STATE OF MICHIGAN

COURT OF APPEALS

ROBERT DAVIS, Plaintiff-Appellee,	FOR PUBLICATION May 21, 2012
v	Nos. 309218; 309250 Ingham Circuit Court
CITY OF DETROIT FINANCIAL REVIEW TEAM, GOVERNOR, and STATE TREASURER, Defendants-Appellants.	LC No. 12-000113-CZ

EDWARD MCNEIL, Plaintiff-Appellee,	
v	No. 309482 Ingham Circuit Court
CITY OF DETROIT FINANCIAL REVIEW TEAM, GOVERNOR, and STATE TREASURER, Defendants-Appellants.	LC No. 12-000321-CZ

Before: WHITBECK, P.J., and O'CONNELL and M.J. KELLY, JJ.

O'CONNELL, J. (*concurring in part and dissenting in part*).

I concur with the majority opinion that the City of Detroit Financial Review Team (Detroit Financial Review Team) is not subject to the Open Meetings Act (OMA), MCL 15.261 *et seq.* I also concur that the Governor and the State Treasurer, being individual executive branch officeholders, are not subject to the strictures of the OMA in this case.[1] I part ways with the majority opinion in its discussion of injunctive and declaratory relief. I write separately to emphasize that an injunction against a co-equal branch of government should be an extremely

[1] In my opinion, neither the Governor nor the State Treasurer acting in the scope of official duties is subject to the OMA, even if acting as a one-person subcommittee of a public body that is subject to the OMA.

rare remedy, available only after a party has definitively established that a declaratory judgment has been ineffective.

I also write separately to remind all public servants that our governmental system turns on a respectful balance of power among the three branches of government. As Thomas Jefferson aptly explained, "the constitution, in keeping three departments distinct and independent, restrains the authority of the judges to judiciary organs, as it does the executive and legislative to executive and legislative organs." Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820) in *The Writings of Thomas Jefferson*, 1816-1826, at 161 (Paul L. Ford, ed., vol X, 1899). The judicial branch's responsibility is to interpret the law impartially, free from the political process reserved for the other two branches of government. In my view, these tenets preclude any remand in this case. I would vacate and reverse all of the trial court's rulings.[2]

I. SEPARATION OF POWERS & THE TRIAL COURT'S INTRUSION INTO THE POLITICAL PROCESS

All judges, including me, are at risk of overstepping boundaries during an intense, frenetic legal battle, and, for that reason, all judges must rely on the federal and state constitutions, each other, and the appellate system to recognize and respect boundaries.[3] On issues of first impression, such as the OMA issue at the core of the present dispute, it is not unusual to be reversed by a higher court. Trial courts must make rapid-fire decisions, while the appellate courts can take weeks, even months, to research and deliberate. All judges will do well to keep in mind Thomas Jefferson's insightful observations: "One single object . . . will entitle you to the endless gratitude of society: that of restraining judges from usurping legislation." Letter to Edward Livingston (Mar. 25, 1825) in *The Writings of Thomas Jefferson*, at 113 (Albert E. Bergh, ed., vol XVI, 1907). And similarly, "[judges] have at times overstepped their limit by undertaking to command executive officers in the discharge of their executive duties . . . ." Letter to Jarvis in Ford, *The Writings of Thomas Jefferson*, at 161.

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[2] These cases involve the relationship between the OMA and the Local Government and School District Fiscal Accountability Act, MCL 141.1501 *et seq*., commonly known as the Emergency Financial Manager Act. The central issue presented to us in these cases is whether a review team that the Governor appoints under § 12(3) of the Emergency Financial Manager Act, MCL 141.1512(3), is a "public body," as defined in § 2(a) of the OMA, MCL 15.262(a). The entire panel agrees that a review team—and therefore the Detroit Financial Review Team—is not a public body under the OMA. Because the trial court erred in concluding that a review team is a public body, I believe we are compelled to reverse and vacate the various rulings and orders the trial court entered in these cases.

[3] In this regard, we as judges are susceptible to what is commonly known as "judicial robe disease." We reduce our susceptibility by adhering to the constitutional separation of power principles.

