

West handout #8

**BABETS v. SECRETARY OF EXECUTIVE OFFICE** Mass. 1261

Cite as 526 N.E.2d 1261 (Mass. 1988)

403 Mass. 230

1230Donald L. BABETS et al.<sup>1</sup>

v.

**SECRETARY OF the EXECUTIVE OFFICE OF HUMAN SERVICES et al.<sup>2</sup>**

Supreme Judicial Court of Massachusetts, Suffolk.

Argued May 5, 1988.

Decided Aug. 15, 1988.

This procedure is fair. It allows the policyholder to negotiate what he or she considers to be the best possible settlement with the tortfeasor and to receive immediately an amount equal to that settlement. At the same time, it allows the insurer, at its option, to seek reimbursement for the underinsured motorist benefits it must pay to the policyholder by making sure that such payment occurs before the tortfeasor is released. If the insurer opts to enforce its repayment rights against the tortfeasor's assets, the insurer bears the risk and the expense attendant to that option. The policyholder, who was willing and entitled to accept the sum of the settlement offer plus his 1229 or her underinsured motorist benefits, receives that amount and does not have to be a party to further litigation.

[6] 4. *Conclusion.* The issue whether MacInnis's settlement of her claim without Aetna's consent caused prejudice to Aetna turns on whether the tortfeasor had sufficient assets at the time of the settlement, such that it would have been reasonable for Aetna to opt to pay MacInnis her coverage, plus an amount equal to the settlement offer, and take over MacInnis's claim.<sup>16</sup> The parties disagree as to the value of the tortfeasor's assets at the time of the settlement in 1981. Because this is a disputed issue of material fact, summary judgment was inappropriate. Mass.R.Civ.P. 56(c), 365 Mass. 824 (1974). On remand Aetna bears the burden of proving material prejudice to establish its affirmative defense to MacInnis's claim for underinsured motorist coverage benefits.

*So ordered.*



16. The likelihood of success of such a claim, the total amount of the plaintiffs' damages in 1981, and the cost of obtaining a judgment for the amount of those damages, also are relevant in determining whether Aetna reasonably could have withheld its consent.

1. David H. Jean and the Reverend Kathryn Piccard. The Massachusetts Chapter of the National Association of Social Workers and Catherine

Plaintiffs brought action requesting declaratory and injunctive relief challenging regulations promulgated by the Department of Social Services governing foster parents. The regulations were attacked on the ground that they irrationally and arbitrarily excluded single persons, unmarried couples and gay men and lesbians from equal consideration as foster parents. Plaintiffs requested disclosure of certain documents relating to process by which foster parent policy was developed and promulgated, and moved to compel production after defendants refused disclosure. The Superior Court, Suffolk County, James P. Lynch, Jr., J., granted the motion, but stayed order to compel pending resolution of report. Plaintiffs applied for direct appellate review. The Supreme Judicial Court, Hennessey, C.J., held that: (1) doctrine of separation of powers as embodied in article of the Massachusetts Constitution does not require recognition of a "governmental" or "executive" privilege, and (2) Court would decline to create a common-law governmental or executive privilege.

*Affirmed.*

**1. Constitutional Law ¶72**

Doctrine of separation of powers, which finds positive expression in article of

Brayden were originally also named as plaintiffs, but the complaint was dismissed as to them, on the defendants' motion.

2. The Commissioner of the Department of Social Services. The Governor of the Commonwealth was originally also named as a defendant, but the claims against him were dismissed on the defendant's motion.

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mation protected by the governmental privilege."

We discuss first the constitutional arguments.

The plaintiffs then moved the court to compel the defendants to produce these documents. After hearing and in camera inspection of the disputed documents, the judge allowed this motion. In his memorandum of decision and order, the judge noted that there was merit to the defendants' position, but that he was constrained to follow existing law, and not to innovate or to create new law. He ruled that there existed under Massachusetts law no privilege that the defendant could invoke to excuse production of the requested documents. Recognizing, however, the importance of the issue, and that an appellate court might create such a privilege when squarely presented with the issue, he reported the matter of the correctness of his order, and stayed the order pending resolution of the report.

In order to present the matter in a more concrete and meaningful posture, the judge went on to make certain findings and rulings concerning the defendants' assertion of the privilege. Taking cognate Federal law<sup>5</sup> as his model, he found and held, assuming that the asserted privilege existed, that the defendants had properly invoked it, and that certain specified documents were within its scope.

<sup>1233</sup>The judge correctly ruled that there presently exists no privilege of the type the defendants assert. We have previously declined to consider the question in the abstract. *Opinion of the Justices*, 368 Mass. 866, 880, 334 N.E.2d 604 (1975). This case squarely presents the issue.

