ALAN WILSON
ATTORNEY GENERAL

August 4, 2015

The Honorable Gerald Malloy
Senator, District No. 29
P.O. Box 142
Columbia, SC 29202

Dear Senator Malloy:

You have asked our opinion regarding the constitutionality of S.C. Code Ann. Section 2-19-20(C), which prohibits any person from concurrently seeking more than one judicial vacancy. By way of background, you state the following:

> [a]s you may be aware, the Judicial Merit Selection Commission has opened filing for numerous judicial vacancies in South Carolina. One limitation on filing for those vacancies is contained in South Carolina Code Section 2-19-20(C) that provides that "[n]o person may concurrently seek more than one judicial vacancy." My opinion request to you is whether that statutory provision is constitutional.
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> After the Huff decision, the constitution was amended to add Article V § 27 to our state's Constitution. Specifically, the constitution now provides for a Judicial Merit Selection Commission to be established by law and to consider the qualifications of candidates for judicial office. It also provides additional qualifications for judicial offices. Article V § 27 specifically enumerates those cases in which someone is ineligible to be elected to a judicial office by providing that "[n]o person may be elected to these judicial positions unless he or she has been found qualified by the commission." It also addresses the ruling in Huff by delineating when a sitting member of the General Assembly is eligible for election, and also when a member of the Judicial Merit Selection Commission would be eligible for a judicial position elected by the legislature. It appears that the Constitution was amended to allow three new specific qualifications for judicial office.

> The question now, I believe, is whether Section 2-19-20(C) is an additional qualification for judicial office to those contained in the Constitution. It seems that a person who files for one office is barred from offering for another judicial office being screened concurrently. If that section does serve as a bar to applying for and being elected to a judicial office and it is not contained in the new qualifications contained in Article V § 27, then can the bar to running for a second office stand?
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> I note that Section 2-19-20(C) was passed in 1999 subsequent to the addition of Article V § 27 and that the drafters of that section should have been aware of both the Huff ruling and the amendment to the Constitution in response thereto. However, I cannot find in that constitutional provision where it provides for the General Assembly to add to that provision statutorily save for specifying the length of time that a member of the legislature and Commission must be out of office before offering for a judicial office.
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> Based on the information above, I am asking whether a provision banning a candidate from applying for more than one judicial office at one time would be considered a qualification for the additional judicial office. And if it is a qualification, is that provision constitutional. Filing is currently open and applications are currently being accepted for numerous judicial vacancies with a filing deadline of August 10, 2015. Since this issue is of significant importance to the upcoming elections and could impact filing decisions of candidates, I would appreciate a response as soon as possible. Thank you for your prompt attention to this request and for your service to the State of South Carolina.

Law/Analysis

Section 2-19-20(C) provides in pertinent part:

> [t]he Judicial Merit Selection Commission shall announce and publicize vacancies and forthcoming vacancies in the administrative law judge division, on the family court, circuit court, Court of Appeals, and Supreme Court. A person who desires to be considered for nomination as justice or judge may make application to the Commission. No person may concurrently seek more than on judicial vacancy. The Commission shall announce the names of those persons who have applied.

(emphasis added). Your question is whether the statutory requirement that, concurrently, one can seek only one judicial vacancy constitutes the imposition by the General Assembly of additional qualifications upon those judges whose offices are created by the Constitution. For

the reasons that follow, it is our opinion that such application would constitute additional qualifications.

In reviewing the constitutionality of a statute, this Office has long recognized the presumption that any statute enacted by the General Assembly is valid. As we have summarized,

> . . . We must bear in mind that "[s]tatutes are presumed to be constitutional and will not be found to violate the Constitution unless their invalidity is proven beyond a reasonable doubt." Bergstrom v. Palmetto Health Alliance, 358 S.C. 388, 398, 596 S.E.2d 42, 47 (2004). Moreover, only a court, not this Office, may declare legislation unconstitutional. Op. S.C. Att'y Gen., June 22, 2007. Thus, regardless of our findings with regard to the constitutionality of these legislative acts, they remain valid and enforceable unless and until a Court rules otherwise.

