1983 WL 181931 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
July 6, 1983

***1** The Honorable Heyward E. McDonald
Senator
604 Gressette Building
Columbia, SC 29202

Dear Senator McDonald:
You have asked the opinion of this office with respect to the following question:
When does the term expire of the person elected in 1979 to Seat One of the Court of Appeals?

It is our opinion that his term expires after August 16, 1983 and at such time as a successor to the Judge is elected by the General Assembly and qualifies.

The historical background of the Court of Appeals is a long and involved one and will not be repeated in its entirety here. The Court's general historical background, leading to the enactment of R-159 of 1983, is adequately summarized in R-159's preamble, which provides in pertinent part:
Whereas, the General Assembly enacted at its 1979 Session Act 164 which under Part IV created a Court of Appeals for South Carolina. The creation of the Court as well as constitutionality of certain provisions were subsequently challenged by the Attorney General in State, ex rel. Riley v. Martin, 274 S.C. 106, 262 S.E.2d 404 (1980). While the Court struck down several provisions relating to the power of the Court of Appeals to set additional terms of Court, keep records of the Court in a manner prescribed by the judges thereof and except candidates for the offices of the Court of Appeals from the general prohibition of Section 2-1-100 of the 1976 Code of Laws, it upheld the creation of the Court of Appeals and left the remaining provisions of the Act in full force and effect. Efforts to further amend Act 164 of 1979 in the Bond Act of 1979 (Act 194) and the Appropriations Act of 1980 (Act 517) were struck down by the Court as violative of Article III, Section 17 . . . in Maner v. Maner, Opinion No. 21801, filed October 20, 1982. Additionally, the Court in Maner determined four of the five judges elected by the General Assembly . . . were ineligible as a result of . . .Martin and since the offices of the Judge of the Court of Appeals came into existence upon creation of the Court on July 1, 1979, there were four vacancies on the existing Court of Appeals.

All five judges for the Court were elected on August 16, 1979, see, 1979 Journal of House of Representatives, pp. 3639-3711, but only the election of the Judge to Seat One, the subject of your inquiry, was valid. See, Maner v. Maner, supra. In a separate opinion, this same date, this office has concluded that R-159 ‘does not create a new Court [of Appeals] but continues [the one] . . . already in existence,’ which had been created by Act No. 164 of 1979. Therefore, it is apparent that R-159 does not abolish the term of the judge elected to Seat One, whatever the remainder of that term might be. See, § 14-8-20(d); State ex rel. Hammond v. Maxfield, (Utah), 132 P.2d 660 (1942); Alexander v. McKenzie, 2 S.C. 81 (1870). The question then, is when the judge's term commenced, pursuant to Act No. 164, and when it expires, in light of recently enacted R-159 of 1983.

***2** § 14-8-20(a) of Act No. 164 provides:
The members of the Court shall be elected by joint public vote of the General Assembly for a term of six years and until their successors are elected and qualify.

Subsection (b) states that 'Seats Number One and Two shall be for a term of four years.' Additionally, § 14-8-40 establishes the requisites for qualification:
The Judges of the Court shall qualify within twelve months after the date of their election or within ten days after the date of the commencement of the operations of the Court by taking the constitutional oath or the office shall be declared vacant by the Governor.

Act No. 164 became effective on July 1, 1979, but the Court itself was scheduled to become operational on July 1, 1980. State ex rel. Riley v. Martin, 262 S.E.2d, supra at 405. However, Act No. 164 contained no express provision concerning the date of the commencement of the judge's terms.

Act No. 164 was amended at the same session of the Legislature by Section 5 of Act No. 194 of 1979. In contrast to its predecessor Act, No. 194 did specifically set the date for commencement of terms. § 14-8-20(a) provided in pertinent part:
. . . The terms of office of the Judges of the Court shall begin on July 1, 1980. Prior to such date, the General Assembly shall have authority to take such measures as necessary . . . to effect full implementation of the Court for operation by July 1, 1980.

Left unchanged was that portion of Act No. 164 regarding qualification for office and also unaltered was the length of term for Seat One, again limited to four years. Act No. 194 of 1979 became effective upon signature of the Governor, on August 8, 1979.

