

1987

Utah v. Evans : Petition for Rehearing

Utah Supreme Court

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David Wilkinson; attorney general; Stephen J. Sorenson; assistant attorney general; Ralph L. Finlayson; assistant attorney general; attorneys for appellant .

Daniel L. Berman, Peggy A. Tomsic; Berman & O'Rorke; attorneys for defendant.

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This petition seeks a rehearing or, more accurately, a hearing with full briefing and argument on the significant constitutional issue of whether the Utah Legislature is truly the judge of all issues pertaining to the disqualification of its members regardless of the purpose or legal consequence attendant to the determination of such issues.

This petition for rehearing simply makes three points:

First, the lower court correctly decided the legislative branch and not the judicial branch had the constitutional power to determine the separation of power issues pertaining to Mr. Evans' qualifications as a legislator, regardless of whether those separation of power issues were being determined for the purpose of seating Mr. Evans in the Legislature or continuing his employment in the executive branch.

Second, this Court did not decide the issue presented in this appeal in State v. Evans, 735 P.2d 29 (Utah 1986) ("Evans I") in that original action. Since the holding of Evans I was simply that the legislative branch had the power to determine issues of disqualification for the purpose of seating, the question of which branch, the legislative branch or the judicial branch, had the power to determine such issue for the purpose of employment was not briefed or passed upon by the Court.

Third, that summary disposition, without full briefing and argument, is a disservice to the significance of the question presented and the deference that could be shown to legislative interest by providing a full hearing before the Legislature's power to determine issues of disqualification is eroded and undermined by judicial fiat.

1. The lower court's decision was constitutionally correct. The Constitution makes the Legislature the "judge" of the "qualification of its members". If the Legislature is to be the judge of its members' qualifications, it has the power to decide all issues pertaining to their disqualification. That is not only the logic of the power conferred, that is what this Court explicitly held in Evans I.

Separation of power issues, the issues germane to the question of disqualification of Respondent Evans, have a two-edged blade. Separation of power constraints can preclude service in the Legislature or, on the other side, employment in the executive branch. The blade may have two edges but the point of inquiry or the question of disqualification is the same. Does the elected representative's simultaneous service run afoul of the separation of power prohibitions of the Constitution? The issue of disqualification is identical regardless of whether the issue is determined for the purpose of seating or for the purpose of employment.

Since the Legislature is charged with being the "judge" on all issues of disqualification, the judicial branch should not, as this Court has directed in its minute order without explanation, usurp that constitutional function. The Court would usurp the power of the Legislature to determine all issues of disqualification if it reaches the merits of the separation of power issues in this case because (1) it would decide on the merits the very issue the Legislature has decided in the case of Mr. Evans and (2) while it will not decide that issue for the purpose of seating, the determination of the same separation of power issue for the purpose of employment will undermine the prior legislative determination by now having the judicial branch say whether Mr. Evans cannot constitutionally do what the Legislature previously has said could be done.

In short, when the Legislature is charged with being the "judge" of all issues pertaining to disqualification, the Legislature and not the courts exercise the judicial power of the State of Utah. That is not only sound analysis, that is precisely the point this Court made in Ellison v. Barnes, 23 Utah 183, 63 P. 899, 901 (1901) when it stated:

The power thus given to the houses of the legislature is a judicial power, and each house acts in a judicial capacity when it exerts it. The express vesting of the judicial power in a particular case so closely and vitally affecting the body to whom that power is given takes it out of the general judicial power.

Id. at 901.

2. This Court in Evans I did not reach and did not decide that the judicial branch had constitutional power to determine separation of power issues pertaining to disqualification if those issues were raised for the purpose of determining the legality of the legislator's employment with the executive branch. This Court held in Evans I that the Legislature had the power to determine all issues of disqualification including separation of power issues pertaining to the elected representative for the purpose of seating. It did not decide that the judicial branch rather than the legislative branch had the power to determine that same precise issue -- for the purpose of employment.

Evans I was an original action in this Court in the nature of an extraordinary writ. The Attorney General did ask this Court to determine the merits of the separation of power issue with regard to Mr. Evans, an issue that had been previously determined by the Legislature, for the purpose of terminating Mr. Evans' employment. The Court refused to do so. The Court said:

We believe the latter question should not be resolved in this proceeding for an extraordinary writ even though we have jurisdiction to do so.

