NO. 84704-5

SUPREME COURT OF THE STATE OF WASHINGTON

PETER GOLDMARK, AS CHIEF EXECUTIVE OFFICER OF THE DEPARTMENT OF NATURAL RESOURCES AND COMMISSIONER OF PUBLIC LANDS, Petitioner, v. ROBERT M. MCKENNA, ATTORNEY GENERAL, Respondent.	MOTION FOR RECONSIDERATION

I. IDENTITY OF MOVING PARTY

The moving party is the Attorney General.

II. STATEMENT OF RELIEF SOUGHT

The Attorney General respectfully requests the Court to reconsider its opinion in this matter for the reason that the majority has misapprehended law and overlooked fact. RAP 12.4(c). Contrary to the majority opinion, this Court has held that the Attorney General has discretion whether to advance or defend legal positions asserted by state agencies or officers. Second, based on misapprehension of law and overlooked fact, the majority opinion suggests that the state of Washington has structured its government to establish a constitutional

state officer who is independently elected, legally trained, and statutorily charged to represent the state in the courts, but remove from that officer authority to harmonize the state's legal interests to protect the state of Washington from harmful, parochial, contradictory legal claims and arguments in litigation. Third, contrary to the majority opinion, the discretion of the Attorney General in matters of litigation does not deny recourse to state officials.

The Attorney General respectfully requests the Court reconsider its majority opinion, adhere to precedent, and dismiss the Commissioner's petition. Alternatively, the Attorney General requests the Court to unambiguously rest its opinion on RCW 43.12.075, specific to the Commissioner of Public Lands.

III. FACTS RELEVANT TO MOTION

On September 1, 2011, the Court issued an opinion mandating the Attorney General to appeal from a superior court judgment against the Commissioner of Public Lands. The superior court judgment rejected the Commissioner's argument that a statute authorizing PUDs to condemn public lands, including trust lands, did not authorize the Okanogan PUD to condemn the trust lands managed by the Commissioner.

The Attorney General declined to press the appeal based upon his considered legal judgment that the trial court decision was sound on the

law and the facts, and because the argument the Commissioner wished to pursue on appeal would be harmful to the legal interests of the State with respect to its power of eminent domain, a power possessed by multiple state agencies and necessary to many critical public projects. ASF ¶ 16, Attachment 9, 0027-0030; ASF ¶ 25, Attachment 18, 0044-46. The majority opinion does not acknowledge this latter undisputed and important basis for the Attorney General's litigation decision.[1]

While much of the majority opinion focuses on RCW 43.12.075, a statute specific to representation of the Commissioner of Public Lands, the majority also suggests in places that its opinion takes into account RCW 43.10.040 and RCW 43.10.067, enabling statutes of the Attorney General.

IV. GROUNDS FOR RELIEF AND ARGUMENT

A. This Court Has Held That The Attorney General Has Discretion Whether To Advance Or Defend Legal Positions Asserted By State Agencies Or Officers

The majority opinion states that this is a case "of first impression" because it raises the question of whether the Attorney General has discretion to decline to represent a state officer in litigation. Slip Opinion at 5. In this respect, the majority opinion misapprehends precedent of this

[1] *See* Slip Opinion at page 1 stating only that the Attorney General "refused to pursue the appeal based upon his evaluation of the merits of the case", and at page 3, footnote 1, stating that "the underlying action . . . has no bearing on the merits of this case."

Court holding that the Attorney General has discretion to decline to defend state officials in litigation. This case does not raise an issue of first impression. Rather, as to state agencies and officers, other than the Commissioner of Public Lands, this case presents an issue that is controlled by decisions of this Court.[2]

In *State ex rel. Dunbar v. State Board of Equalization*, 140 Wash 443, 249 P. 966 (1926), copy attached, this Court held that the Attorney General has discretion not to defend positions taken by state officials. In *Dunbar*, the Legislature amended a statute directing the Board of Equalization to make certain property tax levies for the benefit of several institutions of higher education. The amended statute adjusted the levy rates for the several institutions. The Board declined to follow the revised statute, based upon its position that the statute was invalid for lack of proper authentication, and the Board determined to continue the levy set forth in the original statute. The Attorney General sought a writ of mandamus to compel the Board to make the levy as provided in the amended statute.

The Board contended the Attorney General was without authority to bring the action against the state officers who comprised the Board, *for*

[2] The Court has not previously considered the meaning of RCW 43.12.075, which relates to representation of the Commissioner of Public Lands.

the very reason that the Attorney General was obligated to defend the position of the Board:

> Contention is made that the Attorney General is compelled, under the Constitution and statutes, to represent state officers, and that therefore he cannot begin an action wherein state officers are defendants. Attention is called to section 112 of Rem. Comp. Stat. subd. 3, where it is made the duty of the Attorney General to defend all actions against any state officer.

Id. at 440.

The *Dunbar* Court separately considered this contention of the Board and emphatically rejected it:

> *The law cannot be given any such construction.* [The Attorney General's] paramount duty is made the protection of the interest of the people of the state, and, where he is cognizant of violations of the Constitution or the statutes . . . his duty is to obstruct and not to assist, and, *where the interests of the public are antagonistic to those of state officers, or where state officers may conflict among themselves, it is impossible and improper for the Attorney General to defend such state officers.*

Id. (emphasis added).

It is unmistakable from the language and context of *Dunbar* that the law referenced by the Court was Article III, Section 21 of the Constitution, and "section 112 of Rem. Comp. Stat. subd. 3," the statutory predecessor to RCW 43.10.030(3). Neither the constitutional nor statutory language has changed in any material respect since *Dunbar*.

Subdivision 3 of RRS § 112, referenced by the *Dunbar* Court, read as follows in pertinent part:

> The powers and duties of the attorney general in relation to actions and proceedings in the courts shall be,—
>
> . . .
>
> 3. To defend all actions and proceedings against any state officer in his official capacity, in any of the courts of this state or the United States[.]

Current RCW 43.10.030(3) is materially unchanged:

> The attorney general shall:
>
> . . .
>
> (3) Defend all actions and proceedings against any state officer or employee acting in his or her official capacity, in any of the courts of this state or the United States[.]

Insofar as the issue in this case is concerned, the language of RCW 43.10.030(3) is indistinguishable from the language of RCW 43.10.040, which provides:

> The attorney general shall also represent the state and all officials, departments, boards, commissions and agencies of the state in the courts . . .

The majority opinion in this case endeavors to address *Dunbar's* holding by saying "[t]he cited case[] merely recognize[s] that it may become necessary to institute proceedings against a state officer." Slip Opinion at 13. *Dunbar* may not be fairly read to support such a constricted characterization of its holding.

Dunbar separately considered the Board's argument that the constitution and statute providing that the Attorney General "shall defend all actions and proceedings against any state officer in his official capacity" compelled the Attorney General to represent state officers, including the Board, in litigation. And *Dunbar* directly and emphatically rejected it: "*The law cannot be given any such construction.*" *Dunbar,* 140 Wash. at 440. The majority's statement notwithstanding, there is no suggestion in *Dunbar* that its conclusion "merely recognize[s] that it may become necessary to institute proceedings against a state officer." Slip Opinion at 13. Indeed, the *Dunbar* Court explicitly stated that its writ was issued based upon its rejection of each of the contentions advanced by the Board. *Id.* at 452 ("Finding no merit in any of the contentions of the [Board], the writ will issue.").[3]

In discussing *Dunbar*, the majority opinion recognizes that this Court has "repeated" on several occasions that "the attorney general's paramount duty is to protect the interests of the people of the state." Slip Opinion at 12. Rather than heeding its oft-repeated precedent, however, the majority opinion treats this holding of *Dunbar* as though it does not exist.

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[3] "The fact that a court has multiple holdings does not render any of them dicta." *Washington State Farm Bureau Federation v. Gregoire*, 162 Wn.2d 284, 319, 174 P.3d 1142 (2007).