Op. S.C. Att'y Gen., 2014 WL 1398593 (March 12, 2014). With these principles in mind, we turn to the question of whether a court would deem § 2-19-20(C)'s prohibition upon a person seeking more than one judicial vacancy at a time may be constitutionally applied to candidates for judgeships created by the Constitution.

We first set forth the case authority in South Carolina regarding the validity of the Legislature adding qualifications to a constitutional office. In Joint Legislative Committee for Judicial Screening v. Huff, et al., 320 S.C. 241, 244, 464 S.E.2d 324, 324, 326 (1995), our Supreme Court recognized that

> "The offices of the Supreme Court Justices and Circuit Court judges are creatures of the Constitution, and the General Assembly may not add conditions to those specified in the Constitution for election. . . ." (quoting McLure v. McElroy, 211 S.C. 106, 118, 44 S.E.2d 101 (1947)).

The Court also noted in Huff that "[t]he Court of Appeals became a constitutional court in 1985. S.C. Const. article V, § 7." 320 S.C. at 246, n. 2, 464 S.E.2d at 326, n. 2.

In Huff, the Supreme Court held, that § 2-11-100, could not constitutionally be applied to members seeking election to the Court of Appeals or Circuit Court. That statute prohibited appointment or election of senators or representatives to an office created during the term of service in the General Assembly. The Court referenced two provisions of the Constitution which are relevant in determining whether legislative conditions placed upon one's candidacy for office amount to the imposition of additional qualifications in cases in which the office is a constitutionally created one. According to the Court in Huff,

> [t]wo sections of the South Carolina Constitution are clearly applicable and limit the legislature's power. Article I, § 5 provides: "All elections shall be

> free and open, and every inhabitant of this State possessing the qualifications provided for in this Constitution shall have an equal right to elect officers and be elected to fill public office." Article XVII, § 1A, provides that "[e]very qualified elector is eligible to any office to be voted for, unless disqualified by age, as prescribed in this Constitution."

With that in mind, the Huff Court held that:

> . . . § 2-1-100 cannot constitutionally be applied to members of the General Assembly seeking election to constitutional offices. Accordingly, this Section does not apply to members seeking election to Court of Appeals and circuit court since it would provide an additional qualification. However, it does apply to members seeking election to family court.

320 S.C. at 245, 464 S.E.2d at 326. Huff did not, however, define what constituted an "additional qualification" placed upon a constitutional office.

As stated above, Huff cited McLure v. McElroy. In McLure, the Court spoke extensively with respect to the issue of the constitutionality of the Legislature's providing additional qualifications for a constitutional office. In McLure, the Court cited many authorities, noting that the Annotation contained at 47 A.L.R. 481 stated:

> "With but one exception, the courts have recognized the general rule that when a State Constitution names the qualifications for a constitutional office, the legislature has no authority to prescribe additional qualifications, or to remove any of the requirements provided for in the Constitution, unless that instrument expressly or by implication, gives the legislature such power."

211 S.C. at 118, 44 S.E.2d at 107. The Court added that "[t]he distinction between offices of constitutional origin and those created by statute as to their control by the Legislature has been repeatedly recognized, and the rule has been often announced that an office created by legislative action is wholly within the control of the Legislature which can declare the manner of filling it, now, when and by whom the incumbent shall be elected or appointed and to change from time to time the mode of election or appointment." 211 S.C at 116, 44 S.E.2d at 107.

McLure also referenced Throop on Public Officers, § 73, at 82, and other legal treatises as follows:

> Throop on Public Officers, in Section 73, page 82, suggests as proper a very broad rule, as follows: 'The general rule is that the legislature has full power to prescribe qualifications for holding office, in addition to those prescribed by the Constitution, if any, provided they are reasonable, and not opposed to the constitutional provisions, or to the spirit of the Constitution. Thus, it is

> believed that there can be no valid constitutional objection to the statutes, which are now very common, prescribing special qualifications for particular offices as that the person filling the same shall be a lawyer, a physician, an architect, or otherwise skilled in the particular duties devolved upon him by the office.' Mechum, in his work on Public Offices and Officers includes, (at page 22, 23, Secs.. 64-67) that where constitutional provisions for eligibility to public office are exclusive in their nature, they are of course supreme and it is not within the power of the legislature to supersede, evade or alter them; but where the Constitution is silent, the legislature may speak; and if there are constitutional provisions not construed as exclusive, the legislature may add such other qualifications as are reasonable and proper.

