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The Case of the Vanishing Supreme Court Contest: *Barrow v. Raffensperger* Eliminates the Power of the People to Elect their Appellate, Superior, and State Court Judges

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The Case of the Vanishing Supreme Court Contest: *Barrow v. Raffensperger* Eliminates the Power of the People to Elect their Appellate, Superior, and State Court Judges *

I. INTRODUCTION

Imagine being elected a Georgia Supreme Court Justice. You have spent hundreds of thousands of dollars on your campaign and more than a year of your life running for election, only to have it all come crashing down. You've been informed that your win is now legally meaningless and void, even though you were chosen by the people. You are told that it is now an office that the current Governor gets to fill because the predecessor in the office to which you were just elected, intentionally chose to resign two months early. This political loophole and disenfranchisement of voters is now allowed in the State of Georgia by the Georgia Supreme Court's decision in *Barrow v. Raffensperger*.¹

Georgia has always been a state that supports elections. We elect everyone under the sun – from Supreme Court Justices to County Coroners.² In a highly contentious and publicized case, the Georgia

*I owe a special thank you to Dean Cathy Cox for her time, support, and guidance throughout my time at Mercer Law and on this Casenote. Words cannot comprehend how grateful I am for her mentorship over the last two years. I also would love to thank my parents, Steven and Lisa Mallon as well as my sister, Shelby Mallon, for their unconditional, unwavering support throughout law school. To all of my people who consistently uplift and encourage me to be my best, thank you.

¹ 308 Ga. 660, 842 S.E.2d 884 (2020).

² Telephone Interview with Former Georgia Governor, Roy E. Barnes (September 2, 2020) (discussing the implications of *Barrow v. Raffensperger* and the intentions of the Drafters of the 1983 Georgia Constitution in the establishment of Paragraph IV of the Judicial Selection Section of the Georgia Constitution).

Supreme Court in *Barrow v. Raffensperger* ultimately held that the Secretary of State is not legally mandated to hold an election for an office that will inevitably become vacated.³

This Casenote will address the events that led to an expedited appeal to the Georgia Supreme Court along with an explanation of the peculiar makeup of the Georgia Supreme Court that heard and decided this case. Further, this Casenote will discuss and provide a background of the law establishing both the elections and appointments of Georgia Supreme Court Justices. In its final points, this Casenote will evaluate the court's reasoning in this landmark decision and the implications that have already arisen as a result.

II. FACTUAL BACKGROUND

Justice Keith R. Blackwell was an Associate Justice of the Georgia Supreme Court, who began his term of office on January 1, 2015.⁴ His six-year term was set to expire on December 31, 2020.

On February 26, 2020, Justice Blackwell submitted a letter of resignation to Governor Brian Kemp, stating that he “will conclude his judicial service at the end of the August Term of the Supreme Court,” and asked the Governor to “please accept his resignation from the Supreme Court,” effective November 18, 2020—only forty-three days from the official end of his term.⁵

Governor Kemp accepted Justice Blackwell's resignation that same day.⁶ Governor Kemp then notified Georgia Secretary of State Brad Raffensperger that he intended to fill the vacancy by gubernatorial appointment. Secretary Raffensperger then decided to cancel the scheduled May 19 election.⁷ He directed his staff to publicize the decision and notify the candidates who had submitted or attempted to submit the required qualifying fees and documents for the office.⁸

This case ensued when two political veterans, former U.S. Congressman John Barrow and former state Representative Elizabeth

³ 308 Ga. at 661, 842 S.E.2d at 887.

⁴ *Id.* at 662, 842 S.E.2d at 888.

⁵ *Id.* at 662–663, 842 S.E.2d at 888; Brief of Appellee at *5–6, *Barrow v. Raffensperger*, 308 Ga. 660 (2020)(No. S20A1031).

⁶ *Id.* at 663, 842 S.E.2d at 888.

⁷ *Id.* The Georgia Supreme Court recognized that “on April 9, the election for various state and federal offices scheduled for May 19 was postponed until June 9 due to the public health crisis resulting from COVID-19. For simplicity, we will continue to refer to the election at issue in these cases as the May 19 election.” *Id.* at 660, 842 S.E.2d at 887, n.1.

⁸ *Id.*

Beskin, attempted to qualify for this particular election.⁹ The Secretary of State's office would not accept their qualifying papers and fees, and informed Barrow and Beskin that the election had been cancelled.¹⁰ Shortly thereafter, both Barrow and Beskin filed separate petitions for writ of mandamus under O.C.G.A. § 9-6-20¹¹ against Secretary Raffensperger in Fulton County Superior Court.¹² Both petitions sought for the Secretary to accept their applications for Justice Blackwell's office and place the election back on the ballot.¹³

Following an expedited hearing, the trial court denied both Barrow and Beskin's claims in separate but similar orders.¹⁴ The court found that under Georgia law, once the resignation was accepted by Governor Kemp, a vacancy existed for him to fill.¹⁵ As a result, Secretary Raffensperger no longer had a statutory duty to hold the scheduled May 19 election.¹⁶ Additionally, the trial court reasoned that since the office would be filled by appointment before December 31, 2020, the appointee would serve a newly created term, which would now end on January 1, 2023.¹⁷ Immediately thereafter, Barrow filed an emergency motion with the Georgia Court of Appeals, pleading for expedited consideration of

⁹ *Id.*

¹⁰ *Id.*

¹¹ O.C.G.A. § 9-6-20 (2019). Mandamus requires that:

All official duties should be faithfully performed, and whenever, from any cause, a defect of legal justice would ensue from a failure to perform or from improper performance, the writ of mandamus may issue to compel a due performance if there is no other specific legal remedy for the legal rights.

Id.

¹² *Barrow*, 308 Ga. at 663, 842 S.E.2d at 888–889.

¹³ *Id.* In addition to the petition for a writ of mandamus, Appellant Beskin:

[S]ought injunctive relief under 42 U.S.C. § 1983 and attorney fees and litigation costs under 42 U.S.C. § 1988, claiming that the Secretary acted under color of state law to violate her 'right and privilege to qualify as a candidate for her office and to vote for the candidate of her choice' under the United States Constitution.

