South Carolina Law Review

Volume 36 | Issue 1 Article 5

Fall 1984

Constitutional Law

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CONSTITUTIONAL LAW

I. INTERPRETATION OF THE SOUTH CAROLINA CONSTITUTION'S SEPARATION OF POWERS CLAUSE

In *State v. Whittington*,[1] the South Carolina Supreme Court interpreted the South Carolina Constitution's separation of powers clause. The court struck down a statute which permitted certain hearings to be held, at the arrestee's option, before either a magistrate or an administrative official. This decision articulates an approach to the separation of powers doctrine apparently based on uncompromising doctrinal purity.

The case arose when respondent Whittington refused to submit to a breathalyzer test following his arrest for driving under the influence of alcohol. Under South Carolina law,[2] a mo-

1. 278 S.C. 661, 301 S.E.2d 134 (1983).

2. Section 56-5-2950 provides in part:

(a) Any person who operates a motor vehicle upon the public highways of this State shall be deemed to have given consent to a chemical test of his breath for the purpose of determining the alcoholic content of his blood if arrested for any offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of intoxicating liquor. . . . The arresting officer shall not administer the test and no such test shall be administered unless the defendant has been informed that he does not have to take the test but that his privilege to drive will be suspended or denied if he refuses to submit to the test.

. . .

(c) Any person who is unconscious or otherwise in a condition rendering him incapable of refusal, shall be deemed not to have withdrawn the consent provided by subsection (a) of this section.

(d) If a person under arrest refuses, upon the request of a law enforcement officer, to submit to a chemical test as provided in subsection (a) of this section, none shall be given, but the State Highway Department, upon the receipt of a sworn report of the law-enforcement officer that the arrested person had been driving upon the public highways of the State while under the influence of intoxicating liquor and that the person had refused to submit to the test and such refusal was witnessed and certified to on the sworn report by a person, other than the arresting officer, trained . . . to administer such test, shall suspend his license or permit to drive, or any nonresident operating privilege for a period of ninety days. . . .

(e) Upon suspending the license or permit to drive or nonresident operating privilege of any person, or upon determining that the issuance of a license or permit shall be denied to the person, . . . the South Carolina Highway Depart-

torist using the state's highways is presumed to consent to breathalyzer tests, and failure to cooperate ordinarily results in suspension of the driver's license for ninety days. However, a driver is entitled to a hearing if he believes there is some reason that suspension is not justified.[3] The 1980 amendment to the implied consent statute[4] provided an option to appear before a magistrate rather than before an official of the South Carolina Highway Department. Whittington chose to appear before a magistrate, who determined that suspension of the license was not warranted because Whittington was incapable of withholding consent at the time of his arrest.[5] On the State's appeal the lower court, applying rules from judicial proceedings, found that the appeal was not timely.[6] The State then appealed to the South Carolina Supreme Court, arguing that the proceeding

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ment shall immediately notify the person in writing and upon his request shall afford him an opportunity for a hearing as provided by § 56-1-370, except that the scope of such a hearing for the purposes of this section shall be limited to the issues of whether the person was placed under arrest, whether the person had been informed that he did not have to take the test but that his privilege to drive would be suspended or denied if he refused to submit to the test, and whether he refused to submit to the test upon request of the officer. The South Carolina Highway Department shall order that the suspension or determination that there should be a denial of issuance either be rescinded or sustained. . . .

S.C. CODE ANN. § 56-5-2950 (1976).

3. *Id.*, subsection (e). Another section of the code provides in pertinent part:

The licensee may, within ten days after notice of suspension, cancellation or revocation, except in cases where the suspension, cancellation or revocation is made mandatory upon the Department, request in writing a review and upon receipt of such request the Department shall afford him a review. . . . Such review may be held by a duly authorized agent of the Department, *except that all hearings held pursuant to subsection (e) of § 56-5-2950 may be held, in the discretion of the licensee, before a magistrate in the county where the licensee was arrested unless the Department and the licensee agree that such hearing may be held before a magistrate in some other county.* Upon such review *or order of the magistrate* the Department shall either rescind its order of suspension, cancellation or revocation or, good cause appearing therefor *or upon order of the magistrate,* may continue, modify or extend the suspension, cancellation or revocation of such license.

S.C. CODE ANN. § 56-1-370 (Supp. 1983) (emphasis added).

4. Act of June 11, 1980, No. 501, 1980 S.C. Acts 1470 added the language italicized at *supra* note 3.

5. 278 S.C. at 662, 301 S.E.2d at 134. The basis for this determination and its relation to the narrow grounds for a hearing set out by the statute, *supra* at note 2, are not clear from the record and were not addressed on appeal.