211 S.C. at 117-118, 44 S.E.2d at 107. Further, in McClure, the Court addressed a relevant South Carolina case:

> [t]he only former case from this court touching on the question seems to be State v. Williams, 20 S.C. 12, in which the eligibility of the successful candidate for Clerk of Court of Berkely County was under fire. He had been appointed Supervisor of Registration under a statute which provided ineligibility for any other office during the term of the appointment. It was decided that his term as Supervisor of Registration had expired for lack of Senate confirmation before his election as Clerk, but the court held that regardless of such he was not disqualified to become clerk by the statutory provision. The matter arose under the Constitution of 1868 and Sec. 31 of Art. I of that document (the same as Sec. 10 of Art. I of the current constitution) was quoted as follows: 'All elections shall be free and open, and every inhabitant of this commonwealth, possessing qualifications provided for in this Constitution, shall have an equal right to elect officers and be elected to fill public office.' Also cited was Sec. 7 of Art. VIII, of which there is no true counterpart in the present constitution, as follows: 'Every person entitled to vote at any election shall be eligible to any office which now is or hereafter shall be elective by the people in the county where he shall have resided sixty days, ' etc.
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> The court held briefly, without citation of decision or text authority, that the existing appointment of the defendant as supervisor of registration was not a disability (for the office of Clerk) under the constitution and could not be made so by valid act of the legislature for such an attempt was violative of the constitution, particularly the last above quoted provision (Art. VIII, Sec. 7). The decision is distinguished from this case for it involved eligibility for election to a constitutional office, that is, the office of Clerk of Court which was created by Art. IV, Sec. 27, Constitution of 1868. No mention was made of statutory offices. Moreover, there is some difference in the constitutions of

> 1868 and 1895 (now in force), as has been pointed out; and there was another approved ground for the result of the decision, as will be more fully seen by reference to the report of it.

211 S.C. at 118-119, 44 S.E.2d at 107-108. The facts in the McLure case, however, did not deal with a constitutional office, but instead, one created by the Legislature.

Moreover, in State ex rel. Riley v. Martin, 274 S.C. 106, 118, 262 S.E.2d 404, 410 (1980), the Court again commented upon the imposition of additional statutory qualifications with respect to a constitutional office:

> [t]he offices of Supreme Court Justices and Circuit Court Judges are creatures of the Constitution, and the General Assembly may not add conditions to those specified in the Constitution for election.

(emphasis added). As noted above, when Martin was decided, the Court of Appeals was a statutory court, but became a constitutional court in 1985. Thus, the Martin Court made it clear, by using the words "for election," that additional conditions placed upon such "election" of judges, created by the Constitution, could not be constitutionally imposed.

Most recently, the Court decided Anderson v. South Carolina Election Comm., 397 S.C. 551, 725 S.E.2d 704 (2012) which also addressed this question. There, individuals seeking nomination by party primary to be a candidate for office were required by statute to file a Statement of Economic Interest ("SEI") at the same time and with the same official in conjunction with the filing of a Statement of Intention of Candidacy ("SIC"). Failure to file the SEI resulted in the Court removing candidates from the ballot in accordance with the statute (§ 8-13-1356). In Anderson, the Court addressed the argument that the SEI statute imposed additional qualifications upon members of the General Assembly, a constitutionally created office, but in that instance, found that such requirement did not impose an additional qualification:

> [t]he Republican Party contends that § 8-13-1356 impermissibly adds qualifications for an individual to serve in the General Assembly. In particular, it argues that S.C. Const. art. III, § 7 sets forth the only qualifications for service, and § 8-13-1356, therefore, cannot raise the bar. However, § 8-13-1356 does not alter the qualifications for one to serve as a legislator. Instead, it merely delineates filing requirements to appear on a ballot. We, therefore, reject this argument.

