



## For the Record

By

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### Why Clerks of Superior Court in Georgia are Elected

Frequently, I am asked why clerks of superior court in Georgia are elected. The simplest explanation is that having an elected clerk of superior court is for the greater good. However, understanding and appreciating why clerks of superior court are elected requires a more detailed explanation from a historical perspective.

The origin of clerks of superior court in Georgia is rooted in early British history. For centuries, the custody of court records was entrusted solely to judges but, over time, it became apparent that judges should not have to preside over arguments and simultaneously perform clerical functions of the court such as recording proceedings, issuing writs, and processing other court documents.

Consequently, the office of the Clerk of Court was created, with “subordinate judicial officials” being from among clergy since they were generally the only literate group at the time. Those officials were titled “clerks” (the term derived from the Latin word “*clericus*”, meaning “clergyman”). Officers of common pleas courts in English colonies were later called “county clerks”, which is a title still used today across the nation when referring to the clerk of the superior or clerk of circuit court.

James Madison, one of the framers of the U.S. constitution, writing in the Federalist Papers, said, “*The accumulation of all powers, legislative, executive and judicial in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny*”.

Framers of Georgia’s first constitution in 1777, most who had come from Europe to escape tyrannical rule and tough economic conditions, believed as did Madison (and political theorists John Locke and Montesquie before him): that, to prevent and limit corruption and to ensure that government best serves the interests of all and not just a few, there has to be separation of power in government—even within the judicial branch. As a means for ensuring that government is and courts are not corrupted, founding fathers insisted on electing those given power and entrusted to protect the interests of the citizens of Georgia.

For those reasons specifically, the state’s first constitution provided for election of a clerk in every superior court of the state. That is what is meant when it is said that a clerk of superior court is a county “constitutional officer.”

Like Madison, they believed, if a clerk of superior court is appointed, he or she would be put in the uncanny position of having to serve his or her master (i.e., the one who appointed them) and, consequently, there would be a greater likelihood that, when instructed by a judge or whoever else appoints him or her, the clerk of superior court would have no choice but to act wrongly or illegally for fear of adverse repercussions. It is very hard for an appointed clerk to be autonomous and the lack of independence is likely some time or another to impede the clerk's ability to faithfully perform his or her statutory duties and to serve all persons availing themselves to the services of the clerk's office equally, fairly, and indiscriminately.

When the clerk of superior court is elected, he or she is only accountable to the people who elect him or her. As long as he or she performs his or her duties according to the law, the clerk can tell anyone 'no' if and when he or she is asked or told to do anything improper or illegal. He or she is empowered and protected by the full force and effect of law. Such independence provides separation of power and provides the checks and balances envisioned by framers of the constitution and as being necessary to limit corruption within the judicial system—and even with respect to land records of the county of which the clerk of superior court is the official custodian.

Citizens of this state should forever defend and fight to continue electing clerks of superior court and the three other county constitutional officers—the sheriff, probate judge, and tax commissioner. As long as citizens elect these four local constitutional officers, they are protecting the interests of everyone and helping to avert corruption.

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