Id. at 663, 842 S.E.2d at 889.

¹⁴ *Id.* at 663, 842 S.E.2d at 889. Beskin's federal claims were denied for failure to state a claim under 42 U.S.C. § 1983 because "she did not 'show that her fundamental right to vote has been denied or violated by the Governor's lawful use of the appointment power in this case.'" *Id.* at 664, 842 S.E.2d at 889.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Brief of Appellee, *Barrow v. Raffensperger* at *2–3, 308 Ga. 660, 842 S.E.2d 884 (2020)(No. S20A1031).

the trial court's decision.¹⁸ This motion was then transferred to the Georgia Supreme Court.¹⁹

Throughout the pending litigation, Barrow alleged collusion and manipulation by the Georgia Supreme Court Justices.²⁰ In a motion before the Georgia Supreme Court, Barrow called for all the high court's justices to recuse themselves due to their relationship with their colleague, Justice Blackwell.²¹ Barrow cited to the Georgia Code of Judicial Conduct and asserted that the Justices' impartiality could reasonably be questioned if they did not recuse themselves.²²

Following this motion, five of the eight remaining Justices chose not to participate in this decision.²³ However, the three remaining Justices, Chief Justice Harold Melton, Presiding Justice David Nahmias, and Justice Sarah Warren denied the motion filed by Barrow and insisted there was no conflict of interest.²⁴ To fill the seats of the five recused

¹⁸ *Id.* at 664, 842 S.E.2d at 889. Elizabeth Beskin was also an appellant in this suit, with the Georgia Supreme Court addressing both appellants in a single decision. This Casenote recognizes both Beskin's federal claims as well as the fact that the Georgia Supreme Court held that Beskin's case was not moot. *Id.* at 666-668, 842 S.E.2d at 890-892.

¹⁹ *Id.* at 664, 842 S.E.2d at 889. See also GA. CONST. art. VI, § VI, par. II ("The Supreme Court shall be a court of review and shall exercise exclusive appellate jurisdiction in the following cases: . . . (2) All cases of election contest.") *Id.*

²⁰ Jim Galloway, *Opinion: John Barrow and the Brewing Fight over a Vanished Supreme Court Race*, ATLANTA JOURNAL CONSTITUTION (May 8, 2020), <https://www.ajc.com/blog/politics/opinionjonbarrowandthebrewingfightovervanishedsupremecourtrace/zjWVMo8OW8TITpvun3uCyN>.

²¹ Bill Rankin, *Five GA Supreme Court Justices Remove Themselves From Election Dispute*, ATLANTA JOURNAL CONSTITUTION (Mar. 23, 2020), <https://www.ajc.com/news/local/five-supreme-court-justices-remove-themselves-from-electiondispute/LFAwOGfn4W41SAuz2H3r3L>.

²² *Id.* Rule 2.11 of the Georgia Code of Judicial Conduct states:

The judge is within the third degree of relationship to any of the following listed persons, or the judge's spouse, domestic partner, intimate partner, or any other member of a judge's family residing in the judge's household is within the third degree of relationship to any of the following persons: (a) a party to the proceeding, or an officer, director, or trustee of a party; (b) a lawyer in the proceeding; (c) a person known by the judge to have a more than de minimis interest that could be substantially affected by the outcome of the proceeding; or (d) a person who to the judge's knowledge is likely to be a material witness in the proceeding.

Rule 2.11, Georgia Code of Judicial Conduct (2015).

²³ Justices Blackwell, Boggs, Peterson, Bethel, Ellington, and McMillian J.J., all voluntary withdrew from the case. *Id.*

²⁴ *Id.* The order further elaborated that the three "carefully considered the motion to recuse him or her," without further explanation provided. Following this order, Barrow and his attorneys were shocked that the three remaining Justices did not disqualify

Justices, the Clerk of the Georgia Supreme Court randomly selected five Superior Court judges from a pre-existing list to hear and decide this case.²⁵

In a 6-2 vote, the Georgia Supreme Court affirmed the trial court's ultimate decision that Secretary Raffensperger was not legally obligated to hold the election for Justice Blackwell's office.²⁶ But, not for the reasons provided by the trial court.²⁷ In this hotly divided case, the majority held that the Secretary of State could not be compelled by mandamus to conduct an election that would become legally nugatory, based on the inevitable vacancy that was to occur in Justice Blackwell's office.²⁸

III. LEGAL BACKGROUND

Since the ratification of Georgia's current Constitution in 1983, judges have been chosen "in two different ways for terms of two different types."²⁹ The following analysis provides a general overview of Georgia's constitutional provisions, statutory law, and prior precedent pertaining to the election and appointment of Georgia Supreme Court Justices that led to the decision in *Barrow v. Raffensperger* that the exception now takes precedent over the rule.³⁰

A. The Rule: Justices are elected by the people for six-year terms

The rule that Justices of the Georgia Supreme Court are to be elected to terms of office have been guaranteed since 1896 and has been affirmed in subsequent Georgia Constitutions: 1945, 1976, and 1983.³¹ Article VI, Section I, Paragraph I states: "All Justices of the Supreme

themselves and called out Presiding Justice Nahmias stating: "Nahmias is notorious for his attempts to dominate the Court." *Id.*

²⁵ *Id.* The judges randomly selected were Scott L. Ballard of the Griffin Judicial Circuit, Brenda Trammell of the Ocmulgee Judicial Circuit, Richard Cowart of the Southern Judicial Circuit, Sarah Wall of the Oconee Judicial Circuit, and Timothy Walmsley of the Eastern Judicial Circuit. *See also* Order Granting Emergency Motion for Expedited Consideration of Petition for Writ of Mandamus, *Barrow v. Raffensperger*, 308 Ga. 660 (2020)(No. S20M1012, S20M1020).

²⁶ *Barrow*, 308 Ga. at 661, 842 S.E.2d at 887.

²⁷ The 100-page opinion consists of: a Majority Opinion written by Presiding Justice Nahmias, a Concurring Opinion by Chief Justice Melton, and a strong Dissenting Opinion by Judge Trammell of the Ocmulgee Judicial Circuit. *Id.* at 660, 842 S.E.2d at 884.