397 S.C. at 558, 725 S.E.2d at 707.

We have also addressed in our opinion the question of whether additional qualifications may be imposed upon a constitutional office. For example, in Op. S.C. Att'y Gen., 2009 WL

2406411 (July 21, 2009), we referenced McLure v. McElroy, supra by noting that article I, Section 5 – which provides that "every inhabitant possessing the qualifications provided for in this Constitution shall have an equal right ... to be elected to fill public office" – only "applies to constitutionally created offices." Thus, we found that "[r]equiring council members to resign in order to run for mayor essentially places an additional qualification on a candidate for mayor," but that the office of mayor is not a constitutionally created office with qualifications therefor provided by the Constitution.

Moreover, in Op. S.C. Att'y Gen., 1997 WL 208025 (March 21, 1997), we opined that a bill prohibiting persons who lose in a primary or run-off election from serving in an office as a result of write-in votes was "probably . . . unconstitutional [because] it has the potential to impose additional requirements on candidates for federal office, an unconstitutional practice." We added, citing authorities, that "[d]isqualifying an otherwise qualified winner of a general election contest because he previously lost in a primary has the historically impermissible effect of adding the qualification that any primary entered must be won."

And, in Op. S.C. Att'y Gen., 1964 WL 8279, Op. no. 1648 (March 24, 1964), former Attorney General McLeod wrote:

> [t]he Constitution of South Carolina declares that all persons possessing the qualifications of an elector shall be eligible to office. This has been held to apply to offices created under the Constitution and with respect to such offices the Legislature may not impose qualifications additional to those laid down in the Constitution. Accordingly, a member of the House of Representatives, a Circuit Judge, or other officer whose qualifications are prescribed by the Constitution, could not be compelled to withdraw from office in order to become a candidate to succeed himself or to be a candidate for another elective office. The same conclusions are applicable to one who occupies a federal office such as a Congressman or Senator. The courts reach this conclusion upon the premise that, to compel withdrawal form office as a condition to running for another office, is an added qualification which the Constitution of the State or of the United States does not impose.

With that background in mind, we turn now to the text of Art. V, § 27, which was approved by the people in 1996, and ratified in 1997. The Judicial Merit Screening Commission ("JMSC") was established pursuant thereto in order to mandate that all judgeships "which are filled by election of the General Assembly" be considered by the JMSC. Segars-Andrews v. Judicial Merit Selection Commission, 387 S.C 109, 691 S.E.2d 453 (2010). Article V, § 27 provides as follows:

> In addition to the qualifications for circuit court and court of appeals judges and Supreme Court justices contained in this article, the General Assembly by law shall establish a Judicial Merit Selection Commission to consider the

> qualifications and fitness of candidates for all judicial positions on these courts and other courts of the State which are filled by election of the General Assembly. The General Assembly must elect the judges and justices from among the nominees of the Commission to fill a vacancy on these courts.
>
> No person may be elected to these judicial positions unless he or she has been found qualified by the Commission. Before a sitting member of the General Assembly may submit an application with the Commission for his nomination to a judicial office, and before the Commission may accept or consider such an application, the member of the General Assembly must first resign his office and been out of office for a period established by law. Before a member of the Commission may submit an application with the Commission for his nomination to a judicial office, and before the Commission may accept or consider such an application, the member of the Commission must not have been a member of the Commission for a period to be established by law. (emphasis added).

In Segars-Andrews, supra, our Supreme Court rejected the argument that a member of the General Assembly could not serve as a member of the JMSC, as required by § 2-19-10. Section 2-19-10 mandates that the JMSC must consist of five members appointed by the Speaker of the House, and three members appointed by the Chairman of Senate Judiciary and two members appointed by the President Pro Tempore of the Senate. Further, § 2-19-10 requires that certain of these appointees must be "serving members of the General Assembly."

