

ADVISORY OPINION 2020-4
REVIEW OF SENATE
CONFIRMATION PROCEDURES

Ducey, CJ. for the Court.

Pursuant to Article IV, Section 3(C)(5), of the Student Body Constitution, it is within the jurisdiction of this Court to issue advisory opinions¹ “concerning student rights under the Student Body Constitution upon request of the Student Body President or any Senator.”

We take this opportunity to emphasize that we have not been presented with a case or controversy and we are not considering a particular set of facts. This advisory opinion is a general interpretation of student rights and is not binding on the Court.

On September 29, 2020, this Court received a petition by a Florida State University Senator for an Advisory Opinion² as to the proper interpretation and applicability of Senate Rule of Procedure (“SRP”) §10.10 titled “Confirmations”. SRP §10.10. Assessing the rule in light of the circumstances surrounding the immediate

need for an Advisory Opinion, this Court will address the Petitioners inquiry in three parts concerning:

- I. With respect to Supreme Court Justice appointments made by the Student Body President, whether SRP §10.10 requires a vote by the full Senate for the approval or rejection of each candidate’s confirmation;
- II. Whether SRP §10.10 comports with the Student Body Statutes (“SBS”) and Constitution; and
- III. Whether SRP §10.10, or other provisions contained in SBS or the Constitution, prohibit the Senate Judiciary Committee from outright rejecting a candidate without forwarding them to the full Senate for a vote.

In this opinion, this Court answers each of these questions in the affirmative.

We emphasize that this Advisory Opinion is a statement of this Court’s interpretation of the law and that there are cognizable remedies that could be employed, should this issue come before the Court in

¹ A non-binding statement by a court of its interpretation of the law on a matter submitted for that purpose.” Black’s Law Dictionary, 8th ed. 2004.

² We would like to note that this Court does not yet have access to the official Supreme Court email

account. This request was sent by Petitioner on September 28, 2020 but was forwarded to this Court by SGA Advisors on September 29, 2020.

subsequent litigation.³ The Supreme Court reserves ruling on the issues discussed herein without a case requiring a decision before the Court. However, now that the Court has issued an Advisory Opinion on the matter it should be known that the appropriate procedures for confirmations, as laid out in this Court's Analysis, should be followed by the Student Senate and all Senate Committees accordingly.

ANALYSIS

I.

In forming its opinion, this Court looked to the specific language of SRP §10.10. *See Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (holding that a court must exhaust all traditional tools of statutory construction). When interpreting a statute, Courts begin with the text of the provision at issue, giving the words contained in the provision their ordinary meaning. *See N.Y. v. Travelers Ins. Co.*, 514 U.S. 645, 655; *Moskal v. United States*, 498 U.S. 103, 108 (1990). This Court is mindful that, “the beginning point must be the language of the provision, and when the text speaks with clarity to an issue, judicial inquiry into its meaning, in all but the most

extraordinary circumstance, is finished.” *Ramey v. Director*, 326 F.3d 474, 476 (4th Cir.2003). In relevant part SRP 10.10 states:

“Confirmations: All nominees to Student Government offices requiring Senate confirmation shall have their completed applications forwarded to the appropriate Senate committee for consideration. The committee shall interview and question the nominee and then vote on whether to recommend approval or rejection of the nominee to the full Senate. Following the vote of the committee, all nominees shall be called to the floor of the Senate at its next meeting and may be questioned by any Senator wishing to do so ... Following questions, any Senator shall move to confirm the nominees individually.” SRP §10.10.

Quite plainly, it is apparent from the language of this rule that it was intended to set out the appropriate confirmation procedures for the Senate body to follow when it receives nominations from the Student Body President. *See United States v. Locke*, 471 U.S. 84, 95 (1985) (noting that the Court is required “to assume that legislative purpose is expressed by the ordinary meaning of the words used”). This rule exhibits a sequence of events which the Senate must follow in the order dictated by the provision. *See, e.g.*, SRP §10.10 (“Following the

³ *See Burns v. State of Ohio*, 360 U.S. 252 (1959) (noting that the court holds the ultimate responsibility of determining violations and imposing sentences).

vote...” denotes the time in which this event must occur, i.e., after the vote).

