

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
3 DIVISION

WILLARD PROCTOR, JR.

vs.

Case NO.: 600N-10-1439

PLAINTIFF
Est O'Brien Pulaski Circuit Clerk
Dr 0812 6

HONORABLE CHARLIE DANIELS IN HIS OFFICIAL
CAPACITY AS SECRETARY OF STATE

DEFENDANT

COMPLAINT

Comes now the plaintiff, Willard Proctor, Jr., by and through undersigned counsel, Chrishauna E. Clark, and for his complaint, states:

1. This is an action for declaratory relief pursuant to A.C.A. §16-111-104 and a pre-election action seeking relief pursuant to A.C.A. §7-5-801.

2. Plaintiff is a resident of Pulaski County, Arkansas.

3. Plaintiff has filed for the office of Circuit Judge for Pulaski County, Arkansas, Fifth Division as a write-in candidate.

4. Defendant Honorable Charlie Daniels is the Secretary of State for the State of Arkansas and is sued in his official capacity.

5. Defendant Daniels is responsible for receiving filings for candidates for state and federal office. In order to file to run as a non-partisan judicial candidate, the Plaintiff would file with the Secretary of State. A.C.A. §7-10-103. The Secretary of State would then be responsible for certifying Plaintiff's nomination. A.C.A. §7-7-401.

6. The office of Circuit Judge for the State of Arkansas is a constitutional office created and defined by the Arkansas Constitution.

7. To be eligible to hold the position of Circuit Judge, a person must meet the qualifications set out in the Arkansas Constitution.

8. Plaintiff meets the qualifications for the office of Circuit Judge that are contained in the Arkansas Constitution. Plaintiff is a citizen on the United States of America. ARK. CONST. amend. 51, §6. Plaintiff is a resident of Pulaski County, Arkansas. ARK. CONST. amend. 51, §6. Plaintiff is over the age of eighteen. He is forty-seven. ARK. CONST. amend. 51, §6. Plaintiff is a lawful registered voter. ARK. CONST. art. 3, §1 as amended by Arkansas Constitution, ARK. CONST. amend. 51, §51; ARK. CONST. amend. 80. Amendment 80, Section 16(B) to the Arkansas Constitution defines the qualifications to serve as a Circuit Judge for the State of Arkansas. It states that Circuit Judges "shall have been licensed attorneys of this State for at least six years immediately preceding the date of assuming office." Plaintiff has been a licensed attorney for this State for over twenty-two (22) years. Plaintiff resides in the geographical area to be served. ARK. CONST. amend. 80, §16. Article 5, §9 of the Arkansas Constitution prohibits persons convicted of "embezzlement of public money, bribery, forgery, or other infamous crime" from holding any office of trust in the State of Arkansas. Plaintiff has never been convicted of a crime.

9. On January 25, 2010, plaintiff was removed from his position as a Circuit Judge for Pulaski County by the Arkansas Supreme Court.

10. A.C.A. §16-10-410(d) provides that any judge that has been removed from office cannot be appointed or elected to serve as a judge.

11. A.C.A. §16-10-410(d) adds a qualification for the office of Circuit Judge not contained in the Arkansas Constitution.

12. It is settled law that the legislature may not by enactment add a qualification for office to a constitutional office. In *Green v. Mississippi*, 200 Ark. 204, 138 S.W.2d 377 (1940), the Arkansas Supreme Court addressed the issue with respect to the office of County Judge. The Court stated as follows:

It is true that section 10 of act 452 of the acts of 1917, provides that a person must possess such qualifications in order to be a county judge of Mississippi county, but the act is void in so far as it imposes such qualifications upon a person in order to be a county judge in Mississippi county. The qualifications fixed by the constitution to be county judge in this state inferentially prohibits the legislature from fixing additional qualifications. Why fix them in the first place if the makers of the constitution did not intend to fix all the qualifications required, and why fix only a part of them and leave it to the legislature to fix other qualifications? There is no reasonable answer to these questions. The makers of the constitution knew exactly what qualifications a county judge should have and fixed them, and of course, fixed all of them and not a part of them. The makers of the constitution intended to cover the whole subject of the qualifications for a county judge. Had the makers of the constitution intended otherwise they would have created the office of the county judge with

directions to the legislature to fix their qualifications. Instead of delegating this authority to the legislature they fixed the qualifications of county judges themselves, thinking perhaps it was better to have a good business man in the position than some lawyer who had practiced three years. Every county at that time had business to attend to and has since and will always have important business for the county to attend to and the makers of the constitution well knew that the electorate would have a better opportunity to select a man of good business education from all the citizens than if restricted to the selection of a person of good business education from among the lawyers in the county only.