State v. Evans, 735 P.2d 29, 33 (Utah 1987)

The Court's statement in Evans I is ambiguous. It may be read, as the Attorney General argues, that the Court has the power to determine the separation of power issues pertaining to

disqualification on the merits for the purpose of determining whether Mr. Evans' employment should be terminated. It may also be read as stating that in an original action for an extraordinary writ the Court could exercise its original jurisdiction and decide all of the separation of power issues raised by Mr. Evans' simultaneous service, but the Court choose not to exercise such power in an original action and reserved judgment on all issues not necessary to its decision until such issues were raised of course on appellate review from a declaratory judgment action.

The latter is a more persuasive reading of the Court's opinion in Evans I for two very good reasons. First, it is an axiom of adjudication, particularly constitutional adjudication, that the Court will not decide issues that are not necessary to its decision. In Evans I the Court held the legislative branch had the power to determine the separation of power issues for the purpose of seating. It clearly refused to decide the legality of Mr. Evans' employment. The separation of power issues with regard to Mr. Evans' employment involved two constitutional questions. One, does the judicial branch or legislative branch have the power to determine the separation of power issues, and two, does Mr. Evans' simultaneous service violate the separation of power provisions. If the Court chooses not to adjudicate the legality of Mr. Evans' employment, why would the Court decide one of the critical constitutional

questions pertaining to the legality of his employment but withhold judgment on the other. Particularly, why would the Court decide the question of constitutional jurisdiction between the legislative branch and judicial branch when the adjudication of that particular question was not necessary to its holding that the Legislature had the constitutional power to determine all issues pertaining to Mr. Evans' disqualification for the purpose of seating.

Second, the question of whether the judicial or legislative branch had the power to decide the issues pertaining to Mr. Evans' disqualification for the purpose of termination of his employment were not briefed in Evans I. Read the briefs. Why would this Court reach out to decide a major constitutional issue, an issue that has been decided differently in other jurisdictions, without brief or argument? Compare Fowler v. Bostick, 108 S.E.2d 720 (Ga. 1959) with Monaghan v. School Dist. No. 1, 315 P.2d 797 (Ore. 1957).

3. This matter is not a matter for summary disposition. Mr. Evans' position is supported by fair analysis and authority. Counsel respectfully suggests that the Court should gain the benefit of the full adversary process before deciding an important question.

The issue that this Court summarily decided is an issue with regard to the division of power between the legislative branch and the judicial branch. Certainly questions of that

magnitude, questions of whether the legislative branch will only decide the issues of disqualification for the purpose of seating, would be worthy for consideration by this Court. The Court did not consider those issues in Evans I and the Court has not granted the parties an opportunity to brief and argue those issues now. The Court should do so. The petition for rehearing should be granted.

CONCLUSION

The Court should vacate its order summarily reversing the district court and set this appeal for full briefing and oral argument.

Counsel for Respondent Evans certifies that this petition for rehearing is presented in good faith and not for delay.

DATED: April 18, 1988.

BERMAN & O'RORKE

A handwritten signature in black ink, appearing to read "Daniel L. Berman", written over a horizontal line.

Daniel L. Berman
50 South Main Street, #1250
Salt Lake City, Utah 84144

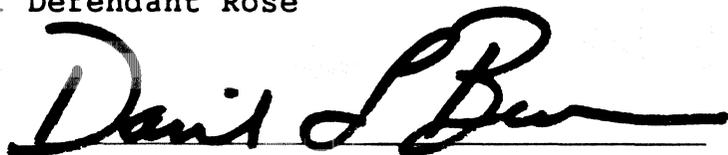
Attorneys for Respondent R. Mont
Evans

CERTIFICATE OF SERVICE

On this 18th day of April, 1988, I hereby certify that I caused to be hand-delivered four true and correct copies of the foregoing PETITION FOR REHEARING to the following:

David Wilkinson
Attorney General
Stephen J. Sorenson, Esq.
Assistant Attorney General
Chief, Litigation Division
Ralph L. Finlayson
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Attorneys for Plaintiff/Appellant

L. Zane Gill, Esq.
Anne Wise, Esq.
BEILE, HASLAM & HATCH
50 West Broadway, Fourth Floor
Salt Lake City, Utah 84101
Attorneys for Defendant Rose

A handwritten signature in black ink, appearing to read "David L. Burt", written over a horizontal line.

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