²⁸ *Id.* at 678, 842 S.E.2d at 898 (emphasis in original).

²⁹ *Id.* at 668, 842 S.E.2d at 892.

³⁰ *Id.*

³¹ *Id.* at 695, 842 S.E.2d at 909 (Trammell, J., dissenting).

Court . . . shall be elected on a nonpartisan basis for a term of six years.”³² To fulfill this constitutional provision, O.C.G.A. § 21-2-9(b)³³ administers a nonpartisan election that coincides with the “general election next preceding the expiration of the term of office.”³⁴ The officer with the statutory duty of conducting this nonpartisan election is the Georgia Secretary of State.³⁵

From 1983 to 2012, the elections for Georgia Supreme Court Justices were held in conjunction with the general election in early November of even-numbered years, with qualifying held several months earlier.³⁶ In 2011, the Georgia legislature passed an amendment to O.C.G.A. § 21-2-138,³⁷ shifting the election for Justices to coincide now with the general primary election for other offices, typically held in the summer of even-numbered years.³⁸ This modification meant that Justices would now be elected to their future offices approximately six months before taking office and created a shorter timespan to campaign between the qualifying period and the actual election.³⁹

B. The Exception: The Governor’s Power of Appointment to A Specialized Term

Consequently, not all Justices initially take office by election for a term of six years.⁴⁰ Paragraph III of Article VI, Section I provides

³² *Id.* at 694, 842 S.E.2d at 909 (Trammell, J., dissenting). “The term of all judges thus elected begins the next January 1 after their election.”

GA. CONST. art. VI, § I, para. I.

³³ O.C.G.A. § 21-2-9(b)(2019).

³⁴ *Id.* See *Barrow*, 308 Ga. at 669, 842 S.E.2d at 892 (“The election process includes qualifying candidates for the office, holding the general election, and – if no candidate wins a majority of the votes – holding a runoff election.”).

³⁵ *Barrow*, 308 Ga. at 677, 842 S.E.2d at 898. See also GA. CONST. art. V, § III, para. III; GA. CONST. art. VI, § VII, para. I; O.C.G.A. § 21-2-9(b); O.C.G.A. § 21-2-50 (2019).

³⁶ Ga. L. 2011, pp. 678, 680.

³⁷ O.C.G.A. § 21-2-138 (2019). This statute orders that:

The names of all candidates who have qualified with the Secretary of State for the office of judge of a superior court, Judge of the Court of Appeals, or Justice of the Supreme Court of this state and the names of all candidates who have qualified with the election superintendent for the office of judge of a state court shall be placed on the ballot in a nonpartisan election to be held and conducted jointly with the general primary in each even-numbered year.

Id.

³⁸ *Barrow*, 308 Ga. at 669, 842 S.E.2d at 892–893; O.C.G.A. § 21-2-138 (2019).

³⁹ *Id.*; O.C.G.A. § 21-2-132(c)(1)(2019)(establishing the qualifying dates for the general election for Justices); O.C.G.A. § 21-2-150(2019) (establishing the date of the general primary elections).

⁴⁰ *Id.* at 669, 842 S.E.2d at 893.

“[v]acancies shall be filled by the Governor except as otherwise provided in the magistrate, probate and juvenile courts.”⁴¹

In order to determine whether an appointment is necessary, Georgia case law mandates that first there must be an existing vacancy.⁴² O.C.G.A. § 45-5-1 provides a roadmap as to how a vacancy may occur.⁴³ Section (a) of O.C.G.A. § 45-5-1 lists the various methods for which offices “shall be vacated,” including “[b]y resignation, when accepted.”⁴⁴ The language of Section (b) provides that a Governor’s appointment will not become effective until the office has actually become vacated.⁴⁵ By contrast, the determination as to the definition of a “vacancy,” and the term of an appointed Justice has not been as clear.

1. What is a “vacancy” under Georgia law?

The Georgia Supreme Court in *Clark v. Deal*⁴⁶ recently defined “vacancy” under Article IV, Section I, Paragraph III of the Georgia Constitution.⁴⁷ It held that “the ordinary meaning of the term ‘vacancy’ is in essence, a public office without an incumbent.”⁴⁸ The court reasoned that when the 1983 Constitution was ratified, Black’s Law Dictionary defined “vacancy” in a similar manner.⁴⁹ It rationalized that this definition was analogous to prior Georgia precedent and legal secondary authorities.⁵⁰ Therefore, the supreme court in *Clark* affirmed the definition for “vacancy” under Paragraph III of Article IV, Section I, as a “public office without an incumbent.”⁵¹

⁴¹ GA. CONST. art. VI, § VII, para. III.

⁴² *Clark v. Deal*, 298 Ga. 893, 896, 785 S.E.2d 524, 526 (2016); *Mitchell v. Pittman*, 184 Ga. 877, 194 S.E. 369 (1937). *See also* *Carey Canada, Inc. v. Hinely*, 181 Ga. App. 364, 365, 352 S.E.2d 398, 399 (1986).

⁴³ O.C.G.A. § 45-5-1 (2019).

⁴⁴ O.C.G.A. § 45-5-1(a)(2019); *See also* *Compton v. Hix*, 184 Ga. 749, 754, 193 S.E. 252, 256 (1937)(determining that language in O.C.G.A. § 45-5-19(a) “is mandatory and must be given effect.”).

⁴⁵ O.C.G.A. § 45-5-1(b)(2019).

⁴⁶ 298 Ga. at 896, 785 S.E.2d at 526–527 (affirming trial court’s decision that the three newly created judgeships for the Georgia Court of Appeals were vacancies under Paragraph III, which provided Governor Nathan Deal the power of appointment to fill the three offices).

⁴⁷ *Id.*

⁴⁸ *Id.* at 896, 785 S.E.2d at 527.

⁴⁹ *Id.* at 896, 785 S.E.2d at 526.

⁵⁰ *Id.* at 896, 785 S.E.2d at 527.

⁵¹ *Id.* Georgia Supreme Court also determined that when a significant shift from prior Constitutions occur, it must be given that effect in the law. *Id.* at 898, 785 S.E.2d at 528–529.

