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OPINION
OF
HAL STRATTON
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Opinion No. 88-06

By: George Snyder
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To: Honorable Murray Ryan
New Mexico House of Representatives
Box 110
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QUESTION PRESENTED:

Does the Constitution of New Mexico require staggered terms for state senators?

CONCLUSION:

No.

ANALYSIS:

From 1955 until 1976, article IV, section 3b of the Constitution of New Mexico provided: "The senate shall consist of one senator from each county of the state...." Moreover, from statehood until 1960, the state constitution was silent on the matter of staggered terms for state senators. But at the general election held on November 8, 1960, the voters amended the first paragraph of article IV, section 4 of the Constitution of New Mexico to provide:

> Members of the legislature shall be elected as follows: those senators from Bernalillo, Chaves, Curry, DeBaca, Grant, Lea, Lincoln,

> Luna, Sandoval, San Juan, San Miguel, Socorro, Taos, Torrance, Union and Valencia counties for a term of six years starting January 1, 1961, and after serving such terms shall be elected for a term of four years thereafter; those senators from all other counties for the terms of four years, and members of the house of representatives for a term of two years. They shall be elected on the day provided by law for holding the general election of state officers or representatives in congress. If a vacancy occurs in the office of senator or member of the house of representatives, for any reason, the county commissioners of the county wherein the vacancy occurs shall fill such vacancy by appointment.

This amendment, of course, created staggered terms for senators.[1] In 1960 (and until 1981), there were thirty-two counties, so the state constitution provided a workable scheme for equal staggering of senators' terms.

In Beauchamp v. Campbell, Civ. No. 5778 (D.N.M. 1966), two Bernalillo County voters sought to have article IV, section 3b of the Constitution of New Mexico, the one county-one senator provision, held discriminatory and thus unconstitutional as it applied to them under the fourteenth amendment of the United States Constitution. A three-judge district court was convened; and although the court did not address the jurisdiction question, it had jurisdiction under article III, section 2 of the federal constitution and what is now 28 U.S.C. § 1343(a)(3). Baker v. Carr, 369 U.S. 186, 200 (1962).

"It was conceded by all concerned during the course of this action that the method of electing senators results in invidious discrimination against the residents of the more populous counties of New Mexico." See Op. at iii.[2] The three-judge federal district court therefore held the one county-one senator provision unconstitutional under the fourteenth amendment, citing, among other cases, Reynolds v. Sims, 377 U.S. 533 (1964), and

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1 Before 1960, article IV, section 4 provided: "[Senators] shall be elected on the day provided by law for holding the general election of state officers or representatives in congress."

2 The ratio between the population of the most populous county and that of the least populous county was 140 to 1.

Baker v. Carr, 369 U.S. 186 (1962). The court continued, however, in the next sentence by stating: "The first paragraph... [of] Article IV, Section 4, of the New Mexico Constitution is also declared to be unconstitutional for the same reasons insofar as it refers to or pertains to the senate or to senators."[3]

Despite the breadth of the court's sweeping declaration of state law as unconstitutional, there is a legitimate, and difficult, question as to what it was in article IV, section 4 that the court declared invalid. Twenty-seven states currently have staggered terms. The Council of State Governments, The Book of the States 179-80 (1986-87). We are aware of no authority that finds staggered legislative terms per se unconstitutional. In fact, the case law[4] is to the contrary. It thus is

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3 The underscored language was inserted in handwriting, but we have no reason to question its authenticity.