Dunbar also provides a good example why the majority's conclusion that the Attorney General must push forward with legal arguments whenever a state official wishes to advance them in the courts, has never been the law in Washington. The levy statutes at issue in *Dunbar* directly affected numerous state agencies and institutions that are but parts of the legal entity of the state of Washington. The statutes at issue affected the interests of the Board of Equalization, the Legislature, the state university, the state college, the Bellingham Normal School, the Cheney Normal School, and the Ellensburg Normal School.[4] Under the revised statute the Board declined to implement, all the educational institutions received levy rate increases, but some institutions received substantially higher levy rate increases than others.

If the state university determined to sue the Board to require it to levy the rate under the revised law, the majority's opinion – directly contrary to *Dunbar* – can be understood to compel the Attorney General to represent and defend the Board, and also to represent the university upon its claim. If the state college or the normal schools who received lower levy rate increases demanded to sue the Legislature to advance alternative legal theories contrary to the interests of the state university, the majority opinion can be taken to compel the Attorney General to represent those

[4] These institutions are the statutory predecessors of the state and regional universities.

schools and advance their various arguments while also defending the university against those arguments. If the Bellingham Normal School, which received the lowest levy rate increase, wished to challenge the higher rate increases granted to the other institutions, the majority's opinion can be understood to require the Attorney General to advance that argument while also defending against it on behalf of each other institution and the Legislature. Moreover, if other state agencies or officers, not directly identified in the statutes, contended that the levy for higher education undercut their funding or obligations, and wished to sue the Board, the Legislature, the universities, or the normal schools, or all of them, the majority opinion here can be taken to compel the Attorney General to represent their sundry legal positions in court, and represent the defendants too.

In other words, the majority opinion suggests that the Attorney General would have no choice but to place multiple inconsistent arguments – a three ring circus of litigation – in the courts. And under the majority opinion, even after a trial court sorted through the chaos of contradictory legal claims and arguments by agencies and officers who comprise but part of the state of Washington, and issued a sound legal judgment, the Attorney General would be compelled to press on, arguing on appeal whatever sundry and contradictory legal arguments the agencies

wished there to advance, without regard for their effect on the legal interests of the state of Washington. And most assuredly, taxpayers would need to hand over a bulging public purse to fund the Attorney General's journey. Because the majority opinion makes no note of these problems, it is not clear that the majority understood, let alone intended to invite, such consequences in its opinion. *See* n.1, *infra*. There is little question, however, that the majority opinion will be read to invite them.

Under the majority opinion, no concern for how the agencies' preferred and contradictory legal arguments would serve or disserve the legal interests of the broader entity of which they simply are a part would be relevant. No concern for lack of merit in the agencies' arguments would be relevant. Instead, under the majority opinion, those concerns would be sacrificed to serve legal arguments preferred by agencies, boards and officials whose program interests are limited, whose legal concerns are confined to advancing those limited missions, who have no knowledge of or responsibility to consider the effect of their preferred litigation positions on the legal interests of the broader governmental entity of which they are only part, and who are unschooled in the law. Yet, their litigation decisions, particularly those to press a case to appeal, necessarily will affect the legal interests of all of state government.

This is no idle concern. The state of Washington is comprised of more than 230 agencies, departments, boards, commissions, institutions, and offices, and many of them operate autonomously but under broadly applicable statutes and legal rules. It is not unusual for agencies to seek to press arguments under those statutes and legal rules that would win a narrow battle for the particular agency, "but lose the war" for the state as a whole. Historically however, it has been very unusual for an agency to demand that the Attorney General litigate a particular matter against the Attorney General's judgment that litigation would be harmful to the legal interests, and inconsistent with the legal policy, of the broader state of Washington.[5] When it does occur, however, exercise of the Attorney General's sound legal judgment harmonizes the legal interests of the state and buffers against damage by parochial, legally uninformed, conflicting agency positions in litigation. By turning away numerous precedents recognizing the Attorney General's discretion in litigation, and giving the same statutory terminology contradictory meanings, the majority opinion can be read to remove this important check, and with it, the ability of the state of Washington to speak with a coherent voice in litigation.

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[5] It is even more unusual, as happened here, for such a demand to be pressed even after the agency's position has been thoroughly considered and rejected in court. In this case, the Attorney General agreed to advance in superior court an argument pressed by the Commissioner in part because, unlike a decision on appeal, a superior court decision would not have precedential effect on the legal interests of the rest of the state of Washington. ASF ¶ 16, Attachment 9, 0027-0030; ASF ¶ 25, Attachment 18, 0044-46.

B. Abandoning Longstanding Precedent, The Majority Opinion Fundamentally Alters The Constitutional And Statutory Structure Of Washington Government

The majority's opinion suggests that Washington has structured its government to provide no legally trained and accountable state officer to marshal the state of Washington's litigation; no legally trained and accountable state officer to ensure that the state of Washington's legal interests are considered in litigation; no legally trained and accountable state officer to ensure that the state of Washington's legal positions in the courts are coordinated, coherent, and consistent.

In this respect, the majority opinion can be understood to conclude that (1) the framers of the State Constitution established a divided executive branch with an independent Attorney General, of constitutional stature, directly answerable to the people, and (2) the Legislature authorized the Attorney General to represent the state and all of its agencies, in all of the courts, in all legal matters, and with rare exception, prohibited agencies from hiring other counsel – *and that the framers and the Legislature took all these steps precisely so that the state of Washington would have no legally trained accountable officer who can harmonize the legal interests of the state of Washington to protect the state from litigation that advances harmful, parochial, contradictory legal positions in the courts.*

This would be a remarkable conclusion even if adopted in a precedential vacuum. It would be all the more extraordinary because it is contrary to the holding of *Dunbar*, and, as the majority opinion acknowledges, it is directly contrary to this Court's repeated recognition that the Attorney General has discretion with respect to litigation on behalf of the state and that "the attorney general's paramount duty is to protect the interests of the people of the state." Slip Opinion at 12.

It also would be directly contrary to the conclusion of this Court in *State v. Gattavara*, 182 Wash. 325, 332-33, 47 P.2d 18 (1935), that the Attorney General's independence under the constitution is designed as an additional check within state government.[6] It is contrary to *State v. Hermann*, 89 Wn.2d 349, 354, 572 P.2d 713 (1977), where, citing to *Gattavara,* this Court confirmed that the purpose of RCW 43.10.040 and RCW 43.10.067, enacted in 1941, was to "end the proliferation of attorneys hired by various state agencies and place the authority for representation of state agencies in the hands of the Attorney General." *Id.* See Answer to Petition for Review at 7-8. *Hermann* also relied upon a letter, copy attached, from former Attorney General Smith Troy, who served from 1941 to 1953, explaining that RCW 43.10.040 and

[6] "We agree with the statement of the Attorney General in his brief . . . that the Constitution of this state . . . [creates the office of Attorney General] one office a check upon the other." *Gattavara*, 182 Wash. at 332-33.

RCW 43.10.067 were enacted to avoid the very harm the majority opinion here can be read to visit on the state.

The majority opinion suggests that compelling the Attorney General to advance whatever litigation positions agencies may desire – without regard to presenting harmful, parochial, contradictory legal positions in the courts – is not a problem, however, for two reasons. First, "we rely on an adversarial system with the judicial branch in its proper role to determine the merits of such disputes." Slip Opinion at 16. The majority's observation misses the point, because it does not address the problem invited by restructuring state government – litigation at the behest of any and every state officer, agency, board, or commission, with the Attorney General obligated to present every legal position demanded, regardless of its effect on the overall legal interests of the state of Washington, until there is no higher court left to consider it. The majority's observation also misses the point because it is not the role of the judicial branch to act in the legal interests of the state of Washington in determining what matters should be litigated, how long they should be litigated, and when litigation should end. It is the responsibility of the Attorney General to do that.

The majority opinion suggests a second reason why removing the discretion of the Attorney General in matters of litigation is not a problem.

