

[J-36A-C-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE AND EASTERN DISTRICTS

CASTILLE, NEWMAN, SAYLOR, EAKIN, BAER, BALDWIN, JJ.

GENE STILP, : No. 151 MAP 2005
: :
Appellant : :
: Order by this Court Assuming Plenary
: Jurisdiction of the Matter, Dated
v. : December 22, 2005.
: :
: :

COMMONWEALTH OF PENNSYLVANIA, : ARGUED: April 4, 2006
ROBERT P. CASEY, JR., TREASURER :
OF THE COMMONWEALTH OF :
PENNSYLVANIA, ROBERT C. :
JUBELIRER, PRESIDENT PRO :
TEMPORE OF THE PENNSYLVANIA :
SENATE, JOHN M. PERZEL, SPEAKER :
OF THE HOUSE OF :
REPRESENTATIVES, :
: :
Appellees :
: :
: :
: :
: :

THE HONORABLE JOHN W. HERRON, : No. 48 EAP 2005
: :
Appellant : :
: Order by this Court Assuming Plenary
: Jurisdiction of the Matter, Dated
v. : December 22, 2005.
: :
: :

COMMONWEALTH OF PENNSYLVANIA, : ARGUED: April 4, 2006
ROBERT C. JUBELIRER, PRESIDENT :
PRO TEMPORE OF THE SENATE OF :
THE COMMONWEALTH OF :
: :

PENNSYLVANIA, JOHN M. PERZEL, :
SPEAKER OF THE HOUSE OF :
REPRESENTATIVES OF THE :
COMMONWEALTH OF PENNSYLVANIA, :
TOM CORBETT, ATTORNEY GENERAL :
OF THE COMMONWEALTH OF :
PENNSYLVANIA, ROBERT P. CASEY, :
JR., STATE TREASURER OF THE :
COMMONWEALTH OF PENNSYLVANIA, :

Appellees

THE HONORABLE CHARLES C. :
BROWN, JR., THE HONORABLE FRANK :
T. HAZEL, THE HONORABLE ROBERT :
K. KUNSELMAN, THE HONORABLE :
BENJAMIN LERNER, THE HONORABLE :
WILLIAM A. MEEHAN, THE :
HONORABLE TIMOTHY PATRICK :
O'REILLY, AND THE HONORABLE :
JOSEPH A. SMYTH, :

Appellants

v.

COMMONWEALTH OF PENNSYLVANIA, :
ROBERT P. CASEY, JR., STATE :
TREASURER OF THE :
COMMONWEALTH OF PENNSYLVANIA, :

Appellees

COMMONWEALTH OF PENNSYLVANIA, :
THOMAS W. CORBETT, JR., ATTORNEY :
GENERAL, INTERVENOR

No. 9 MAP 2006

Order by this Court Assuming Plenary
Jurisdiction of the Matter, Dated January
11, 2006.

ARGUED: April 4, 2006

CONCURRING AND DISSENTING OPINION

I join the majority's holding and reasoning that the Legislature's attempt, via Act 72, to repeal Act 44's compensation plan is unconstitutional as it relates to the salaries of judicial officers, since the enactment plainly reduces those salaries during judicial terms of office, and therefore, violates Article V, Section 16(a) of the Pennsylvania Constitution. I also agree that Act 44's mid-term "unvouchered expense" allocations violated Article II, Section 8 of the Pennsylvania Constitution, in that they facially represented an unconstitutional mid-term salary increase for legislators. My primary point of difference with the majority concerns the decision to negate the application of Act 44's non-severance provision in the circumstances as they have unfolded, thereby resuscitating judicial salary increases that are otherwise a component of void legislation.

On this severance question, I also agree with much of the majority's able reasoning. Indeed, writing on a clean slate, I would join its approach in discerning too great a possibility that Act 44's non-severance provision was employed tactically (to create a disincentive to the issuance of an adverse ruling upon any Act 44 challenge), and in invoking the separation-of-powers doctrine to invalidate the non-severance clause. In this regard, I also agree that, although Act 44's non-severance clause is entitled to a presumption of constitutionality in the first instance, it need not be regarded as an inexorable command.

