State's chief legal officer, which status necessarily implies having the constitutional responsibility for providing legal counsel to State officials and State entities."). It is obvious that Article VII, Section 1 does not expressly grant nor deny the Attorney General the authority to appoint special assistant attorneys general. Put simply, the constitutional provision is silent on the issue.

Under Article VII, Section 1, the Attorney General is required to be the reporter of the opinions of this Court, reside at the seat of government, and maintain the office's public records, books, and papers. The last clause of Article VII, Section 1, "shall perform such duties as may be prescribed by law," expressly authorizes the Legislature to establish duties of the Attorney General's office.

The Petitioners note that the Legislature has expressly provided for the appointment of assistant attorneys general and the method of their payment under W. Va. Code § 5–3–3 (1961) (Repl.Vol.2011).

However, according to the Petitioners, this statute does not authorize the appointment of special assistant attorneys general. Further, the Petitioners contend that, under this Court's decision in *Manchin v. Browning,* 170 W.Va. 779, 296 S.E.2d 909 (1982), the Attorney General does not have common law authority to appoint special assistant attorneys general. We will examine both contentions separately below.

1. The Attorney General's common law authority. The issue of the common law authority of the Attorney General was first addressed by this Court in *State v. Ehrlick,* 65 W.Va. 700, 64 S.E. 935 (1909). The decision in *Ehrlick* addressed the issue of whether a county prosecutor could file a petition for an injunction in the name of the State. The prosecutor filed the petition to enjoin the defendants from carrying on a horse racing gambling operation. After a circuit court granted the prosecutor the relief requested, the defendants appealed. The defendants contended on appeal that only the Attorney General had authority to bring the civil petition in the name of the State. This Court agreed with the defendants. In discussing the powers of the Attorney General and prosecutor, the opinion noted that the Attorney General possessed common law powers. While not dispositive for reversing the trial court's injunction, the opinion held in Syllabus point 2 that, "[a]s the chief law officer of the state, the Attorney General is clothed and charged with all the common-law powers and duties pertaining to his office, except in so far as they have been limited by statute." Syl. pt. 2, *Ehrlick,* 65 W.Va. 700, 64 S.E. 935.

Ehrlick's recognition that the Attorney General had common law powers remained unassailable law until the decision in *Manchin v. Browning,* 170 W.Va. 779, 296 S.E.2d 909 (1982). In *Manchin,* the Secretary of State filed a petition for a writ of mandamus with this Court seeking to compel the Attorney General to represent the Secretary of State's office in a federal litigation. While the case was pending, the federal lawsuit settled. However, the Court determined that it would address the issue of the duty of the Attorney General to represent State officials. In resolving this issue, the opinion in *Manchin* ventured off into sweeping dicta that called into question whether the Attorney General had common law powers.

The decision in *Manchin* relied upon the status of the Office of Attorney General in Virginia, prior to the start of the Civil War, in order to conclude that West Virginia's Attorney General did not have common law powers. The opinion in *Manchin* said the following regarding the Attorney General's status in pre-Civil War Virginia:

> As a consequence of the American Revolution, the executive powers of the Crown office of Attorney General underwent substantial modification in Virginia. The first constitution of Virginia, adopted June 29, 1776, recognized the Attorney General as a judicial officer, thereby removing him from the executive department. He was appointed by and served at the pleasure of the General Assembly and was commissioned by the Governor. In addition, the Attorney General was specifically prohibited from holding elected office in either the legislative or executive department. This constitution continued in force until superseded by an amended constitution, submitted by the General Assembly on January 15, 1830. The provisions of the amended constitution relating to the office of Attorney General were altered little. The Attorney General remained an officer of the judicial department, was appointed and commissioned in the same manner and continued to serve at the pleasure of the General Assembly.
>
> The 1850 Virginia Constitution made some sweeping changes in the office. It provided for the

> first time for the election of the Attorney General by the voters of the Commonwealth and established a definite term of office. The Attorney General continued to serve as an officer of the judiciary, however, and the amended constitution provided "[h]e ... shall perform such duties and receive such compensation as may be prescribed by law, and be removable in the manner prescribed for the removal of judges." Va. Const. of 1850, art. VI, § 22.

Manchin, 170 W.Va. at 784, 296 S.E.2d at 914 (additional citation omitted). As a result of Virginia's Office of Attorney General being a part of the judiciary, the opinion in *Manchin* made an overly broad conclusion that Virginia's Attorney General did not have common law powers.

After concluding that the Attorney General of Virginia did not have common law powers, *Manchin* reasoned that the wording of West Virginia's Constitution, Article VII, Section 1, had to be interpreted as not allowing West Virginia's Attorney General to have common law powers. The convoluted reasoning of *Manchin* was as follows:

> The plain language of this constitutional provision, [Article VII, Section 1,] when viewed against the historical backdrop of the development of the office of Attorney General in the Virginias, leads us to conclude that the Attorney General of West Virginia does not possess the common law powers attendant to that office in England and in British North America during the colonial period. By removing the traditional executive office of Attorney General to the judicial department and establishing a tri-partite state government, with separate legislative, executive and judicial departments, the framers of the first Virginia Constitution in effect abrogated any common law executive powers the holder of that office may have had. The executive function formerly exercised by the Attorney General at common law was extinguished, and for the next 96 years he remained a minor judicial officer, prohibited by the separation of powers from wielding the common law legislative and executive powers traditional to the office in Great Britain.
>
> By the provisions of our present constitution, the Attorney General is once again an officer of the executive department. However, his return to the executive department did not revive the common law powers of the office. The people of West Virginia specifically expressed their intent that the Attorney General should not exercise those powers by providing that he "shall perform such duties as may be prescribed by law." Under settled rules of construction, the word "shall" when used in constitutional provisions is ordinarily taken to have been used mandatorily, and the word "may" generally should be read as conferring both permission and power. The phrases "prescribed by law" and "provided by law" mean prescribed or provided by statutes. The plain effect of the provision is to limit the powers of the Attorney General to those conferred by law laid down pursuant to the constitution. Consequently we conclude that the powers and duties of the Attorney General are specified by the constitution and by rules of law prescribed pursuant thereto. We hereby overrule *State v. Ehrlick, supra,* insofar as it conflicts with this view.

Manchin, 170 W.Va. at 785, 296 S.E.2d at 915 (citations omitted).