2. What is NOT a Vacancy under Georgia law?

The Georgia Supreme Court has also clarified what does not fit within the definition of “vacancy.” In 1937, the Georgia Supreme Court in *Mitchell v. Pittman*⁵² explained that:

[An] office is not vacant so long as it is supplied, in the manner provided by the [C]onstitution or law, with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it.⁵³

The court in *Mitchell* elaborated further, stating that if there is no vacancy based on this definition, then the power of executive appointment cannot be utilized.⁵⁴ It argued that “[t]his power of executive appointment is for an emergency and can be exercised only in the case of a vacancy.”⁵⁵ The court concluded that this appointment power cannot be “effective while a duly commissioned incumbent is in office,” and that all officers mandated to conduct these elections must do so unless there is a proven vacancy.⁵⁶

Consequently, based on the definitions provided in both *Clark* and *Mitchell*, the Secretary of State must follow his legal duty and conduct an election for the relevant office.⁵⁷ More importantly, the Secretary of State cannot cancel an election based on the potential likelihood of a vacancy existing prior to the end of the term.⁵⁸ The Georgia Code requires the existence of a vacancy prior to the cancellation of an election.⁵⁹ If a Secretary were to improperly cancel an election, the harmed parties are able to file a writ of mandamus under O.C.G.A. § 9-6-20.⁶⁰ At the same time, however, the court could find under O.C.G.A.

⁵² 184 Ga. 877, 194 S.E. 369 (1937)(holding that no further vacancy existed once Governor Eugene Talmadge filled the vacancy, and the legislature could not enact a law to fill a non-existent position).

⁵³ *Id.* at 885, 194 S.E. at 373.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Barrow*, 306 Ga. at 677, 842 S.E.2d at 898.

⁵⁸ *Id.* at 677–678, 842 S.E.2d at 898.

⁵⁹ *Id.* at 691, 842 S.E.2d at 901. *See also* O.C.G.A. § 45-5-1(b)(2019).

⁶⁰ *Id.* at 677, 842 S.E.2d at 898; O.C.G.A. § 9-6-20 (2019) states:

All official duties should be faithfully performed, and whenever, from any cause, a defect of legal justice would ensue from a failure to perform or from improper performance, the writ of mandamus may issue to compel a due performance, the writ of mandamus may issue to compel a due performance if there is no other specific legal remedy for the legal rights.

Id.

§ 9-6-26⁶¹ that mandamus was not proper and the election was “nugatory or fruitless.”⁶² Therefore, the presence of a vacancy or lack thereof creates significant legal consequences.

3. When appointed, Justices of the Georgia Supreme Court have a specialized term of office.

The Georgia Constitution provides that if there is a vacancy on the Supreme Court, it is to be filled by gubernatorial appointment.⁶³ Differing from most public offices, state, superior, and appellate appointed judges must serve a new, specialized term.⁶⁴ An appointee to a state, superior or appellate judgeship will no longer “serve out the ‘unexpired term’ of their predecessor.”⁶⁵ Alternatively, Paragraph IV of the Georgia Judicial Selection Section⁶⁶ “create[s] an entirely new and shortened initial term of office for the appointed judge,”⁶⁷ and that the appointee’s term will be until “January 1 of the year following the next general election which is more than six months after such person’s appointment.”⁶⁸

In doing so, Paragraph IV created a definition of an initial period of service for appointed judges that had never been specified before.⁶⁹ To clarify, most appointed public officials in Georgia serve out the remainder of their predecessor’s term.⁷⁰ Whereas, with the ratification of Paragraph IV in the 1983 Constitution, this precedent was eliminated for all state, superior, and appellate judges.⁷¹ Thus, the

⁶¹ *Id.* at 678, 842 S.E.2d at 898 (quoting O.C.G.A. § 9-6-26

(2019)) (“[m]andamus will not be granted when it is manifest that the writ would, for any cause, be nugatory or fruitless”).

⁶² *Barrow*, 308 Ga. at 678, 842 S.E.2d at 898.

⁶³ GA. CONST. art. VI, § VII, para. IV.

⁶⁴ *Heiskell v. Roberts*, 295 Ga. 795, 798, 764 S.E.2d 368, 372 (2014).

⁶⁵ *Id.*

⁶⁶ GA. CONST. art. VI, § VII, para. IV.

⁶⁷ *Heiskell*, 295 Ga. at 798, 764 S.E.2d at 372.

⁶⁸ GA. CONST. art. VI, § VII, para. IV.

⁶⁹ *Barrow*, 306 Ga. at 672, 842 S.E.2d at 895.

⁷⁰ *Id.* See *Heiskell*, 295 Ga. at 799, 764 S.E.2d at 372–373 (explaining that “[u]nlike the prior constitutional provisions . . . [Par. IV] eliminates the unexpired term of the vacant office, so that there is no longer such a thing as an appointment to serve out the ‘unexpired term’ of an appellate, superior or state court judge.”). See also *Hooper v. Almand*, 196 Ga. 52, 25 S.E.2d 778 (1943) (providing the prior constitutional scheme before ratification of 1983 Constitution).

⁷¹ *Id.* at 673, 842 S.E.2d at 895; GA. CONST. art. VI, § VII, para. IV. This significant distinction was elaborated by the supreme court in *Heiskell*:

importance of the enactment of this constitutional provision lies in the distinction between terms of appointed judges and all other appointed officials.

