

SUPREME COURT OF KENTUCKY

**No. 2009-SC-000066-TG
(2009-CA-000219)**

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Virginia G. Fox,

Appellant,

v.

Trey Grayson et al.,

Appellees.

**On Appeal from Franklin Circuit Court
The Honorable Thomas D. Wingate, Judge
No. 08-CI-1426**

REPLY OF APPELLANT VIRGINIA G. FOX

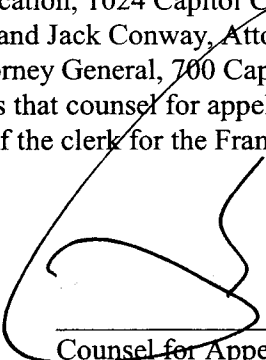
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(Certifications under Civil Rules 76.12(5) and (6) are on the next page.)

CERTIFICATE OF SERVICE

In accordance with Civil Rules 76.12(5) and (6), the undersigned hereby certifies that copies of this Reply were served upon the following individuals by hand this 23rd day of September, 2009: The Honorable Thomas D. Wingate, Judge, Franklin Circuit Court, 214 St. Clair St., P.O. Box 678, Frankfort, KY 40601; Angela Evans, Office of the Attorney General, 700 Capitol Ave., Rm. 118, Frankfort, KY 40601, *Counsel for Trey Grayson, Secretary of State of the Commonwealth of Kentucky*; Ellen M. Heslen and Edmund S. Sauer, Office of the Governor, 700 Capitol Ave., Rm. 101, Frankfort, KY 40601, *Counsel for Steven L. Beshear, Governor of the Commonwealth of Kentucky*; Dennis Taulbee, Council on Postsecondary Education, 1024 Capitol Center Dr., Ste. 320, Frankfort, KY 40601, *Counsel for Pam Miller*; and Jack Conway, Attorney General of the Commonwealth of Kentucky, Office of the Attorney General, 700 Capitol Ave., Rm. 118, Frankfort, KY 40601. The undersigned certifies that counsel for appellant did not withdraw the record on appeal from the office of the clerk for the Franklin Circuit Court.



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ARGUMENT

Inferior State officers and members of boards and commissions, not specifically provided for in this Constitution, may be appointed or elected, in such **manner** as may be prescribed by law, **which may include a requirement of consent by the Senate**, for a term not exceeding four years, and until their successors are appointed or elected and qualified.

Ky. Const. § 93 (bold emphasis added).

This is a case about the words of the Constitution — about what it says, and what it does not say. As this Court has noted, the Constitution should be interpreted first and foremost according to its words. *See Williams v. Wilson*, 972 S.W.2d 260, 268 (Ky. 1998) (citing *Kentucky State Board for Elementary and Secondary Education v. Rudasill*, 589 S.W.2d 877 (Ky. 1979)) (“This Court’s decision in [*Rudasill*] provides a proper methodology for constitutional analysis. It requires that text be the beginning point”). In providing that the “manner” of appointment “may include a requirement of consent by the Senate,” Section 93 of the Constitution sets forth an express permission for making appointments subject to senatorial confirmation. This permission is meaningful both in what it says and in what it leaves out.

The maxim “to say the one is to exclude the other” is a valid and long-standing aspect of legal analysis. *See Bloemer v. Turner*, 281 Ky. 832, 137 S.W.2d 387, 390 (1940) (describing *expressio unius* as the product of “logic and experience”). In his brief, however, the Governor appears to argue either that the maxim *never* applies, or that the presence of the words “may include” in Section 93 somehow render it inoperative. *See* Brief of Appellee Governor Steven L. Beshear at 6-7, 16-20 [hereinafter “Governor’s Brief”]. Neither of these arguments can be reconciled with this Court’s precedent. As Ms. Fox demonstrated in her first brief, this Court and its predecessor have relied upon

the maxim *expressio unius* dozens of times over the past two hundred years. See Brief for Appellant Virginia G. Fox at 3-4. In fact, only six years ago this Court observed that “[i]t is a general rule of statutory construction that the enumeration of particular items or categories excludes others not specifically mentioned.” *Schwindel v. Meade County*, 113 S.W.3d 159, 168 (Ky. 2003). To say, therefore, that *expressio unius* never applies in Kentucky is simply erroneous.

