

SYMPOSIUM: STATE HIGH COURT JUDGES ON MAKING THEIR HARDEST DECISIONS

RHODE ISLAND'S UNIQUE CONSTITUTIONAL HISTORY

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Thank you very much for the generous introduction, and I am delighted to be here in Albany. I have to tell you that I accepted this invitation by e-mail from Mr. Skinner, and I do think it is the first invitation I have ever accepted via e-mail, so there is always a first in life, and I am delighted to be here.

I come from Rhode Island, our own state in the Union, and we bring with us a very unique history. In 1663, the State of Rhode Island was granted a charter by King Charles II,¹ and as a result of that we had tremendous independence from the British Crown right up to and through the American Revolution. We were not satisfied with that, however. Rhode Island declared its independence from Britain on May 4, 1776, two months before the remaining colonies.²

We have two signors of the Declaration of Independence³—a number that will not match the fellow to the left of me, I believe.⁴ However, Rhode Island also refused to participate in the Constitutional Convention in Philadelphia or provide a signatory for the United States Constitution⁵ unless and until the Bill of Rights was made a part of that Constitution.

So we're a tough little bunch down there.
(Laughter)

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¹ PATRICK T. CONLEY & ROBERT G. FLANDERS, JR., *THE RHODE ISLAND STATE CONSTITUTION: A REFERENCE GUIDE* 6 (2007).

² *Id.* at 14.

³ *THE DECLARATION OF INDEPENDENCE: ORIGINS AND IMPACT*, at xvii (Scott Douglas Gerber ed., 2002).

⁴ Justice McKenna Goldberg referred to Justice Greaney and the four signors of the Declaration of Independence from Massachusetts. *Id.*

⁵ CONLEY & FLANDERS, *supra* note 1, at 15.

The colony was so impressed with its charter from King Charles II that we did not adopt a state constitution until 1842.⁶ We remained a parliamentary form of government in which the legislature held all of the power.⁷ It appointed the governor at one point in time, it certainly elected the judges in all of the courts, it exercised plenary power, and it exercised judicial power at times.⁸ And there was a clause when we finally adopted the constitution, the clause that good old King Charles included in his charter, that all powers that were not specifically assigned remained with the General Assembly.⁹

In 1841 and 1842, an Irishman by the name of Thomas Wilson Dorr led the Dorr Rebellion, in which those who were not granted the franchise, could not participate in the government, and had no constitution, rebelled.¹⁰ It was not successful except that it did lead within two years to the adoption of the first constitution in Rhode Island, which became effective in May 1843.¹¹

Again, as I indicated, however, the General Assembly, the legislature, had the ultimate authority over all things in our state, and that remained in force until 2005.¹²

One of the cases that we decided as a court in 1999 reaffirmed all of what I have just explained to you,¹³ and it was not a popular decision, I can tell you.

The Supreme Court of Rhode Island is a constitutional court.¹⁴ We consist of five members, the chief justice and four associate justices.¹⁵ One of our responsibilities under the constitution is to issue advisory opinions. The constitution provides that the justices will render their opinion on a question of law whenever propounded by the governor or either chamber of the legislature.¹⁶ That is a concept that certainly flies in the face of the case or controversy

⁶ *Id.* at 23. Although adopted in 1842, the new constitution became effective in 1843. *Id.*

⁷ *In re Advisory Opinion to the Governor (R.I. Ethics Comm'n—Separation of Powers)*, 732 A.2d 55, 64 (R.I. 1999).

⁸ *Id.* at 63–64.

⁹ R.I. CONST. OF 1843, art. IV, § 10.

¹⁰ CONLEY & FLANDERS, *supra* note 1, at 21–22. This history is also recounted in a well-known U.S. Supreme Court case. *Luther v. Borden*, 48 U.S. 1, 35–38 (1849). The case became famous in constitutional law because it was one of the first times the Court articulated the now well-established political question doctrine. *Id.* at 46.

¹¹ CONLEY & FLANDERS, *supra* note 1, at 23.

¹² R.I. CONST. art. VI, § 10 (repealed 2005).

¹³ *R.I. Ethics Comm'n—Separation of Powers*, 732 A.2d at 62–64.