In *Perdue v. Palmour*, the Georgia Supreme Court reversed the Chattooga Superior Court's finding that the two elections at issue, set by the county superintendent must proceed as scheduled.⁷² The appellees, Carlton Vines and Albert Palmour, had resigned from their respective positions as State Court Judge and Solicitor-General, in order to run for each other's positions in the 2004 election. However, Governor Perdue announced after the qualifying period for both offices that he planned to fill the two vacancies by appointment, which led the County Superintendent to cancel the previously scheduled election.⁷³

The trial court found for Vines and Palmour, claiming that the six-month provision in Paragraph IV would render null and void the language that "the appointee 'shall serve for the unexpired term.'"⁷⁴ The supreme court affirmed the determination that Paragraph IV of the 1983 Constitution "eliminates the unexpired term of the vacant office," but noted that it also established "a new term of office."⁷⁵ The supreme court in *Perdue* elaborated further by establishing a test of "practical balance between democracy and stability."⁷⁶ It explicitly explained:

[O]n one side of the coin, someone appointed to fill a vacancy occurring at the beginning of a six-year term will not be immune from voter consideration for that entire period; he would have to run in the next general election. On the other side of the coin, someone appointed between June and November of a general election year [when the nonpartisan general election was held in November] would not have to run immediately and would have a little over two years to demonstrate his qualifications as a judge The six-month provision was not intended to, nor does it in fact, disenfranchise voters. . . [It] gives the voters the right to select the holders of elective office yet

The same Article and Section of the 1983 Constitution that abolished the old system for the selection and terms of office of appellate, superior, and state court judges explicitly preserved the then-existing system for "[a]ll other judges ... until otherwise provided by local law," and authorized the filling of "[v]acancies ... in the magistrate, probate, and juvenile courts" by methods other than gubernatorial appointment if "otherwise provided by law." Art. VI, Sec. VII, Pars. I and III.

Heiskell, 295 Ga. at 799, 764 S.E.2d at 373.

⁷² 278 Ga. 217, 600 S.E.2d 370 (2004).

⁷³ *Id.* at 217-218, 600 S.E.2d at 371.

⁷⁴ *Id.* at 219, 600 S.E.2d at 372; GA. CONST. art. VI, § VII, para. IV.

⁷⁵ *Id.* at 221, 600 S.E.2d at 374 (Carly, J., concurring).

⁷⁶ *Id.* at 220, 600 S.E.2d at 373.

affords the appointee a sufficient opportunity to demonstrate the merit, or lack thereof, of the appointee's service.⁷⁷

The court in *Perdue* concluded that the trial court's decision wholly negates Paragraph IV and that the elections for State Court Judge and Solicitor General should be cancelled, as they had become appointed positions for Governor Perdue to fill.⁷⁸

A decade later, the Georgia Supreme Court in *Heiskell v. Roberts*⁷⁹ adopted the prior precedent from *Perdue v. Palmour* and ascertained a clearer interpretation.⁸⁰ In *Heiskell*, the Court established that there is "no longer such a thing as an appointment to serve out the 'unexpired term.'"⁸¹ It explained that the effect of these provisions Paragraph III and IV "is to create an entirely new and shortened term of office for the appointed judge."⁸² Therefore, Paragraph IV has been determined by the supreme court as valid precedent and provided a significant influence on the court's decision in *Barrow v. Raffensperger*.⁸³

IV. COURT'S RATIONALE

In *Barrow v. Raffensperger*, the Georgia Supreme Court, as a matter of first impression, addressed whether a Secretary of State could be compelled by mandamus to hold an election to fill an office with an inevitable vacancy on the Georgia Supreme Court.⁸⁴ The court agreed with the trial court's ultimate finding that "the Secretary of State could not be compelled by mandamus to hold the May 19 election for Justice Blackwell's office," but disagreed with the reasoning behind the decision.⁸⁵

A. Majority Opinion

Presiding Justice David E. Nahmias, writing for the majority began with the assertion that the constitutional provision requiring the election of Justices to a six-year term in Paragraph I, is not constitutionally superior to the provisions supporting gubernatorial

⁷⁷ *Id.* at 220–221, 600 S.E.2d at 373.

⁷⁸ *Id.* at 221, 600 S.E.2d at 373.

⁷⁹ 295 Ga. at 795, 764 S.E.2d at 368.

⁸⁰ *Id.* at 798–799, 764 S.E.2d at 372–373.

⁸¹ *Id.* at 799, 764 S.E.2d at 372–373.

⁸² *Id.* at 798, 764 S.E.2d at 372.

⁸³ 308 Ga. at 670–671, 842 S.E.2d at 893–894.

⁸⁴ *Id.* at 662, 842 S.E.2d at 888.

⁸⁵ *Id.* at 661, 842 S.E.2d at 887.

appointment in Paragraphs III and IV of Article VI, Section I.⁸⁶ The dissent claimed that the court was enforcing a preference for appointments over elections.⁸⁷ The court rebutted this assertion, stating that it is not attempting to provide preference of appointments over elections, nor exempt appointed Justices from the election process.⁸⁸ The majority continued, analyzing that the 1983 Constitution “does say expressly and specifically *when* an appointed Justice must face election,” under both Paragraph IV and O.C.G.A. § 21-2-9.⁸⁹

In the court’s discussion of appointments versus elections, they allocated particular attention on the importance of Paragraph IV’s “initial period of service for judges *appointed to elective office*.”⁹⁰ The majority urged that when a significant shift from prior Constitutions occur, it must be given that effect in the law.⁹¹ It emphasized the importance of the specialized term for appointed judges “by the fact that the serve-out-the-existing-term way,” was still in place for most other appointed public offices in the state of Georgia.⁹²

Likewise, the court reiterated that based on the *Perdue v. Palmour* balancing test, “Paragraph IV represents ‘a practical balance between democracy and stability.’”⁹³ It also rejected Barrow’s assertions that this constitutional provision disenfranchises voters.⁹⁴ The majority maintained that the specialized term under Paragraph IV was endorsed by the people of Georgia when they ratified the 1983 Constitution.⁹⁵ It

⁸⁶ *Id.* at 671–672, 842 S.E.2d at 894.

⁸⁷ *Id.* at 672, 842 S.E.2d at 894.

⁸⁸ *Id.* at 672, 842 S.E.2d at 894–895.

⁸⁹ *Id.* at 672, 842 S.E.2d at 894 (emphasis in original). To put this in statutory terms, as noted earlier:

O.C.G.A. § 21-2-9(b) says that Justices ‘shall be elected in the nonpartisan general election next preceding the expiration of the term of office.’ When an incumbent vacates his or her office before his or her term ends, the date of ‘expiration of the term of office’ changes from December 31 of the year in which the *prior incumbent’s* term would have ended to December 31 of the year in which the *appointed Justice’s* term will end as calculated based on Paragraph IV.

Id. (emphasis in original).

⁹⁰ *Id.* at 672, 842 S.E.2d at 895 (emphasis in original).

