SUPREME COURT OF GEORGIA
Matter No. S24U0190

November 22, 2023

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

IN RE: PROSECUTING ATTORNEYS QUALIFICATIONS COMMISSION RULES AND CODE OF CONDUCT.

The Prosecuting Attorneys Qualifications Commission has transmitted to this Court draft standards of conduct and rules for the Commission's governance pursuant to OCGA § 15-18-32 (g). That Code Section provides that "such standards and rules shall be effective only upon review and adoption by the Supreme Court," although the Code Section does not expressly purport to impose any mandatory directive on the Court to adopt such rules. As we are obligated to do before any exercise of judicial power, we must first determine whether the action we seek to take is actually within that power. After consideration, we have grave doubts that adopting the standards and rules would be within our constitutional power.

We need not, however, definitively resolve those doubts today. If the statute at issue imposed on us a mandatory duty to approve the draft standards and rules, we would have to decide whether such a statutory provision was constitutional; if it was, we would be obligated to comply. But the statute does not impose on us such a duty; it simply conditions the effectiveness of the standards and rules upon our approval. Given other important considerations, prudence counsels against definitively resolving the question in this posture and at this time: (1) definitively resolving whether we could

take such action would require deciding difficult constitutional issues of first impression, including issues regarding the scope and nature of our power and the nature of the power that district attorneys exercise; (2) these issues confront us today outside of the normal adversarial process, and so we do not have the benefit of the extensive briefing and argument that the normal adversarial process would offer; and (3) we generally ought not decide difficult and unresolved constitutional issues if not entirely necessary. Accordingly, because we have grave doubts that it would be within our power to take action on the draft standards and rules, and the statute imposes no affirmative duty that would require us to decide conclusively whether such a duty is constitutionally permissible, we decline to take any action on the draft standards of conduct and rules without conclusively deciding whether such action would be constitutionally permissible. The following is a more detailed explanation of why we take no action.

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The Georgia Constitution vests "[t]he judicial power" in this Court. Ga. Const. of 1983 Art. VI § I ¶ I. The Constitution also decrees that "[t]he legislative, judicial, and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the others" except as provided by the Constitution itself. Ga. Const. of 1983 Art. I § II ¶ III. So any action this Court takes must either be (1) within the judicial power or (2) otherwise specifically authorized by the Constitution.

"The judicial power is that which declares what law is, and applies it to past transactions and existing cases; expounds and judicially administers the law; it interprets and enforces the law in a case in litigation." *Sons of Confederate Veterans v. Henry County Bd. of Comm'rs*, 315 Ga. 39, 50 (2) (b) (880 SE2d 168) (2022) (cleaned up). We exceed that judicial power when we attempt to control the

exercise of legislative or executive power. See *Hayward v. Danforth*, 299 Ga. 261, 261-262 (787 SE2d 709) (2016) ("A judicial attempt to control parole conditions violates the constitutional provision regarding the separation of powers.") (citation omitted).

This Court does have and regularly exercises the authority to regulate the practice of law and to regulate the conduct of judges. But we have long explained that the regulation of the practice of law is an inherent part of our judicial power. See *Wallace v. Wallace*, 225 Ga. 102, 110-111 (3) (a) (166 SE2d 718) (1969). And we have similarly explained that the regulation of the conduct of judges is *both* an inherent part of our judicial power *and* is specifically authorized by the Constitution. See *Inquiry Concerning Coomer*, 315 Ga. 841, 854 n.10 (4) (b) (885 SE2d 738) (2023).

Our inherent authority to regulate the practice of law extends to regulating the practice of law by district attorneys. See, e.g., *In the Matter of Paine*, 316 Ga. 157 (886 SE2d 824) (2023) (considering disciplinary matter regarding district attorney's alleged violations of the Georgia Rules of Professional Conduct in a criminal case). But whether our judicial power extends to regulating district attorneys outside of the practice of law appears to be a question of first impression.

The question, then, ultimately becomes one of the nature of the power that district attorneys exercise. If district attorneys exercise judicial power, our regulation of the exercise of that power may well be within our inherent power as the head of the Judicial Branch. But if district attorneys exercise only executive power, our regulation of the exercise of that power would likely be beyond the scope of our judicial power.

