Coates' Canons Blog: Three-judge Panels

By Michael Crowell

Article: https://canons.sog.unc.edu/three-judge-panels/

This entry was posted on December 12, 2014 and is filed under Elections, Miscellaneous

Two recent lawsuits have drawn attention as the first to be subject to a new state law treating some constitutional challenges differently from other lawsuits. The first case was brought by the town of Boone, seeking to invalidate a legislative act stripping the town of its extra-territorial jurisdiction. Governor McCrory filed the second lawsuit, disputing the General Assembly's authority to control the membership of regulatory commissions. Instead of being tried before a single judge, these cases will go before panels of three judges.

Why do these cases, and not others, have to go to three-judge panels?

The answer lies in § 18B.16 of the 2014 budget bill, Session Law 2014-100. That is where the General Assembly set a different path for some constitutional litigation. The law applies to cases filed September 1, 2014, or later, or when pleadings are amended after that date to add covered claims.

The first thing to know is that the new law applies only to "facial" constitutional challenges to legislative acts, raised in civil cases. As discussed further below, a "facial" challenge is an assertion that the facts of the particular case are not critical, the act is unconstitutional on its face, and there is no circumstance under which it can be valid. If, instead, the lawsuit disputes the constitutionality of an act "as applied" to a specific situation, it still will be heard by a single judge as before. And the new law does not apply at all to constitutional questions raised in criminal cases; those continue to be heard by a single trial judge.

The next important thing to know is that the three-judge panel is called upon only if the facial constitutional challenge remains after all other issues in the lawsuit are resolved. Some cases, like those filed by Boone and the governor, will involve only a facial constitutional issue, and they will go straight to a three-judge panel. But when a complaint raises a mix of issues — some statutory, some as-applied constitutional questions, a facial constitutional issue — everything but the facial challenge is to be heard first by a single judge in the ordinary course of business. Usually that will be a superior court judge, but constitutional issues may be raised in district court as well; awarding child custody to non-parents has generated constitutional litigation, for example. Once the single trial judge has decided everything but the facial constitutional issue, the case is transferred to a three-judge panel — if the facial issue still matters at that point — and all other proceedings are stayed by the original trial judge.

The panel is appointed by the chief justice and consists of three superior court judges. Only regular resident superior court judges may serve, not special judges. The judges must come from different parts of the state, one from the east (from divisions 1, 2 or 4), one from the west (divisions 7 and 8), and one from the middle (divisions 3, 5 and 6). The venue for the three-judge panel portion of the case always is in Wake County.

If the three-judge panel decides that the legislative act is facially unconstitutional the state gets a direct appeal to the supreme court. On the other hand, if the panel upholds the act, the case goes back to the original single trial judge, if there was one, for any remaining issues and then follows the ordinary course of appeals beginning with the court of appeals.

(Another change in the law is that if a single judge enjoins the state or a local government from enforcing a state law based on its constitutionality *as applied*, there is a right to an immediate interlocutory appeal to the court of appeals. The interlocutory appeal does not apply when the judge rules the other way.)

Three-judge panels are not wholly new to North Carolina and some lawyers may remember when they were a standard feature of the federal system. The 2003 legislature created three-judge panels for state court lawsuits over legislative or

congressional redistricting, and such a panel heard the lawsuit that followed 2011 redistricting. (The panel upheld the redistricting plan, but the appeal is still pending.) The basics of the new three-judge mechanism are the same as for redistricting cases except that the redistricting panel hears all legal challenges, regardless of whether they are statutory or constitutional and regardless of whether the constitutional argument is facial or as applied.

The law on three-judge panels for redistricting was enacted in the middle of litigation over the post-2000 census reapportionment. When that happened the redistricting plaintiffs also challenged the constitutionality of the panel. In *Stephenson v. Bartlett*, 358 N.C. 219 (2004), the state supreme court upheld the law. It rejected arguments that the legislature was creating a new court in violation of the state constitution or that the law infringed on the chief justice's constitutional authority to assign judges.

Federal experience with three-judge panels is more extensive. In the early 1900s Congress began requiring such panels for all lawsuits contesting the constitutionality of state statutes. In 1937 the panels were extended to cases challenging the constitutionality of federal laws. It was one successful part of FDR's otherwise ill-fated "court packing" proposal. In 1976, however, Congress repealed those three-judge panel laws, finding the procedure too cumbersome and inefficient. It is still the case, though, that when new federal statutes are enacted they sometimes require a three-judge panel to hear challenges to that particular law. Lawsuits over federal campaign finance laws are heard by three-judge panels, for example, as are cases about some of the Great Recession financial reforms.

There is little legislative history for North Carolina's new three-judge panel law, because it was tucked into the budget bill rather than being debated separately. Presumably, though, one purpose is to expedite the resolution of constitutional challenges to controversial new state legislation. That goal may get sidetracked by confusion over the distinction between facial and as-applied challenges and by the division of authority between single judges and panels.

The concept of facial and as-applied challenges seems understandable enough in theory, but the distinction can be difficult in practice. There is considerable federal case law on the subject, with *United States v. Salerno*, 481 U.S. 739 (1987), a leading case. It says a facial challenge requires the plaintiff to "establish that no set of circumstances exists under which the Act would be valid." (at 745). Or, as stated in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008), "that the law is unconstitutional in all its applications." The test is more complicated when First Amendment issues are involved. There, the courts recognize that a law which may be applied constitutionally to limit the plaintiff's speech may still be held unconstitutional if it would violate the free speech rights of enough others to significantly chill protected speech. See *United States v. Stevens*, 559 U.S. 460 (2010). If this interests you, it also is worth looking at *Preston v. Leake*, 660 F.3d 726 (4th Cir. 2011), a case from North Carolina discussing First Amendment facial challenges and what is called the over-breadth doctrine.

In the limited state case law on facial vs. as-applied challenges, the North Carolina Supreme Court has adopted the federal analysis, saying that a facial challenge requires proof that there is no set of circumstances under which the act could be valid. A leading case is *State v. Thompson*, 349 N.C. 483 (1998), which denied a facial challenge to an act concerning bail in domestic violence cases but found the law unconstitutional as applied to the defendant.

The problem is that most North Carolina lawyers, and trial court judges, have not had to think in terms of facial or as-applied challenges and may not be quick to recognize what they have. Pleadings do not have to specify which kind of challenge is being mounted, but the judge who first gets the case still has to figure out how much can be decided alone and what has to go to a three-judge panel. Not all lawyers will be prepared to articulate whether their claim is facial or as-applied.

Also, one would think that while some legislative acts will generate simple, one-issue facial challenges, lawyers may be prone to throw in as many statutory and as-applied constitutional claims and other arguments as they can think of. That raises the prospect of a case bouncing between a single judge and a panel, with additional delays because of the problems inherent in scheduling three judges rather than one, and all in Raleigh. There is the potential, too, of conflicting decisions — say the single judge finds the act constitutional as applied but the panel holds it unconstitutional on its face.

The cases filed by Boone and Governor McCrory do not raise these concerns, because they are facial challenges only, but future cases likely will. And the legislature likely will need to tinker with the new law as we gain that experience.

Links

- www.ncga.state.nc.us/EnactedLegislation/SessionLaws/PDF/2013-2014/SL2014-100.pdf