Before turning to the decision of this Court that modified *Manchin's* denial of inherent powers to the Attorney General, we pause to note that *Manchin* appears to have incorrectly reported that Virginia's pre-Civil War Attorney General did not have common law powers. The 1808 Virginia Supreme Court

opinion in *Dew v. Sweet Springs District Court Judges,* 13 Va. 1 (1808), touched upon the issue of the Attorney General's inherent common law powers.

In *Dew,* the appellant was appointed to fill a vacancy as clerk of a district court. However, he was not allowed to take office because he failed to post the bond that was required before the position could be officially filled. As a consequence, the appellee was appointed to fill the vacancy. The appellant filed a petition for mandamus with a trial court seeking to remove the appellee from the office of court clerk. The trial court denied the petition upon finding mandamus was not the proper remedy. In the appeal, the Virginia Supreme Court cited to arguments suggesting an "information in the nature of a quo warranto" was the proper filing instrument for the appellant to obtain relief. The arguments contended that an information was a common law instrument and that only the Attorney General had common law authority to file the same. However, the Supreme Court determined that an information was not a proper instrument in the case because it could be filed only in a criminal prosecution, and no one had committed a crime regarding the clerk's vacancy:

> But it is objected that the information is not given by the statute, but existed at common law. It certainly existed at common law, but only as a proceeding on the criminal side: it was first given to the party, as a civil remedy, by the statute....
>
> The Attorney–General, at common law, is not bound to file an information when a criminal act has not been committed. Now what crime has [the appellee] been guilty of in accepting an office before declared vacant by the Judges, and the exercise of which was necessary to the public good? ....
>
> On general principles, therefore, it would seem to be more proper, (or rather less objectionable,) to turn over the party to his private and more speedy remedy under the statute, than to the common law information, which he cannot use without the intervention of the prerogative, or the permission of the Attorney–General, and the proceedings on which are, perhaps, more dilatory than in the other case.

Dew, 13 Va. at 12–23.

The decision in *Dew* is important for one purpose. The decision illustrates, contrary to *Manchin,* that the court in *Dew* believed that Virginia's Attorney General had common law powers prior to the Civil War. Further, under the current laws of the State of Virginia, the Attorney General is recognized as having certain common law powers. *See, e.g., Commonwealth ex rel. Beales v. JOCO Found.,* 263 Va. 151, 558 S.E.2d 280, 284 (2002) (recognizing Attorney General has common law authority over certain nonprofit health care litigation); *Tauber v. Commonwealth,* 255 Va. 445, 499 S.E.2d 839, 842 (1998) ("This Court long ago recognized the common law authority of the Attorney General to act on behalf of the public in matters involving charitable assets." (citing *Clarke v. Oliver,* 91 Va. 421, 22 S.E. 175 (1895))).

The correctness of *Manchin's* wholesale rejection of inherent powers in the Office of Attorney General was challenged and modified in *State ex rel. McGraw v. Burton,* 212 W.Va. 23, 569 S.E.2d 99 (2002). In *Burton,* the Attorney General filed a petition for a writ of mandamus with this Court seeking to compel State agencies to use only private legal counsel approved by the Attorney General and to make all in-house State agency lawyers employees of the Attorney General. This Court initially noted that the respondents, the parties opposed to the Attorney General's petition, contended that, as

a result of the "as may be prescribed by law" language in Article VII, Section 1, "the Legislature has essentially plenary and unfettered discretion to, through statutory action, delineate, limit, or even effectively eliminate the Attorney General's role in providing legal counsel and representation to State entities." *Burton,* 212 W.Va. at 29, 569 S.E.2d at 105. The position of the respondents was rejected:

> We believe it is clear ... that there are certain core functions of the Office of Attorney General that are inherent in the office, of which the Office of Attorney General may not be deprived, and which may not be transferred to or set up in conflict with other offices. The suggestion by some of the respondents that the Legislature possesses unfettered discretion to define, delineate, and limit the duties of the Attorney General is wholly at odds with the historical and well-settled understanding of the constitutional role of the Attorney General. Accordingly, we hold that pursuant to Article VII, Section 1 of the West Virginia Constitution, the Attorney General of the State of West Virginia is the State's chief legal officer, which status necessarily implies having the constitutional responsibility for providing legal counsel to State officials and State entities.

Burton, 212 W.Va. at 31–32, 569 S.E.2d at 107–08.

The next issue taken up by *Burton* was whether the Legislature could, as held in *Manchin,* strip the Office of Attorney General of all of its inherent powers. The decision determined that under the separation of powers doctrine the Legislature could not deny the Office of Attorney General all of its inherent powers. *Burton* found that "[o]ne aspect [of the separation of powers doctrine] is the constitutional inability of the Legislature to define the powers and duties of the Office of Attorney General ... so as to deprive the Office of Attorney General ... of the inherent functions and purposes thereof." *Burton,* 212 W.Va. at 33, 569 S.E.2d at 109. *Burton* concluded that "no statute, policy, rule, or practice may constitutionally operate, alone or cumulatively, to limit, reduce, transfer, or reassign the duties and powers of the Office of the Attorney General in such a fashion as to prevent that office from performing its inherent constitutional functions." *Burton,* 212 W.Va. at 41, 569 S.E.2d at 117.[46]

In sum, under *Burton,* the Legislature does not have the unfettered discretion or authority recognized in *Manchin* to nullify all of the inherent powers of the Office of Attorney General. Of course, one of the Attorney General's inherent powers expressly nullified in *Manchin* was the common law powers of the Office. *See CSWS, L.L.C. v. Village of Bedford Park,* No. 1–11–3814, 2012 WL 6861371, at *4 (Ill.App.Ct. Dec. 31, 2012) ("[T]he Attorney General has inherent common law powers[.]"); *Dunn v. Schmid,* 239 Minn. 559, 60 N.W.2d 14, 17 n. 1 (1953) ("[T]he attorney general,

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[46]The decision in *Burton* granted the requested writ, as moulded, to reflect the following:

> [I]n all instances when an executive branch or related State entity is represented by counsel before a tribunal, the Attorney General shall appear upon the pleadings as an attorney of record; however, this requirement does not bar other counsel from also appearing and acting in a legal capacity for the State entity. The Attorney General additionally has the right to appear as an intervenor as Attorney General on behalf of the State in all proceedings where the interest of the State or a State entity is at issue, to assert the Attorney General's view of the law on behalf of the State. To maintain a proper constitutional balance, however, this right must always be exercised with restraint and due respect by the State entity and the Attorney General.