Green v. Mississippi, 200 Ark. 204, 138 S.W.2d 377 (1940).

More recently, in *Daniels v. Dennis*, 365 Ark. 338, 229 S.W.3d 880 (2006), the Arkansas Supreme Court addressed this issue again.

Chief Justice Hannah wrote for an unanimous court as follows:

Where specific qualifications for office are listed in both the Arkansas Constitution and a statute, the constitution controls and voids the statute. *Allred v. McCloud*, 343 Ark. 35, 31 S.W.3d 836 (2000). The court in *Allred* relied on *Mississippi County v. Green*, this court noted the prevailing rule that regulation of qualifications in the constitution acted as a restriction on any legislative power to impose additional qualifications. In Arkansas, our constitution provides the qualifications for judicial candidates, and this court in *Green supra* held that where an office is created by the constitution, and qualifications for that office are fixed by the constitution, the General Assembly lacks the power to add to those qualifications. We again so hold

With respect to the prevailing rule, this court in *Mississippi County v. Green* 200 Ark. 204, 207, 138 S.W.2d 377, 379 (1940), cited 22 Ruling Case Law *Public Officers* § 41, at 401 (1918), which provides that, "[t]he power which each state has

to fix the qualifications of its officers is generally exercised by inserting appropriate provisions in its constitution, and when this is done the legislature is restricted in its right to impose additional qualifications." It is further stated in this same work that "the better opinion appears to be that a regulation on the subject inserted in the constitution operates as an implied restriction on the power of the legislature to impose additional qualifications."

Daniels v. Dennis, 365 Ark. 338, 340-41, 229 S.W.3d 880, 882-83 & n.1 (2006).

The Attorney General's office has issued a recent opinion which is in accord with these holdings. See AG Opinion 2009012 (March 12, 2009). The relevant portions read as follows:

In one relevant Arkansas case, Mississippi County v. Green, 200 Ark. 204, 138 S.W.2d 377 (1940), our Supreme Court held that the General Assembly did not have the authority to enact legislation requiring a county judge to be "learned in the law," as it would add an additional qualification to that constitutional office. *Id.* However, the Court's reasoning in that case appeared dependant on the fact that the constitution specifically sets forth the qualifications for the office of county judge at Article 7, Section 29. *Id.* The court stated: "The makers of the constitution knew exactly what qualifications a county judge should have and fixed them and of course fixed all of them and not a part of them." *Id.* The holding of *Green* was most recently reiterated in the case of Daniels v. Dennis, 365 Ark. 338, 229 S.W. 3d 880 (200).

In another relevant case, Allred v. McLoud, 343 Ark. 35, 31 S.W.3d. 836 (2000), the Supreme Court held that an initiative which attempted to establish term limits for Madison County officials was in violation of the Arkansas Constitution in that it: 1) attempted to add to the specific qualifications set forth for county judge at Ark. Const. art. 7, § 29 and justice of the peace at

Ark. Const. art. 7, § 41; and 2) attempted to add to the general qualifications applicable to all county officers, specifically Ark. Const art. 19, § 3.

Although constables are constitutional officers, their qualifications, unlike those of county judges, are not expressly set forth by the Arkansas Constitution.

AG Opinion 2009-012. (March 12, 2009)

13. The additional qualification contained in A.C.A. §16-10-410(d) is akin to the legislative enactments that attempted to add term limits, require that a county judge have a law degree and limit a candidate from running in the same district. Each of these enactments have been held to be unconstitutional because they add additional qualifications on running for a constitutional office that are not defined in the constitution. Likewise, A.C.A. §16-10-410(d) is unconstitutional because it adds a qualification for candidacy as a Circuit Judge not specifically listed in Arkansas Constitution.