Where the Attorney General determines it is inadvisable to bring or continue to defend litigation or to make particular legal arguments, the majority's answer is for the Attorney General to appoint a special assistant attorney general (SAAG) pursuant to RCW 43.10.065 to do what the Attorney General believes should not be done, "so the state officer still is provided legal counsel." Slip Opinion at 15, n.5. The majority's suggestion is deeply unsound.

When the Attorney General declines to defend or advance a particular argument on behalf of a state officer or agency, he is not abdicating his responsibility to represent the state of Washington and its agencies in litigation – *he is exercising his responsibility.* The majority opinion seeks to avoid the illogic of appointing a special assistant attorney general to make legal arguments that the Attorney General determines would be contrary to the legal interests of the state of Washington by suggesting that it is of no concern because RPC 1.13(h) provides that "a private lawyer's client would only be the particular agency, not the broader governmental entity, unless otherwise notified" by the Attorney General. Slip Opinion at 15, n.5.

The majority opinion misunderstands the limited scope of RPC 1.13(h). The rule protects private lawyers from broad disqualification under the client conflict provisions of RPC 1.7 when they

represent private clients in cases against the state of Washington, and at the same time seek appointment to represent a state agency. It does that by providing that the private lawyer's client is considered the particular agency of the state, rather than the state of Washington, unless the Attorney General notifies the private lawyer otherwise. As Comment [15] to RPC 1.13(h) states, "[p]aragraph (h) was taken from former Washington RPC 1.7(c)," and was placed in RPC 1.13, when the Court substantially revised the RPC in 2006. *See* 157 Wn.2d at 1176-77, 1221-25, showing this amendment.

RPC 1.13(h) does nothing more. It in no way limits the consequences of litigation for the state of Washington, simply because an agency is represented in litigation by a SAAG. There can be no serious suggestion, for example, that the state of Washington would not be bound by a decision of this Court because its rule was announced in a case involving a state agency represented by a special assistant attorney general.

Moreover, while the majority relies on this immaterial RPC provision, and otherwise treats the Attorney General as though the relationship between an independent constitutional officer and the state of Washington is no different from that of a private attorney and private client, the majority opinion does not confront the provisions of the RPC,

adopted by this Court, that actually bear on this case, and that directly speak to the issue that it raises. RPC Scope [18] provides that "[u]nder various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships [including] whether to appeal from an adverse judgment," that such authority "is generally vested in the attorney general," and that "[t]hese Rules do not abrogate any such authority." In short, under the RPC, a government attorney is not in the same position as a private attorney representing a private client.

There are times when, in the Attorney General's legal judgment, judicial resolution of a legal dispute between agencies or officers would serve the legal interests of the state of Washington, such as when a judicial decision is necessary for the state to proceed with confidence in a particular undertaking. Where that is the case, the Attorney General has exercised his or her authority to appoint a special assistant attorney general to represent the disputing parties, or with proper screening, to represent those parties through assistant attorneys general. *See, e.g.*, *Department of Ecology v. State Finance Committee*, 116 Wn.2d 246, 804 P.2d 1241 (1991) (action to determine validity of financing for Ecology headquarters building). The majority opinion simply assumes that the

Attorney General makes such appointments because he or she is required to whenever any state officer or agency seeks one. Slip Opinion at 15-16. The majority's assumption is not, in fact, the basis for the Attorney General's SAAG appointments. The appointment of a SAAG is an exercise of discretion.[7]

The majority's proffered solutions to the problems created by dismantling the legal discretion of the Attorney General thus are not solutions. The majority opinion does not acknowledge either the substantial harm to the legal interests of the state of Washington that it will invite, or its transfer to individual agencies, private lawyers, and the judiciary representational authority in litigation that does not belong to such entities, private citizens, or the courts in our structure of government.

C. The Discretion Of The Attorney General In Matters Of Litigation Does Not Deny Recourse To State Officials

The majority opinion also is based upon its erroneous conclusion that affirming the litigation discretion of the Attorney General would deny recourse to the Commissioner "regardless of the merits, or importance, of the case." Slip Opinion at 6, n.2. The instant litigation itself belies any such contention.

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[7] RCW 43.10.065 provides that "[t]he attorney general *may* employ . . . attorneys" (emphasis added).

More to the point, however, the majority opinion fundamentally misapprehends the law in this regard. This Court has held that the Attorney General's exercise of judgment with respect to directing the course of litigation is subject to review for abuse of discretion. *Blue Sky Advocates v. State,* 107 Wn.2d 112, 117-18, 727 P.2d 644 (1986); *Boe v. Gorton*, 88 Wn.2d 773, 774-75, 567 P.2d 197 (1977); *Berge v. Gorton,* 88 Wn.2d 756, 762, 567 P.2d 187 (1977). Yet, contrary to this clear authority, the majority opinion states that the litigation judgments of the Attorney General would be unreviewable.

The majority opinion also states that acknowledging the Attorney General's discretion would permit litigation decisions "merely because of . . . difference in [political] parties." Slip Opinion at 6, n.2. This assertion similarly is incorrect. Such a decision would be the most patent abuse of discretion.[8] Any such abuse can and should be halted if and when it occurs, not by judicially altering the structure of state government when it has not.

In addition, at a time when the judiciary finds it necessary to respond to charges of partisan judicial decision-making and to express concern with the deleterious effect that such charges have on public confidence in the integrity of government, it is disappointing to see the

[8] As would a litigation decision resting "merely" on the fact that the Attorney General and Commissioner are of the same party.

Court's majority – with no factual foundation in this case – suggest the potential for such decision-making on the part of another constitutional officer as an underpinning for its decision.

Similarly, as in no other decision, the majority opinion expresses concern with allowing the Attorney General to exercise legal judgment in litigation because the office is elected by the people of this state. *Id.* (referring to litigation decisions "based on nothing more than the elected attorney general's judgment.") The idea that the legal judgment of the Attorney General somehow is suspect because – like all of the members of this Court – he or she ultimately is answerable to the citizens of Washington is misguided. Responsibility to the electorate is a fundamental underpinning and strength of Washington's divided government, not a reason to discount the discretion placed in the Attorney General.

Ironically, while the majority opinion is concerned with precluding unreviewable exercise of judgment by government officials, it is important to understand that the majority opinion will be used to justify such exercises of judgment – but not by the Attorney General. The majority opinion will invite unreviewable "legal judgments" of scores of unaccountable agencies and officers who lack both legal training and the authority to represent the legal interests of the state as to whether

advancing particular arguments or positions in the courts is in the legal interests of the state of Washington.

D. The Court Should Reconsider Its Opinion And Dismiss The Commissioner's Petition. Alternatively, The Court Should Unambiguously Rest Its Opinion On RCW 43.12.075

The majority opinion relies substantially on RCW 43.12.075, a statute specific to representation of the Commissioner of Public Lands, to conclude that the Attorney General must appeal at the Commissioner's command, despite the best legal judgment of the Attorney General that such an appeal is contrary to the legal interests of the state of Washington. The Attorney General does not intend to restate here why the Court should conclude that RCW 43.12.075 does not compel the Attorney General to advance the Commissioner's appeal.

However, the majority opinion also references RCW 43.10.040 and RCW 43.10.067, statutes generally addressing the authority of the Attorney General, in reaching its decision. As explained above, the application of these statutes is not a matter of first impression before this Court, and the majority opinion appears to fundamentally misapprehend their import. More fundamentally, references to these statutes are unnecessary to ground the majority opinion and create substantial uncertainty as to its scope.

The Attorney General thus respectfully submits that for the reasons stated above, the majority opinion should be reconsidered and that upon reconsideration the Commissioner's requested writ should be denied. Alternatively, however, the Attorney General respectfully requests that the Court modify the majority opinion to rest its opinion unambiguously on RCW 43.12.075 and remove references to RCW 43.10.040 and RCW 43.10.067. Absent such revision by the Court, the majority opinion erroneously will invite great uncertainty and the broad and substantial harm discussed in this motion.