As the Commission rightly acknowledges in its helpful letter brief, our caselaw has not previously answered this question. And,

unlike in the judicial discipline context, the Constitution affords us no specific authority in this regard.[1]

And in the absence of any specific constitutional authority, we harbor grave doubts that district attorneys exercise judicial power. The Constitution provides that "[t]he judicial power of the state shall be vested *exclusively* in the following classes of courts: magistrate courts, probate courts, juvenile courts, state courts, superior courts, state-wide business court, Court of Appeals, and Supreme Court." Ga. Const. of 1983 Art. VI § I ¶ I (emphasis added). Both by its express terms and by its context, the vesting of the judicial power "exclusively" in the classes of courts would seem to suggest that there is no judicial power vested in district attorneys.

It is true that the office of district attorney is created in the Judicial Article of the Constitution. See generally Ga. Const. of 1983 Art. VI § VIII; *Brugman v. State*, 255 Ga. 407, 413 n.5 (5) (c) (339 S.E.2d 244) (1986) (not deciding whether District Attorneys "are [effectively] in the executive branch, judicial branch, or both"). But the question before us is not about what branch the Constitution places district attorneys in, but what kind of power they exercise.[2]

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[1] We note that the Constitution does appear to expressly reserve for the General Assembly the authority to provide by general law for the discipline, removal, or involuntary retirement of district attorneys. See Ga. Const. of 1983 Art. VI § VIII ¶ II ("Any district attorney may be disciplined, removed or involuntarily retired as provided by general law."). The question presently before us does not require us to interpret this provision, and we decide nothing about its meaning.

[2] Nothing we say here should be understood to affect district attorneys' statutory right to submit their annual budget request without first being subject to revision by the Governor. See OCGA § 45-12-78 (d) ("the data relative to the legislative and judicial branches of the government" shall not "be subject to revision or review by the Office of Planning and Budget and must be included in the budget report as prepared by it"). That provision, unlike the Separation of Powers provision, appears to turn on the organizational

Our separation of powers provision deals with the "powers" and "functions" of each branch — not the formal organization of the branches themselves. Ga. Const. of 1983 Art. I § II ¶ III.[3]

If this were a case that came to us through the ordinary litigation process, we would likely have to answer at least some of the difficult constitutional questions outlined above. But this is not a case; rather, it is a situation in which we must determine whether to exercise our administrative authority that is incident to the judicial power. In making that determination, just as in deciding cases and in all other official tasks, we remain mindful of the oath that we all took to do all things "agreeably to the laws and Constitution of this state and the Constitution of the United States." OCGA § 15-6-6.[4]

"branches of government," see id., rather than "powers" or "functions," Ga. Const. of 1983 Art. I § II ¶ III. We express no opinion whatsoever on this budgetary issue.

[3] As the Commission rightly points out, we have previously suggested that the functions of a district attorney may not be "exclusively executive." See *In re Pending Cases, Augusta Judicial Circuit*, 234 Ga. 264, 266 (215 SE2d 473) (1975) ("[W]e conclude that the functions of district attorneys are not exclusively executive and that the presiding judge may call upon the district attorney to furnish the information requested here as to pending criminal cases[,] if for no other reason than to schedule trials . . . so as to dispose of criminal matters promptly and efficiently."). But it was not until the 1983 Constitution that the Judicial Article vested judicial power "exclusively" in the enumerated classes of courts. Compare Ga. Const. of 1983 Art. I § I ¶ I with Ga. Const. of 1976 Art. VI § I ¶ I. So our pre-1983 precedent on this point was applying different constitutional text.

[4] In making this determination, we do not consider the argument made by letter from the Association of Prosecuting Attorneys that creation of the Commission exceeded the power of the General Assembly. That issue is beyond the scope of the question we posed to the Commission, is presently the subject of litigation, and we need not consider it in order to resolve the limited question presently before us. We do, of course, otherwise consider the Association's letter as we would consider any comments provided by any stakeholder regarding the exercise of our administrative authority.

If the statute at issue imposed on us a mandatory duty to approve the draft standards and rules, we would have to decide whether such a statutory provision was constitutional; if it was, we would be obligated to comply. But the statute does not impose on us such a duty; it simply conditions the effectiveness of the standards and rules upon our approval.

In short, we have grave doubts that we have the constitutional power to take any action on the draft standards and rules. But deciding the question of whether we actually have that power would require deciding difficult constitutional questions of first impression outside of the adversarial process. And "as a matter of constitutional avoidance, we must not address a constitutional question where it is unnecessary to do so." *Sons of Confederate Veterans*, 315 Ga. at 65 (d) (i). Because we are under no legal directive to take action, the most prudent course for us is to decline to take action without conclusively deciding any constitutional question.

Accordingly, we respectfully decline to take any action regarding the Commission's draft standards of conduct and rules for the Commission's governance.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.


, Clerk