Burton, 212 W.Va. at 41, 569 S.E.2d at 117 (footnote omitted).

in addition to his powers expressly conferred upon him by statute, is possessed of extensive common-law powers which are inherent in his office."). *Manchin* held that such powers did not exist because of Virginia's position on the issue, and because our Legislature was given unfettered discretion to determine the duties and powers of the Office. Insofar as we have shown that *Manchin* incorrectly interpreted the common law powers of Virginia's Attorney General, and *Burton* has rejected *Manchin's* holding that the Attorney General has no inherent authority, we make clear and once again expressly hold that the Office of Attorney General retains inherent common law powers, when not expressly restricted or limited by statute.[47] The extent of those powers is to be determined on a case-by-case basis. Insofar as the decision in *Manchin v. Browning,* 170 W.Va. 779, 296 S.E.2d 909 (1982), is inconsistent with this holding, it is expressly overruled.

We are mindful that the doctrine of stare decisis instructs us to be cautious in deciding whether to overrule precedent. "[T]he doctrine of *stare decisis* requires this Court to follow its prior opinions." *State Farm Mut. Auto. Ins. Co. v. Rutherford,* 229 W.Va. 73, 83, 726 S.E.2d 41, 51 (2011) (Davis, J., concurring, in part, and dissenting, in part). In Syllabus point 2 of *Dailey v. Bechtel Corp.,* 157 W.Va. 1023, 207 S.E.2d 169 (1974), we held that "[a]n appellate court should not overrule a previous decision ... without evidence of changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of the doctrine of stare decisis, which is to promote certainty, stability, and uniformity in the law." . . .

In this proceeding, "[o]ur decision to depart from stare decisis is based upon a 'serious judicial error' in the [*Manchin*] opinion." *State v. Mullens,* 221 W.Va. 70, 91, 650 S.E.2d 169, 190 (2007) (footnote omitted). Our decision to overrule *Manchin* is based upon the clear language of our Constitution. In a conclusory fashion, *Manchin* indicated that the phrase "as prescribed by law," contained in Article VII, Section 1, meant that the only powers the Office of Attorney General possessed were those expressly granted by the Legislature. Such an interpretation is inconsistent with both the generally recognized meaning attributed to the phrase "as prescribed by law" and Article VIII, Section 13 of our Constitution.

First, contrary to *Manchin's* interpretation of the clause "as prescribed by law," a Virginia court has recognized that, "[i]n most states where the constitution says that the attorney general's duties shall be 'as prescribed by law,' this is taken to mean that he has such common law powers as have not been specifically repealed by statute[.]" *Terry v. Wilder,* Chancery No. HC–1307–2, 1992 WL 885093, at *8 (Va.Cir.Ct., City of Richmond Dec. 29, 1992). *See People ex rel. Devine v. Time Consumer Mktg., Inc.,* 336 Ill.App.3d 74, 270 Ill.Dec. 202, 782 N.E.2d 761, 765 (2002)[.] . . . Second, pursuant to Article VIII, Section 13 of the West Virginia Constitution, the following is stated regarding abrogating the common law of this State:

> Except as otherwise provided in this article, such parts of the common law, and of the laws of this State as are in force on the effective date of this article and are not repugnant thereto, shall be

[47]A majority of jurisdictions also have held that the Office of Attorney General retains inherent common law powers. [Citations omitted.]

and continue the law of this State until altered or repealed by the legislature.[48]

(Footnote added). We have held that "Article VIII, Section 13 of the Constitution of West Virginia authorizes the Legislature to enact statutes that abrogate the common law[.]" *MacDonald v. City Hosp., Inc.,* 227 W.Va. 707, 715, 715 S.E.2d 405, 413 (2011). We equally have recognized that "[t]he common law, if not repugnant of the Constitution of this State, continues as the law of this State unless it is altered or changed by the Legislature." *State ex rel. Van Nguyen v. Berger,* 199 W.Va. 71, 75, 483 S.E.2d 71, 75 (1996) (internal quotations and citation omitted). *See Robinson v. Charleston Area Med. Ctr., Inc.,* 186 W.Va. 720, 727, 414 S.E.2d 877, 884 (1991) ("[T]he general authority of the legislature to alter or repeal the common law is expressly conferred by article VIII, section 13 of the *Constitution of West Virginia.*" (citation and footnote omitted)). Thus, under Article VIII, Section 13, the Legislature can expressly repeal specific aspects of the Attorney General's inherent common law powers. However, contrary to *Manchin's* cavalier treatment of the subject, the " common law is not to be construed as altered or changed by statute, unless legislative intent to do so be plainly manifested." *Berger,* 199 W.Va. at 75, 483 S.E.2d at 75 (internal quotations and citation omitted). The Legislature has not enacted any general statute that attempts to strip the Office of Attorney General of all its inherent common law powers.

In the final analysis, the authority of the Office of Attorney General "comes from three sources—the constitution of this state; the legislature; and the common law, from which emanates some of its so-called inherent power." *State ex rel. McGraw v. Telecheck Servs., Inc.,* 213 W.Va. 438, 443, 582 S.E.2d 885, 890 (2003).

2. The power of the Attorney General to appoint special assistant attorneys general. The Petitioners contend that the lower courts were wrong in holding that W. Va. Code § 5–3–3 (1961) (Repl.Vol.2011) authorized the Attorney General to appoint special assistant attorneys general and provided a basis for the method of payment chosen. As noted previously, "[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syl. pt. 5, *State v. General Daniel Morgan Post No. 548, V.F.W.,* 144 W.Va. 137, 107 S.E.2d 353 (1959).

The full language of W. Va. Code § 5–3–3 provides as follows:

> The attorney general may appoint such assistant attorneys general as may be necessary to properly perform the duties of his office. The total compensation of all such assistants shall be within the limits of the amounts appropriated by the Legislature for personal services. All assistant attorneys general so appointed shall serve at the pleasure of the attorney general and shall perform such duties as he may require of them.
>
> All laws or parts of laws inconsistent with the provisions hereof are hereby amended to be in harmony with the provisions of this section.

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[48]*See* W. Va. Code § 2–1–1 (1923) (Repl.Vol.2011) ("The common law of England, so far as it is not repugnant to the principles of the constitution of this state, shall continue in force within the same, except in those respects wherein it was altered by the general assembly of Virginia before the twentieth day of June, eighteen hundred and sixty-three, or has been, or shall be, altered by the Legislature of this state.").

