

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

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)
A. DONALD McEACHIN, Senator of Virginia)
)
v.) CASE NO. _____
)
WILLIAM T. BOLLING, Lieutenant)
Governor of the Commonwealth of Virginia)
SERVE: 102 Governor Street)
Richmond, VA 23219)
)

COMPLAINT

COMES NOW, Plaintiff A. Donald McEachin, Senator of Virginia, by counsel, and for his Complaint against William T. Bolling, Lieutenant Governor of the Commonwealth of Virginia, state as follows:

1. This is a lawsuit for both injunctive relief pursuant to the provisions of Code of Virginia Sections 8.01- 620 *et seq.* and for declaratory relief brought pursuant to the provisions of Code of Virginia Sections 8.01-184 *et seq.*, for a determination of whether the Constitution of Virginia authorizes the Lieutenant Governor to vote to break a tie on matters in three areas:

(i) matters where the Constitution of Virginia requires a majority vote of the members elected to each house, including, but not limited to, taxes, election of judges and amendments to the Constitution;

(ii) the organization of the Senate and various procedural issues, including but not limited to, the settling of rules of procedure for the Senate, the selection of officers and the appointment of standing committees; and

(iii) appointments, including confirmation of appointments made by the Governor.

2. Plaintiff A. Donald McEachin is a Member of the Senate of Virginia and currently serves as Senate Democratic Caucus Chairman.

3. Defendant William T. Bolling is the Lieutenant Governor of Virginia.

4. Venue is proper under Va. Code § 8.01-261.2 as the official office of the Lieutenant Governor is in the City of Richmond.

5. As a result of the election held on November 8, 2011 the Senate of Virginia will have, as of January 11, 2012, twenty members who are Democrats and twenty members who are Republicans.

6. After the 1995 election, which was the last time the Senate was equally divided, the Senators (without participation of the Lt. Governor), as contemplated by Article IV, § 7 of the Constitution of Virginia settled the Rules that would govern themselves and agreed to procedures for sharing power.

7. On information and belief, in contravention of the Constitution of Virginia, the Lieutenant Governor and the Republican Senators intend to take the position when the General Assembly convenes that the Republican Lieutenant Governor provides the Republican Senators with a majority in the Senate so that the Republicans can by fiat unilaterally organize the Senate, adopt their own version of the Rules of the Senate and allow the Lieutenant Governor to vote on all matters before the Senate.

8. The doctrine of “separation of powers” is embodied in both Article I (Bill of Rights) and Article III (Division of Powers) of the Constitution of Virginia. Article III, § 1 provides:

The legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time; provided, however, administrative agencies may be created by the General Assembly with such authority and duties as the General Assembly may prescribe. Provision may be made for judicial review of any finding, order, or judgment of such administrative agencies.

Virginia's Lieutenant Governor is an Officer of the Executive Branch, Not a Member of the Senate

9. Article IV (Legislative) governs the powers and duties of the General Assembly. Article IV, § 1 provides:

The legislative power of the Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and House of Delegates.

10. Article IV, § 2 provides:

The Senate shall consist of not more than forty and not less than thirty-three members, who shall be elected quadrennially by the voters of the several senatorial districts on the Tuesday succeeding the first Monday in November.

11. Article IV, § 4, detailing the qualifications of senators and delegates, pertinent in part, provides that:

Any person may be elected to the Senate who, at the time of the election, is twenty-one years of age, is a resident of the senatorial district which he is seeking to represent, and is qualified to vote for members of the General Assembly. A senator or delegate who moves his residence from the District for which he is elected shall thereby vacate his office.

12. As the Lieutenant Governor is not one of the 40 members elected to represent the voters of a senatorial district, he is not a member of the Senate.

13. The Constitution of Virginia includes the Lieutenant Governor in Article V (Executive) and describes his role as the successor to the Governor. Article V, § 16.

14. In a 1928 Opinion, the Virginia Attorney General described the Lieutenant Governor as “of course, one of the officers of the Executive Department.” 1927-1928 Op. Att’y Gen. Va. 180.

15. Lieutenant Governor Bolling in fact is a member of the Governor’s cabinet, having been appointed Chief Jobs Creation Officer by Governor McDonnell. In that capacity, he is responsible for coordinating the Commonwealth’s economic development programs across numerous state agencies.

