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Constitutional Law

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CONSTITUTIONAL LAW

I. SEPARATION OF POWERS

The separation of powers doctrine of the federal constitution¹ does not apply to the states.² While fourteenth amendment due process requires separation of powers in some limited circumstances,³ the states are generally free to devise systems of government most responsive to their needs. South Carolina has centralized its fiscal affairs in the South Carolina State Budget and Control Board.⁴ This body, which serves administrative, quasi-legislative and executive functions, is comprised of the governor, the State treasurer, the comptroller general, the chairman of the Senate Finance Committee, and the chairman of the Ways and Means Committee of the House of Representatives.⁵ All members serve in *ex officio* capacities.

In *State ex. rel. McLeod v. Edwards*⁶ South Carolina's attorney general invoked the original jurisdiction of the South Carolina Supreme Court⁷ to challenge the constitutionality of the Board's composition. He argued that the membership of the two legislators on the Board violated State constitutional provisions that mandate separation of powers⁸ and vest executive authority solely with the Governor.⁹ The court rejected these arguments, relying on three similar holdings made within the past decade.¹⁰ Although *McLeod* did little to clarify this ambiguous area of

1. U.S. CONST. art. I, § 1, § 6, cl. 2; art. II, § 1; art. III, § 1.

2. See *Dreyer v. Illinois*, 187 U.S. 71 (1902).

3. See, e.g., *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927).

4. S.C. CODE ANN. §§ 1-11-10 to -210 (1976 & Cum. Supp. 1977). The Board is divided into three divisions: the Finance Division, the Purchasing and Property Division and the Division of Personnel Administration. *Id.* § 1-11-20.

5. *Id.* § 1-11-10.

6. 269 S.C. 75, 236 S.E.2d 406 (1977).

7. S.C. CONST. art. V, §§ 4, 5; S.C. CODE ANN. § 14-3-310 (1976); S.C. SUP. CT. R. 20, § 1.

8. S.C. CONST. art. I, § 8 provides: "In the government of this State, the legislative, executive and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the function of one of said departments shall assume or discharge the duties of any other."

9. S.C. CONST. art. IV, § 1: "The supreme executive authority of this state shall be vested in a Chief Magistrate, who shall be styled 'The Governor of the State of South Carolina.'"

10. *Harper v. Schooler*, 258 S.C. 486, 189 S.E.2d 284 (1972); *Mims v. McNair*, 252 S.C. 64, 165 S.E.2d 355 (1969); *Elliot v. McNair*, 250 S.C. 75, 156 S.E.2d 421 (1967).

State law,¹¹ the result reached is consistent with early decisions of the court and expands the permissible scope of legislative activity in areas traditionally reserved for executive action.

South Carolina's constitution contains four provisions requiring the separation of powers: two proscriptions against dual office holding,¹² a general separation of powers statement,¹³ and a clause vesting executive authority solely in the governor.¹⁴ All have been used to attack legislators' positions on governing bodies.

An early South Carolina decision dealing with whether a legislator's service on quasi-executive administrative bodies violated the State's separation of powers requirement was *State ex rel. Ray v. Blease*.¹⁵ *Blease* was a challenge to the composition of the State Sinking Fund Commission. The Commission, comprised of the attorney general, the comptroller general, the State treasurer, and the chairman of the House Ways and Means Committee, undertook to redeem stocks and bonds by issuing new debentures. The plaintiff argued that the legislator's service on the Commission violated the proscriptions against dual office holding. The court held that the legislator's position was not an office, but a device that allowed him to discharge the duties "merely incident" to his office.¹⁶ This holding has developed into the test that still prevails in evaluating the permissible scope of legislative involvement in what is otherwise an executive function. Legislators may engage in activities if they are incidental to the duties of their legislative offices.

