

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

Frances P. Segars-Andrews, Petitioner,

v.

Judicial Merit Selection Commission, The State of South Carolina, the Honorable Andre Bauer, in his official capacity as President of the South Carolina Senate, the Honorable Glenn F. McConnell, in his capacity as President Pro Tempore of the South Carolina Senate, the Honorable Robert W. Harrell, Jr., in his capacity as Speaker of the South Carolina House of Representatives..... Respondents.

AMICUS CURIAE BRIEF OF

THE LEAGUE OF WOMEN VOTERS OF SOUTH CAROLINA

STATEMENT OF THE CASE

This case presents questions of state constitutional and legislative authority. Specifically, the issues presented are: (1) judicial independence; (2) separation of powers and the relationship between the legislative branch and the judicial branch, and (3) whether statutorily created requirements can contravene the intent and purpose of constitutional provisions and whether service on constitutional commissions violates dual office holding restrictions.

CONTROLLING CONSTITUTIONAL PRINCIPLES

All political power in this State is vested in and derived from the people only. S.C. Const. Art. I, § 1. These powers are divided among the three branches of government which operate

separate and distinct from each other. S.C. Const. Art. I, § 8. Legislative power is vested in the General Assembly. S.C. Const. Art. III, § 1. Under the constitution, the judicial function is vested in a unified judicial system headed by a Supreme Court. S.C. Const. Art. V, § 1. In the judicial system, the Supreme Court decides cases and also makes rules governing administration of all courts, and practices, and procedures of all courts. S.C. Const. Art. V, § 4. The legislative role is to select the judges and justices, by joint public vote of the General Assembly. S.C. Const. Art. V, §§ 3, 8, and 13. Under the separation of powers, the judiciary cannot exercise the power of selecting judges, and the legislature cannot exercise the power of administering the courts or regulating the conduct of judges. S.C. Const. Art. 1, § 8.

FACTUAL BACKGROUND

1. In 1996, due to concerns about the influence of legislators over the extensive control of the selection of the judiciary and concerns about the independence of the judiciary, the voters of South Carolina approved an amendment to the Constitution that created a separate body to exercise a portion of the power of selecting judges and justices. S.C. Const. Art. V, § 27.
2. This provision called for the creation of the Judicial Merit Selection Commission, appointed by the General Assembly, to screen judges for fitness and qualification before consideration by the General Assembly. The independent power of the Commission lies in the constitutional provision that the General Assembly “must” elect the judges and justices “from among the nominees of the Commission.” The Constitution repeats this mandate by saying that “no person shall be elected to these positions unless he or she has been found qualified by the commission.” S.C. Const. Art. V, § 27.

3. The evident purpose of the people in adopting S.C. Const. Art. V, § 27 was to create a requirement beyond the power of the General Assembly in the form of an independent body which would act as a check and balance on the legislature, with the purpose of the members of the commission to serve as the “qualifiers” of the candidates for the judiciary.

4. Nevertheless, when the General Assembly by statute created the Commission called for in the new clause of the Constitution, it inserted a provision in the statute that required a certain number of commissioners be current sitting members of the General Assembly. S.C. Code § 2-19-10(B).

5. Thus, by placing legislators on an independent body designed by the Constitution to be a check on the Legislature, the statute violates the Constitution Art. V, § 27.

6. In addition, another provision of the Constitution bars members of the General Assembly from simultaneously holding any other “office or position of profit or trust” under the State of South Carolina, the United States, or any other power. S.C. Const. Art. III, § 24. This is known as a ban on dual office holding.

7. Service on the Commission is an “office of honor” or a “position of trust” because these terms are interpreted to include any office or position in which one exercises a portion of the sovereignty of the State of South Carolina. Because the Commission is not merely advisory, but has the absolute power to decide who is qualified and eligible for a judgeship, it meets the definition of exercising a portion of the state’s sovereignty.

8. The statute mandating that sitting legislators compose the majority of the Commission, also means that those legislators will vote twice on an applicant, first as to the candidate being qualified and thus acting as the “qualifiers” and secondly as to who among the qualified candidates is selected to fill the seat, thus acting as the “selectors”,

9. Thus, S.C. Code 2-19-10(B) violates the Constitution, Art. III, § 24.

ADDITIONAL ARGUMENTS IN SUPPORT

1. Under Rule 229, of the South Carolina Appellate Court Rules, the Court may assume jurisdiction when “there is a public interest” involved or if special grounds of emergency or other good reasons exist why the original jurisdiction of the Supreme Court should be exercised. See also S.C. Const. Art. V, § 5, Key v. Currie 305 S.C. 115,406 S.E.2d. 356 (1991).

2. The League of Women Voters of South Carolina (LWVSC) is a non-partisan organization, and the state office of the League of Women Voters US, that has been in existence for more than ninety years, advocating on behalf of voters and believes that the issues presented here are indeed matters of great public interest. The key issue at stake is ensuring that South Carolina employ a system of judicial selection that quarantees quality, diversity, and independence of the judiciary of our state.