W. Va. Code § 5–3–3. It is clear that W. Va. Code § 5–3–3 does not mention "special" assistant attorneys general; the statute refers only to assistant attorneys general. In deciding whether the statute was intended to include special assistant attorneys general, we will trace the relevant history of the statute. *State v. Yoak,* 202 W.Va. 331, 333, 504 S.E.2d 158, 160 (1998) ("We begin by interjecting a history of the amendments to the statute which is controlling in this case."); *State v. D.D.,* 172 W.Va. 791, 794, 310 S.E.2d 858, 860 (1983) ("We begin by examining the ... history of legislative amendments to our child welfare laws[.]").

West Virginia Code § 5–3–3 was originally enacted in 1909. The relevant language of the original version of the statute stated the following:

> [H]e [the Attorney General] is hereby authorized to appoint two assistants to serve at his pleasure, ... and who may perform any of the duties of the attorney general.

W. Va. Code ch. 48, § 2a (1909). The original version of the statute expressly authorized the appointment of assistant attorneys general, but did not mention special assistant attorneys general.[50] The statute was amended in 1937 to read, in relevant part, as follows:

> The attorney general may appoint four assistants to serve at his pleasure and to perform such duties as he may require of them.... And upon finding of the necessity thereof by the governor and attorney general, the attorney general may *appoint not more than one special assistant* to serve at his pleasure and to perform such duties as he may require of him for such time as the governor and attorney general determine the necessity to continue[.]

W. Va. Code ch. 85, § 3 (1937) (emphasis added). It is clear that under the 1937 version of W. Va. Code § 5–3–5, the Legislature expressly authorized the appointment of a special assistant attorney general, in addition to the appointment of assistant attorneys general.

Express legislative authority to appoint a special assistant attorney general remained part of the statute until 1953. In 1953, the Legislature amended the statute and removed the provision concerning the appointment of a special assistant attorney general. *See* W. Va. Code ch. 11, § 3 (1953). The current version of the statute, as set out above, does not include a provision for the appointment of a special assistant attorney general. The historical development of the statute invokes the Latin doctrine *inclusio unius est exclusio alterius, i.e.,* one is the exclusion of the others. This doctrine instructs " 'courts to exclude from operation those items not included in the list of elements that are given effect expressly by statutory language.' " *Bevins v. West Virginia Office of Ins. Comm'r,* 227 W.Va. 315, 327, 708 S.E.2d 509, 521 (2010) (quoting *State ex rel. Roy Allen S. v. Stone,* 196 W.Va. 624, 630 n. 11, 474 S.E.2d 554, 560 n. 11 (1996)). Thus, it is clear from historical analysis that the Legislature did not intend for the current version of W. Va. Code § 5–3–3 to authorize the Attorney General to appoint special assistant attorneys general. The Legislature knew how to expressly include such authorization, as it did so in 1937.

Even though the Attorney General cannot rely upon W. Va. Code § 5–3–3 as authority to appoint special assistant attorneys general, we do not find any language in the statute which expressly prohibits

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[50]It should be noted that although it appears that the Attorney General did not have express legislative authority to appoint assistant attorneys general until 1909, it does appear that prior to that time the Attorney General exercised his inherent common law authority to appoint assistant attorneys general. *See Ex parte Faulkner,* 1 W.Va. 269 (1866) (discussing the position of assistant attorney general in the case).

the Attorney General from making such under that Office's inherent common law authority. A similar issue was addressed by the Missouri Court of Appeals in *Kinder v. Nixon,* No. 56802, 2000 WL 684860 (Mo.Ct.App. May 30, 2000), *transferred sub nom. State ex rel. Nixon v. American Tobacco Co., Inc.,* 34 S.W.3d 122 (Mo.2000). The court in *Kinder* found that Missouri's statute (discussed in *Nixon, infra*) authorized the Attorney General to appoint only assistant attorneys general, not special assistant attorneys general. However, the court found that the limitation imposed by the statute did not limit the Attorney General's inherent common law authority. The court held that "the Attorney General has common law authority to appoint special assistants and nothing in [the statute] either expressly or by reasonable intendment forbids the exercise of that power." *Kinder,* 2000 WL 684860, at *11. We agree with *Kinder* and so hold that the Attorney General has common law authority to appoint special assistant attorneys general.

The Petitioners also contend that W. Va. Code § 5–3–3 restricts compensation of assistant attorneys general to appropriations by the Legislature; therefore, they argue, the fee arrangement with the special assistant attorneys general is invalid. A similar argument was made in *State ex rel. Nixon v. American Tobacco Co., Inc.,* 34 S.W.3d 122 (Mo.2000). . . . One of the issues arising out of the litigation was whether the statute authorizing payment of assistant attorneys general also authorized the contingency fee arrangement made with the special assistant attorney general. The statute stated, in relevant part, the following:

> The attorney general is hereby authorized to appoint such assistant attorneys general as may be necessary to properly perform the duties of his office and shall fix the compensation of such assistants within the limits of the amount appropriated by the general assembly.

Mo. Stat. § 27.020.1. The Missouri Supreme Court in *Nixon* found that, notwithstanding the statute, the Attorney General had authority to enter into the fee arrangement:

> It is generally held in this country that the office of attorney general is clothed, in addition to the duties expressly defined by statute, with all the powers pertaining thereto under the common law. A grant by statute of the same or other powers does not operate to deprive him of those belonging to the office under the common law, unless the statute, either expressly or by reasonable intendment, forbids the exercise of powers not thus expressly conferred....
>
> The statute that allows for the attorney general to hire assistants and to pay them from appropriations does not prohibit the attorney general in the exercise of his common law power from entering into contingency fee arrangements or agreements that otherwise provide for civil defendants sued by the State to pay attorney fees directly to the State's outside counsel. In the absence of a statute to the contrary, we conclude that the attorney general does have the power to enter into this type of fee arrangement with his special assistant attorneys general.

Nixon, 34 S.W.3d at 136 (internal quotations and citations omitted).

Insofar as W. Va. Code § 5–3–3 does not expressly prohibit the Attorney General from making alternative fee arrangements with special assistant attorneys general, we now hold that the Attorney General has common law authority to provide for compensation to be paid to special assistant attorneys general through a court-approved award of attorney's fees taken directly from the losing opponent in the litigation.

We reject outright the Petitioners' contention that such an award by a trial court must be capped at the level established by the Legislature pursuant to W. Va. Code § 5–3–3. The amount of any fee award is discretionary with the trial judge. However, we wish to make clear that we are not addressing the appropriateness of awarding attorney's fees to special assistant attorneys general directly from any actual monetary judgment award to the State because such a contingent fee agreement is not at issue in this case. We also note that the Legislature attempted to address the issue of contingency fee payment to special assistant attorneys general during the 2013 Regular Session of the West Virginia Legislature, but such proposals failed to be approved.

