



ALAN WILSON
ATTORNEY GENERAL

March 26, 2018

The Hon. Joshua A. Putnam
South Carolina House of Representatives
PO Box 11867
Columbia, SC 29211

Dear Rep. Putnam:

We received your opinion request dated March 1, 2018 seeking an opinion on certain questions related to the election of county sheriffs, including a question regarding the constitutionality of certain county-specific provisions in Act No. 971, 1966 S.C. Acts 2340. The following opinion sets out our understanding of your question and our response.

Issue (as quoted from your letter):

I have reviewed S.C. Code § 23-11-10. My understanding of its provisions [is] that sheriffs in all South Carolina counties must be elected every four years. Also, after reading it, I believe that these sheriff elections must be held in a presidential election year as a part of that general election.

It has come to my attention that 1966 Act 971 purports to enact exceptions to this state standard schedule for sheriff and coroner elections in Berkley, Cherokee, and Hampton counties. It also appears [to] use a local law to attempt to enact exceptions for sheriff elections in Beaufort and Kershaw counties ". . . at every *alternate general election*, reckoning from the year 1958." [Emphasis Added]

I respectfully request an opinion from your office regarding SC Const. art. III, § 34 and art. V, § 24; SC Code Ann. § 23-11-10; and 1966 Act 971. Our state constitution and state statute establishes a standard for electing all sheriffs in our state. The 1966 Act purports to use a local law to modify a state standard election schedule.

Specifically, I need to know:

FIRST:

Does SC Code § 23-11-10 set a standard sheriff elections schedule that is applicable to all 46 counties in our state?

SECOND:

Is 1966 Act 971 an unconstitutional attempt to enact local law to modify this state standard schedule for sheriff elections particularly since that Act does not appear to specifically amend SC Code § 23-11-10 in any way? As part of this portion of your opinion, if you believe that this Act is constitutional, can your office, in that event, determine if any such sheriff's election schedules exception was given to Allendale or Chesterfield counties?

Law/Analysis:

It is the opinion of this Office that a court would hold that the standard schedule for sheriff elections set out in Section 23-11-10 is subject to certain exceptions, which include the exceptions set out in Act 971, 1966 S.C. Acts 2340. A court most likely would also hold Section 21-11-10 does not control the schedule of county sheriff elections in Allendale and Chesterfield counties where S.C. Const. art V, § 24 establishes that sheriffs hold their offices for a term of four years, notwithstanding an election held according to a different schedule. We believe that a court would conclude that the answer to these questions is controlled by the jurisprudence set out in the South Carolina Supreme Court case *Brown v. Moseley*, and would uphold exceptions to Section 23-11-10 where necessary to preserve four-year terms of elected sheriffs until such a time as the same Supreme Court directs otherwise.

As you cite in your request letter, Article V, § 24 of the South Carolina Constitution provides:

There shall be elected in each county by the electors thereof a clerk of the circuit court, a sheriff, and a coroner; and in each judicial circuit a solicitor shall be elected by the electors thereof. All of these officers shall serve for terms of four years and until their successors are elected and qualify. The General Assembly shall provide by law for their duties and compensation.

S.C. Const. art V, § 24 (emphasis added). You also cite our state Constitution's prohibition on special legislation, which is found in Article III, § 34, and reads in relevant part:

The General Assembly of this State shall not enact local or special laws concerning any of the following subjects or for any of the following purposes, to wit:

...

IX. In all other cases, where a general law can be made applicable, no special law shall be enacted

X. The General Assembly shall forthwith enact general laws concerning said subjects for said purposes, which shall be uniform in their operations: Provided, That nothing contained in this section shall prohibit the General Assembly from enacting special provisions in general laws.

S.C. Const. art. III, § 34.