Act No. 517 of 1980 further amended Act No. 164 of 1979. No. 517 extended the commencement date of the Court's operation to no earlier than October 1, 1981, as well as extending the beginning of the terms of office of the judges, all in response to State ex rel. Riley v. Martin, supra; Martin had in January, 1980 declared four of the five Judges elected to the Court ineligible to serve because of § 2-1-100. [1] § 14-8-20 of No. 517 provided that the Judge's terms would begin on '. . . October 1, 1981, or upon implementation of the Court of Appeals by the General Assembly whichever date occurs later.' 'Implementation' by the General Assembly was defined in the Act to mean '. . . election of the full complement of authorized Court of Appeals' Judges whether elected in 1979, 1980 or 1981, and appropriation of general fund revenues for operating of the Court of Appeals by the General Assembly.' Act No. 517 became effective on June 10, 1980.

In October, 1982 the decision in Maner v. Maner, supra, declared Act No's 194 of 1979 and 517 of 1980 unconstitutional. These Acts were held to violate Art. III, § 17 of the South Carolina Constitution because 'they were not reasonably related to the subjects' or expressed in the titles to the Acts. Based upon this historical background, then, we must determine when the term of the Judge elected to Seat One on August 16, 1979 commenced. Although not free from doubt, we conclude this term commenced on August 16, 1979 when he was elected to Seat One by the General Assembly.

***3** As stated, Act No. 164 did not specify a commencement date. However, it is almost universally the accepted rule that
Where no time is fixed by the Constitution or Statute, the term begins, in the case of elective offices, on the day of election, and in the case of appointive offices, on the date of appointment . . .

67 C.J.S., Officers, § 68 at p. 376 (1978); 63 Am.Jur. 2d, Public Officers and Employees, § 151 (1972). This rule is recognized in virtually every jurisdiction. See, e.g., State ex rel. Sanchez v. Dixon, (La.), 4 So.2d 591 (1941); Joseph v. Corsi, 100 N.Y. S.2d 49 (1950); State v. Rogge, 80 Mont. 1, 257 p. 1029; State v. Halladay (S.D.), 219 N.W. 125 (1928); People v. Hamrock, (Colo), 222 p. 391 (1924); People v. Sweitzer, (Ill.), 117 N.E. 625 (1917).

The South Carolina cases and opinions of this Office are in complete accord. Macoy v. Curtis, 14 S.C. 371 (1880); Verner v. Seibels, 60 S.C. 572 (1901); see also, Smith v. City Council, 198 S.C. 313, 320, 17 S.E.2d 860, 863 (1941); Heyward v. Long, 178 S.C. 351, 183 S.E. 145 (1935); Op. Atty. Gen, (unpublished, September 21, 1979); 1950 Op. Atty. Gen. at 179; 1929 Op. Atty. Gen at 161. In Heyward v. Long supra, the Court noted a distinction between the 'term of an office' and the

'tenure of an officer'. 178 S.C., supra at 376. The tenure relates to 'actual enjoyment' of the office, a separate and distinct concept from the officer's term
which is a creature of the law and cannot be set apart and made to vary, shift or change, according to the caprice, interest or laches of any who might happen to be the incumbent.

Macoy v. Curtis, 14 S.C., supra at 378. Matters concerning qualification, such as oath and commission, are but evidence of appointment or election; these simply enable the officer to validly possess the office. They are 'forms only', for it is the selection of the officer to fill the office which constitutes the 'essence of his appointment.' Supra. Accordingly, unless otherwise specified, the term of office commences, not with the date of qualification, but upon appointment or election. Verner v. Seibels, 60 S.C., supra at 576. This rule insures 'order and symmetry.' Macoy v. Curtis, 14 S.C., supra. Therefore, since Act No. 164 contains no express commencement date, we must conclude that date to be August 16, 1979, the date of election, unless a contrary legislative intent can be gleaned from Act No. 164.

As shown below, we find no convincing evidence of such legislative intent. While the question is not one free from doubt, and it is perhaps arguable that the General Assembly did not intend the terms to begin until a later date, we do not believe the argument is supported by evidence sufficient to draw that conclusion. Hence, we must conclude that here the law requires application of the general rule that the term commences upon the date of election.

***4** It is true that Act No. 164 contains a provision, § 14-8-80, which requires the Judges to qualify within twelve months after the date of their election or within ten days after the commencement of the operations of the Court. But, as just noted, the matter of when an oath of office is taken is immaterial to its term. Hawkins v. City of Fayette, (Mo.), 604 S.W.2d 716 (1980). The officer's qualification is entirely distinct from the term of office. Moreover, provisions relating to qualifying for office are directory, rather than mandatory, State v. Toomer, 7 Rich (41 S.C.L.) 216; Op. Atty. Gen. (June 12, 1970) and thus § 14-8-80 does not operate to establish the date for commencement of term.