3. The actions of the General Assembly to adopt a statute which violates the will of the people is a position not supported by the Constitution nor by the established precedents of this Court. Instead, both the plain language of the State’s Constitution and the consistent authority contained in the opinions of this Court confirm the General Assembly does not have the authority to substitute its judgment for that of the people and may not frustrate the public policy of this State.

4. South Carolina’s system of judicial selection, which can be described as *legislative election from nominating commission made of a majority of legislators*, when compared to other

states' selection processes, highlights the lack of a check and balance on the legislature's power in the implementation of the selection process. S.C. Const. Art. V, § 27.

5. South Carolina and Virginia are the only states that utilize a system of judicial selection which relies exclusively on the legislature to serve as *both* the qualifying commission and the selecting entity. South Carolina varies from the Virginia system only slightly – in that South Carolina statutorily provides that three members of the Judicial Merit Selection Commission are to be non-legislators. S.C. Code § 2-19-10(B).

6. Virginia's Judicial Selection Commission is comprised entirely of legislators. This in essence is a difference without a distinction, since South Carolina's non-legislators are outnumbered 3-7 on the Commission. S.C. Code § 2-19-10(B).

7. The remaining states are divided between various systems that employ some method of a check and balance on unlimited power and control by one branch by utilizing various structures which delineates the power of the entire process or by employing a general or popular election system.

8. South Carolina and Virginia are the only states in the union that employ a system that relies entirely on the legislature to serve as both the “qualifiers” and “selectors” of candidates for judicial selection which results in vesting complete power and control of judicial selection to the legislature. This lack of any check and balance within the system in South Carolina undermines and violates the purpose and will of the people in adopting the Constitutional Amendment creating the independent body to address exactly this issue.

9. Therefore the League of Women Voters of South Carolina urges this court to find the statute mandating the members of the Judicial Merit Selection Commission be comprised of a majority of members of the legislature to be unconstitutional.

10. This is the first step toward moving South Carolina to a system that removes the legislature from controlling *both* steps of the judicial selection process.

11. Further, the League of Women Voters of South Carolina urges this court to begin the process to move South Carolina to the join the majority of states in employing a system of checks and balances by reconstituting the membership of the Judicial Merit Selection Commission with non-legislators.

12. There is a growing national consensus around the desirable composition of a judicial merit selection system that effectively promotes the checks and balances necessary under a system of separated powers. To reduce partisan interference in the courts, a majority of states that appoint state Supreme Court justices – 24 of 29 – use nonpartisan citizen commissions to submit a slate of qualified candidates from which a candidate is appointed.

13. The core principles that are found in effective nominating commissions include: (1) transparency, so that key meetings and documents are open to the public; (2) nominating commissions in which lawyer members do not dominate non-lawyer members, to ensure broad input and further the public trust; (3) the use of objective judicial performance evaluations that are available to the public; and (4) retention elections to ensure public accountability. *See* “Model Judicial Selection Provisions,” American Judicature Society, 2008, *at* http://www.ajs.org/selection/docs/MJSP_web.pdf; “Judicial Selection in the States: Appellate and General Jurisdiction Courts,” American Judicature Society, *at* http://www.judicialselection.us/uploads/documents/LastResort_1196092722031.pdf.

14. These principles have been promulgated by the American Judicature Society, endorsed by the U.S. Chamber of Commerce, and advanced by the Sandra Day O’Connor Initiative at the Institute for the Advancement of the American Legal System (IAALS), among

others. *See generally*, “Judicial Selection in the States,” American Judicature Society, at www.judicialselection.us; “Promoting the Merit in Merit Selection,” U.S. Chamber Institute for Legal Reform, at <http://tinyurl.com/yknamt8>; “Justice O’Connor Joins Forces with IAALS,” IAALS, at <http://www.du.edu/legalinstitute/>.

15. Article V, § 27 of the South Carolina Constitution was adopted by the citizens of South Carolina to safeguard the separation of powers that is the essence of our constitutional order, by ensuring that the judiciary is not dominated by the General Assembly. This separation of powers is the key to judicial independence, a constitutional value of the highest order. Indeed, former Chief Justice Rehnquist described “an *independent* judiciary with the final authority to interpret a written constitution” as “one of the crown jewels of our system of government today.” William H. Rehnquist, *Keynote Address at the Washington College of Law Centennial Celebration*, 46 Am. U. L. Rev. 263, 274 (1996) (emphasis added).

16. Judicial independence means, at least, that the judiciary is neither dominated nor controlled by the political branches and that it is disentangled to the extent possible from the forces that influence those branches’ policy choices. If judges answer to political parties and electoral majorities to the same degree as legislators, the courts risk being perceived as mere shadow legislatures, with judges perceived, in the words of retired Justice Sandra Day O’Connor, as “politicians in robes.” A court dominated by a legislature risks losing the distinct character necessary for the non-legislative and nonpartisan work of judging and for discharging their constitutional duty of judicial review.

CONCLUSION

For the reasons set forth above, the League of Women Voters of South Carolina endorses the requests of the Petitioner and endorses the request of the Petition to find the statute mandating the members of the Judicial Merit Selection Commission to be unconstitutional.

Respectfully submitted,

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