4 Republican Party of Wisconsin v. Elections Bd., 585 F.Supp. 603 (E.D. Wis.), judgment vacated mem. with direction to discuss complaint, 469 U.S. 1081 (1984) (Supreme Court's action meant no cause of action for temporary disenfranchisement of voters due to reapportionment in a staggered-term setting); Kentopp v. Anchorage, 652 P.2d 453 (Alas. 1982); Kallenberger v. Buchanan, 649 P.2d 314 (Colo. 1982) (dictum); In re Apportionment Law, Etc., 414 So. 2d 1040 (Fla. 1982); In re Reapportionment of Colorado Gen. Assembly, 647 P.2d 191, modified, 647 P.2d 209 (1982); Cargo v. Paulus, 291 Or. 772, 635 P.2d 367 (1981); McCall v. Legislative Assembly, 291 Or. 663, 634 P.2d 223 (1981); Mader v. Crowell, 498 F. Supp. 226 (M.D. Tenn. 1980); Rodgers v. Commissioners Court of San Augustine, 483 F. Supp. 779 (E.D. Tex. 1980); Barnett v. Boyle, 197 Neb. 677, 250 N.W.2d 63 (1977); Groh v. Egan, 526 P.2d 863 (Alas. 1974); Visnich v. Board of Educ. 37 Cal. App. 3d 684, 112 Cal. Rptr. 469 (1974); People v. Lavelle, 56 Ill. 2d 278, 307 N.E.2d 115 (1974); Legislature of the State of California v. Reinecke, 10 Cal. 3d 396, 516 P.2d 6, 110 Cal. Rptr. 718 (1973) Griswold v. County of San Diego, 32 Cal. App. 3d 56, 107 Cal. Rptr. 845 (1973); Mayor of Tucson v. Royal, 20 Ariz. App. 83, 510 P.2d 394 (1973); Marston v. Kline, 8 Pa. Cmwlth. 143, 301 A.2d 393 (1973); Robinson v. Zapata County, Texas, 350 F. Supp. 1193 (S.D. Tex. 1972); Egan v. Hammond, 502 P.2d 856 (Alas. 1972); Twilley v. Stabler, 290 A.2d 636 (Del. 1972); Ferrell v. State of Oklahoma ex rel. Hall, 339 F. Supp. 73 (W.D. Okla.), aff'd mem., 406 U.S. 939 (1972); Carr v. Brazoria County, Texas, 341 F. Supp. 155 (S.D. Tex.), aff'd mem., 468 F.2d 950 (5th Cir. 1972); Dollinger v. Jefferson County Comm'rs Court, 335 F. Supp. 340 (E.D. Tex. 1971); Pate v. El Paso County, Texas,

difficult to explain why the Beauchamp court invalidated all of the first paragraph of article IV, section 4. The state constitutional provision is presumptively constitutional vis-a-vis the federal constitution, Sobel v. Adams, 208 F. Supp. 316, 324 (S.D. Fla. 1962), and the federal court's invalidation of any part of New Mexico's republican form of government should be read as narrowly as fairness permits.

To be sure, staggering would no longer work as spelled out in the first sentence of the first paragraph of article IV, section 4 because the court had held invalid the one county-one senator provision.[5] Moreover, the phrase "for the same reasons" in the Court's sentence on article IV, section 4 clearly refers to the Court's earlier discussion of the one county-one senator problem. Thus, the constitutional flaw in this provision presumably is that the staggering of terms is premised on one county-one senator. We assume that, if the staggered term provision had been worded differently, the court would have had no reason even to have mentioned that section, as there would have been no problem with it under one person-one vote principles.[6]

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324 F. Supp. 935, 337 F. Supp. 95 (corrected) (W.D. Tex.), aff'd mem., 400 U.S. 806 (1970); Chavis v. Whitcomb, 307 F. Supp. 1362 (S.D. Ind. 1969) (dictum), rev'd on other grounds, 403 U.S. 124 (1971); State ex rel. Herr v. Laxalt, 84 Nev. 382, 441 P.2d 687 (1968); Stout v. Bottorff, 249 F. Supp. 488 (S.D. Ind. 1965); Schaefer v. Thomson, 251 F. Supp. 450 (D. Wyo. 1965), aff'd per curiam sub nom. Harrison v. Schaefer, 383 U.S. 269 (1966); Anggelis v. Land, 371 S.W.2d 857 (Ky. 1963); Selzer v. Synhorst, 253 Iowa 936, 113 N.W.2d 724 (1962); State ex rel. Christensen v. Hinkle, 169 Wash. 1, 13 P.2d 42 (1932); State ex rel. Williams v. Meyer, 20 N.D. 628, 127 N.W. 834 (1910); People ex rel. Snowball v. Pendegast, 96 Cal. 289, 31 P. 103 (1892); People ex rel. Jennings v. Markham, 96 Cal. 262, 31 P. 102 (1892).

5 There is a similar problem with the filling of vacancies provision's being stated in terms of "the county wherein the vacancy occurs" (emphasis added), which is also, of course, premised on the one county-one senator system.

6 The following language presumably would have been free of all constitutional doubt: "Half of the senators shall be elected for four-year terms in years evenly divisible by four, and the other half shall be elected for four-year terms in even-numbered years not evenly divisible by four. The legislature shall implement this provision by appropriate legislation."