⁹¹ *Id.*

⁹² *Id.* at 673, 842 S.E.2d at 895.

⁹³ *Id.* at 674, 842 S.E.2d at 896; *Perdue*, 278 Ga. at 219, 600 S.E.2d at 372.

⁹⁴ *Id.*

⁹⁵ *Id.*

concluded by endorsing the proposal that: “the appointment mechanism for initial service of Justices . . . has been the norm, not the exception.”⁹⁶

In its second major argument, the court examined the power of the Secretary of State to hold elections, and if necessary, to cancel elections.⁹⁷ The Secretary of State has the official duty to conduct elections for Justices of the Georgia Supreme Court.⁹⁸ The majority contended that when a vacancy in an incumbent Justice’s office occurs, the need for an election is eliminated.⁹⁹ In doing so, the Secretary of State will no longer have a legal duty to operate the election and “cannot be compelled by mandamus to do so.”¹⁰⁰ Appellee Raffensperger conceded, and the majority acknowledged, that Secretary Raffensperger could not cancel the election for Justice Blackwell’s office because a vacancy is “expected or even highly likely to occur.”¹⁰¹

Nonetheless, the court determined that if a vacancy “will *inevitably* occur before the Justice’s term of office expires,” then the Secretary will not bear legal duty to conduct the election by a petition of mandamus.¹⁰² They emphasized that the election would become meaningless and legally nugatory under Paragraph III and IV of the Judicial Selection Section of the Georgia Constitution.¹⁰³ They elaborated that since the incumbent Justice’s office was to become vacant before the end of the scheduled term, December 31, 2020, “that term and any future term associated with that Justice,” has been eradicated.¹⁰⁴ For this reason, the majority concluded that an election to fill an eliminated term would be nugatory, and mandamus under O.C.G.A. § 9-6-26 could not apply.¹⁰⁵

⁹⁶ *Id.*

⁹⁷ *Id.* at 677, 842 S.E.2d at 898.

⁹⁸ *Id.*

⁹⁹ *Id.* at 677, 842 S.E.2d at 898.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 677–678, 842 S.E.2d at 898.

¹⁰² *Id.* at 678, 842 S.E.2d at 898.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 680, 842 S.E.2d at 900. Pertaining to policy implications, the court stated that:

[H]olding an election for the non-existent next term of a Justice who vacated his office, even if its result would be legally meaningless, could produce some political or other abstract benefit for the candidate who wins, such as influencing the Governor to appoint the winning candidate to fill in the vacancy or increasing the candidate’s name recognition for a future election. There would be more obvious practical detriment from holding such an election, including the costs to the taxpayers and the burden on election officials of conducting a legally meaningless election, and the likelihood that voters and the public would be misled into believing that the election’s result

On the matter of a current vacancy, the majority admitted that Justice Blackwell's office was not presently vacant at the time of the decision.¹⁰⁶ They disagreed with the trial court's findings that there was a present vacancy in the Justice's office, which occurred as a result of Governor Kemp's acceptance of the resignation letter.¹⁰⁷ They held that the trial court's reliance on O.C.G.A. § 45-5-1(a)(2) was misplaced because the resignation of Justice Blackwell would not become effective until November 18, 2020 and there was not a present vacancy in the office.¹⁰⁸ The court endorsed this assertion by stating "Justice Blackwell is continuing to serve as a Justice, performing all the duties and functions pertaining to that office."¹⁰⁹

In its analysis, the majority relied on the definition of "vacancy" to establish the current lack thereof.¹¹⁰ It explained that based on *Clark v. Deal*, Justice Blackwell's office is "conspicuously *not* 'without an incumbent.'"¹¹¹ The court determined that instead, it "is supplied in the manner provided by the constitution or law, with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it."¹¹² It leaned on O.C.G.A. § 45-5-1 as well, and held that Georgia's statutory law cannot alter the interpreted meaning provided in *Clark v. Deal* for "vacancy" under Paragraph IV of the Georgia Constitution.¹¹³ It noted that O.C.G.A. § 45-5-1 "sets forth *how* an office can be vacated but not necessarily *when*" it will become vacated.¹¹⁴

In its conclusion, the majority affirmed the trial court's ultimate decision that Secretary Raffensperger could not be compelled by mandamus to conduct an election that would be "*legally nugatory*."¹¹⁵ They held that "if Justice Blackwell's office will *inevitably* be vacated on or before November 18," a vacancy under Paragraph III of the

would have the legally binding result that elections normally have. But these policy considerations are beside the point, because mandamus is concerned with the *legal* effect of compelling official conduct.

Id. at 679, 842 S.E.2d at 899 (emphasis in original).

¹⁰⁶ *Id.* at 680, 842 S.E.2d at 900.

¹⁰⁷ *Id.* at 680–681, 842 S.E.2d at 900.

¹⁰⁸ *Id.* at 681, 842 S.E.2d at 900.

¹⁰⁹ *Id.* at 680, 842 S.E.2d at 900.

¹¹⁰ *Id.* a 681, 842 S.E.2d at 900.

¹¹¹ *Id.* (emphasis in original).

¹¹² *Id.*; *Mitchell*, 184 Ga. at 885, 19 S.E. at 373.

¹¹³ *Id.*; *Clark*, 298 Ga. at 897, 785 S.E.2d at 528.

¹¹⁴ *Id.* at 679, 842 S.E.2d at 899 (emphasis in original).

¹¹⁵ *Id.* at 682, 842 S.E.2d at 901 (emphasis in original).

Georgia Constitution is created.¹¹⁶ As a result, the future term of a Justice elected to Blackwell's office is eliminated, and under Paragraph IV, the new specialized term for an appointed Justice will not end until 2022.¹¹⁷

B. Concurring Opinion

In a short and sweet concurring opinion, Chief Justice Melton supported the majority opinion and the ultimate result; but wrote separately to “emphasize that this case is not about this Court's choice between elections and appointments.”¹¹⁸ Justice Melton continued by explaining that the court made its decision based on the current language of Georgia's Constitution and the Georgia Code.¹¹⁹ The Chief Justice recognized the great debate pertaining to judicial appointments versus elections, but as a judge, it was not his job to “usurp that power by rewriting constitutional provisions.”¹²⁰ In his conclusion, Justice Melton opined that if Georgians did not agree with the decision in this case, they could fix it by amending the 1983 Georgia Constitution.¹²¹

C. Dissenting Opinion

Judge Brenda Trammell authored the dissenting opinion in this case, agreeing with many of the arguments made by the majority.¹²² However, Judge Trammell dissented because she found the majority's

¹¹⁶ *Id.* at 681, 842 S.E.2d at 901 (emphasis in original).

