



State of West Virginia
Office of the Attorney General

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Via Mail & Email

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Dear Legislative Leaders,

Since Governor Tomblin's veto of the Pain-Capable Unborn Child Protection Act, HB 4588, I have been asked by a number of members of the Legislature whether I, as the State's chief legal officer, read the law to permit the Legislature to override the veto in a special session. My Office has reviewed this question, and this letter sets forth our findings.

In separate sections, the West Virginia Constitution contemplates both that the Legislature may override the Governor's veto and that the Legislature may, on its own initiative, require a special session after adjourning *sine die*. Article VII, Section 14 of the Constitution authorizes the Legislature, upon a majority vote of the members of both houses, to override a veto by the Governor after he returns the vetoed bill to the house that originated it. The section goes on to provide that when the "Legislature shall, by adjournment sine die, prevent" the

Governor from returning the vetoed bill to the Legislature, the Governor must file his “objections” to any legislation he wishes to veto “in the office of the secretary of state.” While that section does not further explain what the Legislature may then do with that veto, Article VI, Section 19 of the Constitution requires the Governor to convene a Legislature-initiated special session “on application in writing, of three fifths of the members elected to each house.” The question is whether the Legislature may, in such a special session, vote to override a veto that was returned by the Governor to the Secretary of State.

We conclude that the better view is that the Legislature may vote to override the Governor’s veto of HB 4588 during a Legislature-initiated special session. As our Supreme Court of Appeals has explained, the Legislature’s powers can only be limited by a clear statement: “The general powers of the legislature are almost plenary. . . . In considering constitutional restraint, the negation of legislative power must appear beyond reasonable doubt.” *State ex rel. City of Charleston v. Bosely*, 165 W.Va. 332, 351 n.3, 268 S.E.2d 590, 601 n.3 (1980) (quotation omitted). Because we have found no such clear statement in the Constitution that restricts the Legislature’s authority to override the Governor’s veto during a Legislature-initiated special session, it would appear that the Legislature retains this override authority.¹

Notably, Professor Robert M. Bastress—who has been cited by the Supreme Court of Appeals on several occasions on questions of constitutional interpretation—has endorsed this reasoning. In his casebook on the West Virginia Constitution, Professor Bastress writes: “There is no time limit in which the Legislature must act to override a veto [. . . and] the Legislature can require the Governor to call a special session upon submitting a written application endorsed by three-fifths of the members, Article VI, § 19, [although] that has (at most) rarely occurred.” Robert M. Bastress, *West Virginia Constitutional Law: A Casebook* 30 (2011). Professor Bastress recently reiterated this view when asked specifically about an override of the Governor’s veto of HB 4588. See Shauna Johnson, “Constitutional scholar: Override special session possible” (Apr. 2, 2014), at <http://wvmetronews.com/2014/04/02/constitutional-scholar-override-special-session-possible/>.

The structure of the West Virginia Constitution also supports the conclusion that a special session can override a veto by the Governor after the Legislature has adjourned *sine die*. Under Section 14, the Governor is required to “file” any post-adjournment veto with the Secretary of State, or the legislation becomes the law of the land. Put another way, he is not permitted to “pocket veto” a bill. In contrast, under the U.S. Constitution—as well as under the constitutions of several other states—the executive’s failure to sign a bill into law after adjournment

¹ In contrast, if the Governor calls the special session on his own initiative, Article VII, Section 7 of the Constitution provides that “when so convened [the Legislature] shall enter upon no business except that stated in the proclamation by which it was called together.” This provision satisfies the clear-statement rule for limiting the Legislature’s authority and would prevent a veto override during a Governor-initiated special session, unless the Governor includes such an override as part of his proclamation calling for the special session.

automatically prevents the bill from becoming law. *See, e.g.,* U.S. Const. Art. I, § 7, cl. 2; Ala. Const. Art. V, § 125; Del. Const. Art. III, § 18; Mass. Const. amend. Art. I; Minn. Const. Art. IV, § 23; N.H. Const. Pt. 2, Art. 44; N.M. Const. Art. 4, § 22; N.Y. Const. Art. IV, § 7; Okla. Const. Art. VI, § 11; Vt. Const. Ch. II, § 11; Wis. Const. Art. V, § 10. That West Virginia has rejected this pocket veto system is structurally significant; as Professor Bastress has explained, “[t]he absence of a pocket veto is . . . one of the reasons that makes section 14 a relatively weak executive check on the legislature.” Robert M. Bastress, *The West Virginia Constitution* 219 (1995). Interpreting the West Virginia Constitution as prohibiting the override of a post-adjourment veto would, however, have the practical effect of adding a pocket-veto provision into the West Virginia Constitution and make Section 14 a far stronger tool for the Governor.

Finally, there are practical reasons for concluding that a special session can override a Governor’s post-adjourment veto. West Virginia is one of very few states to permit an override of the Governor’s veto based upon a simple majority, as opposed to a super majority. *See* 1 Sutherland Statutory Construction § 16:9 (“Although a few constitutions require an affirmative vote of a majority of those elected, most require three-fifths or a two-thirds vote to pass a bill over a veto.”). Thus, even if the Legislature were not permitted to override the Governor’s veto during special session, those who supported the override could simply re-pass the same bill, wait for the inevitable second veto, and then hold a third majority vote to override that veto. But such a process would be needlessly circuitous.

For all these reasons, we conclude that the better view is that a special session can override a Governor’s post-adjourment veto, but we also note that there are reasons for caution. We have found no court case deciding the authority of a Legislature-initiated special session to override such a veto. Nor have we located any examples of a Legislative-initiated special session attempting to override such a veto, although we note that the Legislature has rarely exercised its authority to require the initiation of a special session, for *any* reason. This lack of relevant precedent may militate against testing the Legislature’s power to override a Governor’s post-adjourment veto. After all, if there is sufficient support for a Legislature-initiated special session and an override vote, there are necessarily sufficient votes to re-pass the same bill during a special session and, in that same session, override any subsequent veto by the Governor.

Whether the Legislature will take any of these steps is the Legislature’s prerogative, of course, though I am hopeful that our analysis will be of some assistance to your deliberations. Please let me know if you have any questions on these issues, or if you would like to discuss this matter.

Sincerely,

A handwritten signature in black ink that reads "Patrick Morrissey". The signature is written in a cursive, flowing style with a large, stylized "P" and "M".

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cc:

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