In concluding that Art. V, § 27 was not contravened by § 2-19-10's placement of sitting members of the General Assembly on the JMSC, the Court recognized the rule that a "'legislative act will not be declared unconstitutional unless its repugnance to the Constitution is clear and beyond a reasonable doubt.'" 387 S.C. at 118, quoting Joytime Distribs. And Amusement Co. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). Moreover, the Court adhered to the "settled principle that the provisions of the State Constitution are not a grant but a limitation of legislative power." Id. at 119.

Further, the Segars-Andrews Court was "not persuaded by Respondents' argument that Act No. 391, 1996 S.C. Acts 2393, which added Chapter 19 to Title 2, including Section 2-19-10(B), was ratified on the same date as the joint resolution proposing the article V, § 27 amendment to the Constitution." According to the Court in Segars-Andrews,

> Respondents invite us to glean the meaning of the constitutional amendment from enabling legislation prepared prior to the vote on the constitutional amendment. We decline the invitation. While Respondents' argument may be technically correct, it is simply not realistic to give legal weight to the fiction that the electorate is sufficiently aware of enabling legislation at the time it votes on a constitutional amendment. The Constitution belongs to the

> people of South Carolina, not the Legislature. Our decision rests solely on the unambiguous language in article V, § 27, which contains no indication that the people intended to foreclose legislative membership on JMSC.

Id. The Court, in upholding the requirements of § 2-19-10 as not inconsistent with Art. V, § 27, went on to say that "[s]imply stated, the Legislature has plenary authority over the political aspects of its constitutional authority in the election or judges." Id. at 120. See also, South Carolina Pub. Int. Foundation v. Judicial Merit Selection Commission, 369 S.C. 139, 143, 632 S.E.2d 277, 279 (2006) ["The South Carolina Constitution requires the General Assembly to establish a commission charged with the duty of determining if a person is qualified to be elected as a judge."]

Thus, the question here is whether such "plenary authority" also applies to enactment of § 2-19-20. This provision was enacted at the same time as § 2-19-10, upheld by the Court as constitutional in Segars –Andrews. The issue before us is whether the people, in approving Art. V, § 27, intended to limit one's candidacy for a judgeship to only one judicial position at a time; or put another way, whether the qualifications for circuit judge, members of the Court of Appeals or Supreme Court Justices are exclusively set forth in Article V of the Constitution such that § 2-19-20 would constitute additional qualifications upon those judges created by the Constitution?

As the Court in Segars-Andrews did, we examine the text of Art. V, § 27 itself. The framers made clear that "[i]n addition to the qualifications" for circuit judge, Court of Appeals judge and Supreme Court Justice, "contained in this article," the Judicial Merit Selection Commission must "consider the qualifications and fitness for all judicial candidates on these courts and on other courts of this State which are filled by election of the General Assembly." Art. V, § 15 sets the qualifications for these judgeships (citizen of the United States and this State at time of election; at least thirty-two years of age; licensed attorney at law for at least eight years; resident of the State for five years next preceding election). No mention is made in Art. V, § 27 of those so qualified may not run for concurrently. Indeed, Art. V, § 27 expressly states that "the General Assembly must elect the judges and justices from among the nominees of the commission to fill a vacancy on those courts." The constitutional provision also requires that "[n]o person may be elected to these judicial positions unless he or she has been found qualified by the Commission." Moreover, the provision mandates resignation and a waiting period (established by the General Assembly) by a sitting member of the General Assembly may apply for and the Commission may accept an application for a judgeship. Likewise, a Commission member must not have been a member of the Commission for a period "to be established by law" before he or she may seek a judgeship. Each of these requirements is set forth in the Constitution itself, in Art. V, § 27 and all such requirements strongly indicate that the General Assembly may not add additional qualifications, such as prohibiting a candidate from seeking more than one judgeship at one time. Thus, Art. V, § 27 sets forth a number of additional qualifications for judgeships beyond those enumerated elsewhere in Article V.