The defendants contend that this court should create a privilege under Massachusetts law, modeled on Federal law of executive privilege. They advance both constitutional grounds and nonconstitutional policy arguments in favor of such a privilege.

5. As to the procedures required to be followed in invoking the privilege under Federal law, see *Resident Advisory Bd. v. Rizzo*, 97 F.R.D. 749, 752-753 (E.D.Pa.1983). As to the criteria used in determining the applicability of the Federal privilege to a given document, see *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-154, 95 S.Ct. 1504, 1516-1518, 44 L.Ed.2d 29 (1975);

[1] 1. The defendants argue that executive privilege inheres in or is a necessary ramification of the doctrine of separation of powers, which is fundamental to our form of government, and which finds positive expression in art. 30 of the Declaration of Rights of the Massachusetts Constitution. We disagree. We think that the doctrine of separation of powers does not require recognition of the asserted privilege. What this doctrine interdicts is the interference by one branch of government with the power or functions of another. See *New Bedford Standard-Times Publishing Co. v. Clerk of the Third Dist. Court of Bristol*, 377 Mass. 404, 410-411, 387 N.E.2d 110 (1979); *Opinion of the Justices*, 375 Mass. 795, 813-814, 376 N.E.2d 810 (1978); *Opinion of the Justices*, 372 Mass. 883, 892-894, 363 N.E.2d 652 (1977); *Opinion of the Justices*, 365 Mass. 639, 640-642, 309 N.E.2d 476 (1974); *Opinion of the Justices*, 208 Mass. 610, 613, 94 N.E. 852 (1911). Our declining to recognize the asserted privilege does not constitute the exercise of nonjudicial power or interfere with the Executive's power. We think that it is relevant that the defendants have failed to demonstrate that the Executive does not function effectively because of the lack of the asserted privilege. Moreover, the explicit constitutional grant to the Legislature of a "privilege" as to its deliberations, see art. 21 of the Declaration of Rights of the Massachusetts Constitution, further supports our view that a corresponding privilege in the Executive is not constitutionally required. Had the framers of our government's structure intended to recognize in our Constitution an executive privilege, it is reasonable to expect that they would expressly have created one.

*Taxation with Representation Fund v. Internal Rev. Serv.*, 646 F.2d 666, 677-678 (D.C.Cir.1981); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C.Cir.1980); *Mobil Oil Corp. v. Department of Energy*, 102 F.R.D. 1, 5-6 (N.D.N.Y.1983); *Resident Advisory Bd.*, *supra* at 753.

## **GOVERNOR'S MEETING MEMORANDUM**

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**FROM:** Kathleen Drew **PHONE:** 902-9818

**MEETING:** Washington Association of Counties

**DATE/TIME:** Wed, April 8, 11:00 a.m.

**LOCATION:** Governor's office

**PURPOSE:** Discuss legislative bills and budget issues

**AGENDA:**

1. Budget Priorities
2. Discuss SB 5433 and the fiscal situation in counties
3. A list of bad bills
4. State preemption of local land use authorities
5. Department of Commerce
6. County, city, and state relations.

**PARTICIPANTS:**

Linda Ring Erickson, Mason County Commissioner, WAC Chair  
Eric Johnson, Executive Director  
Scott Merriman, Deputy Director

**BACKGROUND:**

**1. Budget Issues**

Top budget priorities are the gaps in public health and human services funding.

Positive budget items include full funding of state transfers to local government (streamlined sales tax mitigation, timber distributions, liquor taxes, distressed city-county, etc.). The Senate provides an additional \$10 million for the distressed city-county account for low tax base counties. The House and Senate budgets also include incentive funding for counties that enacted the 0.1% sales tax for mental health/chemical dependency services.

Concerns include \$368 million transfer from the Public Works Assistance Account to the general fund, reduced funding to regional support networks for mental health (\$45-\$47 M), cuts to chemical dependency and alcohol and drug abuse treatment, and the elimination of the Sentencing Guidelines Committee.

They are opposed to the reductions in public health funding in both House and Senate. The House funds local public health 1-695 "backfill" with new fees. The House eliminates \$20 million in local public health funding that was added in 2007; the Senate reduces this amount by \$4 million. Logically, counties support the Senate's approach to local public health.

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**GOVERNOR'S MEETING MEMORANDUM**

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You can help by supporting flexibility for counties in fund transfers, revenue diversity, flexibility and new revenue sources, such as is found in SB 5433.