Ms. Fox also clearly established in her brief that the word “include” does not magically render the maxim inoperative, as this Court has used *expressio unius* and *inclusio unius* interchangeably. See *Commonwealth ex rel. Ross v. Lee’s Ford Dock, Inc.*, 551 S.W.2d 236, 239 (Ky. 1977) (“[U]nless and until gasoline for motor boats is added to the list of exceptions by legislative act the familiar maxim ‘inclusio unius est exclusio alterius’ never had a better fit.”). In other words, the “inclusion” of one thing can be the “exclusion” of another, just as the “saying” of one thing can be the exclusion of another.

Nor does the word “may” before the word “include” in Section 93 support the Governor’s argument. Emphasizing the permissive nature of the grant of authority, this word only confirms that the legislature *may*, but *need not*, authorize the Senate to exercise a power of confirmation. Compare OHIO CONST. art. III, § 21 (“When required by law, appointments to state office shall be subject to the advice and consent of the Senate.”); ORE. CONST. art. III, § 4(1) (emphasis added) (“The Legislative Assembly in the manner provided by law *may require* that all appointments and reappointments to state public office made by the Governor shall be subject to confirmation by the Senate.”).

With both possible constructions of the Governor's argument properly seen as implausible, what remains is what Ms. Fox originally noted: that this Court applies *expressio unius* and *inclusio unius* when there is a material or conceptual basis for distinguishing between what is stated (or "included") and what is not stated. And this basis, in the context of confirmation, lies in this Commonwealth's unbroken practice between 1792 and 1990 — a period of almost 200 years — of authorizing only the Senate to exercise a power of confirmation.

In the cases cited by the Governor on this point, by contrast, there was no material basis for distinguishing between what the law said and what it did not say. In enacting the Americans with Disabilities Act, for example, Congress would have been no less concerned with protecting a disabled applicant as with protecting his or her would-be co-workers. For this reason, applying *inclusio unius* in *Chevron U.S.A. Inc. v. Echazabal* would have been inappropriate. *See* 536 U.S. 73, 80-84 (2002) (interpreting 42 U.S.C. § 12113(a), (b)). Likewise, in enacting KRS 532.055(2)(a), the General Assembly would have been no more opposed to admitting "good time credit" as evidence in support of sentencing as to admitting the kinds of evidence specified in the statute. *See Cornelison v. Commonwealth*, 990 S.W.2d 609, 610-11 (Ky. 1999). In fact, the Court explicitly recognized that a material basis for making such a distinction was lacking. *See id.* at 611 ("The evidence with respect to potential good time credit is no less relevant nor more speculative than evidence with respect to parole eligibility."). Here, however, the basis for distinguishing between the House and Senate is palpable and well-settled by historical practice.

In going over this history, the Governor may choose to emphasize nothing more than the “discretion” that the legislature has exercised since 1850, but he neglects to note that until April 1990 this exercise of “discretion” yielded either no confirmation at all or confirmation only by the Senate. Indeed, as Ms. Fox demonstrated in her initial brief, from 1893 until 1934, *all* appointments of inferior officers were subject exclusively to senatorial confirmation, and before 1990 no statute called for any kind of legislative confirmation other than by the Senate. *See* Brief for Appellant Virginia G. Fox at 8-11. To describe these practices as an exercise of “discretion” without reference to the Senate is like staging *Hamlet* without the prince.

Most tellingly of all, the Governor utterly fails to engage Ms. Fox’s most salient argument — that, if Section 93 refers to the Senate only by way of *example*, the General Assembly could authorize *only the House* to exercise a power of confirmation — a result certainly at odds with both the language of the Constitution and our well-settled constitutional practice. The Governor attempts to evade this argument by suggesting that the legislature might never do such a thing. *See* Governor’s Brief at 26 n.10. But that is not the question presented in this case, nor indeed in any case where a court is called upon to exercise judicial review. The question presented in this case is what the Constitution means, not what the legislature might do. If the Constitution in fact refers to the Senate only by way of *example*, as the Governor argues, then the House could readily be substituted for the Senate. No one ratifying the amendment of 1992 — or supporting it in the legislature, for that matter — would have thought that he or she was authorizing

confirmation *exclusively by the House*, yet that is a logically inescapable option under the Governor's untenable construction.¹