The Constitution of the Student Body grants the power to appoint candidates to Student Government offices to the Student Body President. FSU Const. Art. III § 3. And other provisions of the Constitution and Student Body Statutes make clear that Supreme Court Justice positions are included in such offices. *See* FSU Const. Art. II §5(A)(4); Art IV §5; SBS §201.1; SBS §405.2 (“Appointed Officers”).

Three relevant parts of SRP §10.10 support this Court’s conclusion that every candidate sent by the Student Body President to the Senate for confirmation must be voted on by the full Senate voting body. First, SRP §10.10 instructs the Senate to forward each candidate to the appropriate Senate Committee for consideration, where the committee may question candidates as to their qualifications. The SGA website provides a list of questions that Senators are permitted to ask during these hearings.⁴ Once the candidates have been interviewed by the committee, the rule then requires the committee to “vote on whether to *recommend*

approval or rejection of the nominee to the full Senate.” SRP §10.10 (*emphasis added*). To “recommend” means to “suggest an act or course of action”⁵. The specific language contained here supports the Court’s contention that the committee’s vote constitutes a non-binding suggestion as to what action the committee believes the Senate should take as to the candidate’s confirmation.

A second relevant provision contained in SRP §10.10 provides: “Following the vote of the committee, *all nominees shall* be called to the floor of the Senate at its next meeting”. SRP §10.10 (*emphasis added*). Looking to Black’s Law Dictionary for the definition of shall, shall means “has a duty to; more broadly is required to,” and as noted, “[t]his is the mandatory sense that drafters typically intend and that courts typically uphold.” BLACK’S LAW DICTIONARY 689 (6th ed. 1990). This definition, as applied to the foregoing sentence in SRP §10.10, mandates that each and every candidate must go before the Senate floor as part of the confirmation process. Further, the provision dictates when this must happen: “...at [the Senate’s] next

⁴ *See* Forwarding Interview Questions, STUDENT GOVERNMENT ASSOCIATION, available at: <https://sga.fsu.edu/interview.shtml>

⁵ Merriam-Webster. (n.d. 1828). Recommend. In *Merriam-Webster.com dictionary*. Retrieved October 1 2020, from <https://www.merriam-webster.com/dictionary/recommend>

meeting.” SRP §10.10. This clearly indicates that the committee’s interview of the candidate and the meeting in which the candidate is presented to the Senate floor are two separate events, one of which occurs prior to the other. Both, however, are mandatory steps of the confirmation process prescribed by this rule.

Finally, the last sentence of SRP §10.10 states that, “[f]ollowing questions, any Senator *shall move to confirm the nominees individually.*” SRP §10.10 (*emphasis added*). This sentence is perhaps the most indicative of the Court’s position. The word “individually” signifies that every candidate is entitled to a vote by the full Senate. The plain language of this provision affirms that once the candidate is called to the Senate floor, and after any Senators wishing to question such candidate have done so, the final step in the confirmation process requires a Senator to move to confirm each individual candidate separately. There is no reasonable alternative interpretation as to this requirement. *Jones v. U.S.*, 526 U.S. 227, 266 (“[Alternative] construction is applicable only if the statute at issue is genuinely susceptible to two constructions after, and not before, its complexities are unraveled.”) (internal quotations omitted).

We conclude that SRP 10.10 requires a vote by the full Senate for the approval or rejection of each individual candidate’s confirmation.

II.

The Supreme Court is first guided by the Constitution and then by the Student Body Statutes. To determine whether SRP §10.10 prescribes a Constitutionally valid process for the confirmation of Supreme Court Justices, the Court looked to other portions of these documents to determine whether they provide any guidance to the Court as to the confirmation process. Conveniently for this Courts analysis, they do.