Further evidence that the General Assembly did not intend § 14-8-80 to establish the commencement date is found in Act No's. 194 of 1979 and 517 of 1980. We may assume that these statutes, although subsequently declared unconstitutional, may, as operative facts, 16 C.J.S. Constitutional Law; § 101, p. 472 (1956), be relied upon to ascertain legislative intent. Contra, Johnson v. State, (Md.) 315 A.2d 524. They convincingly show that § 14-8-80, in directing the method for qualifications of judges, did not set the beginning date for their terms. § 14-8-80 remained unaltered in the two Acts amending No 164 (No's. 194 and 517), and yet a specific commencement date for the two terms was also expressly included in these two Acts.

A more difficult question is whether in Act No. 164, the Legislature, although it did not say so, intended the term to begin on July 1, 1980, the date the Court was originally to become operational. This difficulty is compounded by the common sense idea that a term of office perhaps ought not begin to run until the office itself has been implemented or is functional. With this in mind, we have searched particularly for legal authority which creates an exception to the general rule that the term begins upon election if the office is to become operational at some future time. However, as will be seen, the scant authority found, strongly suggests that the general rule be applied even in these situations. Moreover, virtually every applicable rule of statutory construction when applied here, indicates that the date of election is the one the General Assembly originally intended in Act No. 164. As Act No. 164 does not express a specific commencement date, such as July 1, 1980, to conclude that is the date intended, we must speculate that, because the General Assembly did not intend the Court to begin operations until July 1, 1980, it also intended that date as the beginning of the term of office of judges as well. It should first be noted however that the General Assembly clearly anticipated in Act No. 164 that elections for judges to the Court might well be held in 1979, rather than 1980, because this was provided for in § 14-8-540. Indeed, all five Judges were elected to the Court on August 16, 1979, almost a year in advance of the operational date. Moreover, it must be presumed that the General Assembly was aware of the South Carolina authority regarding commencement of terms upon the date of election, absent a statutory declaration otherwise. See, Graham v. State, 109 S.C. 301, 96 S.E. 138 (1918). Since we cannot assume an oversight on the part of the Legislature, the fact that no commencement date was expressed, suggests that the General Assembly originally intended the date of the judge's election to serve as the commencement date.

***5** This conclusion is strongly supported by the fact that immediately prior to the election of judges on August 16, 1979, Act. No. 164 was amended by Act. No. 194 to include an express provision setting the commencement date of terms as July 1, 1980. The Supreme Court of South Carolina has recognized that

It will be presumed that the Legislature in adopting an amendment to a statute intended to make some change in the law. (Emphasis added).

Vernon v. Harleysville Mut. Cas. Co., 244 S.C. 152, 157, 135 S.E.2d 84 (1964), citing 82 C.J.S., Statutes, § 384 b(2), p. 904 (1953). A significant change in the phraseology of the statutes amended 'is generally to be regarded as a legislative declaration that the law so amended did not as originally framed embrace the amended provisions . . .'. 82 C.J.S., supra. Thus, again assuming that Act No. 194 can be considered to show legislative intent, ante at 5, we must presume that Act No. 164, as originally enacted did not by implication establish July 1, 1980 as the date of commencement, but instead by operation of law began the terms upon election of the Judges. No subjective intent or motive should be attributed to the legislative action. 82 C.J.S., Statutes, supra at § 354. Only upon the amendment of the Statute with passage of Act No. 194, was the date of July 1, 1980 then established as a commencement date, but Act No. 194 was subsequently declared unconstitutional in Maner v. Maner, supra.

Maner itself further supports our interpretation of Act No. 164. For, while State ex rel. Riley v. Martin had recognized that the Court, pursuant to the Act, would not become operational until July 1, 1980, Maner subsequently held that by the Act 'the offices of the Judges of the Court of Appeals came into existence upon creation of the Court on July 1, 1979.' 296 S.E.2d, supra at 537. According to Maner, Seat One was not vacant; that office had been properly filled by the General Assembly, pursuant to Act No. 164. Moreover, Maner makes it clear that the filling of the office had occurred with the judge's election, regardless of when the Court became operational. This analysis in Maner is entirely consistent with the South Carolina cases discussed above which conclude that the selection of an officer by election of appointment constitutes the 'essence of his appointment' or the filling of the office, and therefore, unless otherwise stated his term begins to run from that date. Macoy v. Curtis, supra. See also, Smith v. City Council, supra at 320 (the office 'is filled either by election or appointment.').