It may be true, as the Governor suggests, that many of the legislators who supported the amendment of 1992 meant only to repudiate the arguments that Kraus was making at that time and that this Court later rejected. *See Kraus v. Kentucky State Senate*, 872 S.W.2d 433, 440 (Ky. 1994). But this hardly helps the Governor. First, it proves that the legislators themselves were thinking only of the Senate — because Kraus was thinking only about the Senate. Second, words matter, and the words the legislators chose and proposed to the people refer only to the Senate. *See Williams v. Wilson*, 972 S.W.2d at 268-69 (citing *Rudasill*, 589 S.W.2d 877). *See also Gatewood v. Matthews*, 403 S.W.2d 716, 720 (Ky. 1966) (“[T]he legislature does nothing unless and until the people ratify and choose to give the revised constitution life by their own direct action.”). In light of well-settled practice, and in light of the fact that no one would interpret Section 93 to permit confirmation *only by the House*, the only permissible construction of this section is that it contemplates only senatorial confirmation.²

¹The Governor's suggestion that Section 93 must not mean what it says because no one has brought an action like Ms. Fox's overlooks current events. *See Governor's Brief* at 23. Only once since the legislature first purported to authorize bicameral confirmation has the Governor been in political sympathy with the Senate but not with the House. (This was true from 2003 until 2007.) When this Governor's term expired, Ms. Fox (and others) were caught in precisely the situation that gave rise to this litigation. And, needless to say, Governor Fletcher's notification of both the House and the Senate of Ms. Fox's appointment merely reflected what the statute said, not whether the statute was constitutional.

²Also because words matter, this Court's reference in *Kraus* to bicameral confirmation is entirely beside the point. *See* 872 S.W.2d at 437. Although bicameral confirmation was completely outside our constitutional practices until 1990, it was not completely outside the text. After 1992, however, it was.

The Governor also puts substantial emphasis in his brief on the proposition that statutes bear a strong presumption of constitutionality. *See* Governor's Brief at 7-8. But in making this argument he overlooks the crucial distinction between constitutional powers that call for legislative definition and constitutional powers that do not. The power of the legislature to enact statutes for the health, safety and welfare of the population — the so-called "police power, to which the Governor obliquely refers, *see* Governor's Brief at 8 n.2 — is entitled to substantial judicial deference because the legislature is institutionally equipped to determine what best promotes those values. But the legislature has no institutional competence to interpret the provisions of the Constitution that establish and maintain separation of powers. Only 25 years ago, in the famous case of *LRC v. Brown*, this Court refused to take a casual approach to separation of powers. *See* 664 S.W.2d 907, 914 (Ky. 1984). This Court should do the same today. Of the five cases from this jurisdiction cited by the Governor in support of this proposition, only one (*Kraus*) comes from a case involving separation of powers; the remaining four come from cases involving an exercise of the police power in one form or another. *See Stephens v. State Farm Mut. Auto. Ins. Co.*, 894 S.W.2d 624, 625 (Ky. 1995) (regulation of insurance); *Posey v. Commonwealth*, 185 S.W.3d 170, 172 (Ky. 2006) (weapons); *Walters v. Bindner*, 435 S.W.2d 464, 465 (Ky. 1968) (pool halls); *Kentucky Indus. Util. Customers, Inc. v. Kentucky Utils. Co.*, 983 S.W.2d 493, 495-96 (Ky. 1998) (utilities). And the reference in *Kraus* can readily be classified as boiler plate, as it is set forth in a short paragraph of its own with no apparent connection to the analysis either before or after. *See* 872 S.W.2d at 438. This Court's refusal to adopt a

casual attitude toward separation of powers in *Brown*, however, is lengthy and plays an important substantive role in that case. For that reason, it should control here.