Article II §5 of the Constitution states that the “Senate shall: ... (4) Confirm appointments of the Student Body President by a two-thirds (2/3) vote ... Supreme Court Justices shall require a two-thirds (2/3) vote under any circumstances.” FSU Const. Art. II §5(A)(4). In Article IV §5, the Constitution also states: “Justices shall be appointed by the Student Body President confirmed by Student Senate as follows: ... (2) The Student Body President shall forward one of the candidates to the Student Senate for confirmation. (3) Confirmation shall require

a two-thirds (2/3) vote of the Senate”. FSU Const. Art. IV §5(A)(2)-(3).

An additional inquiry into the Student Body Statutes reveals a provision in Title V which states, “Supreme Court Justices shall be selected through the procedures outlined in the Student Body Constitution”. SBS §500.3. This process is further discussed in SBS §201.1, titled “Vote Required”, which echoes the words of the Constitution: “Appointments of the Student Body President shall require a two-thirds (2/3) vote of the Senate ... Supreme Court Justices ...shall require a two-thirds (2/3) vote for confirmation by the Senate, under any circumstances”. SBS §201.1.

This Court additionally looks to the Senate’s own Rules of Procedure for clarity. While these rules govern only the Senate’s own practices and thus are not binding on the Court, we still find them relevant to our analysis as they further support our interpretation of SRP §10.10. Rule 6 details the duties and responsibilities of the Senate Standing Committees. SRP §6. Specifically, SRP §6.3 states that the Senate Judiciary Committee shall: “Approve or disapprove appointments or nominations to the Student Government Supreme Court... *pending the*

approval of the full Senate.” SRP §6.3 (*emphasis added*).

Read independently or in conjunction with one another, each of these Constitutional, statutory, and procedural provisions echoes the same underlying principle as the provisions in SRP §10.10: That the full Senate must vote on every candidate that is forwarded to them by the Student Body President for confirmation.

Seeing as no provisions contained within the Student Body Statutes or Constitution present a potential conflict with SRP §10.10, and further, that this Court’s interpretation of SRP §10.10 is both embraced and required by the Constitution, Statutes, and the Senate’s very own Rules of Procedure, we conclude that process described in SRP §10.10 is the constitutionally valid method for confirming Supreme Court Justices.

III.

To this Court’s knowledge, the Senate has impermissibly allowed the Judiciary Committee to have ultimate authority in the rejection of candidates appointed to the Supreme Court by the Student Body President. This gives the Judiciary Committee unfettered discretion

over the composition of the Supreme Court and thus constitutes a blatant overreach by the Legislative body into the powers of both the Executive and Judicial branches of government.

It appears as though the Judiciary Committee has somehow persuaded the entire Senate to falsely believe that the Senate body as a whole does not even get to vote on matters in which the Committee is involved. Yet, nowhere in the Constitution can this Court find the words “Judiciary Committee” mentioned. The Student Body Statutes mention a “Judiciary Committee” 19 times, but never once in regard to appointments or confirmations. The only power granted to the Senate Judiciary Committee by the Statutes is to initiate investigations and impeachment proceedings against any Student Government elected or appointed officer once the chair has been given the formal charges from the Senate Program Assistant. *See* SBS §206.2; SBS §406. We believe the Senate has an obligation to correct its dereliction of duty, rather than abusing its legislative powers to further alter the clear rules put in place by the governing bodies before them.

⁶ *See* FSU Const. Art. IV §3(4) (“If there is a vacancy on the Supreme Court, the Chief Justice

Even more troubling than the Senate’s blatant disregard for its own Rules of Procedure, is the lack of concern it has for remedying this issue as well as the apparent haste in which it wishes to sweep the problem under the rug. Less than 48 hours after petitioning this Court for an Advisory Opinion on SRP §10.10, the Senate convened for a meeting on September 30, 2020 in which amendments were proposed to the very rule it sought guidance on, seemingly in an attempt to push the Senate’s practices even further outside of Constitutional bounds. Moreover, we are now approaching the seventh week of the Fall 2020 Semester and there is still a vacancy on the Supreme Court. Just to issue this Advisory Opinion, the Court had to appoint a temporary Justice.⁶ This not only shows a lack of respect for the students serving on the Supreme Court, but it is a blatant abuse of the Judicial process by the Senate.