16. While it is true that the Constitution provides that the Lieutenant Governor shall be President of the Senate, it also provides that he shall have no vote except in case of an equal division. Article V, § 14. Numerous other provisions in the Constitution clarify the limits of the Lieutenant Governor’s tie- breaking vote and clarify his narrow role in the Virginia Senate.

Under the Virginia Constitution Numerous Measures Require Affirmative Vote of “Majority of the Members Elected” With No Role for Lieutenant Governor

17. Article IV, § 11, which concerns the enactment of laws and the number of votes required for such enactments, states generally that for a bill to become law, it must be affirmed by “a majority of those voting in each house, which majority shall include at least two-fifths of the members elected to that house.” Generally, for a bill to become law at least 16 elected Senators must support the bill and in the event of a tie in the Senate, the Lieutenant Governor could cast a vote under the Constitution.

18. Article IV, § 11 further provides, however, that certain bills must instead be approved by “an affirmative vote of a majority of all the members elected to each house. . . .”

Article IV, § 11 in pertinent part provides:

No bill which creates or establishes a new office, or which creates, continues, or revives a debt or charge, or which makes, continues, or revives any appropriation

of public or trust money or property, or which releases, discharges, or commutes any claim or demand of the Commonwealth, or which imposes, continues, or revives a tax, shall be passed except by the affirmative vote of a majority of all the members elected to each house, the name of each member voting and how he voted to be recorded in the journal.

The Constitution thus requires 21 elected Senators to support a bill concerning these topics. With respect to these matters, the Lieutenant Governor has no role and cannot break a tie.

19. There are other provisions of the Constitution of Virginia, that also require a “majority of the members elected to each house” or a “majority of the elected membership” of each house to pass a particular measure. See Article IV, § 6 (to extend reconvened session); Article VI, § 7 (to select justices of the Supreme Court of Virginia and judges of courts of record); Article IX, § 1 (to increase the size of the State Corporation Commission); Article X, § 9(b) (to pledge the full faith and credit of the Commonwealth for capital projects); Article XII, § 1 (to propose amendments to the Constitution). In all such measures, the Lieutenant Governor has no role as there can be no tie for him to break. The measure would simply fail if it does not receive the affirmative vote of at least 21 elected Senators.

20. Other provisions of the Constitution similarly exclude any role by the Lieutenant Governor as they require more than a “majority of the members elected to each house.” See Article IV, § 6 (two-thirds of the members elected to each house, to extend a regular session of the General Assembly or to call a special session); Article IV, § 7 (two-thirds of the members elected to each house to require the Governor to call a special session); Article V, § 16 (three-fourths vote of the elected membership of each house, to determine that the Governor is in fact unable to discharge the powers and duties of this office); Article VI, § 2 (three-fifths of the elected membership of each house, to change the size of the Supreme Court of Virginia); Article

VII, § 1 (two-thirds of members elected to each house, to pass a charter bill or special act relating to a locality); Article X, § 6 (three-fourths of members elected to each house, to exempt certain property from taxation); Article X, § 9(c)(two-thirds of members elected to each house, to approve revenue bonds); and Article XII, § 2 (two-thirds of members elected to each house, to call a constitutional convention).

21. In the past, Lieutenant Governors in Virginia have recognized that their role in the Senate is limited by such provisions in the Constitution. On at least three occasions, once in the 1976 session and twice in the 1986 Special Session, the Lieutenant Governor on the record recognized he was unable to vote on such measures.

22. On both occasions in the 1986 Special Session, where the vote was 20-20, the Lieutenant Governor ruled that he was “unable to vote” on amendments to tax bills because Article IV, § 11 required an affirmative vote of a “majority of the members elected to each house” on such bills. As to both occasions, which involved tax bills, the Journal of the Senate of Virginia reported:

There being an equal division, the President ruled that the President was unable to vote on this measure, stating as follows:

Article IV, Section 11 of the Constitution of Virginia states that no tax bill shall be passed without a majority ‘of all members elected to each house.’ (This means 21 votes of the 40 elected to the Senate.) In 1980 the Attorney General ruled that for the purposes of this provision, the Lieutenant Governor is not a member of the Senate and cannot vote on a tax bill. Speakers of the House have similarly ruled that a vote on an amendment to a tax bill is tantamount to a vote on the measure itself.

J. Sen. Va., at 62, 80 (Spec. Sess. 1986).

23. Similarly, in both the 1969 and 1977 sessions, the Lieutenant Governor ruled that the affirmative vote of a majority of the members elected to the Senate is required to adopt an

amendment to a joint resolution offered to amend the Constitution of Virginia. J. Sen. Va., at 83, 88-89, 137-38, 163; J. Sen. Va., at 232-34 (1977).