6. Record at 5-7.

before the magistrate was an unconstitutional violation of the separation of powers doctrine.[7]

The supreme court agreed that the 1980 amendment violated article I, section 8 of the South Carolina Constitution, which states, "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 functions of one of said departments shall assume or discharge the duties of any other."[8] In support of its conclusion, the court cited *State ex rel. McLeod v. Yonce* [9] as holding that any exercise of power by the judiciary unconnected with the administration of the judicial function violates the separation of powers doctrine. Further, because *State ex rel. McLeod v. Crowe*[10] held that magistrates are part of the unified judicial system, the court reasoned that magistrates may not exercise any nonjudicial powers. The proceeding at issue in *Whittington* was administrative rather than judicial in nature because under the statutory scheme, control over driver's licenses is an administrative function vested in the Highway Department.[11] Despite their administrative nature, implied consent hearings, through the amendment, had been singled out for magisterial involvement. Thus, the court concluded, that portion of the 1980 amendment which provided the option of a judicial proceeding was invalid as an unconstitutional assignment of administrative power to the

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7. 278 S.C. at 662, 301 S.E.2d at 135. *See also* Brief of Appellant at 4-13. The respondent did not argue the merits of the constitutional claim, but instead argued the procedural issue, which the lower court found determinative. The respondent maintained that the constitutional question was improperly presented on appeal because it was not litigated in the lower court. Brief of Respondent at 1-2. Respondent's arguments were not discussed in the supreme court opinion.

8. S.C. CONST. art. I, § 8. For a brief history of the creation of this clause in reaction to the executive branch assumption of judicial powers during the period of martial law which followed the Civil War, see *Annual Survey of South Carolina Law, Constitutional Law: Separation of Powers* [hereinafter cited as *Separation of Powers*], 33 S.C.L. REV. 25, 26 n. 39 (1981). The inclusion of this clause in the Bill of Rights in the 1868 constitution indicates its original conception as a guarantee of individual liberty. *See* 1 J. WOODRUFF, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA 339-41 (1968).

9. 274 S.C. 81, 261 S.E.2d 303 (1979).

10. 272 S.C. 41, 249 S.E.2d 772 (1978).

11. Title 56 of S.C. CODE ANN. (1976 & Supp. 1983) regulates not only motor vehicle and driver licensing but also traffic and tickets, insurance, damage appraisal, manufacturers, dealers, motor vehicle title, and driver training.

judiciary. Because it was severable from the judicial remedy, the administrative hearing portion of the amendment was allowed to stand.[12]

The phrasing of the opinion suggests that the decision was the inevitable result of the doctrine of stare decisis; however, a reading of the court's prior discussions of the separation of powers doctrine suggests that the case could have gone the other way without deviation from precedent. Even considered individually, the authorities relied upon in this case would hardly dictate the result reached in *Whittington* since each is distinguishable. *Yonce* struck down a statute requiring the Chief Justice of the South Carolina Supreme Court to appoint circuit court judges to preside over certain contested utility rate hearings before the South Carolina Public Service Commission. That opinion seems to have been based partly upon findings that "a circuit judge is a powerful member and an important voice within the judicial department" and that "the Public Service Commission is an important arm of the executive branch" dealing with "matters involving millions of dollars."[13] The *Whittington* court declined to accept the invitation to flexibility held out by *Yonce's* dicta recognizing "some overlapping of authority . . . by reason of the minimal degree of involvement."[14] Apparently the court attached no significance to the particular function at issue in *Whittington.* This procedure involved lower-level judicial officials' exercise of a duty, historically part of an administrative scheme, which did not require special administrative expertise but called upon common judicial skills of applying law to facts and adjudicating important personal and community interests. Had the court chosen to distinguish *Whittington* from *Yonce* by the level of the duty involved, *Crowe's* bare holding that magistrates are part of the unified judicial system would have been less relevant.

Instead of applying and extending *Yonce* and *Crowe*, the court could have noted the line of cases sustaining the constitutionality of the State Budget and Control Board,[15] which illus-

12. 278 S.C. at 663, 301 S.E.2d at 136. The effect of the ruling was to strike the italicized language in the statute set out at *supra* note 3.

13. 274 S.C. at 84, 261 S.E.2d at 305.

14. *Id.* at 88, 261 S.E.2d at 306. *See Separation of Powers, supra* note 8.

15. State *ex rel.* McLeod v. Edwards, 269 S.C. 75, 236 S.E.2d 406 (1977)(reasoning

trated the possibilities for interbranch cooperation within constitutional limits. In those cases, the court found no separation of powers violation in an administrative body's exercise of broad financial powers, despite *ex officio* membership of two state legislators. This arrangement was determined to represent not a usurpation of executive power, but a reasonable effort at cooperation, making the special expertise of legislators available to the executive branch.[16] The procedure at issue in *Whittington*, however, is distinguishable from the Budget and Control Board cases in that the hearing remedy involved not a joint effort but the duplication of one type of proceeding in two different branches of government. It is possible that the court in *Whittington* is signaling an emphasis on doctrinal purity, closing the door to the flexibility suggested in *Yonce* and realized in the Budget and Control Board cases. However, it seems more likely that the court was influenced by the unique fact pattern in *Whittington*: the comprehensive nature of the original administrative scheme, the legislature's unusual decision to provide otherwise identical remedies in two separate branches of government, or the combination of these and other factors.