While we are free, as is any lawyer in responding to an opinion request, to criticize any court's language as ill-phrased and ill-considered, the courts are the ultimate arbiters of the controlling law. We are squarely faced with the sweeping, but plain, language of a federal court finding a state constitutional provision unconstitutional under federal law. In our federalist system of government, we are not at liberty to disregard the holding of a federal court. But with all due respect to the court in Beauchamp, what it should have done was merely to point out that staggering no longer would work precisely as spelled out in the New Mexico Constitution.[7]

There is another difficulty with the court's declaration about article IV, section 4. The court's sentence, by declaring the first paragraph unconstitutional, also arguably declared unconstitutional: (i) the specification that the regular term for a senator is four years; (ii) the requirement that senators shall be elected on the same day that state officers or representatives in Congress are elected; and (iii) the procedure for filling a vacancy in the office of senator. It appears clear that these provisions could not, under any argument, violate federal law.

Having pointed out the problems with the court's statement on article IV, section 4, it is difficult for us to conclude that the court meant what it said. Without more, we might be inclined to conclude that the state constitution continues to require staggered terms, because the court's sentence should be interpreted as limited to a comment that staggering would no longer work as spelled out in the first sentence of article IV, section 4. Any other conclusion is made especially difficult, because it implies that three other items that have no apparent constitutional flaw may be invalid.

However logical our preferred interpretation of the court's language may be, it ultimately involves speculation on what the court had in mind when it wrote its sweeping sentence. The legislature has read the sentence more broadly. We note specifically that the legislature apparently has premised legislation on the invalidity of the first paragraph of article IV, section 4, and does not understand the staggered term provision to be controlling:

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7 It possibly could have added that there was no reason the people's 1960 adoption of staggered terms should not stand and that the legislature should enact a statute that would implement the principle of equal staggering as closely in conformance with the constitutional provision as possible.

> While the legislature is informed and believes that the provisions of the New Mexico state constitution requiring staggered terms for members of the state senate is no longer controlling, should this belief turn out to be invalid, by reason of a judgment of a court of competent jurisdiction, then the following alternative is suggested to such court as a method to preserve staggering of terms. . . .

Laws 1972, chapter 79, section 10. Similarly, Laws 1982 (2d S.S.), chapter 2, section 51 states: "The legislature finds and declares that ... the constitution of New Mexico does not require staggered terms for senators...." And section 2-8B-50 of the 1982 Senate Reapportionment Act, Sections 2-8B-1 to 2-8B-51 NMSA 1978 (enacted by Laws 1982 (3rd S.S.), Chapter 1), provides as follows:

> The legislature declares that:
>
> A. the constitution of New Mexico does not require staggered terms for senators;
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> B. only once since statehood has apportionment law for the senate provided for staggered terms for an equal number of senators;
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> C. it was the intent of the 1972 Senate Reapportionment Act that the senate no longer be staggered with respect to the terms of its members; however, because of a special court ruling[8], there is de facto unequal staggering

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8 The reference here is to Cargo v. King, No. 43123 (Santa Fe County, N.M. 1972, 1974 (Suppl. Order)), in which the court ruled, on the basis of Laws 1972, Chapter 79, Sections 9A and 10A, that eight of the 21 senators elected in 1970 for terms of four years would serve the full four years and the other 13 would stand for reelection in 1972 for terms of four years, thus creating 34-8 staggering. (It is difficult to tell, but it appears the court agreed with the legislature that staggering was no longer required; otherwise, it presumably would have required, pursuant to Section 10B, that 13 senators be elected in 1972 for terms of two years, thus preserving equal staggering.) Later, this was changed to the 35-7 staggering that was in effect in the 1980 election. We understand, from conversations with Hoyt Clifton, Directors, N.M. Bureau of Elections, and Jean Peters, Librarian, N.M. Legislative

> of terms in that thirty-five members of the senate are elected at one general election and seven members of the senate are elected at the subsequent general election;
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> D. such unequal staggering is contrary to the intent of the legislature and serves no functional or theoretical purpose;
>
> E. it is in the best interest of the senate and the state that all such unequal staggering be abolished and that it is better to achieve this end by the extension of the terms of the seven members than by reducing the elected terms of thirty-five members; and
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> F. it is the intent of the 1982 Senate Reapportionment Act [2-8B-1 to 2-8B-51 NMSA 1978] that all members of the senate be elected at the same general election for the same term.

Section 2-8B-51 then provides: "The first election of members of the senate after the effective date of the 1982 Senate Reapportionment Act shall be at the general election in 1984." Thus, on three[9] different occasions, albeit somewhat tentatively at first, the legislature has indicated its understanding that staggered terms are no longer required in New Mexico.