¹¹⁷ *Id.* at 682, 842 S.E.2d at 901. This Casenote will not address the second issue as to “whether, under Georgia law, a Justice's “prospective” resignation, tendered unequivocally in writing but effective only as of a future date, may be withdrawn after the Governor has formally and unequivocally accepted it as effective on that same date.” The Georgia Supreme Court found that such resignation cannot be revoked lawfully, “even if both the Justice and the Governor consent to its purported withdrawal before its effective date.” *Id.*

¹¹⁸ *Id.* at 691, 842 S.E.2d at 907 (Melton, C.J., concurring).

Additionally, it's important to note that three other judges joined this concurrence: Justice Warren, Judge Cowart and Judge Walmsley. *Id.*

¹¹⁹ *Id.* at 691–692, 842 S.E.2d at 907–908 (Melton, C.J., concurring). “This is simply the manner in which the law works when we apply the relevant constitutional provisions ratified by the people of Georgia to the facts of this case.” *Id.* at 692, 842 S.E.2d at 908.

¹²⁰ *Id.* at 692, 842 S.E.2d at 908 (Melton, C.J., concurring).

¹²¹ “The genius of our democracy is that, to the extent the people of Georgia now second-guess the system of elections and appointments they ratified in the 1983 Constitution, they have the power to seek amendment to that foundational document.” *Id.* (Melton, C.J., concurring).

¹²² *Id.* at 693, 842 S.E.2d at 908 (Trammell, J., dissenting). Judge Scott L. Ballard of the Griffin Judicial Circuit joined this dissenting opinion as well. *Id.*

preference of appointments over elections to “den[y] the people the right to elect their Justice[s] provided by the Constitution.”¹²³ The dissent disagreed with the majority’s belief that a gubernatorial appointment was constitutional in this case.¹²⁴

While the majority held that the constitutional provisions pertaining to elections and appointments in Article IV, Section I, Paragraphs I and III to work in tandem, Judge Trammell opposed this notion and held that the majority had missed a major point.¹²⁵ “The power of appointment is an *exception* to the general rule requiring that Justices be elected,” and in fact, are “constitutionally inferior,” to elections.¹²⁶ Specifically, the dissent noted that the mandatory language of “shall” in both Paragraph I and O.C.G.A. § 21-2-9 mandated elections.¹²⁷ Further, the dissent pointed out that in *Clark v. Deal*, the majority had acknowledged that “appointment was an ‘exception’ to the general policy of elections.”¹²⁸

Most importantly, the dissent emphasized that for the first time, “the Governor’s power of appointment is now being held superior to the people’s right to vote,” based on two principals: (1) the period of service mandated in Paragraph IV, and (2) “the language of the timing of the election for the vacated seat.”¹²⁹ The dissent agreed with the majority that there was not a present vacancy in Justice Blackwell’s office nor would one exist until November 18, 2020.¹³⁰

The dissent yielded to the fact that generally there would not be a question that the appointee would “have a right to remain in the seat without,” having to face voters in the next six months in an election.¹³¹ It clarified further that this notion is “the balance between democracy

¹²³ *Id.* (Trammell, J., dissenting).

¹²⁴ *Id.* (Trammell, J., dissenting).

¹²⁵ *Id.* (Trammell, J., dissenting).

¹²⁶ *Id.* (Trammell, J., dissenting).

¹²⁷ *Id.* at 693–694, 842 S.E.2d at 908–909 (Trammell, J., dissenting)(quoting *Mitchell*, 184 Ga. at 885, 194 S.E. at 369)(“This power of executive appointment is for an emergency and can only be duly exercised only in a case of a vacancy. It cannot be exercised to be effective while a duly commissioned incumbent is in office.”) “It is well known to all of us that the primary object to be secured by the amendment of 1896 was to withdraw the elective power of the Justices from the General Assembly of the State and to lodge it with the sovereign people, and to increase the number of judges.” *Stephens v. Reid*, 189 Ga. 372, 379, 6 S.E.2d 728 (1939). *See also* *Brooks v. State Bd. of Elections*, 848 F. Supp. 1548, 1577 (S.D. Ga. 1994).

¹²⁸ *Id.* at 695, 842 S.E.2d at 909 (Trammell, J., dissenting).

¹²⁹ *Id.* at 695, 842 S.E.2d at 909–910 (Trammell, J., dissenting).

¹³⁰ *Id.* at 695, 842 S.E.2d at 910 (Trammell, J., dissenting).

¹³¹ *Id.* (Trammell, J., dissenting).

and stability referred in *Perdue v. Palmour* and *Heiskell v. Roberts*.¹³² The difference here however, was that this resignation will become effective after a regularly scheduled election for the Justice's office.¹³³ The dissent ended this argument with a warning:

For the first time since the enactment of this constitutional provision, the majority is ruling that the appointment power of the Governor trumps the voting power of the public. Let me be clear. This ruling means that even were the election to go forward and a winner be declared, the appointee defeats the electee.¹³⁴

In its overall conclusion, the dissent discussed three potential scenarios in which the holding in this case would create serious problems in the manner of filling judicial offices:

A. A sitting judge determines he will not run again at the end of his term. An election is held, and a successor elected. The judge dies before the end of the term. The Governor then appoints a replacement, and the election is in essence voided.