Of course, the Constitution does afford Congress broad discretion to set its own internal rules, but the Senate cannot pass rules that ignore Constitutional restraints on that power. The Constitution as the supreme law is without qualification and is absolute, and the powers actually granted

shall appoint a temporary Justice to sit by designation.”).

constitute paramount authority of the land. *Shelby County, Ala. v. Holder*, 570 U.S. 529.

The most important basis for finding the Constitutionality of SRP §10.10, as well as the procedure outlined in Part I. of this opinion, is the doctrine forbidding one branch of the government to encroach on the duties and powers of another. Thus, it is based on “the high or decent or due respect that each of the coordinating branched of the government holds for one another.” *U.S. v. Gibert*, 677 F.3d 613 (4th Cir. 2012); *See State v. Johnson*, 514 N.W.2d 551 (Minn. 1994). Courts do not act as a super-legislature; out of respect for the democratic process and in recognition of the coequal status of each branch, certain checks and balances are put in place to ensure that no branch assumes too much power over the people subject to its authority. The separation of powers does not depend on the views of individual government officials, nor on whether the encroached-upon branch approves the encroachment. *Free Enterprise Fund v. Public Co.*, 561 U.S. 477 (2010). And “the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.” *Bowsher v. Synar*, 478

U.S. 714, 736 (1986). (internal quotations omitted).

Further, “it is emphatically the province and duty of the Judiciary to say what the law is,” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164 (1803). If the Courts abdicate this duty, the Senate will have a free rein to adopt procedures that impair the rights of Student Body Officers to hold positions in Student Government. If the Senate continues to pass off its duty under the separation of powers to one of its committees, the independence of the other branches will be threatened seriously. *See Culver v. CPE*, 2020-AP-02.

Some Senators wishing to retain the sense of authority that they have impermissibly been exercising may argue that on the basis of precedent, the Senate should be permitted to continue with the procedures it has employed in recent practice. Interestingly, however, this Court finds no precedent which can be cited to in that regard. According to the documents available on the SGA website, since the year 2017, the Senate has been forwarded candidates for

confirmation to the Supreme Court 19 times.⁷ Out of these 19 candidates, the Senate has only rejected three. Of these three rejections, each has occurred since July of 2020. Thus, the argument as to preserving precedent is foreclosed on the basis that no precedent exists. One cannot argue the importance of a procedure as an adopted practice if such practice has only been employed three times in the past three years, and especially if each of those three times occurred under the same administration, within the last few months.

To ignore or intentionally misinterpret provisions of Student Body Constitution and Statutes in a manner that reduces democratic control of the executive, dismisses our unique traditions of democracy. *See Culver v. CPE*, 2020-AP-02. To allow the Judiciary Committee to creep into the appointment process of the Executive is to condone and promote a breakdown of the separation of powers that is unique to our system and traditions. *Id.* Only the Student Body President may appoint Supreme Court Justices, and only the full Senate may vote to confirm them. *See* FSU Const. Art. II §5; FSU Const. Art. IV §5. The Florida State University student body does not vote

directly to appoint Justices. Hence why the President (elected by the constituents) nominates someone, and the Senate (elected but the constituents) then votes on the nominee. Not every student is fairly represented when only four Senators on the Judiciary Committee decide to make the final decision themselves. Therefore, the overwhelming nature of the interests of popular control of the branches of government and the separation of powers doctrine demands that this Court protect our democratic traditions when clear Constitutional violations have taken place. *See* 2020-AP-01 *SBA v. COGS*.