Two additional cases in the *Blease* line applied this test in challenges involving the other separation of powers provisions of the constitution and began to specify the types of activities that are "merely incident" to the legislative function. *Spartanburg County v. Miller*¹⁷ was a county treasurer's suit claiming that legislation authorizing the county delegation to direct an audit of county offices constituted legislative usurpation of executive

11. The cases cited in note 10, *supra*, are virtually useless in attempting to understand the considerations presented by South Carolina's doctrine of separation of powers. In all three cases, the court summarily decided the issue of the constitutionality of the Budget and Control Board's composition and focused on the challenges to the validity of various bond acts.

12. S.C. CONST. art. VI, § 3; art. XVII, § 1A.

13. *Id.* art. I, § 8.

14. *Id.* art. IV, § 1.

15. 95 S.C. 403, 79 S.E. 247 (1913).

16. *Id.* at 411, 79 S.E. at 251.

17. 135 S.C. 348, 132 S.E. 673 (1924).

powers that the constitution reserves for the governor. Although the court recognized that the legislature's function is to create rather than administer laws, it upheld the enactment. The court stated that the legislature may "engage in the discharge of such functions, to the extent, and to the extent only, that their performance is reasonably incidental to the full and effective exercise of its legislative powers."¹⁸ The court reasoned that because the legislature could lawfully pass statutes establishing county governments, investigation of the implementation of these statutes was a permissible activity.¹⁹ Investigation, then, is an activity incidental to legislative duties.

*Bramlette v. Stringer*²⁰ followed *Miller*. In *Bramlette* an act granting a county delegation discretion in financing and supervising new road building was held to be a violation of the general separation of powers provision of the State constitution. Although the court found that the discretionary purchasing power vested in the delegation was not incidental to the members' duties as legislators, it indicated that under some circumstances legislative supervision falls within the *Blease* test.²¹ *Miller* and *Bramlette*, then, expanded the applicability of the *Blease* test by employing it under the constitutional provisions mandating separation of powers and outlining the executive function. These cases also specified two activities, investigation and supervision, that the court regards as incidental to office.

Language in a third case, *Ashmore v. Greater Greenville Sewer District*,²² indicated that *ex officio* office holding can be a permissible legislative activity. At issue in *Ashmore* was an act creating a Board of Trustees whose duties were to build, maintain and manage a city auditorium. The Board was comprised of a labor representative chosen by the county delegation, the county senator, the city mayor, the chairman of the County Board Commission, the presidents of the local service and business organizations, and a member of the county delegation. Although the court found that the legislation impermissibly intruded upon executive powers, it stated that "[a] governing Board . . . might be properly created by appointment *ex officio* of officers of the separate governmental units whose duties of their respective officers

18. *Id.* at 357, 132 S.E. at 677.

19. *Id.*

20. 186 S.C. 134, 195 S.E. 257 (1938).

21. *Id.* at 149, 195 S.E. at 264.

22. 211 S.C. 77, 44 S.E.2d 88 (1947).

[sic] have reasonable relation to their function *ex officio*.”²³

In *McLeod* the court relied on two factors to uphold the Board’s composition. First, the legislature’s ratification of the identical separation of powers provision in 1970, as part of the constitutional amendment process²⁴ and subsequent to two identical holdings on the issue,²⁵ “expressed contentment of the General Assembly, not merely with the separation of powers principle as originally expressed, but with those words as then judicially construed by the Supreme Court of South Carolina.”²⁶ Some case law supports this means of supporting a decision.²⁷ Second, putting the Board’s legislative members in a minority position ensured that they could not exert excess power or influence over the Board’s activities.²⁸ Their participation on the Board, the court said, was reasonably incidental to their official duties because it was a “cooperative effort [of] making their expertise available to the executive.”²⁹ This language added an additional factor, exchange of expertise, to the range of permissible legislative activity in the executive realm.³⁰

Whether the functions of the legislative members of the State Budget and Control Board truly comport with the *Blease* test must be examined. To determine whether a “cooperative effort” is indeed incidental to these legislators’ offices, an inquiry into the duties of the chairmen of the Senate Finance Committee and House Ways and Means Committee is necessary. These positions are not created by statute, nor are their functions set forth therein. The General Assembly, however, requires these officers to serve in an *ex officio* capacity as members of a number of governmental bodies. These are, in addition to the State Budget and Control Board, the Judicial Council,³¹ the Disaster Preparedness Advisory Council,³² the legislative Audit Council,³³ and the

23. *Id.* at 92, 44 S.E.2d at 95.