**2. SB 5433 and counties' fiscal situation**

Senate Bill 5433, with its broad title of "modifying provisions of local option taxes," has a number of revenue options which Julie Murray has recommended supporting:

1. Until 2015, allows revenue raised from the voter-approved county-city shared 0.3% public safety sales tax to partially supplant existing funds.
2. Until 2015, allows revenue raised from the county 0.1% mental health/ chemical dependency sales tax to partially supplant existing funds.
3. Allow voter-approved multi-year property tax levy lid lifts passed after the effective date of the bill to supplant existing funds (this would apply to King County taxing districts including cities only for lid lifts approved in 2009, 2010, and 2011).
4. Allows cities with a population under 50,000 and counties with a population under 250,000 to use local Real Estate Excise taxes (REET) to fund parks maintenance and operations. The Realtors oppose expanding the use of REET funds for any operating purpose. However this is a minor expansion to help the smallest counties and cities.

Jennifer Ziegler recommends support of a section of the bill which limits the ferry district property tax rate in King County to 7.5 cents per \$1000 of assessed value and authorizes an additional property tax in King County at the same rate to fund transit projects.

The bill gives additional utility tax authority for both counties and cities. Cities currently have utility tax authority, but cannot tax public water/sewer districts because they are another governmental entity. SB 5433 would extend the tax to water/sewer districts until 2015. This bill will also create rural infrastructure improvement and public safety (RIPS) districts to allow this county governed district to impose a utility tax in the unincorporated areas until 2015. The voters would not need to approve these taxes. Cities and counties hope to convince you to support these taxes to help offset the effects of reenacting Initiative 747. If you oppose these revenue options on that because the taxes are not subject to voter approval, consider greater support of other bills that provide state funding to local governments -- but you may not have many other options. Counties have focused their attention on the utility tax because legislators want to preserve the sales tax as

**3. Bad bills****4. State preemption of local land-use authority**

Scott Merriman, Counties, and Dave Williams, Cities, have expressed concern about the electric vehicle bill, HB 1481, and its requirement to allow battery swapping stations and rapid charge stations in all zones except residential, rural, agricultural, and critical areas. The local governments would still be able to condition the development of the site. Julie Murray met with Scott Merriman twice and exchanged several emails to allay his concerns. To that end, we have offered an amendment to further geographically limit this preemption of local land-use authority to the unincorporated area within one mile of I-5 and I-90 and incorporated areas adjacent to these interstates. The bill continues to include

## **GOVERNOR'S MEETING MEMORANDUM**

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preemption for battery charging stations, which are generally characterized as areas vehicles can plug-in to recharge the battery, beginning July 1, 2011. We have also made the development of model ordinances and development regulations a priority in the Puget Sound Regional Councils' planning activities.

Since then Dave Williams did not testify against the bill, but Scott continued to voice opposition to the principle of pre-emption. His concern is the policy question if the state is willing to preempt on electric vehicles, what will be allowed next year? He also expresses concern that on this issue, the Governor's Office is taking more of an advocacy role than a pure policy analysis role.

It is true that the state preemptions of local land-use authority are limited. Energy facility siting, special commitment centers and sex offender housing do preempt local land-use decisions because they attract local opposition. However, the state also requires cities and counties to plan for essential public facilities, and mandates as an allowable use day care in residential zones and manufactured housing on single lots.

While preemption of local control is not the first or preferred course of action, this bill is all about planning for the future. We have mitigated the impact on local governments by phasing-in planning requirements. While there is a cost to local governments, they can plan for it. It is critical for the expansion of electric cars to have battery charging capabilities throughout the state, and again, the bill sets dates for local governments to plan toward (primarily July 1, 2011). Many local governments are doing this. However, if there is no statewide consistency to plan electric vehicle infrastructure, it is more likely that rural areas will lag behind the rest of the state in this technology as a transportation choice.

### **5. Department of Commerce**

- The bill did not move from Senate Ways & Means but we are confident it will.
- The House version describes a collaborative process that counties should look forward to. The Senate moved several programs within the Department of Community, Trade & Economic Development to other state agencies. We are supporting the House version to allow for broad participation by stakeholders to develop recommendations and an implementation plan.
- We understand the concern about the future, but we're committed to making it work for everybody.

### **6. County, city and state relations**

There is an overall sense that the state/county relationship is de-emphasized. What can be done to ensure that does not happen?

## LOBBY WHISKY.

Was it Sent by the Northern  
Pacific Railroad?

Moore's Peculiar Consignment of Fine  
Old Whisky.

The Delegates Who Have Tasted it Say  
It is Good.

Is the Northern Pacific Lobby Already  
Getting in its Work?

What the "Times" Special Correspon-  
dent Has Discovered at Olympia.

A Complete Report of the Business of the  
Convention This Morning.

