

BACON'S REBELLION

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The Tribune of the People

In two high-profile lawsuits, Patrick McSweeney has defended the interests of the common citizen against power grabs by the political class. Virginians owe him a bigger debt than they'll ever know.

By James A. Bacon

Patrick McSweeney shocked Virginia's political establishment two months ago when he persuaded the state Supreme Court to knock down a law giving taxing power to the unelected Northern Virginia Transportation Authority. Now he's hoping that lightning will strike twice in the form of Supreme Court victory nixing the transfer of the revenue-rich Dulles Toll Road to the Metropolitan Washington Airports Authority.

The first ruling overturned the centerpiece of the General Assembly's laboriously constructed 2007 transportation compromise. Without the Supreme Court intervention, transportation authorities in Northern Virginia and Hampton Roads would have enacted a hodge-podge of taxes raising about \$500 million a year for regional transportation projects. A favorable ruling on the second lawsuit might kick the last prop from under a financing package for the multi-billion-dollar Rail-to-Dulles heavy rail project that would soak commuters for another \$50 million or more each year.

In pursuing these cases, McSweeney has emerged as a modern-day tribune of the people: protecting ordinary Virginians from the predations of the political class. While the Democratic and Republican Parties

have been co-opted by powerful special interests, trampling the state Constitution to find more revenue so support their spending schemes, McSweeney's lawsuits have been the only effective force to oppose them. Even if he fails to sway the Supreme Court a second time, the Richmond attorney has put the patriots on notice: Draft your laws more carefully. Do not over-reach.



McSweeney

ideals of fiscal responsibility and free markets. McSweeney sees the political process in the Old Dominion as dominated by special interests that hire lobbyists, make campaign contributions and mobilize their memberships to apply pressure on elected officials. Most notably, the coalition of interests arrayed around the real estate industry -- developers, home builders, engineering and construction firms -- have learned to manipulate the system to their advantage. While environmentalists, NIMBYs and municipal governments act as a partial counterweight, the debate over transportation in Virginia is dominated by those who plot ways to raise more

money to build more road and transit projects -- and foist the cost onto someone else. (Read McSweeney's critique of Virginia transportation policy in "A Conservative Transportation Alternative.")

McSweeney, a former chairman of the Virginia Republican Party, has alienated many within the state GOP, for he is a scourge of Republicans as well as Democrats. Indeed, his lawsuit that knocked down the NVTA demolished the financial core of the GOP-crafted 2007 transportation package.

The NVTA case established an important precedent: The General Assembly cannot divorce itself from the unpopular act of raising taxes by setting up unaccountable regional entities such as the Northern Virginia Transportation Authority to do the dirty work for them.

The General Assembly had given the NVTA and a similar entity in Hampton Roads, which were governed by boards comprised of local government representatives, power to impose an array of regional taxes. Although those representatives were elected to their respective jurisdictions, no one elected them to the regional authorities. As the Supreme Court wrote (*my italics*): "Taxes must be imposed only by a majority of the *elected representatives of a legislative body*."

The abuse of authority is even more egregious in the case of the Dulles Access Road. The 16-mile toll road was built in 1984 with assurances to commuters that the tolls would be removed

once the construction bonds were paid off in 2016. Then in 2006, with the last bonds scheduled to be retired within a decade, the Kaine administration transferred control over the toll road to the Metropolitan Washington Airports Authority (MWAA) as part of its plan to extend Metro heavy rail service to Tysons Corner and Dulles airport. Plans called for diverting most of the \$65 million-a-year revenue stream to paying for the rail construction for as long as 50 years.

The MWAA, to which the Kaine administration had contracted oversight of the Rail-to-Dulles project, has the sole power to set toll rates. "It's one thing for an independent authority to have control over the airports," McSweeney warns, "but when control of the toll roads is transferred, there's no accountability for 50 years. The General Assembly has no power to amend the terms of the contract."

Once the tolls are diverted to a use other than the construction, upgrading, maintenance and debt obligation of the toll road, McSweeney argues, they no longer constitute a user fee. They become a mechanism for transferring wealth from one group (commuters) to another (contractors, sub-contractors, property owners and Metro riders) -- in other words, a tax.

Individuals subject to that toll/tax have no means of seeking redress. There is no one they can hold accountable. Virginia's governor appoints only five of the 13 representatives serving on the MWAA, and the MWAA is not subject to federal, state or local laws governing conflict of interest, freedom of information or audits.

If the MWAA abuses its toll-setting authority, the General

Assembly's hands are tied by the contract between the MWAA and the commonwealth. In sum, there is nothing to prevent MWAA board members, a majority of whom represent Maryland and Washington, D.C., from adding all manner of bells and whistles to the rail project and raising the tolls on Virginia commuters as high as they want.

Not only is the transfer of the Dulles Toll Road atrocious public policy, it is bad law, McSweeney argues. The prerogative to transfer taxing powers belongs to the General Assembly alone. Gov. Kaine had no constitutional right to contract away the legislature's authority. "Taxing authority is legislative power that is vested in the General Assembly," he says. "You cannot delegate that except to other elected bodies."

From there, the lawsuit gets complicated very quickly. The Attorney General's office, representing the Commonwealth of Virginia, contends that the plaintiffs in the case, Northern Virginia commuters Patrick R. Gray and James W. Nagle, cannot sue the commonwealth, which is protected by sovereign immunity. Therefore, the courts should not even hear the case.

McSweeney responds that the doctrine of sovereign immunity does have exceptions, one of which applies in this case: Citizens have the right to sue if public officials violate the Virginia Constitution, the compact by which the people agree to be governed. When Gov. Kaine usurped the power of the legislature to authorize the transfer, he violated the Constitution and opened himself up to lawsuits from citizens.

The commonwealth's comeback is this: McSweeney is construing that exception to sovereign im-

munity too broadly. If the General Assembly believes that the Governor is acting inappropriately, it has had every opportunity to reign in the executive branch itself. So far, it has not chosen to.

McSweeney retorts this way: The principle of separation of powers and the rule prohibiting the delegation of taxing power are "self-executing." In other words, the rule is so fundamental, so deeply embedded in the Constitution, that it is valid, regardless of whether the General Assembly chooses to enforce it or not.

There the arguments stand. In past rulings, the Supreme Court has not been entirely clear about the self-executing doctrine, so the justices could rule either way. During oral arguments two of the seven jurors conveyed some skepticism in their questioning. But that still leaves a potential majority of five to rule in McSweeney's favor.

Meanwhile, a third McSweeney lawsuit is working through the court system. This suit, filed in Richmond circuit court, challenges the issuance of some \$3 billion in transportation bonds approved in last year's legislative package.

We the citizens of the commonwealth of Virginia can only hope that McSweeney finds a way to keep fighting the good fight. Right now, he's one of the very few people standing between the political class and the pillaging of the taxpayer.

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