At the heart of the cases now before the Court is the political question doctrine.[4] The doctrine requires judges to avoid entering into the political process and to put aside personal policy preferences when interpreting statutes. As the United States Supreme Court has stated, the framers of the Constitution recognized the "sharp necessity to separate the legislative from the judicial power." *Plaut v Spendthrift Farm, Inc*, 514 US 211, 221; 115 S Ct 1447; 131 L Ed 2d 328 (1995). Judges cannot avoid their responsibilities to decide cases merely because the cases present issues having political implications. See *Zivotofsky v Clinton*, ___ US ___; 132 S Ct 1421, 1428; 182 L Ed 2d 423 (2012). Nevertheless, under the political question doctrine, courts do not have authority to decide matters that the constitutional text demonstrably commits to a coordinate political department, or matters that lack judicially discoverable and manageable standards for resolution. *Id*. at 1427.

With these considerations in mind, the critical legal question for the trial court to consider was whether the Detroit Financial Review Team is a "public body" within the meaning of the OMA—not whether a review team *should* (in the trial court's opinion) be subject to the OMA or whether it is desirable (again, in the trial court's opinion) for some or all of the meetings of the Detroit Financial Review Team to be open to the public. Unfortunately, the trial court missed this critical question. Rather, as reflected in the trial court's emphasis at the February 15, 2012, hearing in this matter on its belief that "[t]he first caveat of this society is that we have an open government," it appears that the trial court's personal views clouded its resolution of the legal issues. No matter how laudable, a judge's personal views have no place in jurisprudence: "courts are not free to manipulate interpretations of statutes to accommodate their own views of the overall purpose of legislation." *Twichel v MIC General Ins Corp*, 469 Mich 524, 531; 676 NW2d 616 (2004).[5] Thus, the trial court's focus in this case should have been on the narrow legal question of whether a review team is a public body under the OMA. Indeed, as the majority makes clear, it is inherent in the OMA's definition of a public body that some governmental bodies are not "public bodies" and, thus, are not subject to the open meeting requirements of the OMA. Concerns about whether the review team's meetings should be public or private are properly addressed to the Legislature, not the judiciary. See *Detroit City Council v Mayor of Detroit*, 283 Mich App 442, 461; 770 NW2d 117 (2009) ("Despite the stated policy aims of the statute, we cannot rule on policy grounds in contravention of the plain language of the statute. To the extent that the issues presented relate to public policy matters, the making of social policy generally is for the Legislature, not the courts.").

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[4] For an extensive discussion of the concept of separation of powers and the political question doctrine, see *Bendix Safety Restraints Group v City of Troy*, 215 Mich App 289, 294-300; 544 NW2d 481 (1996) (O'Connell, J., concurring). Or, simply consider John Adams' pithy summary: "The judicial power ought to be distinct from both the legislative and executive, and independent upon both, so that it may be a check upon both." John Adams, *Thoughts on Government* (Apr. 1776) in *The Founders' Constitution* at Chap 4, Doc 5 (Philip B. Kurland & Ralph Lerner, eds., 2000).

[5] Of course, such "manipulation" could occur subconsciously rather than intentionally.

Further, a trial court's most comfortable function is to review historical facts, apply the law to those facts, and to reach a conclusion as to the lawfulness of the actions of the parties. In the present cases, the trial court preempted the parties' political actions by first assuming that the OMA applied to the Detroit Financial Review Team and then by issuing injunctions to stop the political process, particularly as to the Detroit Financial Review Team being able to negotiate a consent agreement with the City of Detroit. As set forth in the majority opinion, the trial court failed to apply the law concerning issuance of injunctions and failed to analyze the OMA in any systematic manner. It is worth repeating that courts interpret the law based on existing facts. In this matter, the trial court overstepped its bounds by asserting power over the political process before the process was complete.

Indeed, as referenced by the majority, in *Straus v Governor*, 459 Mich 526, 530; 592 NW2d 53 (1999), the Michigan Supreme Court adopted as its own this Court's opinion in that case. *Straus* includes the following discussion of the propriety of injunctive relief against the Governor or other executive branch actors:

> It is clear that separation of powers principles, Const 1963, art 3, § 2, preclude mandatory injunctive relief, mandamus, against the Governor. *People ex rel Sutherland v Governor*, 29 Mich 320; 18 Am Rep 89 (1874). Whether similar reasoning also puts prohibitory injunctive relief beyond the competence of the judiciary appears to be an open question that need not be resolved in this case. We do note that the Supreme Court has recently recognized that declaratory relief normally will suffice to induce the legislative and executive branches, the principal members of which have taken oaths of fealty to the constitution identical to that taken by the judiciary, Const 1963, art 11, § 1, to conform their actions to constitutional requirements or confine them within constitutional limits. *Durant v Michigan*, 456 Mich 175, 205; 566 NW2d 272 (1997). Only when declaratory relief has failed should the courts even begin to consider additional forms of relief in these situations. *Id*. at 206. [*Straus*, 459 Mich at 532.]