24. At the 1991 session, the Lieutenant Governor ruled that a majority of the members elected was required to adopt a motion to reconsider a vote by which the Senate had agreed to House amendments to a tax bill. J. Sen. Va., at 769-70 (1991).

25. The present Rules of the Senate include an appendix which reflects and reinforces the Constitution's provisions that certain measures require the support of at least 21 elected members of the Senate.

26. No Virginia Lieutenant Governor has ever cast a vote to break a tie on passage of a bill or resolution requiring an affirmative vote of "majority of the members elected."

27. There are two relevant Virginia Attorney General's Opinions that specifically address whether the Lieutenant Governor can vote to break a tie on measures which require an affirmative vote of a "majority of all the members elected." In the first opinion issued in December 1980, the Attorney General noted that Article IV, § 2 confirmed that the Senate consisted of 40 elected members and that Article IV, § 4 confirmed that Senators are elected to represent senatorial districts. The Attorney General concluded that "the Lieutenant Governor is not a member of the Senate for purposes of Article IV, § 11," which provides that no bills dealing with certain subject matter (largely financial) shall be passed except by affirmative vote of a majority of all the members elected to each house. 1980-1981 Op. Att'y Gen. Va. 97.

28. In a second opinion by Republican Attorney General Jim Gilmore in February 1996, the Attorney General affirmed the 1980 Opinion of Republican Attorney General Marshall Coleman, confirming that "the Lieutenant Governor may not vote on bills and resolutions encompassed within the constitutional provisions [which require the affirmative vote of a

“majority vote of all members.”]. 1996 Op. Att’y Gen. Va. 31. The 1996 Opinion noted that the 1980 Opinion, according to Supreme Court of Virginia case law, “is to be given great weight when the General Assembly has not contradicted it.” Id. Given the fact that the General Assembly, despite introducing over 20 amendments to the Constitution, had taken no action to contradict the then 15-year old Opinion, and given that the Lieutenant Governors over the years had acknowledged the correctness of the 1980 Opinion by concluding they were unable to vote on such matters, the February 1980 Opinion should be regarded as “decisive.”

[T]he practical construction given to a statute by public officials, and acted upon by the people, is not only to be considered, but, in cases of doubt, will be regarded as decisive. It is allowed the same effect as a course of judicial decision. The Legislature is presumed to be cognizant of such construction, and, when long continued, in the absence of legislation evincing a dissent, the court will adopt that construction.

Id. (citing Miller v. Commonwealth, 180 Va. 36, 42, 21 S.E. 2d 721, 723 (1942), quoting Smith v. Bryan, 100 Va. 199, 204, 40 S.E. 652, 654 (1902)).

Senate Settles Its Own Rules

29. The organization of the Senate is addressed in Article IV, § 7, which in pertinent part provides:

. . . [I]n the absence of the Lieutenant Governor, or when he shall exercise the office of Governor, the Senate shall choose from its own body a president pro tempore. Each house shall select its officers and settle its rules of procedure. . . Each house shall judge of the election, qualification, and returns of its members, may punish them for disorderly behavior, and, with the concurrence of two-thirds of its elected membership, may expel a member.

30. Nothing in the Constitution allows the Lieutenant Governor any role in the Senate’s responsibility to select its officers and settle its rules of procedure under Article IV § 7.

31. The Attorney General has recognized that where the Constitution does not set forth the requirements of a certain vote, it is up to the Senate through its own Rules to determine the procedures for such vote and to what extent it will allow the Lieutenant Governor to cast a

tie-breaking vote. In his February 1980 Opinion, Republican Attorney General Marshall Coleman noted that the Constitution sets forth the number of votes for many actions, but where the Constitution is silent, the Rules of the Senate determine such votes and to what extent the Lieutenant Governor has any role in such matters. 1979-1980 Op. Att’y Gen. Va. 178-79. The Attorney General noted that the Senate is the judge of its own Rules. He further confirmed that the Senate Rule which required “a majority of the members elected, not less than 21” for a resolution amending the United States Constitution “is not in conflict with any constitutional provision.” As the Attorney General noted, “[t]he Virginia Constitution provides that each house shall ‘settle’ its own rules.” *Id.* (citing 1977-1978 Op. Att’y Gen. Va. 31, 33 (“It must remain the responsibility of the General Assembly to settle and enforce its own rules and procedures.”)).