People ex rel. Sullivan v. Powell, 35 Ill.2d 19, 217 N.E.2d 806 (1966) offers further support for this conclusion and represents authority contrary to the idea that the term does not begin until the Court became operational. In Powell, a new Court was created and Judges were elected on December 20, 1960. Under Illinois law, newly created courts could not be deemed finally organized until the judges and clerk were qualified and commissioned, which in that case was a later date. It was argued that the terms did not begin until the Court was finally established or operational. The Illinois Supreme Court rejected the argument:

***6** . . . The fixing of the date of final organization of the Court [created prior to July 7, 1960] . . . to coincide with the commissioning of the Court officers is not significant in fixing the beginning of the officers' terms. The term of the person holding an office may vary from the term of the office. 'The term of the office of a judge . . . not being otherwise fixed, begins and ends on the date of election . . ..'

217 N.E.2d, supra at 808.

The Court's reasoning in Powell is almost identical to that employed by the South Carolina cases such as Macoy v. Curtis. It would appear that whether the issue is taking the oath or finally organizing the Court, these formalities have little to do with commencement of the term of office, established by operation of law. While we could speculate that the General Assembly may have subjectively intended that the terms not begin until July 1, 1980, when the Court was scheduled to begin operation, Act No. 164 does not so state, and we cannot read into the statute something which is not within the manifest intention of the Legislature or gathered from the statute itself. Laird v. Nationwide Ins. Co., 243 S.C. 388, 134 S.E.2d 206 (1964). Therefore, we must conclude that Act No. 164 of 1979 should be interpreted as commencing the term of the Judge elected to Seat No. One on August 16, 1979. Pursuant to § 14-8-20(a) and (b), the term of the judge elected to that seat runs for four years and until the successor is elected and qualifies. Absent any changes made by R-159 of 1983, the term of the Judge elected to Seat No. One thus would end after August 16, 1983 and when his successor is elected by the General Assembly and qualifies.

It must be emphasized, however, the conclusion that the term began on August 16, 1979 is not free from doubt. There is some authority that where '. . . the office is newly created, the term begins when the office is first filled.' 67 C.J.S., Officers, § 68; and generally an office is not considered filled until the office is accepted by taking the oath. 67 C.J.S., supra at § 45, p. 317. One case, Garotto v. McManus, (Neb.), 177 N.W.2d 570 (1970) in fact appears to hold that, with respect to newly created offices, the term begins upon qualification. This appears to be the minority rule however, and where the question has been considered by other courts in the context of newly created offices, it has been concluded that the term begins upon appointment or election. See, e.g., People ex rel. Sullivan v. Powell, supra; State v. Amos, (Fla.), 133 So. 623 (1931); State ex rel. Davis v. Collins, (Fla.), 134 So. 595 (1931); State v. Dixon, supra.

Moreover, in Macoy v. Curtis, supra, the South Carolina Supreme Court expressly considered the California case, Brodie v. Campbell, 17 Cal. 21, one of the few cases holding that the term begins upon qualification. The Court distinguished the case, but noted that even if 'in all respects analogous', Brodie would not be followed, because the South Carolina rule was that the term commences upon election. 14 S.C., supra at 380. Thus, the South Carolina cases consider the office filled upon election or appointment. Macoy v. Curtis, supra; Maner v. Maner, supra; and this office has therefore concluded that '[t]he law is clear that the person taking the initial term of office will hold the office from the date of his appointment.' Op. Atty. Gen. (September 21, 1979). [2]

***7** A second problem is the effect if any had by Act No.'s 194 of 1979 and 517 of 1980. It will be recalled that Act No. 194 of 1979 set the commencement date at July 1, 1980 and No. 517 delayed the date to October 1, 1981 or upon implementation of the Court by the General Assembly, whichever came later. Two years later both statutes were declared unconstitutional in Maner v. Maner.

The general rule is that when a statute is declared unconstitutional, it has the 'effect of rendering such statute null and void . . . as though it had never been passed . . .'. 16 C.J.S., Constitutional Law, § 101, p. 471. There is authority in South Carolina adopting this rule. See, Wofford and Converse Colleges v. Burnett, 209 S.C. 92, 39 S.E.2d 155 (1946). However, it is also recognized that there are numerous exceptions to the rule, and depending upon the circumstances of each case, an unconstitutional statute may be merely voidable rather than void ab initio. 16 C.J.S., supra at 472 et seq. The doctrine is discussed thoroughly in Perkins v. Eskridge (Md.), 366 A.2d 21 (1976). On several occasions, the Supreme Court of South Carolina has refused to give retroactive effect to a declaration of unconstitutionality, depending on such factors as disrupting the court system, effect upon finalized judgments or equitable considerations. Herndon v. Moore, 18 S.C. 339 (1882); State ex rel. McLeod v. Colleton County, 266 S.C. 279, 223 S.E.2d 166 (1976); Crow v. McAlpine, —— S.C. ——, 285 S.E.2d 356 (1979). Also important is whether the declaration of unconstitutionality involves 'a new constitutional rule.' Beaver v. State, 271 S.C. 381, 247 S.E.2d 448 (1978). Obviously, if Maner's declaration of unconstitutionality with respect to Act No.'s 194 of 1979 and 517 of 1980 were applied only prospectively, such would have considerable effect upon a determination of when the term commenced since Act No. 517 of 1980 was enacted two years prior to Maner. In short, a prospective application of Maner could have the effect of giving the judge elected to Seat No. One virtually a full two year term.