RESPECTFULLY SUBMITTED this 21st day of September, 2011.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of the Motion for Reconsideration on the following via electronic transmittal and First Class United States Mail, postage prepaid:

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DATED this 21st day of September, 2011.

Wendy R Scharber
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ATTACHMENT

State ex rel. Dunbar v. State Board of Equalization, 140 Wash 443, 249 P. 966 (1926)

Supreme Court of Washington.
STATE ex rel. DUNBAR, Atty. Gen.,
v.
STATE BOARD OF EQUALIZATION et al.

No. 20248.
Oct. 9, 1926.

Department 2.

Original action for mandamus by the State, on the relation of John H. Dunbar, Attorney General, against the State Board of Equalization and others. Writ granted.

West Headnotes

[1] Mandamus 250 ⇨112.1

250 Mandamus
250II Subjects and Purposes of Relief
250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities
250k112 Levy of Taxes
250k112.1 k. In general. Most Cited Cases
(Formerly 250k112)

Suit for mandamus held appropriate remedy to compel state board of equalization to levy taxes as directed by Laws Ex.Sess.1925, p. 95.

[2] Mandamus 250 ⇨112.1

250 Mandamus
250II Subjects and Purposes of Relief
250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities
250k112 Levy of Taxes
250k112.1 k. In general. Most Cited Cases
(Formerly 250k112)

Under Const. art. 4, § 4, members of state board of equalization are state officers, who may be compelled by mandamus to levy tax as directed by Laws Ex.Sess.1925, p. 95.

[3] States 360 ⇨44

360 States
360II Government and Officers
360k44 k. Creation and abolition of executive offices in general. Most Cited Cases

Under Const. art. 4, § 4, a state office exists where there is reposed some part of state's sovereign power, and within such rule levying of taxes is a sovereign power.

[5] Attorney General 46 ⇨6

46 Attorney General
46k5 Powers and Duties
46k6 k. In general. Most Cited Cases

Rem.Comp.Stat. § 11032, requiring Attorney General to enforce proper application of "appropriated" funds, requires that he should see to enforcement of act which was intended to provide funds for state institutions.

[6] Courts 106 ⇨207.4(3)

106 Courts
106VI Courts of Appellate Jurisdiction
106VI(A) Grounds of Jurisdiction in General
106k207 Issuance of Prerogative or Remedial Writs
106k207.4 Mandamus
106k207.4(1) Jurisdiction in General; Subjects and Purposes of Relief
106k207.4(3) k. Public officers, boards, and municipalities, acts and proceedings of. Most Cited Cases

Action for mandamus by Attorney General to compel state board of equalization to levy taxes for institutions of higher learning as directed by Laws Ex.Sess.1925, p. 95, held properly brought in original jurisdiction of Supreme Court, since it relates to a matter of state concern.

[8] Mandamus 250 ⚿4(5)

250 Mandamus
250I Nature and Grounds in General
250k4 Remedy by Appeal or Writ of Error
250k4(5) k. Acts of officers, boards, or private corporations. Most Cited Cases

Neither Rem.Comp.Stat. § 11222, RCW 84.48.080, 84.48.090, nor Laws 1925, p. 33, provide a right of appeal from action of state board of equalization which will prevent resort to mandamus to compel that board to levy tax directed by Laws Ex.Sess.1925, p. 95.

[9] Statutes 361 ⚿37

361 Statutes
361I Enactment, Requisites, and Validity in General
361k37 k. Enrollment, authentication, and filing. Most Cited Cases

Enrolled bill on file in office of Secretary of State, appearing as Laws Ex.Sess.1925, p. 95, held sufficiently authenticated, in view of Const. art. 2, § 32, and art. 3, § 12, though not signed by president of Senate and speaker of House, after passed over Governor's veto.

[10] Statutes 361 ⚿60

361 Statutes
361I Enactment, Requisites, and Validity in General
361k57 Determination of Validity of Enactment
361k60 k. Scope of inquiry in general. Most Cited Cases

Courts will not go behind an enrolled bill as it appears in the Secretary of State's office to determine method, procedure, means, or manner in which it was passed.

[11] Statutes 361 ⚿37

361 Statutes
361I Enactment, Requisites, and Validity in General
361k37 k. Enrollment, authentication, and filing. Most Cited Cases

Legislature has inherent power to adopt any procedure that it sees fit by which to transmit to Secretary of State information that bill has been finally passed and present enrolled bill to that office for filing.

[12] Statutes 361 ⚿61

361 Statutes
361I Enactment, Requisites, and Validity in General
361k57 Determination of Validity of Enactment
361k61 k. Presumptions and construction in favor of validity. Most Cited Cases

On showing that it has been custom of Legislature since establishment of state to attest repassage of a bill, either by secretary of Senate or clerk of House, according to where bill originated, a conclusive presumption arose that such procedure was in accordance with legislative rule.

[13] Evidence 157 ⚿83(1)

157 Evidence
157II Presumptions
157k83 Official Proceedings and Acts
157k83(1) k. In general. Most Cited Cases

In absence of showing to contrary, there is presumption that acts of officials are in accordance with rules governing them, and that legal procedure has been followed.

[14] Statutes 361 ⚿35

361 Statutes
361I Enactment, Requisites, and Validity in General
361k25 Approval or Veto by Executive Authority
361k35 k. Passage notwithstanding veto. Most Cited Cases

That rule of procedure in repassage of bill has not been strictly followed by Legislature will not

invalidate act affected.

[15] Statutes 361 ⚿47

361 Statutes
361I Enactment, Requisites, and Validity in General
361k45 Validity and Sufficiency of Provisions
361k47 k. Certainty and definiteness. Most Cited Cases

Laws Ex.Sess.1925, p. 95, providing for a tax at a certain millage on a certain valuation is not void for ambiguity because that valuation is less than assessed valuation of property within state.

Attorney General 46 ⚿7

46 Attorney General
46k5 Powers and Duties
46k7 k. Bringing and prosecution of actions. Most Cited Cases

That Attorney General under Rem.Comp.Stat. § 112, subd. 3, is required to defend all actions against any state officers held not to preclude him from prosecuting action for mandamus to compel state board of equalization to levy tax directed by Laws Ex.Sess.1925, p. 95.

Mandamus 250 ⚿147

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k144 Parties Plaintiff or Petitioners
250k147 k. Public officers. Most Cited Cases

Attorney General is proper party to institute mandamus proceedings to compel state board of equalization to levy tax directed by Laws Ex.Sess.1925, p. 95, in view of Rem.Comp.Stat. §§ 112, 11032, RCW 43.10.030.

**997 John H. Dunbar *434 and E. W. Anderson, both of Olympia, for relator.

Chadwick, McMicken, Ramsey & Rupp, Shank, Belt & Fairbrook, Preston Thorgrimson & Turner, and Wright Froude Allen & Hilen, all of Seattle, amici curiae.

Alex M. Wilston, of Spokane, and Roberts & Skeel, of Seattle, for respondents.

MACKINTOSH, J.

The Legislature of this state, in 1921, passed an act which appears as chapter 142 of the Laws of 1921, and provides that:

'The state board of equalization shall, beginning the fiscal year, 1921, and annually thereafter, at the time *435 of levying taxes for state purposes, levy upon all property subject to taxation, a tax of one and ten one-hundredths of one mill (1.10) for the State University fund; sixty-seven one-hundredths of one mill (.67) for the state college fund; twenty one-hundredths of one mill (.20) for the Bellingham Normal School fund; fifteen and nine-tenths hundredths of one mill (.159) for the Cheney Normal School fund; and twelve one-hundredths of one mill (.12) for the Ellensburg Normal School fund.