A final issue presented in the Senate's confirmation procedure is the Judiciary Committee's lack of transparency. The Student Senate, including its committees, fall subject to Florida Sunshine Laws. *See* Fla. Const. 1885, Art. III §16; Fla. Stat. §§286.011; *See also* SBS §203, §409. The Student Supreme Court shall have jurisdiction to issue injunctions to enforce these Statutes as they apply to Student Government Officers. SBS §203.6. The Judiciary Committee has made absolutely no effort to advise candidates, this Court, or the

⁷ Note that this evaluation is made according to the documents currently posted to the SGA Website, which only date back as far as 2017.

See Candidate Forwarding Letters, (Mar 18 -Oct 20) STUDENT GOVERNMENT ASSOCIATION, available at: <https://sga.fsu.edu/forwarding-confirmation.shtml>

public, of the committee's reason for a candidate's rejection.

A committee's minutes should at the very least reveal the substance and reasoning behind a denial or approval. *See Culver v. CPE*, 2020-AP-02. The Judiciary Committee meeting minutes from each of the rejected candidates' hearings contain no substance, reveal no meaningful deliberation, and provide no basis for rejection of any candidate.⁸ The committee is permitted to conduct hearings, and as such, each member of the committee is entitled to their vote. However, the deliberations regarding the candidate in question contain no explanation as to the reasons behind this vote.

This would not be such a problem, had the Senate conducted confirmations through the appropriate process. Yet, this fact is important to the Court because it plainly exhibits the Judiciary Committee's desire to operate in the shadows of the Senate, unconstrained by any model of order ordained in our governing laws. A committee, consisting of only a handful of Senators, does not have the broad authority to

select only those candidates it deems worthy to send before the full Senate.

Further, when issues involving the Constitutionality of Senate actions have been brought to the attention of the Senate, this Court expects Senators to address such issues in a manner that appreciates the unique responsibility that their positions require as servants to the Student Body. This Court has a duty to maintain a fair and transparent atmosphere in which Student Government business can be conducted and as such, we find the Senate's actions at its last meeting to be very concerning. When the Senate has a question concerning its powers and duties under the laws of this University, the Court is here to provide clarity.⁹ However, when members of the Senate become aware of their own errors, it is patently wrong for them to attempt to evade this Court's ruling by claiming there is "nothing to see here!" and then amending the law to fit their prerogative.

CONCLUSION

In issuing this Advisory Opinion, we do not render any decision as to the merits of a potential claim brought before the Court

⁸ *See* 72 Student Senate Judiciary Committee, (dated July 14, 2020; Sept 14, 2020; Sept 22, 2020) STUDENT GOVERNMENT ASSOCIATION, available at: <https://sga.fsu.edu/committee-minutes.shtml>.

⁹ *See* FSU Const. Art. IV §3(C)(5) (providing that any Senator may request an Advisory Opinion from the Supreme Court).

regarding any of the issues discussed herein. Moreover, the Court emphasizes that Advisory Opinions are not to be retroactively applied. *See Osei v. State*, 226 So. 3d 1077, 1078. Unfortunately, we can not do anything about the lack of Judicial oversight that existed in the Student Government Association this past summer. However, this Court would like to make it very clear that we are committed to the traditions and values of this institution and we are compelled to act in protection of such. As Student Government Officers charged with such responsibility over the administration of justice at this University, the Justices appointed to this Court and now serving within its capacity have no conflicts or reservations doing so.

After careful consideration of the provisions contained in the body of laws which govern this Court, we opine that:

- I. SRP §10.10 requires that every candidate for Supreme Court Justice receive a vote by the full Senate as to his/her confirmation;
- II. The procedure contained in SRP §10.10 is the correct and Constitutionally valid method for the confirmation of Justices; and
- III. The Senate Judiciary Committee is not permitted by any provision in the

Statutes, Constitution, or Senate Rules of Procedure, to reject candidates without the vote of the full Senate.

We advise the Student Senate body to take action to remedy the headaches it has caused other branches of Student Government and when presented with a candidate for Judicial appointment, to confirm such candidate according to the procedures outlined in this opinion.