OLYMPIA, July 13.—[Special.]—  
Colonel J. C. Moore is a Northern  
Pacific railroad lobbyist. He is  
withal one of the most prominent  
delegates from Spokane, was tem-  
porary chairman of the convention  
and is chairman of the legislature  
committee. His connection with  
the railroad has been kept very  
quiet; so quiet, in fact, that had it not  
been for a chance happening it

would not now be in the possession  
of the readers of the TIMES.

### THE CHANCE HAPPENING.

Yesterday morning while walking  
up Main street, my attention was  
casually directed toward an express  
wagon, the horses drawing which  
were toiling up the somewhat steep  
incline. As the wagon was on the  
same side of the street, I could see  
that its load consisted of cases of  
liquor, there being almost sufficient  
to stock a small saloon. I idly be-  
gan to wonder where its destination  
was, and whether it was intended  
for that purpose, when it reached  
Eleventh street. At this time it was  
about half a block ahead of me.

### WHERE IT STOPPED.

Following it with my eye I noticed  
that it stopped in front of the resi-  
dence of General Breckenridge, now  
occupied by J. C. Moore and fam-  
ily. Somebody must have motioned  
or said something to the driver, for  
he immediately drove off and arrived  
by a side entrance reaching to the  
rear of the entrance from Columbi-  
street. I was now thoroughly in-  
terested, and hastening my foot-  
steps reached Columbia street in  
time to see the expressman get on  
his load and drive away.

Now, for some time there have  
been rumors that the railroad people  
would spare neither money nor  
whisky, if by using them they could

## **VOLK, ANGELA (DNR)**

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**From:** CHRISTIANSEN, VICKI (DNR)  
**Sent:** Friday, August 08, 2008 10:36 PM  
**To:** 'CStanley@portblakely.com'; Moran, Bridget (DFW); 'bob.turner@noaa.gov'; 'brobinson@tnc.org'; 'dtroutt@nwifc.wa.gov'; YOUNG, LENNY (DNR); Bernath, Stephen (ECY); Helbrecht, Lynn (RCO); Johnson, Eric; 'JWeiss@wfpa.org'; 'ken\_berg@r1.fws.gov'; 'TMP@myhome.net'; Whipple, David (DFW)  
**Cc:** Mankowski, John (GOV)  
**Subject:** Re: Drinks on Fridays

Good idea! I will try to be there as much as I can! ~Vicki

----- Original Message -----

**From:** Stanley, Court <CStanley@portblakely.com>  
**To:** Moran, Bridget (DFW); Bob.Turner@NOAA.gov <Bob.Turner@NOAA.gov>; brobinson@tnc.org <brobinson@tnc.org>; dtroutt@nwifc.wa.gov <dtroutt@nwifc.wa.gov>; YOUNG, LENNY (DNR); CHRISTIANSEN, VICKI (DNR); Bernath, Stephen (ECY); Helbrecht, Lynn (RCO); Johnson, Eric; JWeiss@wfpa.org <JWeiss@wfpa.org>; ken\_berg@r1.fws.gov <ken\_berg@r1.fws.gov>; TMP@myhome.net <TMP@myhome.net>; Whipple, David (DFW)  
**Cc:** Mankowski, John (GOV)  
**Sent:** Fri Aug 08 15:14:00 2008  
**Subject:** RE: Drinks on Fridays

I'm game!  
Court


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**From:** Moran, Bridget (DFW) [mailto:moranbnm@dfw.wa.gov]  
**Sent:** Friday, August 08, 2008 9:00 AM  
**To:** Bob.Turner@NOAA.gov; brobinson@tnc.org; Stanley, Court; dtroutt@nwifc.wa.gov; YOUNG, LENNY (DNR); CHRISTIANSEN, VICKI (DNR); Bernath, Stephen (ECY); Helbrecht, Lynn (RCO); Johnson, Eric; JWeiss@wfpa.org; ken\_berg@r1.fws.gov; TMP@myhome.net; Whipple, David (DFW)  
**Cc:** Mankowski, John (GOV)  
**Subject:** Re: Drinks on Fridays

Great idea, I'm in when I can make it.  
Bridget

>>> Josh Weiss 08/07/2008 3:21 PM >>>  
Hi Everyone,

Last Friday afternoon John and I were catching up over a drink, and we came up with the following idea. If you think it's a bad idea, blame the wine and hit delete.

 Beginning on August 15th, and every other Friday thereafter, at 3:00, we're going to gather at Waterstreet for a drink or two. We thought it would be fun, and potentially even productive, to invite you to join us. No agenda, no rsvps, no obligations. Feel free to invite other natural resource policy

professionals who might be interested.

Hope to see you there!

Josh Weiss, JD

Director of Environmental Policy

Washington Forest Protection Association

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