Thus, even if the trial court had been correct in its determination that a financial review team constitutes a public body subject to the OMA, it abused its discretion in granting permanent injunctive relief against the Detroit Financial Review Team.[6] The trial court simply granted such injunctive relief without any reasonable basis for concluding that it was necessary. Rather, in accordance with judicial restraint and deference to the coordinate executive branch of government as discussed in *Straus*, the trial court should have limited its consideration of any possible relief to declaratory relief. This is especially so, given that the applicability of the OMA to a financial review team under the very recently enacted Emergency Financial Manager Act is a matter of first impression and, as reflected in our holding, the Detroit Financial Review Team clearly had serious grounds for a good faith (and correct) belief that it was not required to

[6] A trial court's grant of injunctive relief is reviewed for an abuse of discretion. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008).

comply with the OMA. The decision of the trial court to grant injunctive relief in this matter was completely unwarranted.

Accordingly, in future circumstances involving questions of the legality of conduct by state government officials or entities within the executive or legislative branches, a trial court should issue a declaratory judgment as to those questions and presume that the other branches will follow the court's decision. This measured approach avoids a court immersing itself in the political process reserved for the political branches of government and thereby reduces the risk of stigmatizing the judiciary as being merely another political actor.

Moreover, even apart from the special consideration due to state level executive and legislative branch actors, injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8-10; 753 NW2d 595 (2008). This Court has specifically applied that standard in the context of the OMA and, accordingly, noted that "[m]erely because a violation of the OMA has occurred does not automatically mean that an injunction must issue restraining the public body from using the violative procedure in the future." *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525, 533; 609 NW2d 574 (2000). This underscores that the grant of injunctive relief by the trial court in this case was inappropriate.

The trial court's interference in the activities of the Detroit Financial Review Team, even going so far as to enter an injunctive order to preclude that review team from entering into a consent agreement with the City of Detroit, markedly disrupted the political process, particularly with sensitive matters involving financial reforms of city government that by their very nature are beyond judicial competence and lack judicially discoverable and manageable standards for resolution. See *Zivotofsky*, 132 S Ct at 1427.[7]

[7] There was a more egregious lack of respect for the proper separation of powers by the distinct trial court in *Muma v City of Flint Financial Review Team*, ___ Mich App ___; ___ NW2d ___ (2012), as to which this panel is releasing a separate opinion. In *Muma*, the plaintiff sought a declaratory judgment as to the applicability of the OMA to the City of Flint Financial Review Team and an injunction to prevent further alleged violations of the OMA. Rather than issuing a simple declaratory judgment and then allowing the state actors to take further appropriate actions, the trial court in *Muma* used its power to intrude into spheres of government reserved for the political branches. With a figurative swipe of the pen, the trial court permanently enjoined the defendants in that case (the City of Flint Emergency Manager, the Governor, the State Treasurer, and the City of Flint Financial Review Team) "from taking any action reserved to the Flint Mayor and City Council to govern and administer the City of Flint pursuant to the Charter and Ordinances of the City Flint [sic]." Thus, rather than simply deciding if the City of Flint Financial Review Team violated the OMA and providing narrow appropriate relief for any perceived violation, the trial court in *Muma* took upon itself to resolve the political future of the City of Flint, a power reserved exclusively to the other branches of government. Trial courts should rule on issues of law and not involve themselves in political questions reserved for the

II. CONCLUSION

Courts should not allow themselves to be used as vehicles to interfere with the political process. Except in highly unusual circumstances, it is sufficient for a trial court to issue a declaratory judgment as to an alleged improper action by an executive or legislative branch actor. While the trial court's actions were presumably done with no political agenda and with a view to the best interests of the parties (and the City of Detroit), the results were inappropriate injunctions issued against another branch of government, when a simple declaratory judgment would have sufficed.

I would vacate and reverse all of the trial court's rulings in their entirety.

/s/ Peter D. O'Connell

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political branches—especially when the trial court's hearing in *Muma* took less than an hour to undo what took the other branches of government over six months to put in place. Courts are not in the business of resolving political questions. In *Muma* and the present case, a simple declaratory judgment as to the (supposed) applicability of the OMA would have alerted the state actors to the trial court's determinations as to whether the OMA applied. The courts should not be administering a city government or legislating from the bench. The political question doctrine requires courts to refrain from such inappropriate engagement in the political process.