

Court offers little clarity in arguments on Hall's Senate seat

By David Gutman



CHRISTIAN TYLER RANDOLPH |
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Peter Markham, chief counsel for Gov. Earl Ray Tomblin, told the state Supreme Court that a Democrat should be chosen to fill the Senate seat vacated by Daniel Hall because Hall was elected as a Democrat, and the

replacement should reflect the will of the voters. In the foreground is Anthony Majestro, lawyer for the Democratic Party.

Nearly one hour of oral arguments before the state Supreme Court offered little clarity about which party will fill a vacant state Senate seat that will determine the course of the 2016 legislative session.

Both the Democratic and Republican parties claim the right to fill the seat — which represents Wyoming and Raleigh counties and part of McDowell County — after the sitting senator, Daniel Hall, resigned. Hall was elected as a Democrat in 2012, then became a Republican in 2014 — a move that handed the Republicans control of the state Senate.

With control of the Senate hanging in the balance, the Supreme Court chamber was filled near to capacity with interested onlookers, including legislators, lobbyists, union and business leaders and the chairs of both state parties.

While lawyers for both parties focused on the section of state code that deals with filling legislative vacancies, the most vocal justice, Justice Robin Davis, was more interested with whether the state code comports with the U.S. Constitution.

Davis repeatedly cited a 1982 U.S. Supreme Court case — *Rodriguez vs. Puerto Rico* — in which the court ruled that a political party could appoint a legislative replacement so long as the effect did not disproportionately affect any “discrete group.”

Hall resigned the Senate seat two weeks ago to take a lobbying position with the National Rifle Association. (Hall, according to his Facebook page, is currently on an island off the coast of Charleston, South Carolina.)

Davis seemed to imply that choosing a Republican replacement for Hall would disproportionately burden a “discrete group,” the voters who elected him as a Democrat. But she chastised both parties for paying insufficient attention to the *Rodriguez* case.

“You avoided it like the plague,” she said.

The justices seemed less interested, but somewhat more favorable to the Republicans, on the main

arguments the parties presented.

State law says that Gov. Earl Ray Tomblin should appoint a replacement from a list “submitted by the party ... with which the person holding the office immediately preceding the vacancy was affiliated.”

Republicans read that “immediately preceding” as referring to Hall’s party. He was a Republican immediately preceding his resignation, so the replacement should be a Republican, they say.

Democrats say the “immediately preceding” refers to Hall himself, not his party. They say the code is ambiguous, and, thus, the replacement should respect the will of the voters, who elected a Democrat.

“It’s very difficult to see an ambiguity,” Justice Margaret Workman said.

Anthony Majestro, the Democrats’ lawyer, argued that the lengths that Republicans had to go to in arguing the statute was clear proved that it was not.

“When you have to go to the rules of grammar,” Majestro said, “to make the statute clear, the statute is ambiguous.”

But, regardless of the clarity of the statute, Mark Adkins, arguing for the Republicans, said that the voters elected Hall, not his party.

“The mandate of the voters is protected because the voters have entrusted Daniel Hall to make the best decisions on their behalf,” and that includes switching parties, Adkins said.

Only four of the court’s five justices will decide the case, after Justice Brent Benjamin, who is up for re-election in May, recused himself, and Chief Justice Menis Ketchum declined to appoint a replacement.

Judicial elections are now non-partisan, but of the four remaining justices, three — Ketchum, Davis, and Workman — are Democrats. Justice Allen Loughry is a Republican, as is Benjamin.

Ketchum, who could be considered the bellwether justice, did not speak substantively during the arguments.

The court’s decision will sway the balance of the power in the Senate. Tomblin, a Democrat, has said that he will abide by the decision, but would appoint a Democrat if the court doesn’t advise him.

With much of the Republican agenda at stake, the parties’ respective backers have lined up behind them — the state Chamber of Commerce has filed a brief supporting the Republican position, and the AFL-CIO has filed one supporting the Democrats.

A victory for the Republicans would restore the 18-16 majority that they held from just after the 2014 elections up through Hall’s resignation.

A victory for the Democrats would, seemingly, deadlock the chamber at 17-17. That would stall any legislation on which Republicans are unable to get a Democrat to break ranks and vote with them.

Since the beginning of the controversy, Republican leadership has strongly indicated that they may refuse to seat a Democratic appointee, but they seemed to take a step back on Tuesday.

Republican leaders, including Senate President Bill Cole, have pointed to a section of the West Virginia Constitution that says each branch of the Legislature shall be the judge of the “qualifications

of its members.”

On Tuesday, Senate Majority Leader Mitch Carmichael, R-Jackson, said, while he hoped for a favorable ruling, he planned to accept a Democrat if that’s how the court rules.

“It’s my intention that we proceed with seating someone, but we’ll have to cross that bridge when we get to it,” Carmichael said, before the court arguments. “There’s nothing we can do about it, it’s outside of our control.”

That’s a strikingly different tone than Carmichael took last week, when he told West Virginia Public Broadcasting, “We judge the qualifications of the members and we do not believe that a Democrat in that seat after it’s been vacated by a Republican is qualified to hold it.”

Loughry did not seem pleased about the potential dispute with the Republican Senate. He asked the four lawyers who argued before the court what they made of the veiled Republican threats.

Majestro and Peter Markham, representing Tomblin, both said that they would respect the decision of the court, no matter what it is.

Adkins initially demurred, but when asked what he would advise Cole if Cole were his client, he said, “I certainly advise my clients to respect the authority of the court.”

Only Solicitor General Elbert Lin, representing Attorney General Patrick Morrissey, refused to answer Loughry, saying his office took no position on the matter.

“Is it that hard?” Loughry responded, incredulous. “Does a party have to follow the court?”

Aside from the constitutional chaos that could ensue if the Senate disregarded the judgment of the Supreme Court, there would be further problems for Republicans with that scenario.

If Republicans reject a court-ordered, Tomblin-appointed Democrat, that would leave the chamber at 17-16, with one open seat.

Republicans could still pass their agenda, but anything that passed on a straight party-line vote would likely be subject to a veto by Tomblin, a Democrat. (A right-to-work bill, a centerpiece of the Republican agenda, passed the Senate Judiciary Committee last week on a straight party-line vote.)

Normally, it takes only a simple majority to override a veto.

But the West Virginia Constitution says it takes a “majority of the members elected” to override a veto. There were 34 members elected to the Senate. So, 18 votes might be required to override a veto, a number Republicans couldn’t get to without Democratic help.

Reach David Gutman at david.gutman@wvgazettemail.com, 304-348-5119 or follow @davidlgutman on Twitter.