On the other hand, I believe that this Court's decision in Consumer Party of Pennsylvania v. Commonwealth, 510 Pa. 158, 507 A.2d 323 (1986), served a substantial role in the events that led to the insertion of the unconstitutional, mid-term, "unvouchered expense" allocation into Act 44. Certainly, I appreciate that the unvouchered allotment that was at issue in Consumer Party is distinguishable from Act

44's formula-based, dollar-for-dollar image of a next-term salary increase. See Majority Opinion, slip op. at 73-74. Nevertheless, it is my considered perspective that the \$5,000 unvouchered allocation at issue in Consumer Party (constituting approximately one-fifth of legislators' then-prevailing salary rate, payable over and above ordinary expense allowances) represented too great a non-transparent conveyance to pass even the loose reasonable relation test that the Court applied in assessing its constitutional validity.¹ As the majority relates, the decision subsequently has been taken to its logical extreme in the enactment and defense of further mid-term, unvouchered allotments couched as expenses that were a dollar-for-dollar match for next-term salary increases. See Stilp v. Commonwealth, 699 A.2d 1353 (Pa. Cmwlth. 1997); Kennedy v. Commonwealth, 119 Pa. Cmwlth. 24, 546 A.2d 733 (1988).²

¹ The excessive deference embodied in Consumer Party's approach is reflected, for example, in an expressed lack of concern regarding whether the unvouchered allotments couched as expenses were reported by legislators as income or expenses on federal tax returns. See Consumer Party, 510 Pa. at 185-86 n.17, 507 A.2d at 337 n.17.

² While the majority does not expressly disavow Consumer Party, there is discord between the high degree of deference accorded to the legislation authorizing "unvouchered expenses" in Consumer Party, 510 Pa. at 184-87, 507 A.2d at 336-38, and the stricter scrutiny that the majority applies presently in looking behind the facial terms of the non-severance provision to its potential underlying impetus. See Majority Opinion, slip op. at 91-94.

Indeed, to the extent that the approach in Consumer Party is not expressly overruled here, it seems to me that the proper course would be to apply a similar measure of deference to Act 44's non-severance clause as was previously applied to "unvouchered expenses." With Consumer Party as the litmus, in which the Court referenced a dearth of actual evidence of improper purposes on the part of the Legislature and refused to look behind obviously problematic legislation on its own, see Consumer Party, 510 Pa. at 186-87, 507 A.2d at 337-38, it appears that Act 44's non-severance provision would also readily pass review. In this regard, there is also no actual evidence of improper purposes here -- the majority applies a reasonable inference of an intention to intrude (continued . . .)

The overly deferential approach employed in the Consumer Party, Kennedy, and Stilp decisions appears to have fostered the unfortunate appearance of the courts' imprimatur upon the "unvouchered expense" method of circumventing Article II, Section 8. Simply put, Consumer Party's approach to mid-term "unvouchered expenses" left open too substantial an opportunity for further erosion of the constitutional prohibition, which, unfortunately, has continued in the aftermath, most recently in Act 44. Compounding this, the present case involves a situation in which members of the judiciary are called upon to adjudicate a matter touching on their personal financial interests under the rule of necessity. See Majority Opinion, slip op. at 10-11. Against this landscape, it does not seem to me that the Court can sufficiently guard against all appearances of self-interest and/or involvement, while acting to negate an expression of legislative will (namely, Act 44's non-severance clause) to maintain any part of the tainted Act 44 legislation.³

In summary, because I believe that Consumer Party was wrongly decided, I would expressly overrule the decision. Since, moreover, I cannot support the invalidation of Act 44's non-severance clause in the circumstances as they have unfolded, I would deem the enactment void as of its inception. For that reason, I would also hold that the salary status quo for judicial officials affected by Act 44 should be maintained at the pre-Act 44 levels, as was otherwise accomplished by Act 72.

(. . . continued)

into the judicial function. See Majority Opinion, slip op. at 91-94. Again, however, such inferences were no part of the Consumer Party decision.

³ In this regard, I would emphasize that my position is not that the Court should act in and of its own accord to invalidate Act 44's compensation plan as it relates to judicial officers. Rather, I believe that the Court should simply not disturb the express directive of the Legislature that the entire compensation plan must fall should any provision of Act 44 be deemed invalid.