24. 1970 S.C. Acts, 2684.

25. See note 11, *supra*.

26. 269 S.C. at 81, 236 S.E.2d at 408.

27. See, e.g., *Eisner v. Macomber*, 252 U.S. 189 (1920); *City of Orangeburg v. Southern Ry. Co.*, 45 F. Supp. 734 (D.S.C. 1942), *aff’d*, 134 F.2d 890 (4th Cir. 1943).

28. 269 S.C. at 82-83, 236 S.E.2d at 408-09.

29. *Id.* at 83, 236 S.E.2d at 409.

30. No precedent for this factor was present in South Carolina case law; instead, the court looked to the law of another jurisdiction and relied on *State ex rel. Schneider v. Bennett*, 218 Kan. 285, 547 P.2d 786 (1976).

31. S.C. CODE ANN. §§ 14-27-20 to -30 (1976).

32. S.C. CODE ANN. § 25-5-30 (1976).

33. *Id.* § 2-15-10.

Reorganization Commission.³⁴ These appointments indicate that the chairmen often function as liaisons between the legislative and other branches of government. Their specialized functions distinguish *McLeod* from *Ashmore*, in which members of the legislature at large assumed broad duties that had only a territorial relationship to their offices. The chairmen's "cooperative efforts" as liaisons seem reasonably related to the duties of their offices. Clearly, then, the South Carolina Budget and Control Board's composition does not offend the separation of powers doctrine as developed in South Carolina.

II. NONATTORNEY MAGISTRATES

In *State v. Duncan*³⁵ the South Carolina Supreme Court rejected a convicted criminal defendant's challenge to the use of nonattorney magistrates on equal protection³⁶ and due process grounds. This latter issue is a difficult one that has been a source of controversy in other jurisdictions. Although most holdings favor the constitutionality of the practice³⁷ California strongly dissents from the majority view.³⁸ The question is close because federal constitutional law can be read to support both views.

When a defendant's liberty is at stake, a good argument exists favoring trial before a judicial officer with a legal education. Partly because of the complexity of modern criminal procedure and substantive law,³⁹ criminal defendants already possess a sixth amendment right to representation by counsel at every critical stage of the criminal process where their substantial rights may be affected.⁴⁰ If counsel is necessary to safeguard a defendant's right to a fair trial, a person equally knowledgeable

34. *Id.* § 1-19-60.

35. 269 S.C. 510, 238 S.E.2d 205 (1977).

36. Defendant argued that he was denied equal protection because some counties in South Carolina have attorney magistrates. Because this situation was not created by state action, the defendant did not have a claim on this ground. *Id.* at 520, 238 S.E.2d at 209.

37. *See, e.g.*, *Crouch v. Justice of Peace Court*, 7 Ariz. App. 460, 440 P.2d 1000 (1968); *State v. Boone*, 218 Kan. 482, 543 P.2d 945 (1975); *Ditty v. Hampton*, 90 S.W.2d 772 (Ky. 1972); *Tsiosdia v. Rainaldi*, 89 N.M. 70, 547 P.2d 553 (1976); *In Re Application of Hewitt*, 81 Misc.2d 202, 365 N.Y.S.2d 760 (County Ct. 1975); *State v. Pfeiffer*, 25 Or. App. 45, 548 P.2d 174 (Ct. App. 1976); *Ex parte Ross*, 522 S.W.2d 214 (Tex. 1975); *Thomas v. Justice Court*, 538 P.2d 42 (Wyo. 1975).