As for *Cumberland Telephone & Telegraph Co. v. City of Hickman*, 111 S.W. 311 (Ky. 1908), and *Commonwealth ex rel. Attorney General v. Howard*, 180 S.W.2d 415 (Ky. 1944), which the Governor cites in support of his argument that courts should be careful in drawing inferences from constitutional language, these cases appear to support Ms. Fox's argument much more readily than the Governor's. *Cumberland Telephone & Telegraph* involved the extraordinary claim that the Court should infer from a variety of procedural devices pertaining explicitly to the General Assembly that the same devices should apply to municipalities. Because nothing in the words of the Constitution or in our constitutional tradition even remotely suggested that these devices should be transposed to an entirely different context, the Court refused to do so. *See id.* at 313 (discussing Ky. Const. § 46). Similarly, the Court in *Howard* refused to validate a means of proceeding against a Commonwealth's Attorney for alleged mis- and malfeasance in office other than the one expressly set forth in the Constitution. *See id.* at 418-19 (discussing Ky. Const. § 227). In both cases, to say the one was to exclude the other.

Finally, the Governor attempts to suggest that a constitutional provision that would have conferred an express sole power of confirmation on the Senate was rejected by the delegates to the Convention of 1890-91 because of antipathy to such a conferral. *See Governor's Brief* at 11. No such thing occurred. Far from making a mountain out of a molehill, the Governor is trying to make a mountain out of nothing. To be sure, original Section 76 of the Constitution of 1890, as ratified by the voters, was deleted by the

delegates thereafter. But the debates from the day in question conclusively demonstrate that the delegates had no intention whatsoever to depart from the well-settled practice of authorizing only senatorial confirmation. As the principal **proponent** of the deleted section, Charles J. Bronston, informed his colleagues, the erstwhile Section 76 had originally been included *only* to allow the Governor to appoint the Librarian, and concern later arose that this section would also allow the Governor to appoint other individuals. To forestall such a possibility — and **only** to forestall such a possibility — the delegates chose to delete Section 76. In other words, the worrisome inconsistency between Section 76 and what is now Section 93 was not its reference to senatorial confirmation, but its reference to gubernatorial appointment:

We, of the Committee, were fully aware that at the time section 76 was adopted, it was thought important to allow the Governor to appoint the Librarian. It was not understood at that time that the appointing power should be extended to any other official save that. The Committee was clearly of the opinion that if section 76 stood, you would have to modify the last clause in [current Section 93] to prevent a conflict.

We did not deem that that would be wise, because, if that construction was given, unquestionably it would allow the Governor to appoint, not only the Librarian, but the Commissioner of Insurance and the Reporter of the Court of Appeals, and other subordinate officers, who are paid . . . out of the State Treasury, and it would disturb that settled principle which, we believe, has been approved by the people, that as to all these subordinates, it should be left to the power of the General Assembly to say whether they should be elected or appointed, and if not elected by the people, by whom they should be appointed.

IV OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION (1890) at 5728 (Mr. Bronston) (September 11, 1891). *See also* Sheryl G. Snyder & Robert M. Ireland, *The Separation of Governmental Powers Under the Constitution of Kentucky: A*

Legal and Historical Analysis of L.R.C. v. Brown, 73 KY. L.J. 165, 173 n.59 (1984-85).

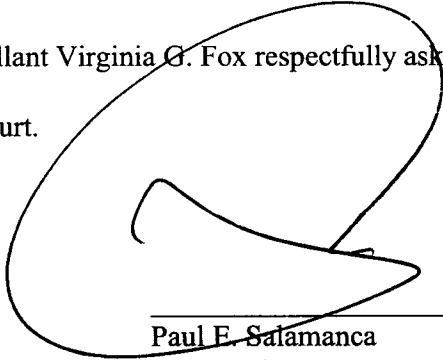
In other words, the delegates deleted Section 76 because they wanted to limit *the Governor's power*, not because they objected to senatorial confirmation. Nothing in the debates suggests the least concern with such confirmation. This Court should also bear in mind that only two years after these debates the General Assembly enacted a statute that required senatorial confirmation of all gubernatorial appointments. *See Ky. Acts 1893*, ch. 202, § 11 (codified as RS § 3750) (bold emphasis added):

Unless otherwise provided, all persons appointed to an office by the Governor, whether to fill a vacancy, or as an original appointment, shall hold office, subject to the advice and consent of the Senate, which body shall take appropriate action upon such appointments at its first session held thereafter.

This requirement is hardly consistent with an aversion to senatorial confirmation. On the other hand, it accurately reflects Kentucky's well-settled and exclusive reliance on the Senate in this regard.

CONCLUSION

For the foregoing reasons, Appellant Virginia G. Fox respectfully asks this Court to reverse the decision of the Circuit Court.



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