IV. CONCLUSION

In this proceeding, the Petitioners, defendants in two consolidated petitions for writs of prohibition, have sought to have the Respondent's special assistant attorneys general disqualified. The most glaring deficiency in the arguments made by the Petitioners is that there was not one allegation that the special assistant attorneys general have actually engaged in any improper conduct that has caused an injury. The briefs set out a plethora of allegations that involve remotely possible harmful conduct. We have not and will not interfere with or disqualify a party's counsel merely because of allegations of improper conduct that has not occurred. To allow a mere possibility of improper injurious conduct to be the standard for disqualification would result in parties constantly seeking to disqualify opposing counsel because of phantom injuries. The law of disqualification cannot rest on the imagination of opposing counsel.

This case has called upon the Court to revisit its holding in *State ex rel. McGraw v. Burton,* 212 W.Va. 23, 569 S.E.2d 99 (2002), that the Office of Attorney General has inherent core functions that cannot be totally extinguished. In revisiting *Burton,* we have determined that this Court improperly held in *Manchin v. Browning,* 170 W.Va. 779, 296 S.E.2d 909 (1982), that the Office of Attorney General did not retain inherent common law powers. As a consequence, we have found it necessary to overrule *Manchin.*

In the final analysis, it is the common law authority of the Attorney General that permitted that Office to appoint the special assistant attorneys general in these cases and to provide for a method of possible recovery of attorney's fees. Thus, while we find the Circuit Courts of Mason County and Wayne County relied upon the wrong reasons for rejecting the motions to disqualify the special assistant attorneys general, those courts nevertheless were correct in denying the motions.
Accordingly, . . . Writs Denied.

Justice KETCHUM, deeming himself disqualified, did not participate in the decision of this case.

Judge FOX, sitting by temporary assignment.

NOTE

State ex rel. Morissey v. West Virginia Office of Disciplinary Counsel, 234 W. Va. 238, 764 S.E.2d 769 (2014), reaffirmed *Nibert*'s holding but also circumscribed the power of the Attorney General. The case came to the Court as a petition for a writ of prohibition against the Disciplinary Counsel seeking to stop enforcement of, and to overturn, an advisory opinion of that office that the Attorney General

lacked the power to prosecute criminal cases. The Court denied the writ. Tossing aside serious justiciability obstacles, the Court proceeded to the merits. It conceded that the Attorney General's common law powers included the authority to undertake criminal prosecutions but nevertheless concluded that the enactment of Article IX, § 1 and its creation of the office of county prosecutor had terminated the Attorney General's common law criminal powers. Thus, the Attorney General could only prosecute criminal cases that he or she is specifically authorized by statute to undertake.

D. Gubernatorial and Other Vacancies

Read Article VII, §§ 16-17.

[Extracted from ROBERT M. BASTRESS, JR., THE WEST VIRGINIA STATE CONSTITUTION 235-36 (2nd ed., Oxford University Press, 2016).]

Section 16 sets forth what shall occur in case a governor cannot finish his or her term or becomes incapacitated and establishes a line of succession. The section has its roots in Article V, § 9 of the Virginia Constitution of 1851, which provided that in case of a vacancy in the governorship, "said office, with its compensation, shall devolve upon the lieutenant governor." The 1863 framers decided they did not want to have a lieutenant governor so they substituted the president of the senate for the governor: "the said office with its compensation, duties and authority, shall devolve upon the President of the Senate[.]" 1863 Const., Art. V, § 6. Clearly, under that provision, the senate president moved up to become the governor, as would a lieutenant governor. The change in 1872 to the current language was probably in response to an intervening experience under the 1863 Constitution. On February 26, 1869, Governor Arthur Boreman resigned to assume a seat in the United States Senate. He had six days left in his term. Pursuant to Article V, § 6, the Senate President, Daniel Farnsworth, was then sworn in as Governor. (Inauguration of the new governor at the time took place on March 4th, and the governor's term was two years.) Farnsworth did not, however, resign from his Senate seat or as Senate President. One can surmise that Farnsworth did not want to surrender his Senate position to serve as Governor for six days. For those six days, the State was in violation of Article IV of the 1863 Constitution, which required separation of powers among the three branches of state government and provided that "[n]o person shall be invested with or exercise the powers of more than one of them at the same time." The change in 1872 to have the senate president merely "act" as governor was, then, apparently an attempt to avoid the dilemma between creating the separation of powers issue and forcing the Senate President to resign as a senator to complete a short gubernatorial term.

This played out when, in November, 2010, Governor Joe Manchin resigned less than two years into his term to assume a seat in the U.S. Senate, which resulted in the case that follows and the Court's first significant explication of § 16.

Section 17 provides for the governor to fill by appointment any vacancy that occurs in any of the elected constitutional offices. Persons so appointed continue in office until their successors have been elected and qualified under terms set by the legislature. See W. Va. Code § 3-10-3 (providing for an

election to fill a vacancy if more than two years and six months remain on the unexpired term). Two amendments to section 17, one in 1902 and the other in 1957, adjusted the list of the elected constitutional officers to coincide with changes made to the list in sections 1 and 2 of Article VII.

The section's oddly placed second sentence requires certain officers in the executive department and public institutions to give to the governor semiannual accounts of money they have received and disbursed. Anyone who intentionally files a false report commits perjury.

STATE EX REL. WEST VIRGINIA CITIZENS ACTION GROUP v. TOMBLIN,
227 W.Va. 687, 715 S.E.2d 36 (2011).

Benjamin, Justice:

In this original jurisdiction action, the petitioners seek a writ of mandamus compelling the respondents to call a special election as soon as practicable in 2011 to fill the vacancy in the office of governor created on November 15, 2010, when former Governor Joe Manchin, III, resigned from that office to assume the office of United States Senator. Petitioners herein are the West Virginia Citizen Action Group, Thornton Cooper, and Kenny Perdue, as President of the West Virginia AFL-CIO. Respondents are Earl Ray Tomblin as Senate President and in his capacity in fulfilling the constitutional role to act as governor during the current vacancy, Richard Thompson as Speaker of the House of Delegates, and Natalie E. Tennant as Secretary of State.