However, this office is not a court and it would be presumptuous, if not impossible to accurately predict whether a court would apply Maner prospectively or retroactively. The issue must be decided on a case by case basis. We can only note that the issue presents a serious question and makes any conclusion that the term began on August 16, 1979 as not free from doubt. [3] Nevertheless, we must assume the general rule; thus, No.'s 194 and 517 were void ab initio and should not be considered as having altered the commencement date.

The remaining question is R-159's effect on this conclusion. As noted, we do not believe R-159 created a new Court; thus Seat No. One was not abolished by the new Act. Op. Atty. Gen., July 6, 1983. Instead, R-159 simply amended Act No. 164, effective upon the Governor's signature. R-159, in § 14-8-20(a) provides:

***8** The terms of office of the judges of the Court shall begin on September 1, 1983, and shall expire on June 30, 1985, and on which date the Court shall cease to exist.

However, subsection (d) of the same section states:
Notwithstanding the above provisions of this section . . . nothing herein shall be construed as diminishing or enlarging the term or the judges elected to the Court of Appeals on August 16, 1979.

Full effect must be given both these provisions, Hartford Acc. & Indemnity Co. v. Lindsay, 273 S.C. 79, 254 S.E.2d 301 (1979). Reading them together, we must conclude that R-159, despite § 14-8-20(a)'s declaration that the terms began on September 1, 1983, intended that the judge elected to Seat No. One has whatever term remained to him by operation of law. In short, R-159 in effect incorporated Act No. 164's provisions relating to that particular term of office. As noted, even though R-159 did not mention a specific commencement date the thus we have concluded that date was August 16, 1979, No. 164 did state the term was four years and until a successor was elected and qualified. Since it is well recognized that such holdover language makes the holdover period 'as much a part of the judge's term as the period within the statutory term', 48 C.J.S., Judges, § 25, p. 574 (1981); People v. Sweitzer, supra, we conclude that R-159 intended that the judge elected to Seat No. One on August 16, 1979 should serve until after August 16, 1983, and until a successor is elected and qualified. [4]

CONCLUSION

It is the Opinion of this Office that the term of the person elected to Seat No. One of the Court of Appeals in 1979 expires after August 16, 1983 at such time as his successor is elected by the General Assembly and qualifies.

With kindest personal regards, I am
Sincerely yours,

T. Travis Medlock
Attorney General of South Carolina

Footnotes

1 Section 2-1-100 provides:
No Senator or Representative shall, during the time for which he was elected, be elected to the General Assembly or appointed by any executive authority to any civil office under the dominion of this State which shall have been created during the time for which such Senator or Representative was elected to serve in the General Assembly.

2 Maner v. Maner, by indicating that Seat One had been filled is strongly supportive of the idea that the term of that Seat was already running when the case was decided in October, 1982.

3 We should also note that the General Assembly, in its adjournment resolution of June, 1983, did not set an election for Seat One on July 27, 1983. This arguably is a legislative construction of Act No's 164 and R-159 to the effect that the term of the judge elected to Seat One will not soon expire. We cannot give the resolution that degree of weight, however, the resolution may well have been adopted for any number of reasons about which we should not speculate or draw any conclusions from. Moreover, it could be viewed simply as a recognition that the term does expire after August 16, 1983 and at such time as a successor is elected and qualified.

4 Under any view of the question of holdover, the result is the same. Pursuant to R-159, in contrast to Act No. 164, the only method for filling vacancies is 'in the manner of original election', by the General Assembly. Thus, it is evident that even if the judge's term were viewed as completely ending on August 16, 1979, the judge would hold over until such time as the office could be properly filled pursuant to R-159, election by the General Assembly. See, C.J.S. Officers, § 71, p. 380.

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