There is perhaps a significant basis in policy for concern over this interbranch duplication of remedies—the desire to prevent direct competition between coordinate branches of government. Had the procedure at issue in *Whittington* been allowed to stand, opportunities might have opened for "forum shopping" between two branches of government. Thus, a person would have a choice between an administrative official or a local magistrate for the more "favorable" hearing. This type of activity presents a potential evil beyond simple dual involvement of two branches of government in one remedy. The most damaging effect would be encouragement of ill will between two branches of government, a result which the court would be justifiably anxious to avoid.[17]

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upholding the Board's constitutionality set forth for the first time); 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); Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967).

16. State *ex rel.* McLeod v. Edwards, 269 S.C. 75, 84, 236 S.E.2d 406, 409 (1977).

17. One can only speculate about whether this competition had in fact arisen in implied consent hearings and whether disparate results had been reached by the two forums. The record and briefs do not indicate that the court in *Whittington* dealt with the actual working of the dual procedures.

From this perspective, *Whittington* is arguably consistent with the Budget and Control Board holdings and with the *Yonce* dicta, since these decisions manifest an inclination toward doctrinal purity tempered by pragmatic considerations. The emphasis in *Whittington* on the statutory scheme, the consideration in *Yonce* of the extent of interbranch overlap, and the dicta in a Budget and Control Board case about upsetting a "vital part of the machinery of the government of this State"[18] collectively indicate a court aware of and sensitive to practical realities and to the traditional allocation of governmental powers in the state. Given the inherent difficulty of drawing lines according to abstract notions of legislative, executive, and judicial powers,[19] this sensitivity is well-placed. It is also a longstanding part of constitutional jurisprudence in South Carolina.[20]

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18. State *ex rel.* McLeod v. Edwards, 269 S.C. 75, 84, 236 S.E.2d 406, 409 (1977). This opinion also notes that the legislature, judiciary, executive, and the people had long accepted the Board's legitimacy. Oddly, the court chose to articulate its rationale for the first time at a time when there was little need for justification. This decision came after some ten years of unbroken (albeit unexplained) approval of the Board by the South Carolina Supreme Court and after a major constitutional revision had reenacted the separation of powers clause without modification.

19. Nixon v. Administrator of General Services, 408 F. Supp. 321, 341-42 (D.D.C. 1976) indicates standards for drawing these lines.

> The modern view of separation of powers rejects . . . metaphysical abstractions . . . and reverts instead to a more pragmatic, flexible, functional approach. . . .
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> We . . . decline to embrace . . . [the] archaic view of the separation of powers as requiring three airtight departments of government. . . . Rather, given the tension between the independence and interdependence of the three branches, separation of powers questions are to be resolved by analyzing with particularity the extent to which an act by one branch prevents another from performing its assigned duties and disrupts the balance among the coordinate departments of government.

What is said of federal separation of powers is also applicable to state governmental operations, which have also become increasingly complex as the evolution of a modern economy and social structure has resulted in demands which stretch traditional categories of government to their limits. Administrative law and regulation stand as clear examples of the blurring of traditional distinctions, since a single entity may engage in traditionally legislative policy determination and then impose sanctions in a quasi-judicial process. A parallel development has occurred in the legislative and judicial branches, directed toward allowing both self-management and "oversight" of various activities of other governmental branches.

20. *See, e.g.*, Carolina Glass Co. v. State, 87 S.C. 270, 291, 69 S.E. 391, 399 (1910) ("the Constitution assumed the existence of an organized society, and when it vested the judicial power in the Courts, it had reference to the judicial power then existing, and such as the people then understood to be vested in and exercised by the Courts").

Where does all this leave legislators and prospective litigants of cases involving the separation of powers? At the very least, *Whittington* suggests extreme caution to legislators who seek to provide alternative administrative and judicial remedies. The court is likely to strike down statutory arrangements which allow parties to choose freely between remedies which are identical aside from their locations in different governmental branches. Beyond this, the court has provided little guidance to litigants as to how it will approach future separation of powers cases. *Whittington* leaves the court room to distinguish future cases, should it choose to do so. Unless the South Carolina Supreme Court shows definitively that it intends to apply *Whittington's* strict language to all types of governmental overlap, emphasizing form without regard to substance, litigants should be prepared to argue in terms of practicality as well as doctrine.

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