Specifically, Art. V, § 27 appears to state that qualifications for circuit judge, Judge of the Court of Appeals and Justice of the Supreme Court are "contained in this article," meaning Article V. Moreover, Art. V, § 27 painstakingly designates the role of the General Assembly in certain specific areas, clearly implying it has no role beyond that in establishing qualifications for these judicial offices. As our Supreme Court has recognized many times, the rule of "expressio unius exclusio alterius" meaning the enumeration of particular things excludes the idea of something else not mentioned. Little v. Town of Conway, 171 S.C. 27, 171 S.E. 447, 448 (1933). See also Hodges v. Rainey, 341 S.C. 79, 86-87, 533 S.E.2d 578, 582 (2000). Thus, in our opinion, the text of Article V, § 27 supports the general rule that the General Assembly may not add qualifications to the offices of Circuit Judge, Court of Appeals Judge, or Supreme Court Justice in the form of § 2-19-20(C).

You also make the point in your letter that "Section 2-19-20(C) was passed in 1999 subsequent to the addition of Article V, § 27 and that the drafters of that section should have been aware of both the Huff ruling and the amendment to the Constitution in response thereto." While this is undoubtedly true, we believe the text of Art. V, § 27 does not leave room for additional qualifications. Only recently, our Supreme Court stated that "a statute cannot alter the 'qualifications' for office when the Constitution has established them unless the Constitution itself authorizes such alteration." Tempel v. South Carolina State Election Commission, 400 S.C. 374, 384, 735 S.E.2d 453, 458 (2012).

Conclusion

Section 2-19-20(C), if challenged in court, would be entitled to a presumption of validity. Only a court, and not this Office, may conclude that § 2-19-20(C) is violative of or limited by the Constitution. A court would afford this statute, like any other, a presumption of constitutionality, such that its unconstitutionality must be demonstrated beyond a reasonable doubt.

That said, we believe a court would likely conclude that § 2-19-20(C) may not be constitutionally applied to those judgeships which are of constitutional origin, i.e. circuit court judges and members of the Court of Appeals and Supreme Court. It is likely that application of § 2-19-20(C) to these constitutional positions would be deemed by a court as imposing additional qualifications upon those offices. Our Supreme Court has recognized, time and again, that the Legislature cannot create additional qualifications for a constitutionally created office beyond those contained in the Constitution, unless the Constitution so authorizes.

In our view, the Constitution has not so authorized here. Art. V, § 27 expressly states that "in addition to" the qualifications "contained in" Art. V, certain other qualifications are imposed by Art. V, § 27. Those are: (1) the General Assembly must elect judges and justices from among the nominees of the Commission; (2) no person may be elected unless found qualified by the Commission; (3) requirements placed upon sitting legislators in order to be elected to a judicial office and (4) requirements placed upon members of the Commission before he or she may be elected as a judge. The text of Art. V, § 27 gives specific duties to the General

Assembly in certain areas, but not in the area of prohibiting a person from running for more than one judicial position at a time.

The enumeration of these express qualifications and authorization to the General Assembly in Art. V, § 27 clearly indicates an intent by the people that no others may be imposed. Even though the Legislature may have been aware of Art. V, § 27, as well as South Carolina case law, when it enacted § 2-19-20(C), it cannot alter the terms and conditions of Art V, § 27, approved by the people. Moreover, while we recognize that Anderson may have reached a different conclusion, upholding the imposition of additional filing requirements upon candidates (SEI), we do not believe the Anderson case in any way alters the express terms of Art. V, § 27, providing that "in addition to" the qualifications "contained in" Article V, certain additional qualifications are imposed by § 27 with respect to those judgeships created by the Constitution (circuit court judges, Court of Appeals judges and Supreme Court justices.) These words must be given their plain meaning -- that the qualifications for these judgeships are clearly limited by Article V and that the Legislature may not go beyond.

Accordingly, it is our opinion that a court would likely conclude that § 2-19-20(C) may not be applied to candidates for these constitutionally created judgeships. Of course, statutory judgeships may be regulated by the General Assembly, including by means of application of § 2-19-20(C).

Sincerely,

Robert D. Cook
Solicitor General

RC/jl