'It shall be the duty of the joint board of higher curricula in the report to be made next preceding the convening of the Legislature in 1925 to recommend any changes in levy herein provided for which the said board may deem necessary or proper, and to give their specific grounds and reasons therefor, for the purpose of having the levy herein provided for readjusted by the Legislature of 1925.'

The Legislature of 1925 passed chapter 82 of the Laws of Extraordinary Session of 1925, repealing chapter 142 of the Laws of 1921, the new provision reading:

'The state tax commission shall, beginning the fiscal year 1926, and annually thereafter, at the time of levying taxes for state purposes, levy upon all property subject to taxation, a tax of one and forty-seven one-hundredths of one mill (1.47) for the State University fund; eight thousand seven hundred forty-six ten-thousandths of one mill (.8746)

for the state college fund; twenty-six one-hundredths of one mill (.26) for the Bellingham Normal School fund; twenty-two one-hundredths of one mill (.22) for the Chency Normal School fund; and sixteen one-hundredths of one mill (.16) for the Ellensburg Normal School fund, upon one billion, one hundred fifty-eight million, twenty-six thousand, six hundred seventy-six dollars ($1,158,026,676.00).

'Sec. 2. That chapter 142 of the Laws of 7921, page 528, be and the same is hereby repealed.'

Thereafter, and in September, 1926, the state board of equalization, disregarding the act of 1925, proceeded *436 to make a levy upon the property subject to taxation in this state according to the provisions of the law of 1921. Thereupon this action was begun by the state, on the relation of the Attorney General, against the board of equalization, to compel it to make a levy in accordance with the mandate of the 1925 statute. The objection of the respondents to the issuance of the writ of mandate divides itself into three major classifications: First, that the action is improperly brought in this court; second, that chapter 82 of the Laws of Extraordinary Session of 1925 is invalid because not properly authenticated; and, third, that that chapter is invalid because of ambiguity.

I. The first objection to the proceeding may be divided under several heads:

[1] (A) It is urged that generally mandamus is not a proper remedy. The answer to this was adequately given in the decision in State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101, 37 L. R. A. (N. S.) 466, where there was thoroughly reviewed the power of the court to issue mandamus against officials to compel the performance of a duty imposed upon them by statute, and where it was held that the validity of such a statute can be considered in the mandamus action.

[2] (B) It is urged that the respondents are not state officers and therefore not subject to the writ sought. Section 4, art. 4, State Constitution. This court several times, in considering whether persons occupying different positions in connection with the state and municipal governments were public officers, has held that persons exercising functions analogous to those exercised by the respondents here were public officers. In State v. Womack, 4 Wash. 19, 29 P. 939, it was held that a member of the board of education *437 was a public officer and that that term was not confined to such officers of the **998 state as are mentioned in the Constitution. It was said that the members of the board of education 'are certainly public officers under any definition that can be found of the term public officer.' In Olympia Water Works v. Thurston County, 14 Wash. 268, 44 P. 267, it was held that members of county boards of equalization were public officers. In Lewis v. Bishop, 19 Wash. 312, 53 P. 165, the same decision was arrived at. In State ex rel. Cowles v. Schively, 63 Wash. 103, 114 P. 901, the state insurance commissioner, a person whose office was created by the state Legislature, was held to be a state officer. In State ex rel. North Coast Fire Insurance Co. v. Schively, 68 Wash. 148, 122 P. 1020, this same office was again held to be a state office and its occupant a state officer, and the early case of State ex rel. Stearns v. Smith, 6 Wash. 496, 33 P. 974, which held that a member of the board of regents of the Agricultural College was not a state officer, was criticized and in effect overruled. In State ex rel. Davis v. Johns (Wash.) 248 P. 423, the office of regent of the State University was held to be a state office. It was said in Blue v. Tetrick, 69 W. Va. 742, 72 S. E. 1033:

'* * * It is clear that a tax commissioner holds an office, and the Constitution authorizes the Legislature to create an office. The Constitution goes further than merely to authorize the Legislature to create an employment; it authorizes it to create an office. The tax commissioner is an officer, paid out of the public treasury, and exercises some great powers pertaining to sovereignty, and is therefore an officer, not an employé.'

[3] A state office exists where there is reposed some part of the state's sovereign power and the levying of taxes is a sovereign power. The examination of a many page note to the case of ***438** Shelby v. Alcorn, 36 Miss. 273, 72 Am. Dec. 169, leaves no question as to the respondents' status. It would therefore appear that this court has original jurisdiction in mandamus over the respondents.

[5] (C) The next objection presented to the action is that the Attorney General is not a proper party to institute and maintain it. In Jones v. Reed, 3 Wash. 57, 27 P. 1067, it was held that the Attorney General was the proper party to enjoin the misapplication of funds appropriated by the Legislature for the purpose of establishing an agricultural school, and that that officer was the only one who could maintain such action. In State ex rel. Attorney General v. Seattle Gas & Electric Co., 28 Wash. 488, 68 P. 946, 70 P. 114, it was held that the Attorney General was not a proper party to maintain a quo warranto proceeding to inquire into the wrongful exercise of a franchise granted by a municipality. It was there held that the Attorney General did not have common-law powers and had no authority to institute an action concerning merely a local question which did not affect generally the citizens of the state, and it was also pointed out that the prosecuting attorneys of the several counties were given the power expressly to institute such proceedings. In Jones v. Reed, supra, and State ex rel. Pierce County v. Superior Court for Thurston County, 86 Wash. 685, 151 P. 108, this court held that the Attorney General is the only party who under the law can maintain an action to prevent public funds being improperly used. It would seem that if the Attorney General is the only proper party to prevent the misappropriation of public funds he should be a proper party to compel their proper use. If this is not so, there would be no one empowered to institute an action to compel state officials to use appropriated funds in the manner directed by the state Legislature. ***439** Under section 112 of Rem. Comp. Stat., it is made the duty of the Attorney General to institute and prosecute actions which may be necessary in the execution of the duties of any state officer, and, it having been made the duty of the respondents by chapter 82 of the Laws of Extraordinary Session of 1925 to levy certain taxes, it would seem to follow that it was the duty of the Attorney General to institute and prosecute such action as may be necessary to see that those duties were properly performed. Furthermore, section 11032 of Rem. Comp. Stat. makes it the duty of the Attorney General to enforce the proper application of funds appropriated to the public institutions of the state. The educational institutions are public institutions of the state, and, although the funds here may not strictly be said to have been appropriated, yet that word as used in this section should not be given that narrow and restricted meaning, but the intent of the act should be observed, which is that the Attorney General should see to the enforcement of an act which was intended to provide funds for the carrying on of state institutions.

[6] (D) The further argument is made that mandamus will not be granted in this court unless the matter under examination is one of state concern. This court has held, in State ex rel. Ottesen v. Clausen, 124 Wash. 389, 214 P. 635, State ex rel. Goodwin v. Savidge, 133 Wash. 532, 234 P. 1, and in State ex rel. Van Brocklyn v. Savidge (Wash.) 249 P. 996, that mandamus will not issue originally out of the Supreme Court against a state officer to secure to the relator a purely private right. The first of these actions was to compel the payment of a balance due under a road-building contract; the second and third were actions seeking to compel the issuance of mining and gas leases. It would hardly seem necessary to discuss the question of whether appropriations ****999** for the five institutions***440** of higher learning present a matter of more than private interest and concern. The furnishing of higher educational facilities to the youth of the state has at all times been considered a matter of public and state concern, and an application to secure that which was allotted to those institutions by the state Legislature cannot be denied on the

ground that merely private rights are involved and that the relator should be deprived of the opportunity of originally presenting the issue to this tribunal.