¹⁴ R.I. CONST. art. X, § 1.

¹⁵ R.I. GEN. LAWS § 8-1-1 (1997).

¹⁶ R.I. CONST. art. X, § 3.

doctrine,¹⁷ a concept all of you hopefully have learned while you are here in Albany, and I am sure you have.

It is not a case or controversy; it is an advisory opinion. It is a signed opinion; each of us signs our names to it. It is not supposed to have any precedential value, but let me tell you, you know it does. It certainly does.

And we have been required I think ten times since I joined the court in 1997, eight or nine times I guess, to render advisory opinions to either the governor or either house of the General Assembly.

These, in my opinion, relate to the structure of our government, to the very organic foundations of Rhode Island and its thirty-nine cities and towns. And they are the tough calls.

In 1999, we were asked whether the Ethics Commission—we didn't have an ethics commission until the constitution was amended in 1986¹⁸—could promulgate a regulation that basically altered the constitution.¹⁹ It deprived the members of the General Assembly on ethics grounds from exercising power that had been reserved to the General Assembly in the constitution, specifically the appointment to and participation on state boards and commissions.²⁰

Now, that is a lot of power if you know anything about state government, particularly in Rhode Island. Boards and commissions are legislatively created, they run the Department of Elementary and Secondary Education,²¹ the colleges,²² the lottery,²³ the environment,²⁴ the bridges, and the turnpikes.²⁵ I could go on and on. Those were legislatively created, many legislators served on them, and at times, the General Assembly held the majority of seats on some of those boards and commissions.

I think that it did lead to problems. I think corruption is probably a good word that one could use at times. So we have an ethics

¹⁷ R.I. Ophthalmological Soc'y v. Cannon, 317 A.2d 124, 130 (R.I. 1974) ("Unlike the United States Constitution, there is no express language in the Rhode Island constitution which confines the exercise of our judicial power to actual 'cases and controversies.'").

¹⁸ See R.I. CONST. art. III, § 8.

¹⁹ *In re* Advisory Opinion to the Governor (R.I. Ethics Comm'n—Separation of Powers), 732 A.2d 55, 57 (R.I. 1999).

²⁰ *Id.*

²¹ R.I. GEN. LAWS § 16-60-1 (2001).

²² R.I. GEN. LAWS § 16-59-1 (2001).

²³ Act of Mar. 14, 1974, ch. 20, § 1, 1974 R.I. Pub. Laws 44 (amended 2005) (establishing the state lottery commission).

²⁴ R.I. GEN. LAWS § 42-17.3-1 (repealed 1990).

²⁵ R.I. GEN. LAWS § 24-12-2 (1997).

commission that said wait a minute, this is not ethical, so, therefore, as a matter of state ethics, the members of the General Assembly cannot participate in these boards and commissions.²⁶ And they made that effective at six months from the time they promulgated it, and they prevailed upon the governor to ask us this advisory opinion.²⁷

And we tracked the history, beginning in 1663 with King Charles II and winding up in 1999, and indicated that under the structure of our government in Rhode Island we remained a parliamentary form of government where the parliament, similar to the British Parliament, held the power, the governmental power.²⁸

Well, let me tell you, there was a violent dissent by a former justice of the court,²⁹ which added to the difficulties that we confronted. It was an extremely controversial case. We were criticized for deciding it. We refused to answer a portion of it;³⁰ we were criticized for not answering that portion. And we basically had to again discuss, address, and decide the very structure of state government.

That opinion issued in June 1999, and in November 2004 the voters amended the state constitution.³¹ They eliminated the residual powers clause that vested the General Assembly with all of the state's residual powers.³² They did not give them to any other branch of government, however, so stay tuned on that.

(Laughter)

We haven't really been quite confronted with that issue too much at the moment.

And the amendments enacted in 2004 precluded, as a matter of constitutional law, any elected legislator from participating in boards and commissions that perform executive functions.³³

That was very tough. I think the voters did the right thing. We basically invited them to do that, but we weren't going to do it by

²⁶ *In re* Advisory Opinion to the Governor (R.I. Ethics Comm'n—Separation of Powers), 732 A.2d 55, 57 (R.I. 1999).

²⁷ *Id.* at 59.

²⁸ *Id.* at 62–64.