To find that article IV, section 4 continues to require staggered terms would dictate that we find portions of the 1982 Senate Reapportionment Act unconstitutional, which establish non-staggered senatorial terms. We are mindful, however, that statutes are presumptively constitutional. 2A N. Singer, Sutherland Statutory Construction §45.11 (4th ed. 1984). We are reluctant to speculate on Beauchamp's meaning and effect so as to render a legislative act unconstitutional.

Council Service, that this change arose because of a need to fill a vacancy.

9 It should be noted, however, that Laws 1971, chapter 251, section 8 preserved staggering of terms, albeit not equal staggering of terms. This act was repealed by Laws 1972, chapter 79, section 98.

Moreover, the legislature's interpretation of the state's constitution, even when it involves a reading of a difficult court case, is entitled to great deference (see, e.g., State ex rel. Herr v. Laxalt, 84 Nev. 382, 387 441 P.2d 687, 690 (1968), and cases there cited), especially when any competing opinion involves some speculation. This general principle is particularly the situation here, where each house of the legislature has been textually delegated exclusive jurisdiction to decide whether a person has been elected, a question that may involve constitutional and other legal questions. See N.M. Const. art. IV, §7 ("Each house shall be the judge of the election and qualifications of its own members....") (emphasis added). Also, the court's language is plain. We therefore believe that the state constitution does not require staggered terms.

We emphasize, however, that we do not read Beauchamp as preventing the legislature or the voters from passing legislation or a constitutional amendment, respectively, that would provide for staggered terms. Under our theory of why the court held the first paragraph of article IV, section 4 invalid, it is not staggered terms, but rather the manner in which the terms are staggered, that renders the paragraph unconstitutional. Indeed, to read the court's sentence stating that the first paragraph of article IV, section 4 is unconstitutional as also declaring staggered terms unconstitutional per se would lead to absurd results. For example, senators' terms could not be four years, as that also is mentioned in the first paragraph of article IV, section 4.[10]

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10 Section 2-8B-5A NMSA 1978 ("Members of the senate shall be elected for terms of four years.") would thus be unconstitutional. Similarly, senators could not be elected on the day of the general election of state officers or representatives in Congress, and Section 2-8B-51 NMSA 1978 ("The first election of members of the senate after the effective date of the 1982 Senate Reapportionment Act shall be at the general election in 1984.") would also have been unconstitutional.

Our opinion here only addresses the question submitted, which is whether the state constitution requires staggered terms, not whether a literal reading should be given to Beauchamp's broad language. Because the portion of article IV, section 4 that discusses staggered terms is as written, unworkable without one senator per county, the case for its being unenforceable is stronger than is the argument that the four-year term, date of election and vacancy provisions are unenforceable. We thus expressly decline to opine on the status of the other elements of article IV, section 4.

Moreover, the court, in speaking of the 1966 Senate Reapportionment Act (Laws 1966, Chapter 27), listed Section 8 of that Act as one of several provisions of the Act that "are not affected by this decision as they are not concerned in the constitutional issue." Section 8, among other things, declared all senatorial terms terminated at the end of 1966, provided that senators from even-numbered districts should be elected for six-year terms starting January 1, 1967 (and thereafter for four years), and stated that all other senators shall be elected for terms of four years starting on that date. That Section 8 was not affected by the court's decision is strong evidence, of course, that it saw nothing wrong with the principle of staggered terms.

For these reasons, we are of the opinion that Beauchamp invalidated the staggered terms requirement in the first paragraph of article IV, section 4 of the Constitution of New Mexico, and that there is thus no enforceable provision in the Constitution of New Mexico that requires staggered terms for senators.

In particular, we neither adopt nor overrule Att'y Gen. Op. 67-8 (1967), which states that, because of Beauchamp, "there is [now] no constitutional provision relating to the terms of office for State senators." Similarly, we neither adopt nor reject the possible implication in Att'y Gen. Op. 73-11 (1973) that the four-year term provision for senators is no longer "an operative part of our State Constitution." The same is true with respect to Att'y Gen. Op. 69-57 (1969), which states:

> . . . Article IV, Section 4 is valid insofar as it relates to the filling of vacancies in single county legislative districts because the question of vacancies was not an issue in Beauchamp v. Campbell, and insofar as it may imply otherwise, Opinion of Attorney General No. 67-8, dated January 19, 1967 is expressly rejected.

Finally, the same is true with respect to Att'y Gen. Op. 78-5 (1978), which states: "Article IV, Section 4 . . . had governed the question of filling vacancies in the office of state senator, but the first paragraph of that section has been held invalid . . . insofar as it . . . pertains to . . . senators. Beauchamp v. Campbell . . . ."

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