(E) Contention is made that the Attorney General is compelled, under the Constitution and statutes, to represent state officers, and that therefore he cannot begin an action wherein state officers are defendants. Attention is called to section 112 of Rem. Comp. Stat. subd. 3, where it is made the duty of the Attorney General to defend all actions against any state officer. The legitimate conclusion of such an argument is that the Attorney General must, if such a situation arise, sit supinely by and allow state officers to violate their duties and be recreant to their trusts, and that, instead of preventing such actions, it is his duty to defend the delinquents. The law cannot be given any such construction. His paramount duty is made the protection of the interest of the people of the state, and, where he is cognizant of violations of the Constitution or the statutes by a state officer, his duty is to obstruct and not to assist, and, where the interests of the public are antagonistic to those of state officers, or where state officers may conflict among themselves, it is impossible and improper for the Attorney General to defend such state officers. This court, in State ex rel. Dysart v. Gage, 107 Wash. 282, 181 P. 855, recognized that such situations might arise and held that, where a prosecuting attorney, although made the legal advisor *441 of all school districts, could not properly represent antagonistic interests of districts involved in litigation, private counsel would have to be employed by those officers whose actions were being questioned.

[8] (F) The point is raised that mandamus will not lie for the reason that there is an adequate remedy by appeal. This point was sustained in State ex rel. Brunn v. State Board of Medical Examiners, 61 Wash. 623, 112 P. 746, where the question involved was the right to a license to practice medicine, and in Russell v. Dibble, 132 Wash. 51, 231 P. 18, where the same question was had. In State ex rel. Hawksworth v. Clifford, 130 Wash. 103, 226 P. 272, compensation under the Workmen's Compensation Act (Rem. Comp. Stat. § 7673 et seq.) was not fixed by the court by writ, for the reason that the act itself set out a medthod of appeal. But this court has held that, in questions arising before county boards of equalization, no appeal having been provided for, extraordinary writs were proper. Olympia Water Works v. Thurston County, 14 Wash. 268, 44 P. 267; Lewis v. Bishop, 19 Wash. 312, 53 P. 165; Adams County v. Scott, 117 Wash. 85, 200 P. 1112. There is no logical or practical difference between the functions of county boards of equalization and the state board of equalization, and, unless there is some provision of law granting an appeal from the action of the state board of equalization in matters such as here in controversy, mandamus is the remedy to be sought. That there is such provision for an appeal is contended for by the respondents. They claim that chapter 18 of the Session Laws of 1925, creating the tax commission and making its members the state board of equalization, provides an appellate procedure. Section 7 of that act specifies that any party feeling aggrieved by 'any order of the tax commission shall have a right of appeal*442 to the superior court,' etc.; but an examination of the chapter clearly indicates that the men composing the tax commission, although they are the same ones who also compose the board of equalization, occupy two different positions, and this appeal section relates to their actions when sitting as a tax commission and not as equalizers making levy under statutory mandate. Not only does the act restrict the right of appeal to questions arising before the tax commission, but from the very nature of the duties of these men an appeal was not contemplated from the action of the board of equalization when proceeding under a statute such as either chapter 142 of the Laws of 1921 or chapter 82 of the Laws of Extraordinary Session of 1925. Although the later act refers to the tax commission, it plainly means the members of that commission sitting as the board of equalization. Rem. Comp. Stat. § 11222; section 11, chapter 18, Laws of 1925. Moreover, even though an appeal might have been provided for, it is neither speedy nor adequate. It is

unnecessary to go into the exigencies of a matter of this kind. The provision for the levying and collecting of a tax for the maintenance of public institutions is a matter which cannot be adequately and speedily determined in the regular course of appeal.

[9][10] II. Under this head is presented the argument that the enrolled bill on file in the office of the Secretary of State, appearing as chapter 82 of the Laws of Extraordinary Session of 1925, is invalid because not properly authenticated. This court early adopted and ever since has adhered to the rule that it will not go behind an enrolled bill as it appears in the Secretary of State's office to determine the method, the procedure, the means or manner in which it was passed in the houses of the Legislature. After a most through examination of the ***443** two ****1000** opposing theories, this one was finally adopted, and the one obtaining in several jurisdictions, that journal entries and independent investigations may be resorted to for the purpose of determining whether an enrolled bill was actually passed as enrolled, was repudiated. The rule in this state is not only sustained by long-continued acceptance, but is based upon sound logical and practical reasoning. That the enrolled bill rule is the rule in this state appears not only from the decided cases (State ex rel. Reed v. Jones, 6 Wash. 452, 34 P. 201, 23 L. R. A. 340; Parmeter v. Bourne, 8 Wash. 45, 35 P. 586, 757; Gottstein v. Lister, 88 Wash. 462, 153 P. 595, Ann. Cas. 1917D, 1008), but it is so conceded in the argument by respondents' counsel, and therefore there is eliminated from consideration in this case considerable matter in the briefs relating to the manner in which chapter 82 of the Laws of Extraordinary Session of 1925 was passed over the Governor's veto by the House of Representatives. All those things, under the concession made by the respondents' counsel themselves, are immaterial and not subject to investigation by the court. Finding an enrolled bill in the office of the Secretary of State, unless that bill carries its death warrant in its hand, the courts will make no investigation of the antecedent history connected with its passage except as such an investigation may be necessary in case of ambiguity in the bill for the purpose of determining the legislative intent. Scouten v. City of Whatcom, 33 Wash. 273, 74 P. 389. As Chief Justice Dunbar, in Parmeter v. Bourne, supra, said for this court:

'This argument is squarely against the decision in State ex rel. Reed v. Jones, 6 Wash. 452 (34 P. 201 [23 L. R. A. 340]), where this court held that, where an act of the Legislature had been properly certified, courts had no authority to inquire into any prior proceedings on the ***444** part of the Legislature to ascertain whether the mandatory provisions of the Constitution had been complied with, but that the enrolled bill properly certified to was conclusive evidence of that question. This decision was based upon the theory that the Legislature was one of the co-ordinate departments of the government, with equal authority with the others, and that the assumption is a false one, that the 'mandatory provisions of the Constitution are safer if the enforcement thereof is intrusted to the judicial department than if so intrusted to the Legislature.' Or, 'in other words,' said this court, 'courts holding the other view have acted upon the presumption that their department is the only one in which sufficient integrity exists to insure the preservation of the Constitution."

The question then, and the only question relating to the validity of this bill, is whether upon its face it is regular. The bill shows that it bears these indorsements:

'Passed the Senate December 7, 1925. E. J. Cleary, President of the Senate.

'Passed the House December 18, 1925. F. B. Danskin, Speaker of the House.

'Vetoed December 24, 1925. Roland H. Hartley, Governor of Washington.

'Massage to the Secretary of State.

'Senate Chamber.

'Olympia, Washington, January 6, 1926.

'Hon. J. Grant Hinkle, Secretary of State-Sir: The Legislature of the state of Washington has passed notwithstanding the veto of the Governor, Senate Bill No. 40 entitled: 'An act relating to the state institutions of higher education, making provisions for the annual levy of a tax to produce revenue therefor and repealing chapter 142 of the Laws of 1921, page 528.' ***445** And said bill, together with the Governor's veto message on same, is herewith transmitted. Victor Zednick, Secretary of the Senate.

'Filed: Jan. 7, 1926, 11:00 a. m. J. Grant Hinkle, Secretary of State.'

Respondents' position is that this is not a sufficient authentication, for the reason that, after the bill had been vetoed by the Governor and returned to the Legislature the signatures of the president of the Senate and speaker of the House do not appear; in other words, the claim is that, after a bill has been vetoed it is incumbent that the president of the Senate and speaker of the House sign the bill as under the law they are obliged to do bills on original passage. Let us examine the provisions of the Constitution relating to this phase of the matter. Section 32 of article 2 of the Constitution provides:

'No bill shall become a law until the same shall have been signed by the presiding officer of each of the two houses in open session, and under such rules as the Legislature shall prescribe.'