B. The incumbent runs for election, loses, and then resigns, only to be re-appointed by the Governor.

C. The incumbent does not stand for election, an election is held, the incumbent does not like the result of the election and resigns to avoid the taking of the office by the elected official.¹³⁵

As a final point, Judge Trammell acknowledged that she in fact was initially appointed by Governor Nathan Deal.¹³⁶ However, she could not "in good conscience agree that the election should be cancelled and the will of the people thrust aside as 'fruitless and nugatory.'"¹³⁷ And because of the disregard for the voices of the people, she added, "I respectfully dissent."¹³⁸

¹³² *Id.* at 695–696, 842 S.E.2d at 910 (Trammell, J., dissenting); *Palmour*, 278 Ga. at 221, 600 S.E.2d at 374; *Heiskell*, 295 Ga. at 799, 764 S.E.2d at 372–373.

¹³³ *Id.* at 696, 842 S.E.2d at 910 (Trammell, J., dissenting)(emphasis added).

¹³⁴ *Id.* (Trammell, J., dissenting).

¹³⁵ *Id.* at 702–704, 842 S.E.2d at 914 (Trammell, J., dissenting).

¹³⁶ *Id.* at 706, 842 S.E.2d at 915 (Trammell, J., dissenting).

¹³⁷ *Id.* (Trammell, J., dissenting).

¹³⁸ *Id.* (Trammell, J., dissenting).

V. IMPLICATIONS

Immediately after the Georgia Supreme Court announced this decision, this opinion sparked swift and widespread public backlash, both in the national and state media.¹³⁹ The concerns related to the belief that there is now dangerous precedent set for partisan politics to become further inserted into the nonpartisan positions of Georgia's judiciary.

As a result of *Barrow v. Raffensperger*, state election results for judges now are nothing more than the world's most reliable poll.¹⁴⁰ This landmark decision by the Georgia Supreme Court has created a blueprint for vast expansion of a governor's power to shape the state's legal system while ignoring the voices of the electorate in judicial contests.¹⁴¹ This decision removed power from the people, both as voters and as potential qualified candidates.

A. The Effects Have Already Begun: The Case of Judge Tommy Smith

One of the consequences predicted in the dissent occurred within the first election cycle following this decision.¹⁴² Judge Tommy J. Smith won the June 9, 2020 election for a Superior Court judgeship in the Middle Georgia Judicial Circuit with 71% of the vote.¹⁴³ However, after spending hundreds of thousands of dollars and over a year of campaigning, Smith was later informed that his election victory was

¹³⁹ Ian Millhiser, Georgia Republicans Cancel Election for State Supreme Court, So Governor Can Appoint a Republican, Vox Media (May 19, 2020), <https://www.vox.com/2020/5/19/21262376/georgia-republicans-cancel-election-state-supreme-court-barrow-kemp-blackwell>.

See also Kate Brumback, *Georgia High Court Election Cancellation Headed For Appeal*, AP NEWS (Mar. 18, 2020), <https://apnews.com/article/349de8f37534149dfdc28da4b6689093>.

¹⁴⁰ Jonathan Ringel, *Superior Court Election Was a 'Nullity,' Say Secretary of State's Lawyers*, DAILY REPORT (Aug. 19, 2020), <https://www.law.com/dailyreportonline/2020/08/19/superior-court-election-was-a-nullity-says-secretary-of-states-lawyers/>.

¹⁴¹ Jim Galloway, *Opinion: In Judicial Races, It's Now Vital That Your Rival Doesn't Quit in a Huff*, ATLANTA JOURNAL CONSTITUTION (May 27, 2020), <https://www.ajc.com/blog/politics/opinion-judicial-races-now-vital-that-your-rival-doesn-quit-huff/VpkyJ31ByzmZEXtLsGfeOJ/>.

¹⁴² *Barrow*, 308 Ga. at 703–704, 842 S.E.2d at 914 (Trammell, J., dissenting).

¹⁴³ Jonathan Ringel, *Superior Court Election Was a 'Nullity,' Say Secretary of State's Lawyers*, DAILY REPORT (Aug. 19, 2020), <https://www.law.com/dailyreportonline/2020/08/19/superior-court-election-was-a-nullity-says-secretary-of-states-lawyers/>.

now legally meaningless.¹⁴⁴ The office to which he had been elected, the Superior Court judgeship, became an appointed office for Governor Brian Kemp to fill as a result of the resignation of the predecessor, Judge Kathy Palmer. Judge Palmer had resigned on April 13, 2020 to run for the Georgia State Senate. However, the June 9 election for the judgeship was not cancelled, unlike the election in *Barrow v. Raffensperger*.¹⁴⁵

The good news in Judge Smith's case was that Governor Kemp did appoint him to the office he was duly elected to by the people, and he became a Superior Court Judge in the Middle Georgia Judicial Circuit.¹⁴⁶ The catch is, however, that instead of a full four-year term, Judge Smith will only be in office for a shortened two-year term as a result of his appointment, instead of election. Smith will have to run again in 2022 for a full four-year term. Judges statewide will continue to face issues like this based on the monumental expansion of gubernatorial appointment power by the court in *Barrow v. Raffensperger*.

B. Controlling the Chaos: Legislative Change

In order to prevent this chaotic process from seeping further into Georgia's judiciary, a change would most likely have to be made by the Georgia General Assembly. The Judicial Selection Section of the Georgia Constitution has not been amended since its ratification in 1983. There are a variety of methods the Georgia legislature could take to provide further clarification, both in the Georgia Code and in the current Constitution.

As for Georgia statutory law, the Georgia Code could be amended to provide public officials the ability to resign from their current office without creating a chain effect that would cancel the upcoming election for their office. Additionally, an amendment might be made to the language of the six-month provision of Article IV, Section I, Paragraph IV to provide further clarity as to the intentions of the drafters. This amendment could be crafted to provide potential limitations on resignations occurring within a certain number of months before the end of the Justice's six-year term. Finally, the General Assembly could clarify the priority for filling judicial vacancies by election, rather than appointment, to maintain the longstanding primacy of electing officials in the state of Georgia.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

Unless the Georgia General Assembly provides legislative clarification or an amendment to the Constitution or the Georgia Code, Georgia Governors—of either political party—will continue walking through the wide door opened by the Georgia Supreme Court in *Barrow v. Raffensperger* to thwart the electoral will of Georgia voters at their discretion. Will the evident confusion be sufficient to cause the legislature to act? Or will Georgia become a state that no longer enjoys judicial elections? Only time, and a few more election cycles, will tell.

Ashley Mallon