38. *See Gordon v. Justice Court*, 12 Cal. 3d 323, 525 P.2d 72, 115 Cal. Rptr. 632 (1974), *cert. denied*, 420 U.S. 938 (1975).

39. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932).

40. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

in the law should be required to hear arguments, admit evidence and rule on questions of law. Otherwise, a defendant's rights to a fair trial and representation by counsel become meaningless.⁴¹ The danger is not one to be corrected by appellate courts on a case-by-case basis because a reasonable probability of prejudice is arguably present whenever a criminal defendant is tried by a nonattorney magistrate.⁴² Any procedure that can reasonably be expected to result in prejudice must yield to the fourteenth amendment's guarantee of due process of law.⁴³

The argument against a blanket requirement that all magistrates hearing criminal cases be attorneys is based on the proposition that fundamental fairness, not absolute perfection in the criminal process,⁴⁴ is the essence of due process.⁴⁵ A fair and impartial trial, then, fulfills the due process requirement. The United States Supreme Court upheld a procedure that allows nonattorneys to determine the existence of fourth amendment probable cause and to issue arrest warrants, as long as the nonattorney is neutral and detached.⁴⁶ Hence, to ensure that fair procedures are observed in criminal proceedings only impartiality is required, not a legal education.⁴⁷ Because due process safeguards are provided, a conviction by a nonattorney magistrate should be overturned on due process grounds only when it appears that the defendant was actually prejudiced by the magistrate's lack of legal acumen.⁴⁸

The United States Supreme Court issued a narrow holding on the issue of the constitutionality of nonattorney magistrates in *North v. Russell*.⁴⁹ *North* was an appeal from a sentence imposed by a nonattorney judge presiding over a Kentucky police court. State procedure provided as a matter of right for a trial de novo before an attorney judge. Although appellant-defendant argued that any trial before a nonattorney judge violates due process, the Court confined its holding to the context of Kentucky procedure.

41. *Gordon v. Justice Court*, 12 Cal. 3d 323, 525 P.2d 72, 115 Cal. Rptr. 632 (1974), cert. denied, 420 U.S. 938 (1975).

42. *Id.*

43. *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

44. *Beck v. Washington*, 369 U.S. 541 (1962); *State v. Boone*, 218 Kan. 482, 543 P.2d 945 (1975); *Tsiosdia v. Rainaldi*, 89 N.M. 70, 547 P.2d 553 (1976).

45. *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

46. *Shadwick v. City of Tampa*, 407 U.S. 345 (1972).

47. *Ditty v. Hampton*, 490 S.W.2d 772 (Ky. 1972), appeal dismissed, 414 U.S. 885 (1973).

48. *State v. Duncan*, 269 S.C. 510, 238 S.E.2d 205 (1977).

49. *North v. Russell*, 427 U.S. 328 (1976).

The right to a trial de novo and defendant's entitlement to bail while awaiting the new trial were the factors that persuaded the Court to uphold the Kentucky system.⁵⁰ It also noted that prior decisions concerning nonattorney judicial officers emphasized impartiality rather than level of education.⁵¹

The South Carolina Supreme Court was faced in *Duncan* with the issue expressly left undecided in *North*: the constitutionality of trial before a nonattorney magistrate when the defendant has no right to a trial de novo before an attorney judge.⁵² The court was persuaded by the arguments favoring use of these judicial officers. Three factors were highly relevant to the decision. First, under South Carolina procedure, a criminal defendant convicted in magistrate's court has a right to a two-step appeal to the circuit⁵³ and State supreme courts.⁵⁴ Second, the South Carolina Office of Court Administration provides magistrates with opportunities for legal education.⁵⁵ Third, magistrates in this state are paid fixed salaries; they receive none of the fees collected by their courts.⁵⁶ The court believed that these safeguards assured that due process is accorded every criminal defendant convicted in a South Carolina magistrate's court.