After careful consideration of the parties' pleadings and oral arguments, as well as the briefs of *amici curiae*, and the applicable law, and for the reasons that follow, this Court denies the writ of mandamus requested by the petitioners with regard to Respondent Thompson and Respondent Tennant. We grant the petition with regard to Respondent Tomblin, and we direct Respondent Tomblin, in fulfilling his role to act as governor during the current vacancy, to forthwith issue a proclamation fixing a time for a new statewide election for governor consistent with *W. Va. Const*., art. VII, § 16 and W. Va. Code § 3-10-2 (1967).

I.

FACTS

The facts of this case as represented by the parties are brief and undisputed. Former Governor Joe Manchin, III, was elected to a second four-year term of office at the general election on November 4, 2008. That term began on January 19, 2009, and is scheduled to end on January 14, 2013.

On June 28, 2010, United States Senator Robert C. Byrd passed away. A special election to fill the Senate vacancy created as a result of Senator Byrd's death was held on November 2, 2010, and former Governor Manchin was elected to fill the Senate vacancy.

On November 15, 2010, former Governor Manchin resigned as governor and was sworn in as United States Senator. His resignation created a vacancy in the office of governor. On the same day that former Governor Manchin resigned, State Senate President and Respondent herein, Earl Ray Tomblin, began to act as governor pursuant to *W. Va. Const*., art. VII, § 16 and W. Va. Code § 3-10-2.

A question thereafter arose with regard to when a new statewide election must be held under our law to fill the vacancy in the office of governor. The next general election will be held in November 2012. The petitioners seek a writ of mandamus to compel the holding of a new election as soon as practicable in 2011. This Court subsequently issued a rule to show cause returnable before this Court for oral argument to be heard on January 11, 2011.

The sole issue before this Court is narrow and straightforward — when, under our law, shall a statewide public election take place to fill the current vacancy in the office of governor? . . .

III.

DISCUSSION

This case rests upon the interpretation of a provision of our state constitution and a statute. The applicable constitutional provision is *W. Va. Const*., art. VII, § 16, which provides:

> In case of the death, conviction on impeachment, failure to qualify, resignation, or other disability of the governor, the president of the senate shall act as governor until the vacancy is filled, or the disability removed; and if the president of the senate, for any of the above named causes, shall become incapable of performing the duties of governor, the same shall devolve upon the speaker of the house of delegates; and in all other cases where there is no one to act as governor, one shall be chosen by joint vote of the legislature. Whenever a vacancy shall occur in the office of governor before the first three years of the term shall have expired, a new election for governor shall take place to fill the vacancy.

(Emphasis added.) The applicable statute is W. Va. Code § 3-10-2, the relevant portion of which provides:

> In case of the death, conviction or impeachment, failure to qualify, resignation or other disability of the governor, the president of the Senate shall act as governor until the vacancy is filled or the disability removed; and if the president of the Senate, for any of the above-named causes, shall be or become incapable of performing the duties of governor, the same shall devolve upon the speaker of the House of Delegates; and in all other cases where there is no one to act as governor, one shall be chosen by the joint vote of the Legislature. Whenever a vacancy shall occur in the office of governor before the first three years of the term shall have expired, a new election for governor shall take place to fill the vacancy. If the vacancy shall occur more than thirty days next preceding a general election, the vacancy shall be filled at such election and the acting governor for the time being shall issue a proclamation accordingly, which shall be published prior to such election as a Class II-0 legal advertisement in compliance with the provisions of article three [§§ 59-3-1 et seq.], chapter fifty-nine of this code, and the publication area for such publication shall be each county of the state. But if it shall occur less than thirty days next preceding such general election, and more than one year before the expiration of the term, such acting governor shall issue a proclamation, fixing a time for a special election to fill such vacancy, which shall be published as hereinbefore provided.

(Emphasis added.)

It is the position of the petitioners that the new election mandated by art. VII, § 16 of the Constitution must occur as soon as is practicable in 2011. According to the petitioners, art. VII, §16 is clear that the arrangement wherein the senate president acts as governor is temporary and that a new election for governor must speedily take place to fill the vacancy when, as in the present case, the vacancy in the governor's office occurs during the first three years of the term. Petitioners further contend that other constitutional provisions, such as the one providing for separation of powers, are consistent with construing art. VII, §16 as providing for only the shortest practicable period during which the senate president shall act as governor. Respondent Thompson supports the position of the petitioners.

Respondent Tomblin replies that *W. Va. Const*., art. VII, § 16 was enacted at a time when a general election was held annually. This is the reason for the distinction made between a vacancy occurring in the first three years of the term and one occurring in the final year of the term. Respondent Tomblin explains that if the vacancy occurred in the first three years of the term, the vacancy simply could be filled in the next general election to occur that same year. Because each general election which occurred in the first three years of the governor's four-year term was not a regularly scheduled gubernatorial election, Respondent Tomblin argues that art. VII, § 16 refers to the election as a "new election." However, according to Respondent Tomblin, if the vacancy occurs in the final year of the term, the election to fill the vacancy would be held in the regularly scheduled gubernatorial election. Even though general elections are now held every two years, Respondent Tomblin asserts that the language of art. VII, § 16 remains the same and must be read accordingly. According to the statute, "[i]f the vacancy shall occur more than thirty days next preceding a general election, the vacancy shall be filled at such election." Under the present facts, the vacancy occurred more than thirty days next preceding a general election. Respondent Tomblin further contends that *W. Va. Const*., art. VII, § 16 should be read in *pari materia* with *W.Va. Const*., art. IV, § 7, which provides, in part, that "[w]hen vacancies occur prior to any general election, they shall be filled by appointments, in such manner as may be prescribed herein, or by general law, which appointments shall expire at such time after the general election as the person so elected to fill such vacancy shall be qualified." Respondent Tomblin asserts that the filling of the vacancy in the office of governor by the Senate President pursuant to *W. Va. Const*., art. VII, § 16, is effectively a constitutional appointment which can last in duration until after the next general election in November 2012. Respondent Tomblin therefore posits that the election to fill the vacancy in the office of governor does not have to occur until November 2012. Accordingly, Respondent Tomblin concludes that because he has no duty under our law to call a new election prior to November 2012, this Court should deny the writ sought against him.