Having set out these constitutional provisions, we turn now to the legislative acts referred to in your letter. Section 23-11-10 of the South Carolina Code reads in full: "There shall be an election for sheriff held in each county at the general election in each presidential election year." S.C. Code Ann. § 23-11-10 (2007). On its face, this appears to set a standard schedule for all county sheriff elections. *Id.* However, you note that a portion of an uncodified act of the General Assembly, Act 971 of 1966 (hereinafter "Act 971"), expressly sets out exceptions to this standard schedule in subsection (3): "[t]he clerk of Court in Berkeley and Cherokee Counties, the sheriff and coroner in Berkeley, Cherokee and Hampton Counties and the sheriff in Beaufort and Kershaw counties shall be elected at every alternate general election, reckoning from the year 1958." Act 971, 1966 S.C. Acts 2340, 2341. For the purposes of this opinion, we will refer to this as the "exceptional schedule." As of 1966, this provision was an exception to the general rule found earlier in the same act providing that county sheriffs be elected "at every alternate general election, reckoning from the year 1960," which aligns with the presidential election year schedule set out in the current version of Section 23-11-10. *Id.* We note also that Act 971 was amended in 1968 to add "the supervisor and superintendent of education in Berkeley County" to the exceptional schedule set out in subsection (3) of Act 971. Act 1082, 1968 S.C. Acts 2557.

The 1966 comment to subsection (3) of Act 971, which sets out the exceptional schedule, reads: "No change from Section 23-304 [of the 1962 Code of Laws]. This section has been held to be constitutional and not special legislation. There have been dissents on this part." *Id.* In other words, legislation setting out an exceptional schedule for calculations for the dates of county sheriff elections predates the 1966 Act, and our Supreme Court has upheld such legislation before. *See Brown v. Moseley*, 222 S.C. 1, 71 S.E.2d 591 (1952) & *discussion infra*.

It appears that the holding referred to in the reporter's comment is found in the 1952 case of *Brown v. Moseley*, which decided a challenge to the right of a sheriff to hold office beyond 1952 under prior acts of the General Assembly and upheld the exceptional schedule carried

forward by the 1966 Act in a 4-1 decision. *Brown v. Moseley*, 222 S.C. 1, 71 S.E.2d 591 (1952). We quote at length from the *Brown* opinion here for its historical explanation of the legislation:

The Constitution of 1895, Art. V, Sec. 30, provides for the election of a sheriff by each county for the term of four years, and until their successors are elected and qualify, which duplicated Art. IV, sec. 30, of the Constitution of 1868, so was not new. The Constitution of 1895 also directed in Art. VI, sec. 5, the codification of the laws and there was first published thereunder the Code of 1902. It contained as Sec. 253 the following:

'There shall be a general election for the following County officers, to wit: County Supervisors and County Superintendents of Education, held in each County at every general election for members of the House of Representatives; and for the election of Sheriff, Coroner and Clerk of the Court of Common Pleas, at every alternate general election, reckoning from the year one thousand eight hundred and eighty-eight, except as to the Counties of Berkeley and Cherokee, and except for Sheriff and Coroner in Hampton County.

'The Probate Judge in every County, and the Clerk of Court in Berkeley and Cherokee Counties, and the Sheriff and Coroner in Berkeley, Cherokee and Hampton Counties, shall be elected at every alternate general election, reckoning from the [year] one thousand eight hundred and ninety.'

And as Sec. 820, the following:

'There shall be an election for Sheriff held in each County, Except in the Counties of Berkeley, Cherokee and Hampton, at the general election in 1904, and on the same day in every fourth year thereafter. In the Counties excepted the election shall be in 1902.'

This was merely carrying forward the statutes which were in effect prior to the adoption of the Constitution of 1895 as is seen from the following excerpts from the Revised Statutes of 1893:

[omitted]

Subsequent codifiers have faithfully followed this seeming statutory duplication in the subsequent decennial codes and that now current (of 1942) contains as part of sec. 2350.

Id. at 3-4, 71 S.E.2d at 591-92. In summary, statutory exceptions to standard schedules for the election of certain county officials have existed even before the adoption of the current South Carolina Constitution. *Id.* The reasons for some of these exceptions have been lost to history, but others are known, as described by the Court in *Brown*:

Beaufort County became an exception to the schedule provided by those statutes for the most of the counties by amendment of the last quoted section, 3473, by Act No. 92 of 1933, 38 Stat. 97. There are doubtless sound, historical reasons for the exception of the named counties from the majority schedule but they have not come to light in the argument or consideration of this case. They may well be similar to that which came to exist with respect to Kershaw County.