Section 12, art. 3, of the Constitution is as follows:

'Every act which shall have passed the Legislature shall be, before it becomes a law, presented to the Governor. If he approves, he shall sign it; but if not, he shall return it, with his objections, to that house in which it shall have originated, which house shall enter the objections at large upon the journal, and proceed to reconsider. If, after such reconsideration, two-thirds of the members present shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members present, it shall become a law. * * *'

[11] An examination of these sections shows that it is mandatory that the presiding officers of the two houses ***446** of the Legislature shall sign the bill upon its original passage, but that there is no provision for such signature upon a repassage after veto; that after a veto 'it shall become a law' when two-thirds of the members of each house have voted to pass it over the Governor's veto. The way is left open for the Legislature to provide by rule for the manner ****1001** of authentication. There is no question that, if the Constitution had provided, upon a repassage of a vetoed bill, that the designated officers should sign it, the absence of such signature on the enrolled bill in the Secretary of State's office would render that bill invalid; but, in the absence of any constitutional provision relating to this matter, the Legislature under its inherent power has the right to adopt any procedure that it sees fit by which to transmit to the Secretary of State the information that the bill has been finally passed and present the enrolled bill to that office for filing. The decisions cited by the respondents Amos v. Gunn, 84 Fla. 285, 94 So. 615; Hamlett v. McCreary, 153 Ky. 755, 156 S. W. 410; State v. Kiesewetter, 45 Ohio, 254, 12 N. E. 807; Scarborough v. Robinson, 81 N. C. 409; Lynch v. Hutchinson, 219 Ill. 193, 76 N. E. 370, 4 Ann. Cas. 904; State v. Mickey, 73 Neb. 281, 102 N. W. 679, 119 Am. St. Rep. 894; State v. Lynch, 169 Iowa, 148, 151 N. W. 81, L. R. A. 1915D, 119) are all decisions from which there can be no dissent and involve only the question of validity of a bill on its original passage not authenticated by the signature of either one or both the presiding officers of the two houses of the Legislature where there was an express constitutional provision that a bill should be so authenticated. In none of those cases was the question involved whether an authentication was necessary upon a repassage of a bill, but respond-

ents cite one such case appearing in State v. Howell, 26 Nev. 93, 64 P. 466, where the Supreme*447 Court of Nevada held that, under a constitutional provision requiring that all bills passed by the Legislature should be signed by the presiding officers of the House and Senate, where the Governor had vetoed the bill after adjournment of the Legislature and the subsequent Legislature repassed it over the veto, the failure of the presiding officers of the subsequent Legislature to sign the bill rendered the law invalid, and that the constitutional provision applied to the repassage of bills over the Governor's veto. Two judges of the court signed the opinion, and one dissented. That seems to be the sole authority in favor of the respondents' position, but opposed to it we find the decisions of the Court of Appeals of Kentucky, of the Supreme Court of Missouri, and of the Supreme Court of Indiana. In State ex rel. Holt v. Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65, the last-mentioned court held that an attestation of a bill as required by the Indiana Constitution on its original passage was not required to be made a second time after it had been passed over the veto of the Governor. This question was thoroughly analyzed and considered, and the conclusion made that under a constitutional provision such as the one obtaining in this state there was no requirement for a second attestation, for the reason that the Constitution provides that, the repassage having been made by a two-thirds vote, the bill 'shall become a law,' and that there the matter ends. The same court, in City of Evansville v. State of Indiana ex rel. Blend, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93, said that, where a bill which had originated in the house of Representatives, and had been passed by both branches of the Legislature and vetoed by the Governor, had been returned to the house where it originated and repassed and then sent to the Senate and repassed, 'the moment it passed the Senate it became a law,' and this under a constitutional provision which reads as does ours:

*448 'Every bill which shall have passed the General Assembly shall be presented to the Governor; if he approve, he shall sign it, but if not, he shall return it, with his objections, to the house in which it shall have originated, which house shall enter the objections at large upon its journals, and proceed to reconsider the bill. If, after such reconsideration, a majority of all the members elected to that house shall agree to pass the bill, it shall be sent, with the Governor's objections, to the other house, by which it shall likewise be reconsidered; and if approved by a majority of all the members elected to that house, it shall be a law.' Const. Ind. art. 5, § 14.

The Kentucky court said, in Perkins v. Lucas, 197 Ky. 1, 246 S. W. 150:

'No indorsement was made upon the enrolled bill, nor signed by the presiding officers of either house, to the effect that the bill had been passed over the Governor's veto, and this plaintiff insists must have been done to make it a valid measure. It is well established in this jurisdiction that, when an enrolled bill has been attested by the presiding officers of each house, respectively, as section 56 of the Constitution requires, it will be accepted by the courts as the actual bill which was passed, and the courts will not go behind that certification to determine whether all the requirements of the Constitution have been complied with in the passage of the bill, nor will they look to the entries in the journals to determine that fact, nor allow such entries to overthrow the presumption that the steps taken in the passage of the bill were regular and in conformity to the constitutional requirements. The reason for this exclusive presumption in favor of the regularity of the passage of the bill from the attestation of the presiding officers of the two houses is that a bill when made ready to be presented to the Governor must have the certificates of the presiding officers of the two houses of the Assembly upon it, and the courts will not go behind this certification to consider the regularity of its passage out of regard to the equality of the legislative branch of the government with that of the judiciary. Duncan v. Combs, 131 Ky. 330, 115 S. W. 222; *449 Hamlett v. McCreary, 153 Ky. 755, 156 S. W. 410; State

Board of Charities, etc., v. Combs, 190 Ky. 147, 227 S. W. 282; Lafferty v. Huffman, 99 Ky. 92, 35 S. W. 123, 18 Ky. Law Rep. 17, 32 L. R. A. 203; **1002Commonwealth v. Shelton, 99 Ky. 122, 35 S. W. 128, 18 Ky. Law Rep. 30; Wilson v. Hines, 99 Ky. 228, 35 S. W. 627, 37 S. W. 148, 18 Ky. Law Rep. 233; Vogt v. Beauchamp, 153 Ky. 67, 154 S. W. 393. When a bill thus certified has been disapproved by the Governor and returned to the house in which it originated, another constitutional provision governs. Section 88 of the Constitution provides, in substance, that, if the Governor disapproves a bill, he shall return it with his objections to the house in which it originated, which shall enter the objections in full upon its journal, and reconsider it. Upon the reconsideration, if a majority of all the members elected to that house shall agree to pass the bill, it shall be sent with the Governor's objections to the other house, which shall consider it in like manner, and, if approved by a majority of all the members elected to that house, 'it shall be law,' and in such cases the votes of both houses shall be determined by yeas and nays, and the names of the members voting for and against the bill shall be entered upon the journal of each house, respectively. It will be observed that in this state of case no certification is required by the presiding officers of the houses, nor any other officer or individual, nor is any one required to sign the bill in any way. * * *'

The Missouri Supreme Court said this in Pacific Railroad v. Governor, 23 Mo. 353, 364, 66 Am. Dec. 673, 681:

'That instrument [the Missouri Constitution] provides that every bill, having passed both houses shall be signed by the speaker of the House of Representatives and by the president of the Senate. This is the mode adopted for the authentication of every bill, and furnishes the evidence of its passage by the two houses in the first instance. The Governor's signature to a bill is not required as a means or part of its authentication, but an evidence of his approval. The Governor, being no member of either house, and in contemplation of the Constitution not being present during their deliberations, could not know whether a bill had passed *450 the two houses or not. The Constitution itself contemplated that there might be laws without the signature of the Governor and therefore the mode of authentication adopted was the evidence of the passage of all bills, in the first instance, by the two houses, as well those passed with his approbation as those passed against his consent. * * *'

[12][13] The Legislature, not being hampered by any constitutional limitation regarding the attestation of repassed bills, as already said, has the power to make such rules or adopt such procedure as in its wisdom appeared best in the handling of the enrollment of such a bill, and there appears in this record and affidavit, unobjected to and uncontroverted, from the Secretary of State, showing that it has been the custom of the Legislature since the establishment of the state to attest the repassage of a bill in the manner as shown on the face of this bill, either by the secretary of the Senate or the clerk of the House, according as to whether the bill originated in one or the other of those bodies. There must be, therefore, a conclusive presumption that this procedure is in accordance with a legislative rule, and the power of the Legislature to make such rule and compliance with it renders the action valid and the bill becomes an existing and effective law. Furthermore, in the absence of any showing to the contrary, the presumption is that the acts of officials are in accordance with the rules governing them and that regular procedure has been followed. Sweitzer v. Territory, 5 Okl. 297, 47 P. 1094; St. Louis & S. F. Ry. Co. v. Gill, 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452.