14. This Court should declare A.C.A. §16-10-410(d) to be unconstitutional.

15. The nonpartisan primary is scheduled for May 18, 2010. Early voting begins on May 3, 2010. Plaintiff prays that this matter be immediately set for a hearing in sufficient time to be declared eligible for election as a Circuit Judge prior to the election.

16. The Attorney General for the State of Arkansas is being notified of these proceedings since the constitutionality of a statute is being contested.

By: Senate Judiciary Committee

"AN ACT TO ESTABLISH THE ARKANSAS JUDICIAL DISCIPLINE AND
DISABILITY COMMISSION; AND FOR OTHER PURPOSES."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Definitions. The word "judge" in this act means anyone, whether or not a lawyer, who is an officer of the judicial system performing judicial functions, including an officer such as a referee, special master, court commissioner, or magistrate, whether full-time or part-time.

SECTION 2. (a) There is hereby established a committee to be known as the Arkansas Judicial Discipline and Disability Commission (hereinafter referred to as "Commission"), consisting of nine (9) members, each of whom shall be residents of Arkansas, and shall be appointed as follows:

(1) three (3) members shall be judges of the Arkansas Court of Appeals, Circuit Court, Chancery Court or Municipal Court appointed by the Arkansas Supreme Court;

(2) three (3) members shall be lawyers admitted to practice in Arkansas who are not judges or former or retired judges, one (1) of whom shall be appointed by the Attorney General, one (1) by the President of the Senate, and one (1) by the Speaker of the House; and

(3) three (3) members who are neither lawyers or judges or former or retired judges, appointed by the Governor.

(b) (1) A Commission member shall serve for a term of six (6) years and shall be eligible for reappointment to a second full term. Initial appointments shall be made so that the terms of one (1) member in each of the three categories shall expire every other year. A member appointed to a term of less than six (6) years or to fill an unexpired term may be reappointed to two (2) full terms.

(2) When initial appointments are made, the appointing authority for each category of Commission membership shall also appoint an alternate member for each regular member appointed. An alternate member shall be appointed for a term of six (6) years and may be reappointed for a second term. An alternate member appointed to fill an unexpired term shall be eligible for an appointment for two (2) full terms.

(c) If a Commission member or an alternate Commission member moves out of the jurisdiction, ceases to be eligible for appointment to represent the category for which he was appointed, or becomes unable to serve for any reason, a vacancy shall occur. An appointment to fill a vacancy for the duration of its unexpired term shall be made by the appropriate appointing authority, effective no later than sixty (60) days from the occurrence of the vacancy. If a vacancy is not filled in accordance with this paragraph, the Chief Justice of the Supreme Court shall, within ten (10) days thereafter, appoint, from the category to be represented, a member who shall serve for the duration of the unexpired term.

(d) Commission members shall serve without pay, but shall be entitled to maximum per diem expenses as authorized by the General Assembly for each day attending meetings of the Commission or in attending to official business as authorized by the Commission, and, in addition thereto, shall be entitled to

mileage for official travel in attending Commission meetings or other official business of the Commission, at the rate provided by law or state travel regulations for reimbursement to state employees for official state travel.

(e) The Commission shall employ a Director and such additional professional and clerical staff as may be authorized, from time to time, by appropriation passed by the General Assembly. The Director shall not engage in the practice of law nor serve in a judicial capacity during his or her employment.

(f) The Commission shall initiate or shall receive information, conduct investigations and hearings, and make recommendations to the Arkansas Supreme Court concerning:

- (1) allegations of judicial misconduct;
- (2) allegations of physical or mental disability of judges requiring leave or involuntary retirement; and
- (3) matters of voluntary retirement or leave for disability.