The records in the office of the Secretary of State show that Kershaw County first departed from the general schedule of the statute in 1918. A vacancy occurred after the election in 1916 of W. W. Huckabee and I. C. Hough was appointed to fill the vacancy early in 1917, but gave up the office in 1918 when Grover C. Welsh was elected. Quadrennial elections have since been held, reckoning from 1918.

Id. at 5-6, 71 S.E.2d at 592. In other words, at some point years prior to the decision in *Brown*, a county deviated from the standard sheriff election schedule – apparently without challenge¹ – and the ensuing quadrennial cycle was thereafter recognized by an act of the General Assembly. *See id.*; *cf.* Act 971, 1966 S.C. Acts 2340. Even at the time of the *Brown* case, however, it appeared that not all exceptional county election cycles had been recognized in this way:

It also appears from the records in the office of the Secretary of State that Allendale and Chesterfield Counties have been electing their respective sheriffs in the same years as Kershaw County and the other counties which are excepted from the general schedule of the statutes, although no amendatory act has been found which is applicable to Allendale and Chesterfield.

Id. (emphasis added). After reciting this history, the Supreme Court in *Brown* turned to the merits of the claim. We quote at length again from the *Brown* opinion for its reasoning and conclusion:

¹ This point is not expressed in the *Brown* opinion, but the Court does distinguish certain unnamed precedent cited by the plaintiff on the grounds that the "the cited cases were instituted immediately following attempted elections in admittedly off-years, and are thereby further distinguishable on their facts from the unique case in hand." *Brown v. Moseley*, 222 S.C. 1, 6, 71 S.E.2d 591, 593 (1952). For an example of such a case see *Cannon v. Sligh*, 170 S.C. 45, 169 S.E. 712 (1933).

The defendant's term of office depends upon the term of his predecessor, DeBruhl, who was last elected in 1950, and in contemplation of the constitution was entitled to a four-year term. . . . Significantly and of controlling importance in this case, the present constitution does not specify a beginning election year for the four-year terms. That was left to the General Assembly, doubtless because of the existing lack of uniformity in this respect among the counties, as shown by the statutes and codes which have been cited above.

...

Plaintiff's contention is for a literal application of the old statutes as they were before the amendment of 1952, whereby it is claimed that the sheriff's election in 1918 in Kershaw County and at every four-year interval since should be declared null and void. However, such drastic adjudication, if otherwise necessary, which is not conceded, is obviated by the terms of the Act of 1952. In apparent recognition of that, plaintiff has attacked the constitutionality of the act, principally upon the ground that it violates sub-section IX of section 34 of Art. III of the Constitution of 1895, which prohibits a special law where a general law can be made applicable. However, the immediately following provision of the constitution contains the proviso, within which the act plainly comes, that the General Assembly may enact special provisions in general laws. This is usually a difficult subject upon which there have been many decisions However, the propriety of special provision of law under the facts of this case appears to be so unmistakable that we think it unnecessary to review the decided cases thereabout, or even cite them in more detail. The amended statutes here in question are of force generally throughout the State with special quadrennial dates for the elections in certain of the counties, and uniformly provide the four-year terms which are specified by the constitution.

Id. at 7-8, 71 S.E.2d at 593 (emphasis added). Thus, the South Carolina Supreme Court upheld legislation of the General Assembly setting out an exceptional schedule for the election of a county sheriff in the face of a challenge asserting that the law was unconstitutional special legislation in contravention of S.C. Const. art. III, § 34. *Id.* Chief Justice Baker dissented, in part because he asserted that the result of the decision was to "[add] two years to the *term* of the defendant's predecessor," and "[n]othing could be clearer under our decisions than that the term of office of a constitutional officer cannot be enlarged or reduced by legislation." *Id.* at 12, 71 S.E.2d at 596 (emphasis in original).

We believe that a court faced with the question presented in your letter would hold that *Brown v. Moseley* is controlling precedent and dispositive of the constitutionality of the exceptional schedule in Act 971 of 1966. *See id.* at 7-8, 71 S.E.2d at 593. Act 971 merely carried forward the exceptional schedule set out in the same prior legislation considered in *Brown*, even amidst some criticism. *See* Act 971, 1966 S.C. Acts 2034, comment ("No change from Section 23-304 [of the 1962 Code of Laws]. This section has been held to be constitutional and not special legislation. There have been dissents on this part."). While this exceptional schedule is now found in an uncodified act as opposed to the Code of Laws as it did in 1952, the substance of the legislation is identical. *Id.*; *see also Brown v. Moseley*, 222 S.C. at 7-8, 71 S.E.2d at 593.