²⁹ *Id.* at 111 (Flanders, J., dissenting) (“These questions still need to be answered more definitively than they have been today and more clearly than they have been even in our constitution. Indeed, one hopes that our advisory opinions are just the opening salvos in the greater and the potentially more dispositive crossfire that will now ensue. Let the people be heard.”).

³⁰ *Id.* at 72.

³¹ R.I. CONST. art. VI, § 10 (repealed 2005).

³² *Id.*

³³ R.I. CONST. art. III, § 6.

the stroke of a pen, in signed opinions that were just that, our own opinions.

So I would say that our advisory responsibilities, or advisory opinion responsibilities, are some of the most difficult that confront the members of my court.

Since then we have had other advisory opinions, three of which involved a proposed casino to be developed by the Narragansett Indian tribe.³⁴ Our constitution, however, provides that no lotteries shall be operated except lotteries operated by the State.³⁵ We have a body of law that says that lotteries include all games of chance, and casinos would fall within that definition.³⁶

We decided this case about six weeks before there was to be a vote at the 2004 general election to allow the Narragansetts to undertake a casino.³⁷ So that question was pulled off the ballot very close to the time of the election.³⁸ That was very, very controversial. The tribe attempted, for the next two elections after that, 2005 and 2006, to secure voter approval for a casino, and each time it was a variant on someone operating the lottery other than the State.³⁹ The court struck it down each time.⁴⁰ That was very controversial.

For me, my concern is usually of a different matter. I don't know how much time I have, but I can tell you if we have a defendant who is facing life without parole, if we have a party that is going to lose land rights, land use rights, if the stakes are very, very high for an individual or a family or victims, those cases are the ones that keep me up at night.

The constitution is the constitution. It is something that engenders a great deal of public interest. It is not that hard to call in my opinion.

The other cases, the ones in which people are not going to be heard or have been heard and the law either has a remedy that will

³⁴ See *In re Advisory Opinion to the Governor (Casino)*, 856 A.2d 320, 323 (R.I. 2004); *In re Advisory Opinion to the House of Representatives (Casino II)*, 885 A.2d 698, 700 (R.I. 2005); *In re Advisory Opinion to the Governor (Casino III)*, 904 A.2d 67, 67 (R.I. 2006).

³⁵ R.I. CONST. art. VI, § 15 ("All lotteries shall be prohibited in the state except lotteries operated by the state and except those previously permitted by the general assembly prior to the adoption of this section, and all shall be subject to the prescription and regulation of the general assembly.").

³⁶ *Casino*, 856 A.2d at 327–28.

³⁷ *Id.* at 325.

³⁸ *Id.*

³⁹ See, e.g., *Casino II*, 885 A.2d at 712 (concluding that the State would not operate the proposed casino, as the state constitution requires, because it would not control the selection of table games, etc.).

⁴⁰ *Casino*, 856 A.2d at 334; *Casino II*, 885 A.2d at 712; *Casino III*, 904 A.2d at 68–69.

hurt them or put a defendant away forever, or the law does not have a remedy, those are the cases that I find to be the most troublesome. Those are the cases that keep me up at night.

Beyond that, during my tenure we have also dealt with our state constitution in terms of the issue of search and seizure.

Until 1992, the Supreme Court of Rhode Island interpreted Article I, Section 6 of the Rhode Island Constitution, which prohibits unreasonable searches and seizures, much more strictly than the United States Supreme Court addressed Fourth Amendment jurisprudence.⁴¹

That has eroded somewhat. We now view the law relative to automobile stops and probable cause to support search warrants to be on the same level with the United States Constitution.⁴² That only happened in 1992.⁴³

With respect to other areas on search and seizure grounds, we do not permit, on the state constitutional basis, drunk driving roadblocks in Rhode Island.⁴⁴ That has not gone over well at times, but unless the constitution is amended, we are satisfied that Article I, Section 6 is strictly construed in terms of unreasonable searches and seizures and stop-and-frisks.⁴⁵ So we do not permit drunk driving roadblocks in Rhode Island.⁴⁶

Of recent vintage we have addressed a gay divorce case. A majority of the court, of which I was not among, decided that couples who get married in Justice Greaney's state may not get a divorce in Rhode Island.⁴⁷ That was a three-two decision where the court said that unless and until the legislature recognizes marriage to include gay marriage, then the family court, being a statutory court of limited jurisdiction, does not have authority to grant a divorce to two persons of the same sex.⁴⁸ As I indicated, that was a three-two decision.

