

No. 30094 - *State of West Virginia ex rel. Darrell V. McGraw, Jr., in his capacity as Attorney General for the State of West Virginia, v. Gregory A. Burton, Cabinet Secretary of the Department of Administration; Nichelle Perkins, Director of Personnel of the Department of Administration; Kay Huffman Goodwin, Cabinet Secretary of the Department of Education and the Arts; Mike Callaghan, Cabinet Secretary of the Department of Environmental Protection; Paul Nusbaum, Cabinet Secretary of the Department of Health and Human Resources; Joe Martin, Cabinet Secretary of the Department of Military Affairs and Public Safety; Brian Kastick, Cabinet Secretary of the Department of Tax and Revenue; and Fred VanKirk, Secretary of the Department of Transportation; The Public Service Commission of West Virginia; The West Virginia Board of Education, the West Virginia Department of Education and the Superintendent of Schools; The West Virginia Consolidated Public Retirement Board; and The West Virginia Regional Jail and Correction Facility Authority*

Albright, Justice, concurring:

FILED

June 11, 2002

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS

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June 12, 2002

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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 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.

While I do not anticipate that the judgment of this Court in this case will meet with universal approval, I earnestly hope that it merits and is accorded universal respect. This

case came to us with the makings of a constitutional crisis. The opinion we have rendered represents, among other things, a constitutional framework upon which the Legislature and the multi-faceted Executive can, with earnest efforts and appropriate levels of comity, build a mutually satisfactory and mutually respectful means of dealing with the problems presented, to a greater or lesser extent, in the pleadings, briefs and arguments. Our decision also represents, as the Court's opinion notes, a profound effort to fashion the least intrusive remedy, a result of the perceived intention of this Court to accord proper respect to both of the other branches of our state government.

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 which appear, at least facially, to be of less than constitutional magnitude. One provision of our state's law, which was vividly brought to our attention by this case, is the language found in West Virginia Code § 5-3-1 (1994), which reads as follows:

[I]t is unlawful from and after the time this section becomes effective for any of the public officers, commissions, or other persons above mentioned to expend any public funds of the state of West Virginia for the purpose of paying any person, firm or corporation for the performance of any legal services.

That statutory provision was adopted in the heart of the Great Depression. It expresses a policy of the Legislature which, as the current case demonstrates, has been varied by some subsequent enactments of law and, apparently, by the simple exercise of legislative or executive fiat. Nevertheless, that provision enunciates a public policy which is protective of the fiscal affairs

of this state and expressive of a proper concern for the unnecessary expenditure of public funds for legal services—services which may in some instances be more properly and more efficiently provided by the office of the attorney general.

The reality is that the opinion rendered by the Court in this case is not about the particular persons who may, for the moment, occupy specific offices or have responsibility for the operation of various state entities. The issues involved in such a review of this long-standing public policy affect the future of the state and its government, regardless of who may now or hereafter hold public office or control various entities of state government.

In my view, such issues 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.