As of this writing, the author of this opinion has been unable to locate any enacted legislation of the General Assembly which expressly provides that Allendale or Chesterfield counties shall operate on an exceptional schedule for county sheriff elections in the same way that Act 971, 1966 S.C. Acts 2340 provides for Beaufort and Kershaw counties. It appears that the statement in dicta in *Brown v. Moseley* that "no amendatory act has been found which is applicable to Allendale and Chesterfield" remains true today. *Brown v. Moseley*, 222 S.C. 1, 6, 71 S.E.2d 591, 592 (1952). It also appears that the exceptional schedules in Allendale and Chesterfield counties, likely born of circumstances similar to those of Kershaw County described in *Brown v. Moseley*, is perpetuated due both to tradition and to avoid a lengthening or diminution of a sheriff's term which is set at four years by the South Carolina Constitution. *See id.*; S.C. Const. art. V, § 24.

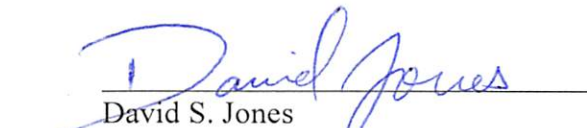
While the General Assembly might choose to recognize the exceptional election schedules in Allendale and Chesterfield counties by statute in the future as the Legislature has done in other counties, we believe that a court most likely would also hold Section 21-11-10 does not control the schedule of county sheriff elections in Allendale and Chesterfield counties where the South Carolina Constitution establishes Article V, § 24 that elected sheriffs hold their offices for a term of four years and the same Constitution is silent as to the timing of such an election. S.C. Const. art. V, § 24; *cf. Brown v. Moseley*, 222 S.C. at 7-8, 71 S.E.2d at 593 ("[T]he present constitution does not specify a beginning election year for the four-year terms. That was left to the General Assembly, doubtless because of the existing lack of uniformity in this respect among the counties."). After all, in the words of Chief Justice Baker writing even in dissent, "[n]othing could be clearer under our decisions than that the term of office of a constitutional officer cannot be enlarged or reduced by legislation." *Id.* at 12, 71 S.E.2d at 596 (C.J. Baker in dissent); *cf., e.g., Limehouse v. Blackwell*, 190 S.C. 122, 2 S.E.2d 483 (1939) & *Privette v. Grinnell*, 191 S.C. 376, 4 S.E.2d 305 (1939); *see also Op. S.C. Att'y Gen.*, 1980 WL

120964 (November 14, 1980) (opining that Section 23-11-40 could not be construed to "[authorize] a person elected sheriff to enter the office immediately after his election" and consequently "shorten the four year term which the person appointed by the Governor is completing" in violation of the S.C. Constitution).

Conclusion:


In conclusion, for the reasons set forth above, it is the opinion of this Office that the standard schedule for sheriff elections set out in Section 23-11-10 is subject to certain exceptions, which include the exceptions set out in Act 971, 1966 S.C. Acts 2340. A court most likely would also hold Section 21-11-10 does not control the schedule of county sheriff elections in Allendale and Chesterfield counties where S.C. Const. art V, § 24 establishes that sheriffs hold their offices for a term of four years, notwithstanding an election held according to a different schedule. We believe that a court would conclude that the answer to these questions is controlled by the jurisprudence set out in the South Carolina Supreme Court case *Brown v. Moseley*, and a court would uphold exceptions to Section 23-11-10 where necessary to preserve four-year terms of elected sheriffs until such a time as the same Supreme Court directs otherwise. See *Brown v. Moseley*, 222 S.C. 1, 7-8, 71 S.E.2d 591, 593 (1952). If there is some constitutional defect in this electoral practice which has persisted in our state for over a century, it is the province of the South Carolina Supreme Court to distinguish or overrule its prior jurisprudence on this subject and to set out the appropriate remedy. Until such a time as the Court chooses to do so, this Office is bound to affirm the jurisprudence set out in *Brown v. Moseley* as the governing law.

Sincerely,



David S. Jones
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General