Interestingly, and maybe we can draw some comfort from this, that was not a highly controversial decision one way or the other. I

⁴¹ State v. Werner, 615 A.2d 1010, 1014 (R.I. 1992).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Pimental v. Dep't of Transp., 561 A.2d 1348, 1353 (R.I. 1989).

⁴⁵ *Id.* at 1352.

⁴⁶ *Id.* at 1353.

⁴⁷ Chambers v. Ormiston, 935 A.2d 956, 967 (R.I. 2007) ("We conclude that the word 'marriage,' . . . in the statute which empowers the Family Court 'to hear and determine all petitions for divorce from the bond of marriage,' was not intended by the General Assembly to empower the Family Court to hear and determine petitions for divorce involving . . . 'two persons of the same sex who were purportedly married in another state.'").

⁴⁸ *Id.*

think if it had gone one way or the other—it just did not engender attention as I recall.

I was not in the majority in that opinion; Justice Suttell and I dissented.⁴⁹

There was a bill in the General Assembly last year; there is a bill to legalize gay marriage or recognize civil unions in the legislature every year. It has never passed. But there is now an effort to amend the Family Court Act⁵⁰ to allow the granting of divorces for gay couples who are married out of state. I think that's a just result, the court has said that's where it should be decided,⁵¹ and I think it will be decided.

So in Rhode Island, sometimes things are a laugh a minute. I am the acting Chief Justice at this point because our beloved Chief Justice Williams announced his retirement in December.⁵²

Before that, Chief Justice Weisberger had been a member of the court for twenty-two years and he became Chief Justice in 1995.⁵³ And when he became acting Chief Justice in 1993, it was because his predecessor resigned in the midst of a scandal, a corruption scandal, and ultimately was disbarred.⁵⁴ That was Chief Justice Thomas Fay, who took over from Chief Justice Joseph Bevilacqua, who had been a former Speaker of the House in Rhode Island, who also resigned in the midst of a scandal and close to impeachment.⁵⁵

So we had two of them that left the court under very difficult circumstances, and again the constitution was amended at that point to allow for judicial selection with the Judicial Nominating Commission, which selects three to five names of applicants, and those three to five names are then submitted to the governor who selects a candidate from those names.⁵⁶

I was one of the first judges, I think I was the second judge actually, to be elevated to the supreme court by that system. Frank Williams was the second chief justice. Chief Justice Weisberger and

⁴⁹ *Id.* at 974 (Suttell, J., dissenting) (reading the jurisdictional statute much more broadly and finding that the family court could entertain a divorce petition of a same-sex couple even without assessing the underlying validity of the marriage in Rhode Island).

⁵⁰ R.I. GEN. LAWS §§ 8-10-1–8-10-45 (1997).

⁵¹ *Chambers*, 935 A.2d at 966.

⁵² Katie Mulvaney, *Maneuvering Begins to Succeed State Supreme Court Chief Justice Frank J. Williams*, PROVIDENCE J., Dec. 15, 2008, available at http://www.projo.com/news/content/williams_successor2_12-14-08_82CKEIN_v18.3ac796e.html.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ R.I. CONST. art. X, § 4.

Chief Justice Williams were both selected in accordance with that system. And the system seems to be working very well.

It used to be before that, again, the legislature, which held all the power, would elect a justice in the grand committee.⁵⁷ Both chambers would convene in grand committee and they usually elected a legislator.⁵⁸ Now the governor makes those selections.⁵⁹

I will, however, tell you that some of our absolute judicial giants have come from that former system. I am a product of both systems. I was appointed under the old system to the superior court and appointed by the governor in accordance with judicial nominating to the supreme court.

So I have a foot in both camps. I welcome the process that we are undergoing right now.

⁵⁷ R.I. CONST. OF 1843, art. X, § 4.

⁵⁸ Mulvaney, *supra* note 52.

⁵⁹ R.I. CONST. art. X, § 4.