The factors appear convincing when abstractly stated. When viewed in the context of actual South Carolina practice and procedure, however, whether the factors truly afford due process safeguards to a criminal defendant tried in a nonattorney magistrate's court is unclear. Although varied educational opportunities are available to nonattorney magistrates, they are required to attend only a single five-day orientation and a yearly two-day conference.⁵⁷ Whether this limited instruction suffices to properly prepare nonattorneys to deal with thorny issues of constitutional law is questionable. Moreover, evidence indicates that despite the existence of training programs in many states, most nonattorney magistrates simply are not knowledgeable on rudimentary legal issues.⁵⁸

50. *Id.* at 335.

51. *Id.* at 337.

52. 269 S.C. 510, 238 S.E.2d 205 (1977).

53. S.C. CODE ANN. § 18-3-70 (1976).

54. *Id.* § 18-9-10.

55. 269 S.C. at 518, 238 S.E.2d at 208.

56. *Id.* at 516, 238 S.E.2d at 207. See S.C. CODE ANN. §§ 22-7-30 to -40 (1976).

57. Interview with John C. Patrick, III, Staff Attorney with the South Carolina Office of Court Administration (Nov. 13, 1978). Voluntary short courses on various topics are also offered to magistrates.

58. *North v. Russell*, 427 U.S. 328, 341 n.1, 343 n.3 (1976) (Stewart, J., dissenting).

The court in *Duncan* found that any errors at trial could be corrected by South Carolina's two-step appeal procedure. Two complications arise, however. First is the question of the kind of record available on appeal. Although magistrates' courts are not courts of record, the judge is required to reduce the testimony to writing.⁵⁹ Apparently this is often done from memory.⁶⁰ Given a lay magistrate's possible lack of legal knowledge and inevitable human fallibility, an incomplete appellate record is a distinct possibility. Second, the untrained lay magistrate may neglect to inform the criminal defendant of basic constitutional rights, specifically the right to counsel. This was defendant Duncan's contention.⁶¹ If a defendant is not represented by counsel and the magistrate does not inform him of his right of appeal, he is likely to remain ignorant of that right. If appeal is not properly taken, defendant will be unable to challenge his conviction by petitioning for post-conviction relief. The South Carolina Uniform Post Conviction Procedure Act⁶² has been construed to disallow attack of a conviction on the ground that the defendant was not informed of his right to appeal.⁶³

The position taken in California seems to be better than that of the South Carolina court. *Duncan* held that an actual prejudice standard applied to this issue.⁶⁴ The court seems to have been influenced by the now-discredited notion that due process claims against the states should always be evaluated on a case-by-case basis.⁶⁵ No standard criteria can be prospectively applied when denials of due process are tested on the facts of particular cases. The United States Supreme Court has recently affirmed the principle that safeguards must be imposed whenever a reasonable probability of unfair proceedings is present.⁶⁶ This reasonable probability almost certainly exists under current South Carolina practice. Although *North* notes that diverse state practices should not be voided simply because they differ from a

59. S.C. CODE ANN. § 22-3-790 (1976).

60. See report of the Honorable Nathan H. Brown, Magistrate for Georgetown County, Record at 10-12, *State v. Duncan*, 269 S.C. 510, 238 S.E.2d 205 (1977).

61. 269 S.C. at 512, 238 S.E.2d at 206.

62. S.C. CODE ANN. §§ 17-27-10 to -120 (1976).

63. *Simmons v. State*, 264 S.C. 217, 215 S.E.2d 883 (1975). For a full discussion of *Simmons*, see *Criminal Law, Annual Survey of South Carolina Law*, 28 S.C.L. Rev. 290, 302-07 (1976).

64. 269 S.C. at 520, 238 S.E.2d at 209.

65. See, e.g., *Betts v. Brady*, 315 U.S. 791 (1942).

66. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

practice that may be more desirable,⁶⁷ South Carolina's use of nonattorney magistrates probably exceeds constitutional limits.

Elizabeth C. Lipson

67. 427 U.S. 328, 338 n.6 (1976).