[14] And even if the rule of procedure had not been strictly followed, that would not violate the act, for, as was said in Pacific Railroad v. Governor, supra:

*451 'Upon the whole, we are of the opinion that the objections taken against the mode of passing this law by the General Assembly on its re-

consideration are untenable; that the Constitution and law precludes an inquiry as to the existence of such objections, the Constitution regarding the provisions alleged to have been violated in the passage of this law as merely directory, and, being so, a departure from them, even if there was a departure, would not render the law void.'

There appearing nothing upon this enrolled bill which shows that it was repassed irregularly, there is therefore nothing from which to reach a conclusion that the bill is other than valid.

[15] III. Some suggestion is made that chapter 82 is void by reason of ambiguity; it appearing that the assessed valuation of the property of the state fixed by the board of equalization was in the sum of $1,207,621,657; and chapter 82, providing for a certain millage upon a lesser valuation, renders the act invalid. There is no ambiguity in the act. The act plainly provides for a certain millage upon a certain valuation; in other words the act fixes an absolute amount to be provided for the maintenance of these five institutions. It is but a matter of mathematical computation to figure what that amount is. If the state board of equalization fixes the assessed value of the property of the state for taxation at $1,000,000,000, or $2,000,000,000, or any other amount, the amount to be levied for these institutions is to be collected upon the basis of the valuation fixed by the board. That entails nothing but a simple arithmetical process. While it might have been simpler for the Legislature to have originally done its own multiplying and fixed in the act the exact amount, it was not compelled to adopt that easier method, but could adopt the one which it has, and, because it has chosen a more indirect ***452** way of arriving at a result rather than the direct way, presents no reason for holding that the act is thereby rendered ambiguous. If legislative acts are to be held invalid for the reason that they are ambiguous ****1003** merely because they contain more words than may have been necessary to express the legislative intent, many virtuous enactments would have to be annulled.

Finding no merit in any of the contentions of the respondents, the writ will issue, directing them to comply with the requirements of chapter 82 of the Laws of Extraordinary Session of 1925. On account of the necessity of an immediate determination of this matter in the public interests, the writ will issue instanter.

PARKER, MITCHELL, MAIN, and ASKREN, JJ., concur.

Wash. 1926
State v. State Bd. of Equalization
140 Wash. 433, 249 P. 996

END OF DOCUMENT

ATTACHMENT

Attorney General Smith Troy Letter dated 01-31-77

2-1-77

Apt. F 1
1510 College Street SE
Olympia, Washington 98503

January 31, 1977

Honorable Slim Rasmussen
Chairman, Senate State Government Committee
Legislative Building
Olympia, Washington 98504

Dear Senator Rasmussen:

There is now before your committee and, depending upon your action, perhaps ultimately before the entire Senate a bill designated S.B. 2213. This bill, if enacted into law, will severely limit the responsibilities of the attorney general. It would authorize most state agencies henceforth to employ their own attorneys who would initiate or defend actions in the courts, render official legal opinions, etc., without any supervision or control of the attorney general and with responsibility to no one other than the agency head, usually a non-lawyer.

As a former attorney general and, more particularly, the attorney general who was probably most responsible for the establishment of the existing system of consolidated legal services within the attorney general's office, I would like to relate and express at this time some history and thoughts derived from my experience with regard to the subject matter of this bill. I am, as you will see, very much opposed to the proposal and urge its rejection by the legislature.

Although both the state constitution and early statutes seem to me to have clearly contemplated that the attorney general would be the lawyer for the state of Washington and all of its officers and agencies, there was no specific prohibition in the laws in existence prior to 1941 against the employment of lawyers by individual state agencies. Accordingly, gradually over the years an erosion of the original concept took place - apparently without a great deal of objection by at least some attorneys general who, I can only assume, were perhaps more concerned about their own office work load than with the larger picture.

Moreover, while the practice was challenged in the middle 1930s in State v. Gattavara, 185 Wash. 325 (1935), the state supreme court, although upholding the attorney general's position in that case (namely, that only his office could bring a lawsuit for a state agency), did so without squarely reaching the constitutional question of whether the legislature may permit state agencies to hire and be exclusively represented by their own attorneys.

By the time I became the attorney general in the spring of 1940, this erosion process had proceeded to the point that the staff of the attorney general's office consisted of only about twelve lawyers out of, as I recall, some 102 lawyers employed by all state agencies. In other words, about 90 lawyers were employed at that time by agencies outside of the attorney general's office - or nearly 90% of all lawyers then employed by the state. As a consequence, I had virtually no control over state litigation, conflicting interpretation of state statutes were being given to various state agencies and, in general, the situation was, simply stated, a mess.

In response to this situation my first thought was to go to court with a test case on the constitutional question. After some reflection, however, I decided against this approach - not so much because I didn't think it would succeed as because the system I had inherited had by then become so entrenched that a legislative correction of the problem appeared more practical, and perhaps more quickly attained, than protracted litigation. Therefore, I caused to be introduced in the legislature a bill which was enacted by the 1941 session as chapter 50, Laws of 1941, since codified as RCW 43.10.067. By that act the legislature expressly prohibited state officers or agencies, other than the attorney general, from employing any attorney in a legal or quasi-legal capacity either to represent that agency in the courts or to conduct any other legal business on behalf of the agency. As a direct consequence of this enactment the total number of lawyers employed by the state was reduced from more than 100 to approximately 40. And I might add that although both houses of the 1941 legislature were then Democratic, as of course I was also, the bill was not only signed into law but was fully supported by the then Republican Governor, Arthur B. Langlie.

Aside from the obvious cost saving to the state which resulted from a substantial reduction in the number of attorneys employed, the consolidation of legal services mandated by this 1941 law also had numerous other beneficial effects. For one thing, legal advice and statutory interpretation became consistent, disputes between agencies became capable of being resolved by the attorney general's opinion process rather than through litigation, and needed controls over the conduct of state litigation became possible to establish. At the same time, by reason of this change in the system of providing legal services for state agencies, the people's interests seem to me to have become far better served

by reason of the fact that those services were being performed by a public official directly answerable to the voters through the electoral process.

I know, of course, how much the attorney general's office has grown in size since my time. I understand that there are nearly 160 assistant attorneys general serving in the present incumbent's office. But, I would look upon that growth as merely a reflection of a corresponding growth in state government, generally, rather than something which has been produced by the system of consolidated legal service which was established during my tour of duty. In fact, I would strongly suggest that if the system which I inherited in 1940 had been allowed to continue there would probably be closer to 260 lawyers employed to represent state agencies at the present time. In this regard, aside from my own experience with the situation in 1941, I have come across data from other states in which legal services are not consolidated which amply bears that projection out.

In urging the defeat of Senate Bill No. 2213, which, as I see it, would be a large step backward, I most certainly am not unaware of the fact that this proposal is favored by our new governor and perhaps some agency heads - as well as by a number of prominent members of the majority party in both houses of the legislature. Be that as it may, it is my sincere personal judgment that the bill is bad law and that its passage would be adverse to the best interests both of state government and the people of our state. Search though I might I can honestly think of no good reasons at all for its enactment. Therefore, with all due respects to those of you who may, for one reason or another, feel otherwise, I urge its defeat. Any other course of action, in my opinion, would run counter to an element of the basic system of checks and balances which is fundamental to our form of government.

Very truly yours,

Smith Troy

Smith Troy
Attorney General (1940-1953)