
Coates' Canons Blog: Holding Over After Your Term Ends (revisited)

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An apparent constitutional difference in filling vacancies to appointed and to elected offices—a difference that raised some puzzling questions—did not faze the North Carolina Supreme Court in its ruling March 12, 2010, in the case of **Baxter v. Danny Nicholson, Inc.** The Court of Appeals, in its earlier opinion had based its holding on the difference. The Supreme Court, reversing that opinion, emphasized the need for certainty in the filling of vacancies.

The issue that was before the Court in *Baxter* arises when an officeholder's term ends, but his or her successor does not immediately take office (for whatever reason). By law, the old officeholder continues in office. He or she is said to "hold over." Both the N.C. Constitution and the relevant statute, G.S. 128-7, so provide. The reason is clear: we don't want gaps in offices. The offices exist to further the work of the people. Vacancies are undesirable.

The particular issue is this: when does the holdover person leave office? Does it matter whether the office is an elected or an appointed one? The statute says that it does not matter: "All officers shall continue in their respective offices until their successors are elected or appointed, and duly qualified." That last term, "duly qualified," is generally agreed to mean, "take the oath of office."

But the Constitution, in the language of Art. VI, Sec. 10, seems to say that it does matter: "In the absence of any contrary provision, all officers of this State, whether appointed or elected, shall hold their positions until other appointments are made or, if the offices are elective, until their successors are chosen and qualified." The Court of Appeals in its opinion recognized what that language seems to say, that holdovers in elective office stay until their successors are chosen and take the oath, but holdovers in appointed offices stay only until their successors are appointed. And since the Constitution is superior law, the statute cannot be enforced as written with respect to holdovers in appointed offices. Their officeholding ends as soon as a successor is appointed, regardless of how much later it may be before the successor gets around to taking the oath. A post discussing that Court of Appeals holding can be found [here](#).

There are some questions that arise if holdovers in appointed offices are displaced as soon as the replacement appointment is made, without waiting until the successor takes the oath. First, when is an appointment "made"? When the appointing authority (in the *Baxter* case, it was the Governor) says it out loud? When the appointing authority writes it down? When it is mailed? When the person being appointed receives it? Second, how do people, such as the holdover, find out about the appointment? Third, what happens if the holdover takes some official actions between the time of the appointment and the time he or she receives notification. Fourth, what happens if the appointment is made and the holdover is notified, but then the person appointed never actually enters the office? Does the holdover come back in? Is there simply a vacancy?

The Supreme Court put all these questions to rest. It held that the statute providing that the holdover remains in office until the successor takes the oath applies equally whether the office is elective or appointive. "We conclude . . . that the statutory framework specifically provided by the General Assembly wisely and plainly avoids this problem of vacancies . . ." And, "We decline to approve an interpretation that would result in a vacancy and cessation of the work of an appointed officer immediately upon the announcement of a successor."

But what about that language in the Constitution that seems to treat the replacement of holders in elective and appointive offices differently? Not a problem. The Supreme Court always interprets statutes in ways that are constitutional, the Court said, unless there is "an irreconcilable conflict." Here, both the Constitution and the statute are attempting to avoid the problem of gaps in office and uphold the importance of oaths. As a result, there is no irreconcilable conflict: "The constitutional and statutory provisions may reasonably be read and considered together, and nothing in our Constitution suggests that the drafters sought to limit the power of the legislature to require an oath and to guard against vacancies in



appointed offices.”

So, now the law is the same for holdovers in appointed offices and in elective offices, just as the statute provides: the holdover stays in office until the successor takes the oath. In the *Baxter* case, the officer was holding over in a state office—the Industrial Commission—but the statute and the Court’s opinion apply equally to local offices.