32. Under the current Rules of the Senate, motions to amend or suspend the Rules of the Senate require the affirmative vote of two-thirds of the elected members of the Senate.

33. As the Constitution does not address how the Senators select officers, organize committees or make or confirm appointments, such matters are determined by the Rules of the Senate to be decided by the elected Senators. The Lieutenant Governor has no constitutional right to vote on such matters. If the Lieutenant Governor were to intervene in the organization of the Senate and in the adoption of the Senate’s Rules, it would also constitute an unconstitutional violation of the separation of powers.

34. While there was a period of time in which the Senate granted the Lieutenant Governor additional responsibilities, including serving as Chairman of the Senate Committee on Rules, and having the responsibility to refer bills to Committees and to appoint Senate Members to various state commissions, the Senate revised its Rules long ago to revoke such authority and also amended nine sections of the Code of Virginia to repeal the Lieutenant Governor’s authority

to appoint 23 members of 9 commissions and instead gave that authority to the Senate Committee on Privileges and Elections. 1973 Va. Acts of Assembly 1181-85.

COUNT I – DECLARATORY JUDGMENT

35. Plaintiff hereby incorporates by reference the allegations set forth in Paragraphs 1 through 34 of this Complaint as if fully set forth herein.

36. An actual justiciable controversy ripe for adjudication exists between the parties as the Lieutenant Governor is asserting the right to cast a tie-breaking vote on matters such as the organization of the Senate, the selection of Senate officers, the adoption of Senate Rules and on matters that the Constitution would require the affirmative vote of “a majority of all elected members” and Plaintiff asserts that the Lieutenant Governor has no such right under the Constitution of Virginia.

WHEREFORE, Plaintiff A. Donald McEachin respectfully requests that this Court take jurisdiction of this proceeding and declare as follows:

(1) The Lieutenant Governor has no constitutional right to cast a tie-breaking vote as to matters that require an affirmative vote of a “majority of the members elected to each house” or a “majority of the elected membership” including, but not limited to, provisions in Article IV, § 6; Article IV, § 11; Article VI, § 7; Article IX, § 1; Article X, § 9(b); and Article XII, § 1;

(2) The Lieutenant Governor has no constitutional right to cast a tie-breaking vote on the organization of the Senate, the election of Senate officers or the adoption of the Rules of the Senate;

(3) The Lieutenant Governor has no constitutional right to cast a tie-breaking vote as to appointments, including confirmation of appointments made by the Governor; and

(4) Such other and further matter as equity may require and the Court deems appropriate.

COUNT II – INJUNCTION

37. Plaintiff hereby incorporates by reference the allegations set forth in Paragraphs 1 through 34 of this Complaint as if fully set forth herein.

38. If Defendant Bolling, when the new General Assembly Session begins in January, 2012, is not restrained from usurping the role of a tie-breaker with respect to the matters above in contravention of the Constitution of Virginia, the Plaintiff, the other Members of the Democratic Caucus and the citizens of Commonwealth of Virginia, will suffer great and irreparable injury. The nature and character of said injury is such that there is no adequate remedy at law.

WHEREFORE, A. Donald McEachin respectfully requests that this Court enjoin and restrain Defendant Bolling as follows:

(1) that the Lieutenant Governor be enjoined and restrained from casting a tie-breaking vote as to matters that require an affirmative vote of a “majority of the members elected to each house” or a “majority of the elected membership” including, but not limited to, provisions in Article IV, § 6; Article IV, § 11; Article VI, § 7; Article IX, § 1; Article X, § 9(b); and Article XII, § 1;

(2) that the Lieutenant Governor be enjoined and restrained from casting a tie-breaking vote on the organization of the Senate, the election of Senate officers or the adoption of the Rules of the Senate;

(3) that the Lieutenant Governor be enjoined and restrained from casting a tie-breaking vote as to appointments, including confirmation of appointments made by the Governor; and

(4) such other and further relief as the Court may deem just and proper.

Respectfully submitted,

A. DONALD McEACHIN,
Senator of Virginia

By Counsel

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VERIFICATION

I, A. Donald McEachin, Plaintiff herein, under penalty of perjury, say that I have read the foregoing Complaint and know the contents thereof, and that the same is true to the best of my knowledge, information and belief.

Given under my hand this 5th day of December, 2011.

A. Donald McEachin, Senator of Virginia