(g) (1) Records, files and reports of the Commission shall be confidential and no disclosure shall be made except as follows:

(A) upon waiver in writing by the judge at any stage of the proceedings;

(B) upon inquiry by an appointing authority or by a state or federal agency conducting investigations on behalf of such authority in connection with the selection or appointment of judges;

(C) in cases in which the subject matter or the fact of the filing of charges has become public, if deemed appropriate by the Commission, it may issue a statement in order to confirm the pendency of the investigation, to clarify the procedure aspects of the proceedings, to explain the right of the judge to a fair hearing, and to state that the judge denies the allegations;

(D) upon inquiry in connection with the assignment or recall of a retired judge to judicial duties, by or on behalf of the assigning authority; or

(E) upon filing of formal charges, in which case only the charges and the records of the formal proceedings thereon shall become public;

(F) where the circumstances necessitating the initiation of an inquiry include notoriety, or where the conduct in question is a matter of public record, information concerning the lack of cause to proceed shall be released by the Commission.

(2) All proceedings held prior to a determination of probable cause and the filing of formal charges shall be confidential. Any hearing scheduled after the filing of formal charges shall be open to the press and to the public, except that, following the completion of the introduction of all evidence, the Commission may convene to executive session for the purpose of deliberating its final conclusions and recommendations, provided, that, upon completion of the executive session, the final action of the Commission shall be announced in an open and public session.

SECTION 3. Leave. Grounds for leave consist of a temporary physical or mental incapacity which impairs the ability of the judge to substantially perform the duties of his or her judicial office and which exists or is likely to exist for a period of one year or less. Leave cannot be granted to exceed one year.

SECTION 4. Suspension with pay. A judge may be suspended by the Supreme Court with pay (a) while an indictment or information charging him or her in any court in the United States with a crime punishable as a felony under the laws of Arkansas or the United States is pending; (b) while a recommendation to the Supreme Court by the commission for his or her removal, or involuntary

disability retirement is pending; or (c) when articles of impeachment have been voted by the House of Representatives.

SECTION 5. Mandatory suspension. A judge shall be suspended from office with pay by the Supreme Court when in any court in the United States he pleads guilty or no contest to, or is found guilty of an offense punishable as a felony under the laws of Arkansas or the United States, or of any other offense that involves moral turpitude. If his conviction becomes final, he may be removed from office pursuant to Section 6 of this act. If his conviction is reversed and he is cleared of the charge, by order of the court, whether without further trial or after further trial and a finding of not guilty, his suspension terminates. But nothing in this section shall prevent the Commission from determining that a judge be disciplined or removed according to Section 6 of this act.

SECTION 6. (a) Removal from office. The grounds for removal conferred by this act shall be both alternative and cumulative to the power of impeachment provided by the constitution and removal otherwise provided by law.

(b) Grounds for removal.

(1) A judge may be removed from office on any of the following grounds:

(a) conviction of any offense punishable as a felony under the laws of Arkansas or the United States;

(b) conviction of a criminal act that reflects adversely on the judge's honesty, trustworthiness, or fitness as a judge in other respects;

(c) the commission of conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) the commission of conduct that is prejudicial to the administration of justice;

(e) willful violation of the Code of Judicial Conduct or Professional Responsibility;

(f) willful and persistent failure to perform the duties of office;

(g) habitual intemperance in the use of alcohol or other drugs.

(2) In considering recommending removal, the Commission may consider the frequency of the offense, the motivation of the conduct, the length of time since the conduct in question, and similar factors.

(3) Any judge removed from office pursuant to this act cannot be appointed thereafter to serve as a judge.

SECTION 7. Vacancy. The granting of leave, suspension, with or without pay, removal or involuntary disability retirement pursuant to this act shall create a vacancy in the judicial office.

SECTION 8. Members of the commission, referees, commission counsel and staff shall be absolutely immune from suit for all conduct in the course of their official duties.

SECTION 9. The Arkansas Supreme Court shall adopt rules with regard to all matters of Commission operations and all disciplinary and disability proceedings and promulgate rules of procedure.

SECTION 10. All provisions of this Act of a general and permanent nature are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code Revision Commission shall incorporate the same in the Code.

SECTION 11. All laws and parts of laws in conflict with this Act are hereby repealed.

APPROVED: March 17, 1989