This Court begins our analysis by examining the language of *W. Va. Const*., art. VII §16. *See Randolph County Bd. of Educ. v. Adams*, 196 W. Va. 9, 15, 467 S.E.2d 150, 156 (1995) (explaining that "[t]he starting point in every case involving construction of our Constitution is the language of the constitutional provision at issue" (citation omitted)). We previously have recognized that "[t]he provisions of the Constitution, the organic and fundamental law of the land, stand upon a higher plane than statutes, and they will as a rule be held mandatory in prescribing the exact and exclusive methods of performing the acts permitted or required." Syllabus Point 2, *Simms v. Sawyers*, 85 W. Va. 245, 101

S.E. 467 (1919). . . .

The language in *W. Va. Const*., art. VII, §16 which is relevant to this case provides that "[w]henever a vacancy shall occur in the office of governor before the first three years of the term shall have expired, a new election for governor *shall* take place to fill the vacancy." (Emphasis added.) This language is plain and unambiguous, and indicates that when a vacancy occurs in the office of governor during the first three years of the term, a new election shall be held to fill the vacancy. The mandatory nature, prescribed in our Constitution for a new election is demonstrated by the framers' use of the word "shall." "As used in constitutional provisions, the word 'shall' is generally used in the imperative or mandatory sense." Syllabus Point 3, *State ex rel. Trent v. Sims*, 138 W. Va. 244, 77 S.E.2d 122 (1953). When a vacancy occurs in the final year of the term, a new election is not mandated by this provision. In that instance, the vacancy shall be filled at the next general election.

This Court also has indicated that "[i]n construing a constitution, what is implied is as much a part of the instrument as what is expressed." *State ex rel. Moore v. Blankenship*, 158 W. Va. 939, 956-957, 217 S.E.2d 232, 242-243 (1975) (citation omitted). We believe that the framers of the Constitution, by specifically requiring an election when a vacancy occurs in the first three years of a gubernatorial term but not requiring an election if the vacancy occurs in the final year of the term, clearly intended that a person not elected to the post may act as governor for a period of no more than one year. This is the obvious result of not mandating a new election if the vacancy occurs in the final year of the term. Further, there would be no reason for the framers to require a new election in the event that there is more than one year remaining in the term if this were not the framers' intent. Clearly, the framers contemplated that the new election must occur at such a time as will permit the person elected as governor in the new election to assume office within one year of the date that the vacancy in the office occurred.

This reading of *W. Va. Const*., art. VII, § 16 is in accord with the plain language of the constitutional provision and with the clear implications arising from that language. Moreover, it is consistent with the Constitution's separation of powers doctrine. According to *W. Va. Const*., art. V, § 1,

> 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 v. Huber, 129 W. Va. 198, 209, 40 S.E.2d 11, 18 (1946). The fact that the framers included a clear and strong provision in the Constitution mandating the separation of powers, but provided an exception in art. VII, § 16 wherein a legislative officer shall contemporaneously act as governor when necessary, suggests to this Court that the framers intended for this exception to be temporary in nature, not to exceed one year. In other words, the framers intended only a temporary disruption in the balance of power between the legislative and executive branches.

Further, this Court's reading of art. VII, §16 is consistent with the fact that our government is founded upon the right of the people to elect their highest public officials. This right is enshrined in our Constitution which provides that "[t]he powers of government reside in all the citizens of the State, and can be rightfully exercised only in accordance with their will and appointment." *W.Va. Const*., art. II, § 2 (*See also W. Va. Const*., art. VII, § 1 providing for the popular election of the governor). This right of the people is also recognized in our jurisprudence:

> The American constitutional system, under which West Virginia's government is organized, W. Va. Const. art. 1, § 1, changed substantially the operative theory of sovereignty and identified the sovereign, whose will legitimizes authority, as the people. Virginia Declaration of Rights, c. 1, § 2 (May 6, 1776); the Declaration of Independence (July 4, 1776); U.S. Const. Preamble; W. Va. Const. art. 2 § 2.

Syllabus Point 1, *State ex rel. Skinner v. Dostert*, 166 W. Va. 743, 278 S.E.2d 624 (1981). For this reason, the framers contemplated that in the event that a vacancy occurs in the office of governor, a person shall act as governor for only such time as is reasonably necessary to elect a new governor. Any other reading of art. VII, § 16 would be in conflict with the right of the people to elect the highest public officials who serve them.

Accordingly, for all of the reasons discussed above, this Court holds that pursuant to *W. Va. Const*., art. VII, §16, the period of time in which the duties of the governor shall be performed by a person who was not elected to the office of governor by the people in a statewide election shall not exceed one year. Consequently, we further hold that pursuant to *W. Va. Const*., art. VII, §16, whenever a vacancy shall occur in the office of governor before the first three years of the term shall have expired, a new statewide election shall be held as soon as practicable and in compliance with the constitutional prescription that the office be assumed by an elected successor within one year of the date when the vacancy first occurred. In the instant case, the vacancy in the office of governor occurred in the first three years of the term. Therefore, the Constitution mandates that a new election for the office of governor be held within the time period contemplated by *W. Va. Const*., art. VII, § 16.

Having determined the clear meaning of *W. Va. Const*., art. VII, §16, and the constitutional requirement that a new election for governor be held, we now turn our attention to W. Va. Code § 3-10-2. At the outset, we note that the first paragraph of this statute reproduces verbatim the language of *W. Va. Const*., art. VII, §16. This indicates to us the Legislature's intent to execute the provisions of art. VII, §16, properly. It also demonstrates the Legislature's understanding that it is required to create a mechanism to fulfill the constitutional mandate set forth in art. VII, § 16. Because this statutory language comes directly from art. VII, § 16, this language is unquestionably constitutional. Moreover, this language obviously has the same meaning that it has in art. VII, § 16. Most importantly, the

statutory language, borrowed from our Constitution, likewise mandates a new election if the vacancy in the office of governor occurs in the first three years of the governor's term.

Immediately after this language from the Constitution, W. Va. § 3-10-2 provides that "[i]f the vacancy shall occur more than thirty days next preceding a general election, the vacancy shall be filled at such election." According to the petitioners, this language is unconstitutional when applied to the instant facts because it delays the election to fill the vacancy in the office of governor nearly two years until the next general election. The petitioners assert that such a result is inconsistent with the constitutional mandate prohibiting a legislative officer from performing the acts of the governor for a period exceeding one year. We agree. In this case, the vacancy in the office of governor occurred on November 15, 2010, which is more than thirty days preceding the next general election which is scheduled for November 2012. However, delaying the election to fill the vacancy in the office of governor until November 2012 would result in a legislative officer acting as governor for a period in excess of one year. Such a result directly conflicts with and violates art. VII, § 16. Therefore, this statutory language is unconstitutional as applied to the facts of this case and is therefore rendered inoperative in the matter before us.[6]

To this point, this Court has determined the meaning of the language at issue in *W. Va. Const*., art. VII, § 16, and the corresponding language in W. Va. Code § 3-10-2. We also have found that the Legislature intended to execute the provisions of *W. Va. Const*., art. VII, § 16 when it enacted W. Va. Code § 3-10-2. This Court has found some of the language in W. Va. Code § 3-10-2 to be unconstitutional as applied to the present case. The fact remains, however, that the statute, by incorporating the language from *W. Va. Const*., art. VII, § 16, clearly provides that whenever a vacancy shall occur in the office of governor before the first three years of the term shall have expired, a new election shall be held as soon as practicable to prevent a legislative officer from serving as acting governor for a period exceeding one year. The statute further contemplates that in the event that a vacancy occurs in the first three years of the term, the acting governor shall issue a proclamation, fixing a time for a special election to fill such vacancy.

In the instant case, the vacancy in the office of governor occurred during the first three years of the term. Therefore, *W. Va. Const*., art. VII, § 16 operates to prohibit Respondent Tomblin, as Senate President from acting as governor for a period of time exceeding one year from the date of the vacancy in the office of governor. W. Va. Code § 3-10-2 also requires Respondent Tomblin, as "acting

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[6]The statutory language at issue is not, however, facially invalid. One challenging a statutory provision on its face "must establish that no set of circumstances exists under which the legislation would be valid." *Robinson v. Charleston Area Med. Center*, 186 W. Va. 720, 726, 414 S.E.2d 877, 883 (1991) (citation omitted). In the instant case, if a vacancy were to occur in the governor's office in the final year of the term, it would be proper under the constitution to fill the vacancy at the next general election. Therefore, there is a set of circumstances under which the statutory language would be valid.

governor,"[7] to issue a proclamation, fixing a time for a special election, to fill the vacancy in the office of governor in the time period contemplated by both *W. Va. Const*., art. VII, § 16, and W. Va. Code § 3-10-2. Therefore, this Court finds that there is a clear legal right in the petitioners to the relief sought and a legal duty on the part of Respondent Tomblin, in his official capacity, to do the thing which the petitioners seek to compel. Finally, this Court finds that the petitioners do not have another adequate remedy. Accordingly, we conclude that all of the requirements for the issuance of a writ of mandamus have been met.

In the second paragraph of W .Va Code § 3-10-2, the Legislature established the procedure to be followed regarding the holding of a new or special election for governor. (Obviously, the term "special election" used in the second paragraph of the statute is synonymous with the term "new election" used in the first paragraph of the statute.):

> If the vacancy is to be filled at a general election and shall occur before the primary election to nominate candidates to be voted for at such general election, candidate to fill the vacancy shall be nominated at such primary election in accordance with the time requirements and the provisions and procedures prescribed in article five of this chapter. When nominations to fill such vacancy cannot be so accomplished at such primary election, and in all cases wherein the vacancy is to be filled at a special election, candidates to be voted for at such general or special elections shall be nominated by a state convention to be called, convened and held under the resolutions, rules and regulations of the political party executive committees of the state. . . . (Emphasis added).

This procedure appears to indicate that candidates for governor who are to be voted on in the new or special election shall be nominated by a convention, as opposed to a primary election, to be called under the rules of the political party executive committees of the State. The procedure established in the second paragraph of W. Va. Code § 3-10-2 regarding the holding of a new or special election to fill the vacancy in the office of governor is within the legislative prerogative and does not violate the State Constitution. Having found the procedure constitutional, it would be improper of this Court to second-guess the wisdom of this procedure, or to otherwise "legislate" a procedure more to our liking. We observe that the Legislature has just begun its general session. The Legislature may amend the procedure for providing for a new or special election if it deems it appropriate to do so, provided, however, any new procedure may not conflict with the Constitution which requires that all acts necessary to elect a governor shall be completed within one year of the vacancy in the office.Accordingly, this Court grants the writ of mandamus prayed for by the petitioners with regard to Respondent Tomblin, in his official capacity, and we direct Respondent Tomblin, in executing his duty to act as governor, forthwith to issue a proclamation to fix a time for a new statewide election to

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[7]Our State Constitution does not provide for the office of acting governor. Rather, it simply provides that the senate president shall temporarily act as governor during a vacancy in that office until such time as a new governor is elected. However, W. Va. Code § 3-10-2 utilizes the term "acting governor." The senate president does not cease being a constitutional officer when he or she acts as governor. The senate president remains the senate president. Should the senate president become unable or incapable of performing as senate president, art. VII § 16, clearly articulates that the constitutional duty and power to act as governor devolve to the Speaker of the House of Delegates.

fill the vacancy in the office of governor consistent with the provisions of W. Va. Code § 3-10-2.[8] In issuing his proclamation and setting the date for a new election, Respondent Tomblin, in his official capacity, must be cognizant of the statutory deadlines under which the Secretary of State must act. In her brief, the Secretary of State indicates that existing election statutes require a minimum of 160 days between the proclamation calling for a special election and the date of the election. The appendix to the brief of the Secretary of State further indicates that an optimal schedule may require 195 days between the proclamation calling for a special election and the date of the election. These dates were not disputed by any other party. The setting of the date of such new election must ensure that the vacancy in the office of governor be properly filled within one year of the date when the vacancy occurred.

With regard to Respondent Thompson and Respondent Tennant, we find that the applicable law does not compel action on their part in this matter. Therefore, we deny the writ with regard to those respondents.

IV.

CONCLUSION

For the reasons set forth above, the writ of mandamus prayed for by the petitioners with regard to Respondent Tomblin, in his official capacity, is granted as directed. However, the writ prayed for against Respondent Thompson and Respondent Tennant is denied. The Clerk is directed to issue the mandate of the Court contemporaneously with this opinion.

Writ granted in part; writ denied in part.

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[8]As set forth above, Respondent Tomblin argues that when W. Va. Const., art. VII, § 16 and W. Va. Code § 3-10-2 were enacted, general elections were held every year, and that the language in these provisions must be read in that context. We note that by 1932, the Legislature had amended the election code to provide that the general election shall be held in each *even* year. However, even though W. Va. Code § 3-10-2 has been amended numerous times since then, the Legislature has not changed the language of that statute to reflect the fact that general elections now occur every two years. This clearly indicates to the Court that W. Va. Code § 3-10-2 is not to be read in the context of general elections occurring yearly.